

ASSESSING THE STATUS OF SCHOOL DESEGREGATION SIXTY YEARS AFTER *BROWN*

*Erica Frankenberg**

2014 MICH. ST. L. REV. 677

TABLE OF CONTENTS

INTRODUCTION.....	677
I. DEVELOPMENT OF THE LAW REGARDING DESEGREGATION ..	679
II. REACTION TO <i>PARENTS INVOLVED</i>	683
A. Immediate Response	683
B. Federal Interpretations of <i>Parents Involved</i>	685
C. Conclusion.....	687
III. CHANGING CONTEXT FOR POLICIES TO ACCOMPLISH DESEGREGATION	688
A. Demographic Transformation	688
B. How Social Science Evidence Has Developed Regarding Desegregation	690
C. Changing Policy Tools to Accomplish Integration	692
IV. PRELIMINARY ASSESSMENT OF THE EFFECTS OF <i>PARENTS INVOLVED</i> ON DISTRICTS' VOLUNTARY INTEGRATION POLICIES	694
A. Survey of Voluntary Integration Efforts	695
B. Experiences of Eleven Districts' Voluntary Integration Efforts That Received Federal Funding.....	699
C. What Can We Learn from These Districts More Generally?	704
V. IMPLICATIONS.....	706
CONCLUSION.....	708

INTRODUCTION

As the country remembered the sixtieth anniversary of the *Brown v. Board of Education*¹ decision as a pivotal moment in which the Supreme Court helped move the country closer towards racial

* Assistant Professor, Department of Education Policy Studies,
Pennsylvania State University.

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

equality, the reality of segregation in the nation's public schools belied the celebrations that the nation had eradicated racial segregation. In fact, in data released just before the May 17th *Brown* anniversary, researchers found that schools were increasingly more segregated for black and Latino students.² Nearly 40% of black students and more than 43% of Latino students attended intensely segregated minority schools or schools where students of color comprised 90% or more of the enrollment.³ In the South, which had become the most desegregated region of the country for African-American students by 1970 due to the many desegregation plans implemented to comply with *Brown*, the gains were unraveling especially rapidly.⁴ Although the South was still the most integrated region for African-American students in 2011, they were in majority white schools at such a low rate that had not been seen since 1968, before Supreme Court decisions requiring more extensive desegregation efforts.⁵ What's more, schools of minority concentration overlapped very strongly with schools in which there were overwhelming numbers of low-income students.⁶ Taken together, these trends suggest that while *Brown* did bring about tremendous progress in the South, the country still has a system of schools in which poor black and Latino students often are not in the same schools as white, middle-class students.

This Article examines the status of school desegregation, in particular focusing on the evolution of desegregation since the *Parents Involved*⁷ decision. In Part I, I describe legal decisions that first required more far-reaching desegregation efforts and later have constrained what desegregation is either required or permitted, culminating in *Parents Involved*. Part II describes the initial reaction to the *Parents Involved* decision, including the changing interpretation by the federal government. Part III details three major changes affecting desegregation since *Brown*: changed

2. GARY ORFIELD & ERICA FRANKENBERG, CIVIL RIGHTS PROJECT, *BROWN AT 60: GREAT PROGRESS, A LONG RETREAT AND AN UNCERTAIN FUTURE* 7 fig.1, 11 fig.2, 24 tbl.11 (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>.

3. *Id.* at 18 tbl.8, 23-24 tbl.11.

4. *Id.* at 17.

5. See *id.* at 18 tbl.8; see, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 14 (1971).

6. ORFIELD & FRANKENBERG, *supra* note 2, at 16 tbl.7.

7. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 747-48 (2007) (plurality opinion).

demographics, social science evidence, and policy tools. In Part IV, I assess existing evidence about school desegregation after *Parents Involved*. The Article concludes with implications in Part V. Research continues to assert that segregated schools are inherently unequal and students of all races benefit from diverse schools.⁸ This Article aims to contribute to our understanding of the current status of desegregation now, after *Parents Involved* limited voluntary integration efforts, to illuminate how diversity efforts may be furthered in the next sixty years.

I. DEVELOPMENT OF THE LAW REGARDING DESEGREGATION

The *Brown v. Board of Education* decision was the culmination of a legal strategy that was years in the making to overturn the *Plessy*⁹ decision that legitimated racially segregated schools in seventeen states.¹⁰ Although the *Brown* Court declared that separate was “inherently unequal[.]”¹¹ it did not specify how to remedy segregation until the following year in a decision commonly known as *Brown II*.¹² In that decision, the Court remanded the four cases in *Brown* back to district courts to oversee desegregation with a series of vague guidelines.¹³ In doing so, it also meant that no overarching guidance was given to the hundreds of districts that also were legally segregated (aside from the four districts that were parties in *Brown*).¹⁴ Thus began a lengthy struggle, in the courts and in the legislatures, to make sense of what *Brown* required.

The Supreme Court did little to clarify what desegregation meant in the decade after *Brown*, and civil rights organizations with limited resources struggled to bring challenges in district courts, where many judges were resistant to desegregation.¹⁵ Thus, a decade after *Brown*, there was very little desegregation of black and white students in the South.¹⁶ In the following decade, however, rapid

8. See Section III.B.

9. *Plessy v. Ferguson*, 163 U.S. 537, 548-49 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

10. ORFIELD & FRANKENBERG, *supra* note 2, at 4.

11. 347 U.S. at 495.

12. *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 300-01 (1955).

13. *Id.* at 299-301.

14. See *id.* (limiting its holding to the federal district courts that originally heard the cases).

15. GARY ORFIELD, *THE RECONSTRUCTION OF SOUTHERN EDUCATION: THE SCHOOLS AND THE 1964 CIVIL RIGHTS ACT* 16-22 (1969).

16. *Id.* at 117-18.

change occurred. The Civil Rights Act of 1964 required desegregation compliance or federal funding could be cut off to local school districts.¹⁷ This was particularly significant a year later when the Elementary and Secondary Education Act dramatically expanded educational funding.¹⁸ The Civil Rights Act also authorized the Justice Department to bring desegregation cases, thus bringing federal resources to bear in the effort to desegregate schools.¹⁹ In a series of Supreme Court decisions, the Court increasingly specified what desegregation required.²⁰ In a short period of time, the South became the most integrated region of the country for black students.²¹

In 1974, for the first time in several decades, the Court ruled against more extensive desegregation efforts in *Milliken*.²² Since that time, the Court has increasingly restricted first what it requires of districts to fully eradicate dual-segregated systems of schools²³ and, more recently, has become skeptical of even voluntary uses of race to *integrate* K–12 schools.²⁴ As a result of the former line of cases and a push by some judges and the Department of Justice during the George W. Bush Administration to end desegregation plans, hundreds of remedial desegregation orders have ended²⁵ and segregation has risen in these unitary status districts.²⁶ There still are

17. Civil Rights Act of 1964, 42 U.S.C. § 2000d (1964).

18. Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (codified as amended in scattered sections of 20 U.S.C.).

19. 42 U.S.C. § 2000c-6(a).

20. *Green v. Cnty. Sch. Bd.*, 391 U.S. 430, 439-42 (1968); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 18-31 (1971); *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 196-98, 203-14 (1973).

21. ORFIELD & FRANKENBERG, *supra* note 2, at 10 tbl.3.

22. *Milliken v. Bradley*, 418 U.S. 717, 745, 752 (1974).

23. *Bd. of Educ. v. Dowell*, 498 U.S. 237, 249-50 (1991); *Freeman v. Pitts*, 503 U.S. 467, 489-91, 494 (1992); *Missouri v. Jenkins*, 515 U.S. 70, 92, 100-01 (1995).

24. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 747-48 (2007) (plurality opinion).

25. Danielle Holley-Walker, *After Unitary Status: Examining Voluntary Integration Strategies for Southern School Districts*, 88 N.C. L. REV. 877, 887-88 (2010); Chinh Q. Le, *Racially Integrated Education and the Role of the Federal Government*, 88 N.C. L. REV. 725, 748, 750-51 (2010); Wendy Parker, *The Decline of Judicial Decisionmaking: School Desegregation and District Court Judges*, 81 N.C. L. REV. 1623, 1628-29 (2003).

26. ORFIELD & FRANKENBERG, *supra* note 2, at 10-11 tbl.3 & fig.2; Sean F. Reardon, Elena Tej Grewal, Demetra Kalogrides & Erica Greenberg, *Brown Fades: The End of Court-Ordered School Desegregation and the Resegregation of American Public Schools*, 31 J. POL'Y ANALYSIS & MGMT. 876, 877-78 (2012).

several hundred districts believed to be under court order.²⁷ At the same time, in a line of cases in higher education, the Court first restricted the rationale for race-conscious affirmative action policies in colleges and universities in *Bakke*²⁸ in 1978 and later sharply restricted what policies could be used to achieve diversity in higher education.²⁹

After the 1990s cases initiated a host of unitary status decisions, lower courts began going further than the Supreme Court in questioning race-conscious policies that districts had in place. In the late 1990s, several circuit courts struck down race-conscious policies in K–12 schools involving assignment to specialized schools and transfer policies.³⁰ In each, the courts assumed a compelling interest in diversity but ruled that the policies used were not narrowly tailored enough to pass constitutional muster.³¹ In several subsequent decisions, including several district court cases after *Grutter v. Bollinger*,³² courts relied on *Grutter* to assert several compelling interests that paralleled and expanded upon those found in the Court's higher education cases.³³ Courts affirmed the districts' race-conscious policies in most cases post-*Grutter*.³⁴

In 2006, the Supreme Court agreed to hear two cases challenging districts' voluntary integration policies from Seattle,

27. *District Court Order Data*, CENTER FOR EDUC. POL'Y ANALYSIS, <http://cepa.stanford.edu/data/district-court-order-data> (last visited Sept. 28, 2014); Nikole Hannah-Jones, *Lack of Order: The Erosion of a Once-Great Force for Integration*, PROPUBLICA (May 1, 2014, 1:11 PM), <http://www.propublica.org/article/lack-of-order-the-erosion-of-a-once-great-force-for-integration>.

28. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 320 (1978) (holding a special admissions program that used explicit racial classifications unconstitutional).

29. *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2421 (2013); *Gratz v. Bollinger*, 539 U.S. 244, 270, 275 (2003); *Grutter v. Bollinger*, 539 U.S. 306, 343-44 (2003).

30. *Eisenberg v. Montgomery Cnty. Pub. Sch.*, 197 F.3d 123, 133-34 (4th Cir. 1999); *Tuttle v. Arlington Cnty. Sch. Bd.*, 195 F.3d 698, 707 (4th Cir. 1999); *Wessman v. Gittens*, 160 F.3d 790, 808-09 (1st Cir. 1998).

31. *Eisenberg*, 197 F.3d at 130, 132-33; *Tuttle*, 195 F.3d at 701, 705, 707; *Wessman*, 160 F.3d at 796, 808-09.

32. 539 U.S. at 325.

33. *Comfort v. Lynn Sch. Comm.*, 418 F.3d 1, 14-16 (1st Cir. 2005), *abrogated by* *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 723-25 (2007) (majority opinion); *McFarland v. Jefferson Cnty. Pub. Sch.*, 330 F. Supp. 2d 834, 849 (W.D. Ky. 2004). *But see* *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 377 F.3d 949, 964 (9th Cir. 2004).

34. *Comfort*, 418 F.3d at 19; *McFarland*, 330 F. Supp. 2d at 861-62 (affirming a policy for assigning schools based on the students' race).

Washington and Jefferson County, Kentucky.³⁵ Each district used a controlled-choice plan in its student assignment.³⁶ Seattle considered students' ranking of high school options, capacity, and the effect of the assignment on a school's racial diversity in considering where to place students.³⁷ Jefferson County, Kentucky's controlled-choice policy applied to the entire district, and students could rank schools within their geographic cluster.³⁸ The district granted choices with a goal of having between 15% and 50% black students at each school.³⁹ The districts' policies were challenged by parents whose children did not receive an assignment to their first-choice school.⁴⁰ Following *Grutter*, both policies were upheld by circuit courts upon review, as was a voluntary integration case from Lynn, Massachusetts.⁴¹ The Court denied certiorari to Lynn's plan, allowing it to stand,⁴² but six months later—after Justice O'Connor retired and was replaced by Justice Alito—the Court granted certiorari to review two very similar cases from the Sixth and Ninth Circuits concerning the voluntary integration policies of Louisville and Seattle, respectively.⁴³

The question before the Court was whether the race-conscious nature of the districts' policies violated students' rights under the Equal Protection Clause of the Fourteenth Amendment.⁴⁴ A range of amicus briefs was filed with the Court, underscoring the significant issues affecting a wide range of parties.⁴⁵ In particular, many briefs cited social science evidence, most arguing that social science suggested that the Court should uphold the policies.⁴⁶ The federal

35. *Parents Involved*, 551 U.S. at 715-18.

36. *Id.* at 711-12, 716-17.

37. *Id.* at 711-12.

38. *Id.* at 716.

39. *Id.*

40. *Id.* at 713-14, 717.

41. *Id.* at 711; *Comfort v. Lynn Sch. Comm.*, 418 F.3d 1, 19 (1st Cir. 2005), *abrogated by Parents Involved*, 551 U.S. at 723-25.

42. *Comfort v. Lynn Sch. Comm.*, 546 U.S. 1061 (2005).

43. *Parents Involved*, 551 U.S. at 748 (plurality opinion).

44. *Id.* at 711 (majority opinion).

45. For a list of briefs filed, see *Docket for 05-915*, SUP. CT. OF U.S., <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/05-915.htm> (last visited Sept. 28, 2014).

46. For analysis of social science in briefs, see NAT'L ACAD. OF EDUC., RACE-CONSCIOUS POLICIES FOR ASSIGNING STUDENTS TO SCHOOLS: SOCIAL SCIENCE RESEARCH AND THE SUPREME COURT CASES 5-6 (Robert L. Linn & Kevin G. Welner eds., 2007), *available at* http://www.naeducation.org/cs/groups/naedsite/documents/webpage/naed_080863.pdf; *see also* Erica Frankenberg & Liliana M. Garces, *The*

government, however, argued on behalf of the plaintiffs that the plans unfairly discriminated against some students on the basis of race.⁴⁷

The Court agreed with the federal government, striking down the districts' plans in a lengthy, fractured decision on June 28, 2007.⁴⁸ Justice Kennedy and the four justices who dissented agreed that there were compelling governmental interests that the districts were pursuing in implementing voluntary integration policies.⁴⁹ The Court, in the plurality opinion joined in part by Justice Kennedy, held that the districts' use of an individualized student's race or ethnicity to decide where he or she attended school was not narrowly tailored to achieve diverse schools.⁵⁰

II. REACTION TO *PARENTS INVOLVED*

A. Immediate Response

The *Parents Involved* decision was issued at the end of the Supreme Court's term and was a fractured decision with five separate opinions. Justice Kennedy's controlling opinion joined Chief Justice Robert's plurality opinion in part but did not concur in key parts. The result was that there was considerable initial confusion as to what the decision meant, as well as what the effect of the decision would be. The immediate reaction from stakeholders was mixed.⁵¹ The language of the opinions, each laying claim to the mantle of *Brown* and suggesting that other opinions eviscerated *Brown*, only deepened the confusion.

The Supreme Court in *Parents Involved* for the first time limited the ways in which districts could *voluntarily* integrate their students, which followed the ending of scores of court-ordered

Use of Social Science Evidence in Parents Involved and Meredith: Implications for Researchers and Schools, 46 U. LOUISVILLE L. REV. 703, 737 (2008).

47. Brief for the United States as Amicus Curiae Supporting Petitioner at 6-7, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (No. 05-908).

48. *Parents Involved*, 551 U.S. at 747-48 (plurality opinion).

49. *Id.* at 783 (Kennedy, J., concurring in part and concurring in the judgment); *Id.* at 806 (Breyer, J., dissenting).

50. *Id.* at 726 (plurality opinion).

51. David J. Hoff, *Decision Sparks Divided Reactions*, EDUC. WEEK (June 28, 2007), http://www.edweek.org/ew/articles/2007/06/28/43scotusreax_web.h26.html.

desegregation plans.⁵² Civil rights advocates and educators feared this decision would only further undermine the pursuit of integration and ultimately the educational opportunity for all children due to the increasing legal risk districts would face.⁵³ Then-law professor James E. Ryan, however, questioned the significance of the decision, noting that few districts were voluntarily adopting student assignment policies that intended to integrate schools.⁵⁴ He concluded, “[T]his decision does not change much on the ground.”⁵⁵ On the other hand, commentators have noted that the decision may perhaps be even more significant for what it doesn’t say. Chinh Le and I argued that, aside from the decision, there were a number of extralegal hurdles to achieving integration, especially in the many communities that had never attempted to mitigate growing segregation.⁵⁶ Moreover, Ryan also remarked that the Court lost the opportunity in *Parents Involved* to endorse voluntary integration as a means to pursue the promise of *Brown* in this century.⁵⁷

In sum, *Parents Involved* was initially viewed with mixed opinions. In terms of what the decision actually said, it struck down one of the most popular and effective voluntary integration strategies. On the other hand, a majority of the Court found that there were compelling governmental reasons to pursue diverse schools and to reduce racial isolation.⁵⁸ The decision, at the very least, didn’t affirmatively further integration efforts and was another in a line of cases in both K–12 and higher education rolling back what was either required of or permitted by educational institutions to provide diverse learning environments. The ultimate import of the decision then seemed to hinge on the extent to which districts invoked the flexibility left under Justice Kennedy’s concurrence and how the

52. Holley-Walker, *supra* note 25, at 883; Reardon et al., *supra* note 26, at 876-78.

53. See Patricia J. Williams, *Mourning in America*, NATION, July 30, 2007, at 10.

54. James E. Ryan, *The Supreme Court and Voluntary Integration*, 121 HARV. L. REV. 131, 132 (2007).

55. *Id.*; see also Jeffrey Rosen, *Can a Law Change a Society?*, N.Y. TIMES, July 1, 2007, at C1.

56. Erica Frankenberg & Chinh Q. Le, *The Post-Parents Involved Challenge: Confronting Extralegal Obstacles to Integration*, 69 OHIO ST. L.J. 1015, 1021 (2008).

57. Ryan, *supra* note 54, at 156.

58. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 797-98 (2007) (Kennedy, concurring opinion).

decision was interpreted at the local level; namely, did the decision have a broader chilling effect on diversity policies?⁵⁹

B. Federal Interpretations of *Parents Involved*

In August 2008, the Bush Department of Education's Office of Civil Rights (OCR) released a "Dear Colleague" letter to school districts, advising them about the *Parents Involved* decision and its implications for districts.⁶⁰ This letter, Assistant Secretary Stephanie Monroe explained, would articulate the way in which OCR would evaluate districts' compliance with Title VI of the 1964 Civil Rights Act.⁶¹ In the letter, Monroe first described that the Seattle and Louisville plans had been subject to strict scrutiny.⁶² In describing the compelling interests that K-12 race-conscious policies could pursue, Monroe failed to recognize the interests that a majority of justices endorsed as written in Justice Kennedy's controlling opinion: to promote diversity and to reduce racial isolation in schools.⁶³ The letter went on to emphasize that "[t]he Department of Education strongly encourages the use of race-neutral methods for assigning students to elementary and secondary schools."⁶⁴ These methods, the letter noted, would not subject districts to strict scrutiny analysis, unlike those plans considered in *Parents Involved*.⁶⁵ Such guidance, however, ignored the fact that Justice Kennedy identified permissible means to pursue integrated schools that could include the

59. Political scientists have noted that court decisions, particularly when in a controversial domain such as race, may have effects that are inconsistent with the actual ruling. See STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* 86 (2d ed. 2004). Thus, it is important to understand the ways in which local communities are contesting student assignment after *Parents Involved*.

60. Letter from Stephanie J. Monroe, Assistant Sec'y for Civil Rights, Office for Civil Rights, U.S. Dep't of Educ., to the public (Aug. 28, 2008) (on file with author).

61. *Id.* Under Title VI, the federal government is required to monitor compliance of any entities receiving federal funding with the prohibition of furthering racial discrimination. 42 U.S.C. § 2000d-1 (2012). In the civil rights era, Title VI was an important tool to force southern school districts to comply with *Brown* and subsequent cases that mandated school desegregation. See generally ORFIELD & FRANKENBERG, *supra* note 2, at 37.

62. Letter from Stephanie J. Monroe to the public, *supra* note 60.

63. *Id.*; *Parents Involved*, 551 U.S. at 797-98 (Kennedy, J., concurring in part and concurring in the judgment).

64. Letter from Stephanie J. Monroe to the public, *supra* note 60.

65. *Id.*

consideration of race, either in a generalized way or in combination with other factors.⁶⁶ Finally, before the Bush Administration left office, it released another “Dear Colleague” letter, stating that students’ right to transfer from schools not meeting Adequate Yearly Progress under No Child Left Behind (NCLB) could not be impeded by voluntary desegregation and suggesting even mandatory desegregation plans might need to be altered.⁶⁷

It was more than three years before the 2008 “Dear Colleague” letter was removed as the official position of the federal government regarding student assignment.⁶⁸ On December 2, 2011, the U.S. Department of Education and Department of Justice jointly released guidance regarding how school districts “can voluntarily consider race to further compelling interests in achieving diversity and avoiding racial isolation.”⁶⁹ Relying on cases from *Brown to Grutter* to *Parents Involved* and reflecting findings from social science research, the guidance described in expansive terms the reasons that districts would have compelling interests to further diversity and to avoid the harms of racially isolated schools for minority students.⁷⁰ The guidance also stated the Departments’ conclusion that there were a variety of ways in which a majority of the Court would allow districts to pursue these compelling interests.⁷¹ In explaining this, the guidance emphasized the flexibility that existed for districts to use race on a generalized basis, as well as noting that although individualized use of race would be subject to a strict scrutiny analysis, such an analysis should not be ““fatal in fact.””⁷² After

66. *Parents Involved*, 551 U.S. at 788-90.

67. Letter from Stephanie J. Monroe, Assistant Sec’y for Civil Rights, Office for Civil Rights, U.S. Dep’t of Educ., to the public (Jan. 8, 2009), *available at* www.ed.gov/about/offices/list/ocr/letters/colleague-20090108.pdf.

68. Prior to that, there were a few other efforts by the Obama Administration, including revising the Magnet School Assistance Program (MSAP) guidelines to more closely tie funding to eliminating racial isolation, developing a new definition of racial isolation to comply with *Parents Involved*, and identifying school diversity as a possible competitive preference in U.S. Department of Education funding programs. *See* Genevieve Siegel-Hawley & Erica Frankenberg, *Redefining Diversity: Political Responses to the Post-PICS Environment*, 86 PEABODY J. EDUC. 529, 538 (2011).

69. U.S. DEP’T OF JUSTICE & U.S. DEP’T OF EDUC., GUIDANCE ON THE VOLUNTARY USE OF RACE TO ACHIEVE DIVERSITY AND AVOID RACIAL ISOLATION IN ELEMENTARY AND SECONDARY SCHOOLS 1 (2011), *available at* <http://www2.ed.gov/about/offices/list/ocr/docs/guidance-ese-201111.pdf>.

70. *Id.* at 2-5.

71. *Id.* at 5-7.

72. *Id.* at 5 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003)).

articulating the legal framework, the guidance next described different categories of student assignment approaches,⁷³ steps that districts should take in implementing such efforts,⁷⁴ and various practical examples of policies that districts could implement to create more diverse schools (including, but not limited to, student assignment policies).⁷⁵

C. Conclusion

In the aftermath of *Parents Involved*, there were a range of opinions about what the decision meant, what districts' options were, and what the overall impact of the decision would be. One short-term result was considerable discussion about integration, and a number of professional educational organizations and civil rights groups hosted educational sessions or produced materials to help make sense of the decision.⁷⁶ Initially, the federal government supported a restrictive reading of *Parents Involved*, which was at odds with other interpretations.⁷⁷

Yet, there was still a tremendous amount that was unknown in the aftermath of *Parents Involved*. If the strategies Justice Kennedy proposed were legally viable, were they also likely to be effective? What was known about race-neutral strategies since social science evidence presented in *Parents Involved* seemed mixed? Were there other strategies worth considering? For example, there was little known about a promising integration plan in Berkeley, California that employed a generalized use of race.⁷⁸ Districts had many

73. *Id.* at 5-7.

74. *Id.* at 7-8.

75. *Id.* at 9-13.

76. *E.g.*, ANURIMA BHARGAVA, ERICA FRANKENBERG & CHINH Q. LE, NAACP LEGAL DEF. AND EDUC. FUND, STILL LOOKING TO THE FUTURE: VOLUNTARY K-12 SCHOOL INTEGRATION 3-4 (2008), available at <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/still-looking-to-the-future-voluntary-k-12-school-integration/naACP-still-looking-future-2008.pdf>; Arthur L. Coleman, Francisco M. Negron Jr. & Katherine E. Lipper, *Promoting Diversity in Your Schools*, AM. SCH. BD. JOURNAL, <http://www.asbj.com/TopicsArchive/ImmigrationandDiversity/Promoting-Diversity-in-Your-Schools.html> (last visited Sept. 28, 2014). For example, there was a large crowd at the Fall 2007 CGCS conference in Nashville.

77. *See, e.g.*, BHARGAVA, FRANKENBERG & LE, *supra* note 76, at 3-4.

78. The first systematic study of the Berkeley policy's effectiveness was in 2009. LISA CHAVEZ & ERICA FRANKENBERG, CIVIL RIGHTS PROJECT, INTEGRATION DEFENDED: BERKELEY UNIFIED'S STRATEGY TO MAINTAIN SCHOOL DIVERSITY, at vi, 2, 6 (2009), available at

questions after the 2007 decision, and legal analysis and social science evidence took time to be developed. In 2009, several universities sponsored a conference to consider what options remained after *Parents Involved* alongside smaller gatherings to provide insight about what knowledge existed to date.⁷⁹ Thus, while districts searched for answers, model plans, and evidence, social science was initially not as robust on what was now required in the changed legal context. A lack of such a fully defined research base or legal consensus meant that districts may have been only further confused about their possible options after *Parents Involved*.

III. CHANGING CONTEXT FOR POLICIES TO ACCOMPLISH DESEGREGATION

In addition to the legal context, desegregation has shifted in several ways that affect how it is conceptualized. In particular, I focus here on: (1) demographic transformation; (2) more robust social science literature about the harms of segregation and benefit of integration; and (3) changing policy tools.

A. Demographic Transformation

At the time of *Brown*, desegregation was typically conceptualized as trying to integrate black students into what had been all-white schools. During the 1950s, the overall population was 88% non-Hispanic white, 10% African-American, and 1.5% Hispanic.⁸⁰ In 2010, 63.7% of the total population were non-Hispanic white, 12.6% were African-American, and 16.3% were Hispanic.⁸¹ In

education/integration-and-diversity/integration-defended-berkeley-unified2019s-strategy-to-maintain-school-diversity/Integration-Defended-corrected-9-16-09.pdf.

79. Papers from this conference were subsequently published in Symposium, *Looking to the Future: Legal and Policy Options for Racially Integrated Education in the South and the Nation*, 88 N.C. L. REV. 713 (2010) and INTEGRATING SCHOOLS IN A CHANGING SOCIETY: NEW POLICIES AND LEGAL OPTIONS FOR A MULTIRACIAL GENERATION ix (Erica Frankenberg & Elizabeth DeBray eds., 2011).

80. CHARLES T. CLOTFELTER, AFTER *BROWN*: THE RISE AND RETREAT OF SCHOOL DESEGREGATION 33 (2004).

81. KAREN R. HUMES, NICHOLAS A. JONES & ROBERTO R. RAMIREZ, U.S. CENSUS BUREAU, OVERVIEW OF RACE AND HISPANIC ORIGIN: 2010, at 4 (2011), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf>. Because of the changes in racial/ethnic classification, these percentages are not directly comparable with pre-2000 data.

addition, other groups such as Asians and multiracial individuals also comprised growing shares of the population.⁸²

The changes in the public school enrollment are also stark. In 1970, just as the civil rights era was ending, the K–12 enrollment was still overwhelmingly white: 79.1%.⁸³ Another 15% of students were black and 5.1% were Latino at the time.⁸⁴ At that time, the South was the most diverse region of the country, and only two in three public school students were white.⁸⁵ Another 27.2% were black and 5.5% were Latino (concentrated in Texas and Florida).⁸⁶ All other regions were over three-quarters white.⁸⁷ Thus, in the area in which most desegregation orders were in place, the enrollment was largely a white majority, and the vast majority of students of color were African-American.⁸⁸ This is one of the reasons that many court orders focused primarily on desegregating black students.⁸⁹

Today the enrollment is vastly different, complicating our notion of what desegregation is. The public school enrollment nationally is just barely majority white, at 51.5%.⁹⁰ However, this aggregate change is even more evident when looking at certain regions of the country. The South, where most desegregation lawsuits were filed and where states had laws mandating segregation prior to *Brown*, and the West are both majority nonwhite regions.⁹¹ Further, although most desegregation cases focused on the rights of African-American students in the South since they were the vast majority of nonwhite students in the region, today Latinos outnumber African-American students in the South.⁹² In the West, whites are only the second-largest group of students to Latinos.⁹³ While some regions of the country are still largely white, such as the

82. *Id.*

83. GARY ORFIELD, PUBLIC SCHOOL DESEGREGATION IN THE UNITED STATES, 1968-1980, at 21 (1983).

84. *Id.*

85. *Id.*

86. *Id.* at 18, 21.

87. *Id.* at 21.

88. *Id.* at 5, 21.

89. Though often overlooked, the Ninth Circuit held in a California case prior to *Brown* that the segregation of Latinos was unconstitutional. *Westminster Sch. Dist. v. Mendez*, 161 F.2d 774, 781 (9th Cir. 1947).

90. ORFIELD & FRANKENBERG, *supra* note 2, at 9 (providing relevant statistics in Table 2).

91. *Id.*

92. *Id.* Note, however, that the majority of African-Americans still live in the South. *Id.*

93. *Id.*

Midwest and the Northeast, the high fragmentation of metropolitan areas in those regions limits the effectiveness of intra-district desegregation plans, which are far more common than between-district desegregation efforts.⁹⁴

Taken together, these trends suggest the need to rethink the common conception of desegregation during the *Brown* era. Further, given the vast differences between regions, “desegregation” may mean different things in communities in the South, West, or Northeast, for example.

B. How Social Science Evidence Has Developed Regarding Desegregation

The *Brown* decision included a citation to social science evidence that was presented in some of the cases to support the conclusion that minority students suffered by attending segregated schools.⁹⁵ Since this time, an array of studies has been conducted analyzing whether and how schools with high concentrations of minority students affect the education of students who enroll in them. The consensus of these studies confirms the original findings cited in *Brown*. Syntheses of research conclude that black and Latino students have lower achievement outcomes and are less likely to graduate from high school when they attend minority schools.⁹⁶ Research also shows that the achievement of white students is not harmed in desegregated schools.⁹⁷ This is likely due to one of the other common findings of studies, which also shows that segregated schools have fewer resources that are important for students’ learning: qualified and experienced teachers,⁹⁸ middle-class peers,⁹⁹ and advanced curriculum.¹⁰⁰

94. *Id.*

95. See Robert L. Carter, *The Effects of Segregation and the Consequences of Desegregation: A Social Science Statement*, 22 J. NEGRO EDUC. 68, 68-76 (1953).

96. See generally NAT’L ACAD. OF EDUC., *supra* note 46; Roslyn Arlin Mickelson & Martha Bottia, *Integrated Education and Mathematics Outcomes: A Synthesis of Social Science Research*, 88 N.C. L. REV. 993 (2010); Janet Ward Schofield, *Review of Research on School Desegregation’s Impact on Elementary and Secondary School Students*, in HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION 597 (James A. Banks & Cherry A. McGee Banks eds., 1995).

97. Schofield, *supra* note 96, at 603.

98. Brief of 553 Social Scientists as Amici Curiae in Support of Respondents at 11, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (Nos. 05-908, 05-915).

In addition to a more robust literature base exploring the ways in which segregation harms minority students, in keeping with the development of case law, research has also focused on the *benefits* of diverse schools for students of all backgrounds. Studies have found that early exposure to diverse classrooms, particularly when structured according to Gordon Allport's conditions of equal-status contact, result in lower prejudice and stereotype formation,¹⁰¹ more cross-racial friendships,¹⁰² and increased critical thinking skills.¹⁰³ Further, sociologists suggest that there are long-term benefits of diverse schools, including a perpetuation effect that results in students leading more desegregated lives as adults¹⁰⁴ and higher levels of democratic engagement.¹⁰⁵

99. See, e.g., ORFIELD & FRANKENBERG, *supra* note 2, at 16 (providing poverty statistics in Table 7).

100. Brief of 553 Social Scientists, *supra* note 98, at 11.

101. Thomas F. Pettigrew & Linda R. Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, 90 J. PERSONALITY & SOC. PSYCHOL. 751, 765-66 (2006).

102. This research was persuasive to the dissent in *Parents Involved*. Justice Breyer's opinion found a democracy in diverse schools:

[P]roducing an educational environment that reflects the "pluralistic society" in which our children will live . . . helping our children learn to work and play together with children of different racial backgrounds . . . teaching children to engage in the kind of cooperation among Americans of all races that is necessary to make a land of 300 million people one Nation.

Parents Involved, 551 U.S. at 840 (Breyer, J., dissenting) (quoting Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971)) (citing WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* 155 (1998); Maureen T. Hallinan, *Diversity Effects on Student Outcomes: Social Science Evidence*, 59 OHIO ST. L.J. 733, 741-42 (1998); Lincoln Quillian & Mary E. Campbell, *Beyond Black and White: The Present and Future of Multiracial Friendship Segregation*, 68 AM. SOC. REV. 540, 541 (2003)).

103. See generally John D. Bransford & Daniel L. Schwartz, *Rethinking Transfer: A Simple Proposal with Multiple Implications*, 24 REV. RES. EDUC. 61 (1999); Allan Wigfield et al., *Development of Achievement Motivation*, in HANDBOOK OF CHILD PSYCHOLOGY: VOLUME THREE: SOCIAL, EMOTIONAL, AND PERSONALITY DEVELOPMENT 933 (Nancy Eisenberg, William Damon & Richard M. Lerner eds., 6th ed. 2006).

104. Marvin P. Dawkins & Jomills Henry Braddock II, *The Continuing Significance of Desegregation: School Racial Composition and African American Inclusion in American Society*, 63 J. NEGRO EDUC. 394, 401-03 (1994); Michal Kurlaender & John T. Yun, *Is Diversity a Compelling Educational Interest? Evidence from Louisville*, in DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION 111, 136-37 (Gary Orfield ed., 2001); Amy Stuart Wells & Robert L. Crain, *Perpetuation Theory and the Long-Term Effects of School*

These findings then help us understand in more expansive ways how segregation is harmful to students' long-term opportunities and to our nation's future.¹⁰⁶ Indeed, the very populations that are growing in our society are those who historically have been subject to segregated schools and the poor educational outcomes that often occur in such schools.¹⁰⁷

C. Changing Policy Tools to Accomplish Integration

Finally, the landscape of educational policymaking has shifted substantially since *Brown*, and for many reasons, the policy tools that are commonly used to design integration efforts, either those that are adopted in response to court order, by consent decree, or voluntarily, are often choice based. Yet, in illustration of how significant the changes have been during the immediate aftermath of *Brown*, choice was first used to subvert desegregation.¹⁰⁸ After *Green* held that a district's freedom-of-choice plan was not enough to comply with *Brown*—combined with increasing enforcement efforts under the Johnson administration—many districts began implementing mandatory reassignment plans.¹⁰⁹ In some instances, these reassignments, often coupled with busing students to their new schools, were implemented hastily to comply with court orders and faced substantial resistance.¹¹⁰ Particularly in districts that were

Desegregation, 64 REV. EDUC. RES. 531, 550 (1994). See generally Kristie J. R. Phillips et al., *Integrated Schools, Integrated Futures?: A Case Study of School Desegregation in Jefferson County, Kentucky*, in FROM THE COURTROOM TO THE CLASSROOM: THE SHIFTING LANDSCAPE OF SCHOOL DESEGREGATION 239 (Claire E. Smrekar & Ellen B. Goldring eds., 2009).

105. See Roslyn Arlin Mickelson & Mokubung Nkomo, *Integrated Schooling, Life Course Outcomes, and Social Cohesion in Multiethnic Democratic Societies*, 36 REV. RES. EDUC. 197, 198 (2012).

106. *Brown v. Bd. of Educ.*, 347 U.S. 463, 493 (1954) (“[E]ducation is perhaps the most important function of state and local governments. . . . It is the very foundation of good citizenship.”).

107. See generally ORFIELD & FRANKENBERG, *supra* note 2.

108. Gary Orfield, *Choice and Civil Rights: Forgetting History, Facing Consequences*, in EDUCATIONAL DELUSIONS?: WHY CHOICE CAN DEEPEN INEQUALITY AND HOW TO MAKE SCHOOLS FAIR 3, 9-12 (Gary Orfield, Erica Frankenberg & Associates eds., 2013).

109. *Id.* at 26.

110. For instance, Jefferson County Public Schools (JCPS) in Kentucky noted the fierce resistance in their community when mandatory reassignment and busing began in the 1970s in the newly merged county district to comply with court order. It was part of their rationale for why integrated schools were so important to

smaller or where white-enclave schools existed nearby, some white families left the desegregating district in protest.¹¹¹

As a result of the backlash in some communities, districts began incorporating choice into their student assignment—responding to critics of mandatory reassignment who questioned how effective it could be if it exacerbated white flight from the district.¹¹² One of the most popular choice-based assignment policies that arose during this era was magnet schools, which created specialized schools with a unique theme and selected students from across the district thereby disentangling school patterns from what were often segregated neighborhoods.¹¹³ Magnet schools were frequently diverse and very popular; in 1976, the federal government began the Magnet School Assistance Program to help districts create magnets that would assist with reducing racial isolation.¹¹⁴ Several dozen districts also implemented controlled-choice assignment policies, which allowed parents to rank their school preferences, and districts considered these preferences as well as racial balance in deciding where to assign students.¹¹⁵ Both types of plans allowed for parental input, while also permitting districts to pursue their racial diversity goals.¹¹⁶

While policies incorporating school choice may have made desegregation plans more popular, there are also tradeoffs. Any type of school choice requires parents to know that they must make a choice, meet deadlines, investigate schooling options, and determine

the community. *See generally* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 803-19 (Breyer, J., dissenting).

111. Gary Orfield, *Metropolitan School Desegregation: Impacts on Metropolitan Society*, in IN PURSUIT OF A DREAM DEFERRED: LINKING HOUSING AND EDUCATION POLICY 121, 124-25 (John A. Powell, Gavin Kearney & Vina Kay eds., 2001); Diana M. Pearce, *Deciphering the Dynamics of Segregation: The Role of Schools in the Housing Choice Process*, 13 URB. REV. 85, 85-91 (1981). However, white families were also leaving central city districts that were not subject to desegregation orders. Christine H. Rossell, *School Desegregation and White Flight*, 90 POL. SCI. Q. 675, 676 (1975) (“The data in this article show that school desegregation has little or no effect on white flight.”).

112. *E.g.*, CHRISTINE H. ROSSELL, THE CARROT OR THE STICK FOR SCHOOL DESEGREGATION POLICY: MAGNET SCHOOLS OR FORCED BUSING 24-26 (1990).

113. *See* Genevieve Siegel-Hawley & Erica Frankenberg, *Designing Choice: Magnet School Structures and Racial Diversity*, in EDUCATIONAL DELUSIONS?, *supra* note 108, at 107, 111-14.

114. *See generally* Frankenberg & Le, *supra* note 56, at 1047-52.

115. Orfield, *supra* note 108, at 17.

116. *See id.* at 13-17.

what is best for their child.¹¹⁷ Thus, choice policies are often more complicated than mandatory reassignment and parents who don't get their choice may complain.¹¹⁸ Further, higher-socioeconomic families are typically advantaged with choice policies, and as a result, low-income, minority, and transient families may not get their preferred choices, but may instead be assigned to a school.¹¹⁹ Nevertheless, despite these tradeoffs, today virtually all voluntary integration plans incorporate some type of choice or transfer request because of their popularity.¹²⁰

IV. PRELIMINARY ASSESSMENT OF THE EFFECTS OF *PARENTS INVOLVED* ON DISTRICTS' VOLUNTARY INTEGRATION POLICIES

In the aftermath of *Parents Involved*, there have been a few of attempts to assess the response of school districts to the decision or the extent to which districts are still pursuing voluntary integration. In a survey of responses conducted with two colleagues, I investigated both legal and political responses and found a wide variety.¹²¹ For example, the two districts whose policies were challenged in *Parents Involved* had divergent responses to the decision. Seattle had discontinued use of its controlled-choice plan prior to the decision and adopted a neighborhood schools assignment policy.¹²² Jefferson County, on the other hand, modified its controlled-choice policy to continue using a race-conscious student assignment plan.¹²³ Most legal responses initially after the decision were those in which districts ended race-conscious policies—sometimes doing so before litigation was actually filed.¹²⁴ Additionally, district courts invoked *Parents Involved* as a reason to

117. *Id.* at 8, 14-17.

118. Indeed, the challenge to Louisville's plan was from a parent who submitted her application late and her child was not assigned to his first choice school. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 853 (2007) (Breyer, J., dissenting).

119. See EDUCATIONAL DELUSIONS?, *supra* note 108, at chs. 2, 3 & 11.

120. See Richard D. Kahlenberg, *Socioeconomic School Integration: Preliminary Lessons from More Than 80 Districts*, in INTEGRATING SCHOOLS IN A CHANGING SOCIETY, *supra* note 79, at 167, 178 (discussing how choice is "more politically acceptable than redrawing school boundaries to achieve" diversity).

121. Kathryn A. McDermott, Elizabeth DeBray & Erica Frankenberg, *How Does Parents Involved in Community Schools Matter? Legal and Political Influence in Education Politics and Policy*, 114 TCHRS. C. REC., Dec. 2012, at 1, 8-32.

122. *Id.* at 10-11.

123. *Id.* at 11-13.

124. *Id.* at 10-20.

end remedial desegregation orders even though the 2007 decision was not directly on point.¹²⁵ Political responses were also disparate, from adopting multifactor plans (either race-conscious or not), socioeconomic-based policies, or dropping the pursuit of diversity altogether to return to neighborhood schools.¹²⁶ Optimistically, this could be seen as a multiracial moment in which an external event caused local communities to reevaluate and craft a more complex understanding of diversity to better reflect contemporary demographics.¹²⁷ Interestingly, in several communities, there was discussion or debate protesting the lessening of race as a factor in student assignment.¹²⁸

A. Survey of Voluntary Integration Efforts

This Article builds upon prior work examining the political and legal responses to *Parents Involved* in addressing the question about the impact of *Parents Involved* by trying to understand the extent to which voluntary integration plans are in use in the United States. The discussion around the *Parents Involved* case illustrated how little is known about race-conscious student assignment policies. One estimate was that more than one thousand districts considered race,¹²⁹ while another estimate was that the decision would affect hundreds of districts.¹³⁰ James E. Ryan noted that *Parents Involved* would likely affect between ten and thirty districts.¹³¹ In other words, as is the case with districts subject to court desegregation orders or consent decrees, there is no authoritative source about how many districts employ voluntary integration policies.

Some of the few studies of the extent of voluntary integration produce wildly different estimates. Sean Reardon and Lori Rhodes, for example, identified forty districts that had socioeconomic-based

125. *Id.* at 9, 16-18.

126. *Id.* at 21-24.

127. Siegel-Hawley & Frankenberg, *supra* note 68, at 548. Less promisingly, it could make racial isolation increase due to trying to achieve different conceptions of diversity aside from race alone.

128. *Id.* at 543-44.

129. David G. Savage, *Ever True to Brown?: Two Public School Cases Raise the Legacy of the Famed Desegregation Ruling*, 92 A.B.A. J., Dec. 2006, at 16.

130. Robert Cohen, *Setback for School Desegregation—U.S. Justices Say Race Cannot Be Main Factor When Placing Students Throughout a District*, STARLEDGER, June 29, 2007, at A1.

131. Ryan, *supra* note 54, at 146.

student assignment policies.¹³² Richard Kahlenberg, a proponent of socioeconomic integration, identified “more than 80” such districts.¹³³ Both studies noted the wide array of ways in which a student’s socioeconomic status was incorporated into student assignment policies; these differences in policy design had implications for the extent of school diversity that resulted from their implementation. Kahlenberg argued that districts that used socioeconomic status in a system-wide way and defined neighborhoods instead of students by socioeconomic status might make schools more racially diverse.¹³⁴ He noted, however, the “tension” between a plan’s effectiveness and legal sustainability.¹³⁵ Reardon and Rhodes found only a handful of districts that had what they classified as strong socioeconomic-based plans.¹³⁶ Because many of these had replaced race-conscious plans, the strong socioeconomic-based plans had little effect on racial segregation, although they did help to create socioeconomically diverse schools.¹³⁷ Further, the majority of socioeconomic-based plans were classified as weak mechanisms, which Reardon and Rhodes found not to be effective at reducing racial or economic segregation.¹³⁸ They cautioned that their results were tentative due to the relatively few districts and relatively short amount of time to study the effects of such policies.¹³⁹

Using these sources and others,¹⁴⁰ I constructed an initial list of approximately 100 school districts that might use some type of voluntary integration policy.¹⁴¹ Using source notes, I looked for policies in each district to understand whether, and if so how, they

132. Sean F. Reardon & Lori Rhodes, *The Effects of Socioeconomic School Integration Policies on Racial School Desegregation*, in *INTEGRATING SCHOOLS IN A CHANGING SOCIETY*, *supra* note 79, at 187, 202 (assuming that all forty are not under court order).

133. Kahlenberg, *supra* note 120, at 167 (including some districts under court order).

134. *Id.* at 179.

135. *Id.* at 180.

136. Reardon & Rhodes, *supra* note 132, at 202-04.

137. *Id.* at 203-04.

138. *Id.* at 202-03.

139. *Id.* at 204.

140. Other sources include discussions with experts in the field; Holley-Walker, *supra* note 25, at 884-87; and Philip Tegeler, Saba Bireda & Genevieve Siegel-Hawley, *The Integration Report, Issue 28*, *INTEGRATION REPORT* (Jan. 19, 2011), <http://theintegrationreport.wordpress.com/>.

141. My thanks to Stormy Stark for her research assistance with this task and persistence in tracking down policy details and administrators in these districts.

pursued voluntary integration. In many cases, it was difficult to ascertain what the district's student assignment policy was, and, in such instances, my research assistant or I contacted the district directly to get more specific policies if available or, if not, spoke with someone who was familiar with the district's student assignment policy. In particular, I wanted to know how they conceptualized diversity (race, economic, etc.) and what type of policy design they used (controlled choice, magnet schools, transfer preference, etc.).

In the course of researching the districts in greater depth, a number of districts did not meet the criteria of voluntary integration. Some were still under court order (and thus weren't voluntary). Others were no longer pursuing the goal of reducing racial isolation or creating diversity. In a few it was impossible to verify if indeed they were pursuing integration as a goal, and if so, how. Because of the challenge of identifying relevant policies even in districts that were known to have integration policies, it is quite likely this assessment of voluntary integration efforts understates their prevalence. Due to the larger political and legal landscape, it is understandable that a district may not want to call widespread attention to their voluntary integration efforts.¹⁴²

My current estimate of districts that have some type of voluntary integration policy is sixty-nine districts.¹⁴³ This group of districts is geographically diverse, reaching from Massachusetts to the South and West, as well as districts in the Midwest and Border states. There are a few large urban districts like Chicago or countywide districts, but most are midsized districts. Together they enroll 4.3 million students or approximately 9% of all public school

142. At the same time, it is also worth noting that the extent to which such policy details are obscured may have significant drawbacks. For district families, especially those new to a district, it could be very difficult to learn about integration policies, how they work, and why they are adopted—all of which could be important to maintaining support for the policies. It is likely that less advantaged families might be particularly less likely to know about assignment details. Additionally, for our larger understanding of the phenomenon of voluntary integration, it makes it more difficult to answer basic questions like the extent to which districts are trying to pursue integration, how are they doing it, and what is effective. These questions could be particularly useful to inform districts that are becoming more diverse through demographic changes or as they end court oversight of the efficacy of various types of policy design.

143. Work on the database of districts with some type of voluntary integration policy is ongoing.

students.¹⁴⁴ (Of course, not all students in these districts are experiencing diverse schools. In districts with magnet schools, for example, only a percentage of students would be enrolled in schools that are explicitly focused on diversity.) The districts have an over-representation of students of color (72% of all students in these districts) and, to a lesser extent, low-income students (56% received free or subsidized lunch in 2010-2011).¹⁴⁵

There are four principal ways in which these districts pursue integration: (1) diversity priority for transfers; (2) magnet school criteria; (3) district-wide controlled-choice policies; or (4) establishing attendance-zone boundaries.¹⁴⁶ Of these, the first two are less far reaching because they affect a small fraction of the district's enrollment. Thus, such districts may employ diversity guidelines, but in the case of transfers, the guidelines will only affect students who request a different school than their initial assignment, which isn't likely to be a large amount of students. Likewise, in order for magnet schools to be "magnetic" they need a unique theme¹⁴⁷ and thereby are also unlikely to account for more than a handful of district schools. Controlled-choice policies may govern all district schools or those of a certain level, like elementary schools. Controlled-choice policies were the ones utilized in Seattle and Louisville at issue in *Parents Involved*.¹⁴⁸ And finally, some policies were drawing attendance boundaries with either neighborhood diversity explicitly considered or permitted to be considered.¹⁴⁹ This is likely the most far reaching—if diversity is indeed considered—because it would affect the base assignment (pending transfers or magnet schools) for every child in the district.

144. District enrollment data comes from the NCES Common Core of Data, 2011-2012. Calculations are the author's using the latest year available at time of analysis. Data is missing for one district that employs voluntary integration. PATRICK KEATON, NAT'L CTR. FOR EDUC. STATISTICS, DOCUMENTATION TO THE NCES COMMON CORE OF DATA PUBLIC ELEMENTARY/SECONDARY SCHOOL UNIVERSE SURVEY: SCHOOL YEAR 2010-11, at B-20-B-31 (2012), available at <http://nces.ed.gov/ccd/pdf/psu102agen.pdf>.

145. *Id.* at B-4-B-31.

146. See Erica Frankenberg, *Integration After Parents Involved: What Does Research Suggest About Available Options?*, in INTEGRATING SCHOOLS IN A CHANGING SOCIETY, *supra* note 79, at 53, 53-74 (discussing design of voluntary integration policies and the relation to prospects of diverse schools).

147. See *id.* at 61.

148. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 710-11 (2007) (majority opinion).

149. See Frankenberg, *supra* note 146, at 58.

The districts also vary on the ways in which they define diversity and what diversity criteria they use, although they are largely race-neutral in their approach. Most districts that employ race-conscious criteria rely on multiple factors, of which race or ethnicity is one factor.¹⁵⁰ This “multiple factors” analysis when including race is typically used in determining the diversity characteristics of geographic areas. In comparison to pre-*Parents Involved* policies, this represents a diminution in the use of race in two ways: to consider the race of an area instead of an individual and to consider race among other factors. Both may make the policy less targeted to achieve racial diversity. Socioeconomic diversity is overwhelmingly the most common type of diversity specified. To the extent that it was possible to identify what type of socioeconomic status is being employed, there is a range of conceptualizations. Most common is eligibility for free or reduced price lunch, which is a binary measure above or below a threshold that is 185% of the poverty line; less frequently mentioned is household income. Other diversity factors include academic achievement, educational attainment, and linguistic status.

This discussion begins to provide a foundation for understanding how court decisions may be affecting districts’ student assignment policies. The number of districts employing socioeconomic status to create diverse schools has grown rapidly in the last decade. Moving forward, it will be important for researchers to understand how such policy shifts affect the diversity in schools in order to inform future policymaking by school boards who wish to pursue integration.

B. Experiences of Eleven Districts’ Voluntary Integration Efforts That Received Federal Funding

In the aftermath of the *Parents Involved* decision, it was clear that districts needed guidance about what assignment options remained permissible and effective. The Council of Great City Schools (CGCS), an organization comprised of several dozen largely urban districts, together with the NAACP Legal Defense Fund first obtained funding from private foundations to fund their work assisting districts (along with other organizations). CGCS also lobbied Congress to allocate federal funding for school districts

150. See *id.* at 57.

around diversity.¹⁵¹ Through an earmark of Title IV of the 1964 Civil Rights Act, which funds regional Equity Assistance Centers (formerly known as Desegregation Assistance Centers), Congress allocated \$2.5 million to a competitive grant program called Technical Assistance for Student Assignment Policies (TASAP).¹⁵² The U.S. Department of Education was charged with administering the grant and published a notice in the Federal Register in July 2009, requiring applications a month later.¹⁵³ Districts had to demonstrate need for the project and prior commitment to voluntary integration efforts.¹⁵⁴ Despite the short turnaround, nearly two dozen districts applied, and eleven received funding.¹⁵⁵ The maximum grant award was \$250,000 over two years, and districts could engage with experts as they saw fit.¹⁵⁶ Common types of expertise included geographic information systems consultants to advise on boundaries, consultants for public-engagement efforts around various plans, and legal advice.¹⁵⁷

Along with two colleagues, I have spent the last several years studying these districts,¹⁵⁸ and they provide important insights to help understand the full effect of *Parents Involved* and, more generally, federal courts' decisions around race-conscious policies. These districts, by dint of having applied for TASAP funding and successfully obtaining funding, are arguably among the most committed districts to voluntary integration, and in the eyes of the

151. Kathryn A. McDermott et al., Good Intentions, Limited Impact: The Technical Assistance for Student Assignment Plans Program 5 (July 2014) (unpublished manuscript), *available at* http://works.bepress.com/kathryn_mcdermott/17/.

152. *Id.* at 4.

153. *Id.* at 9.

154. *Id.* at 10.

155. Funded districts were: Boston, MA; Champaign, IL; Evangeline Parish, LA; Hillsborough County, FL; Jefferson County, KY; Orange County, FL; Portland, OR; Rockford, IL; St. Paul, MN; San Diego, CA; and San Francisco, CA. *Id.*

156. *Id.* at 9.

157. *Id.* at 36.

158. *See generally id.*; Elizabeth DeBray et al., Lessons from a Federal Grant for School Diversity: Tracing a Theory of Change and Implementation of Local Policies (April 2012) (unpublished manuscript) (on file with author); Erica Frankenberg, Kathryn McDermott & Elizabeth DeBray, The Changing Politics of Diversity: Lessons from a Federal Technical Assistance Grant (April 2012) (unpublished manuscript), *available at* http://works.bepress.com/kathryn_mcdermott/2/; Kathryn A. McDermott et al., Assigning Opportunity: Student Assignment Policies, Race, and Class in Three School Districts (2013) (unpublished manuscript) (on file with author).

reviewers for the Department of Education were proposing feasible projects to pursue integration. Though it is still early to fully assess the empirical changes in student composition in these districts' schools, our study of what policies were adopted is cause for concern. At least five districts adopted policies that we believe are likely to move away from integration.¹⁵⁹

In several districts, the student assignment policies adopted were contrary to the aims of the TASAP grant and what the districts had intended to do as specified in their grant proposal. Rockford and Boston are two examples of districts whose plans have little connection to improving equity or diversity, and the plans of both changed during the TASAP period as a result of local politics.

Rockford, Illinois applied for a TASAP grant because of the racial and economic resegregation of its schools that had occurred after court desegregation ended.¹⁶⁰ Its TASAP application noted that the schools with concentrations of minority and low-income children were also those that were not making adequate yearly academic progress and sought to design a student assignment policy that would mitigate resegregation and thereby improve educational quality for students.¹⁶¹ It proposed to use TASAP funds to hire a consultant to lead the community through a public-engagement process to consider a variety of assignment scenarios.¹⁶² During the process, the business community—which believed that the existing choice assignment policy made it difficult to recruit and retain white, middle-class residents—became involved in advocating for a neighborhood-based plan.¹⁶³ The Chamber of Commerce along with several other groups formed a “Zones Now” coalition that prioritized stability as the most important goal of the new student assignment policy.¹⁶⁴ Although most parents of students in the districts were satisfied with the choice assignment policy, the Zones Now coalition turned out people to forums, focus groups, and board meetings to

159. We were unable to interview anyone in San Diego to ascertain what the district did with its TASAP funds.

160. Tiffanie Lewis, Erica Frankenberg & Lyn Peterson, *Moving Beyond Desegregation: The Case of Post-Unitary Rockford Public Schools 24* (April 2013) (unpublished manuscript) (on file with author).

161. *Id.* at 23-24.

162. *See id.* at 25-27.

163. *Id.* at 32-33.

164. *Id.* at 33.

support the zones-based assignment policy, which the school board eventually adopted.¹⁶⁵

Boston applied for the TASAP grant in combination with several civil rights groups that had opposed Boston's earlier efforts to move to smaller zones because it would lessen access for black and Latino students to good schools.¹⁶⁶ Less than a year later, however, the civil rights groups ended their collaboration with the district due to differing priorities.¹⁶⁷ The civil rights groups had hoped to begin discussing regional solutions to segregation, while the district was focused on student assignment within its boundaries.¹⁶⁸ The student assignment redesign was on hold for over a year until 2012, when the mayor announced reducing transportation times to schools as a priority (the mayor appoints the school committee).¹⁶⁹ After a long process, the school committee adopted a new plan that gives students the option of choosing schools located in the two highest-performing quartiles among all district schools.¹⁷⁰ Notably, this does not assure students of being assigned to such a school and thus has little guarantee of equity, much less diversity.

Very few districts adopted race-conscious policies or sought to explore the flexibility left to districts under Justice Kennedy's concurrence. One of the few examples is JCPS, which had been under court order to desegregate and had been voluntarily integrating students since being declared unitary in 2000.¹⁷¹ As mentioned, its plan was deemed unconstitutional in *Parents Involved*. Its TASAP plan was called "No Retreat"¹⁷² and indicated JCPS's commitment to continuing to pursue diversity. JCPS implemented a race-conscious controlled-choice policy in Fall 2009 that assessed the characteristics of the population in terms of household income, racial composition, and adult educational attainment in each school's attendance area to assign students a diversity code of either "1" for more disadvantaged

165. *See id.* at 33-34.

166. Kathryn A. McDermott, Erica Frankenberg & Sarah Diem, *The "Post-Racial" Politics of Race: Changing Student Assignment Policy in Three School Districts*, EDUC. POL'Y, Jan. 30, 2014, at 16, available at <http://epx.sagepub.com/content/early/2014/01/28/0895904813510775>.

167. *Id.* at 16-17.

168. *Id.*

169. *Id.* at 17.

170. *Id.* at 17-18.

171. McDermott et al., *supra* note 151, at 25.

172. *Id.* at 26.

areas or “2” for more advantaged areas.¹⁷³ The policy’s goal was to have 15–50% of “1” students in each school.¹⁷⁴ The first few years of the policy led to complaints of long transportation times and other implementation issues.¹⁷⁵ The district subsequently invited experts to help revise their policy and adopted most of the recommendations to make the plan more equitable in creating diverse schools.¹⁷⁶ It retained a race-conscious, multifactor, controlled-choice policy that assigned students to three diversity categories using the same race and socioeconomic characteristics, although measured at the smaller block-group level.¹⁷⁷ The district also successfully defended its policies against federal and state legal challenges as well as attempts by the state legislature to force the district to adopt a neighborhood schools policy.¹⁷⁸ Thus far, school board candidates supporting neighborhood schools have been unsuccessful in local elections—illustrating the public’s support for the policy.¹⁷⁹

Finally, a third pattern we saw was a move immediately from race-conscious to race-neutral approaches to student assignment, which might not be surprising given the “Dear Colleague” letter representing the federal government’s official interpretation of *Parents Involved* at the time of TASAP Request for Proposals. In Champaign, the district switched from a race-conscious controlled-choice plan that had governed student assignment while under a consent decree to a five-factor socioeconomic index for controlled-choice after the consent decree ended.¹⁸⁰ San Francisco had already ended an ineffective race-neutral plan when it adopted a controlled-

173. *Id.* at 25.

174. *Id.*

175. GARY ORFIELD & ERICA FRANKENBERG, CIVIL RIGHTS PROJECT, DIVERSITY AND EDUCATIONAL GAINS: A PLAN FOR A CHANGING COUNTY AND ITS SCHOOLS 2 (2011), available at <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/diversity-and-education-gains-a-plan-for-a-changing-county-and-its-schools/Louisville-report-9-12d-final.pdf>.

176. *See id.* at 2-4.

177. *Id.* at 11-12.

178. *Id.* at 12-13.

179. *See* Sarah Diem & Erica Frankenberg, *The Politics of Diversity: Integration in an Era of Political and Legal Uncertainty*, 115 TCHRS. C. REC., Nov. 2013, at 22, 24; *see also* GARY ORFIELD & ERICA FRANKENBERG, CIVIL RIGHTS PROJECT, EXPERIENCING INTEGRATION IN LOUISVILLE: HOW PARENTS AND STUDENTS SEE THE GAINS AND CHALLENGES 2, 35-36 (2011), available at http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/experiencing-integration-in-louisville-how-parents-and-students-see-the-gains-and-challenges/LOUISVILLE_finalV3_12711.pdf.

180. McDermott et al., *supra* note 158, at 23.

choice policy that gave preference to students who lived in neighborhoods with historically low academic achievement.¹⁸¹ In both instances, some of our interviewees talked about monitoring the impact of these plans on racial isolation. While there are important rationales for adopting these policies, we heard in our fieldwork that district officials thought that they could not consider race when we asked them why such policies had been adopted. And because research suggests that socioeconomic plans are not as successful as race-conscious plans in creating racially diverse schools, there could be negative consequences for racial integration efforts to adopting race-neutral plans.¹⁸²

C. What Can We Learn from These Districts More Generally?

From these broad-based and more in-depth studies, there is evidence suggesting a chilling effect of the *Parents Involved* decision. District officials are largely adopting race-neutral policies, in some instances because they believe that race-conscious options are not permissible. In other districts, leaders are dropping the pursuit of diversity altogether, which may be influenced at least in part by the mixed message of *Parents Involved* as to whether diversity is a goal worth pursuing. Thus, one of the legacies of the decision may be, as Ryan speculated, the fact that the Court declined to be a champion of diversity in the twenty-first century.¹⁸³ Although five justices did endorse compelling governmental interests in voluntary integration policies, that message may have been obscured by striking down common policies used to achieve such goals. Further, the plurality opinion did not find any compelling interests in its analysis of Louisville and Seattle's plans.¹⁸⁴ When coupled with the 2008 "Dear Colleague" letter's interpretation of *Parents Involved*—specifically referencing compelling interests in *Grutter* not *Parents Involved*—it is easy to see how this was a further signal questioning the merit of adopting such plans at all.¹⁸⁵

181. *Id.* at 34.

182. Sean F. Reardon, John T. Yun & Michal Kurlaender, *Implications of Income-Based School Assignment Policies for Racial School Segregation*, 28 EDUC. EVALUATION & POL'Y ANALYSIS 49, 68 (2006); see Reardon & Rhodes, *supra* note 132, at 204.

183. See Ryan, *supra* note 54, at 156.

184. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 747-48 (2007) (plurality opinion).

185. Letter from Stephanie J. Monroe to the public, *supra* note 60.

The 2011 federal guidance was a shift that strongly endorsed the importance of voluntary integration and outlined, in considerable detail, means that could be used in compliance with the standards outlined in *Parents Involved*.¹⁸⁶ However, at least as of this writing, the guidance may have been too delayed or not well known enough to have had a substantial impact at the local level. As districts continue to achieve unitary status, publicizing the guidance on K–12 student assignment would make clear what options are permissible. This could be a useful way to try to preserve the diversity achieved under court order, and could limit the resegregation seen in other post-unitary districts. The U.S. Department of Education and Department of Justice could expand efforts to educate district leaders, their attorneys and other advocates, and technical-assistance providers about how the federal government views what options remain legal and viable for districts to continue to work towards creating diverse, equitable schools of the twenty-first century.

One promising development has been more recent K–12 cases that have been distinguished from *Parents Involved* in terms of whether all uses of race by school districts are subject to strict scrutiny or whether generalized uses of race might receive a lower level of scrutiny. In cases such as one in Lower Merion, Pennsylvania where the school board considered the racial composition of a neighborhood in redrawing boundaries, courts eventually determined that the decision did not require strict scrutiny analysis.¹⁸⁷ This and other similar cases have pushed the bounds of one area of Justice Kennedy's concurrence in which he suggested several means of pursuing the compelling interests he identified and noted that they would not necessarily invoke strict scrutiny.¹⁸⁸ In this way, these cases are helping to define, and perhaps limit, what impact *Parents Involved* will ultimately have by illustrating that there are generalized race-conscious approaches to student assignment that are subject to a lower standard of judicial review and therefore are more likely to be found constitutional.

186. U.S. DEP'T OF JUSTICE & U.S. DEP'T OF EDUC., *supra* note 69, at 5-13.

187. *Doe ex rel. Doe v. Lower Merion Sch. Dist.*, 665 F.3d 524, 556-57 (3d Cir. 2011).

188. *See Parents Involved*, 551 U.S. at 788-89 (Kennedy, J., concurring in part and concurring in the judgment).

V. IMPLICATIONS

This Article has traced recent developments in law and policy concerning desegregation specifically as a way to understand empirical findings about rising segregation in U.S. public schools. We are still in the initial stages of understanding how, and to what extent, *Parents Involved* has affected the desegregation landscape. After all, in the first decade after *Brown* there was only a small percentage of southern blacks attending majority white schools. While it will be possible to document policy changes made after *Parents Involved* and how they relate to changing levels of school diversity, it is impossible to be able to measure the counterfactual: the possible impact of a decision affirming Seattle and Louisville's plans might have had to encourage other districts to adopt voluntary integration policies. Thus, there is not only the chilling effect of *Parents Involved*, but also the loss of the endorsement the Supreme Court could have given to voluntary integration in this educational, legal, and demographic environment.¹⁸⁹

Although not an explicit focus of this Article, it is important to note the larger desegregation context within which the response to *Parents Involved* is occurring. As mentioned above, scores of desegregation cases under consent decree or court order have ended in recent decades. In some that remain under order, no one in the district may realize that is the case. Research has found that segregation in the South has risen as a result of districts being declared unitary.¹⁹⁰ While there have been suggestions that one approach to improve racial segregation would be to invigorate existing desegregation orders and issue guidance to districts that are still party to remedial desegregation efforts,¹⁹¹ there has been no such guidance forthcoming to date from the Department of Justice. This represents a lost opportunity to use the flexibility that exists for districts under court order to use race-conscious strategies that might better target goals of reducing racial isolation or increasing diversity in schools. Further, at a time in which it is more difficult to employ voluntary integration methods, lessening the potential impact remedial court oversight could have on desegregation compounds the challenge of pursuing school integration.

189. See Ryan, *supra* note 54, at 131-32.

190. Reardon et al., *supra* note 26, at 880.

191. Le, *supra* note 25, at 785.

More broadly, other factors also are contributing to existing school segregation, which are largely overlooked in the focus on student assignment. Housing patterns relate strongly to school patterns, yet there is little concerted effort to address both concurrently.¹⁹² At a time of increased restrictions on educational policies to address segregation, enforcing the Fair Housing Act could be one approach that would have an educational dividend. Likewise, thinking carefully about the ways in which boundary lines structure and separate students not only within districts but also between districts would be important given the fact that particularly outside of the South, most of the segregation is due to differences between districts.¹⁹³ Even in the South, which has traditionally had larger, countywide districts, a new pattern of district fragmentation is emerging that could exacerbate segregation due to the lack of assignment policies that are interdistrict in nature.¹⁹⁴

Finally, the growth of school-choice options over the last several decades without much consideration to the impact on access and opportunity for students of color or low-income students also plays an increasingly large role in trying to achieve integration. As described above, virtually all desegregation policies that are new or revised include some type of choice.¹⁹⁵ Additionally, the funding of charter schools and incentives to promote the expansion of charter schools is of concern due to the high levels of segregation in charter

192. See Erica Frankenberg & Genevieve Siegel-Hawley, *Public Decisions and Private Choices: Reassessing School-Housing Segregation Link in the Post-Parents Involved Era*, 48 WAKE FOREST L. REV. 397, 425-26 (2013) (showing that studies have found a strengthening link between housing patterns and school patterns, meaning that reductions in housing segregation could be reflected in reductions in school segregation); Erica Frankenberg, *The Role of Residential Segregation in Contemporary School Segregation*, 45 EDUC. & URB. SOC'Y 548, 561, 563 (2013); Sean F. Reardon & John T. Yun, *Integrating Neighborhoods, Segregating Schools: The Retreat from School Desegregation in the South, 1990-2000*, in SCHOOL RESEGREGATION: MUST THE SOUTH TURN BACK? 51, 51-52, 67 (John Charles Boger & Gary Orfield eds., 2005); Genevieve Siegel-Hawley, *City Lines, County Lines, Color Lines: The Relationship Between School and Housing Segregation in Four Southern Metro Areas*, 115 TCHRS. C. REC., June 2013, at 4, 16.

193. CLOTFELTER, *supra* note 80, at 73; Reardon & Yun, *supra* note 192, at 64-66.

194. Erica Frankenberg, *Splintering School Districts: Understanding the Link Between Segregation and Fragmentation*, 34 LAW & SOC. INQUIRY 869, 905 (2009); Susan Eaton, *How a 'New Secessionist' Movement Is Threatening to Worsen School Segregation and Widen Inequalities*, NATION (May 15, 2014), <http://www.thenation.com/article/179870/how-new-secessionist-movement-threatening-worsen-school-segregation-and-widen-inequal#>.

195. See *supra* Section III.C.

schools.¹⁹⁶ In May 2014—more than a decade after the George W. Bush Administration archived the only existing guidance on civil rights and charter schools—the Obama Administration issued guidance on how students’ civil rights should be protected in charter schools.¹⁹⁷ In particular, the document summarized the requirements to offer admission on a fair, equitable basis, providing appropriate services for students with disabilities or English Language Learners, and administering discipline.¹⁹⁸ Each are potentially ways that charter schools as schools of choice could instead choose what students they are serving.¹⁹⁹

CONCLUSION

While this Article has surveyed the ways in which the extent of school desegregation is declining and legal and political factors that contribute to these empirical trends, it is important to note that there is also a wealth of information about *why* desegregation matters and decades of experiences to understand ways in which plans can be structured to be more or less effective. More research is needed to understand the impact of the new policies that are being implemented as a result of *Parents Involved*, though preliminary indications suggest that the nation may be moving further from efforts that are effective in creating diverse schools. As the country grows ever more diverse, the costs of not living up to the promise of *Brown* for our children and our society will only increase. Ensuring the guarantee of integrated schools with equal opportunity for all students will require educators, researchers, and advocates working

196. See generally CHRISTOPHER A. LUBIENSKI & SARAH THEULE LUBIENSKI, *THE PUBLIC SCHOOL ADVANTAGE: WHY PUBLIC SCHOOLS OUTPERFORM PRIVATE SCHOOLS* (2014); Erica Frankenberg & Genevieve Siegel-Hawley, *A Segregating Choice?: An Overview of Charter School Policy, Enrollment Trends, and Segregation, in EDUCATIONAL DELUSIONS?*, *supra* note 108, at 129-30 (finding that vouchers are a smaller but growing trend in some states).

197. U.S. DEP’T. OF EDUC., OFFICE FOR CIVIL RIGHTS, *APPLYING FEDERAL CIVIL RIGHTS LAWS TO PUBLIC CHARTER SCHOOLS* 3-4 (2000), available at <http://www2.ed.gov/offices/OCR/archives/charterqa/charindex.html>; Letter from Catherine E. Lhamon, Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ., Office for Civil Rights, to the public, (May 14, 2014), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201405-charter.pdf>.

198. See Letter from Catherine E. Lhamon to the public, *supra* note 197.

199. See generally Gary Orfield & Erica Frankenberg, *Conclusion: A Theory of Choice with Equity, in EDUCATIONAL DELUSIONS?*, *supra* note 108, at 267 (concluding in part that barriers to choice, such as a lack of special education programs or programs for students with learning disabilities, need to be eliminated).

together to craft creative, yet legal, solutions. It will likely also require changes in our current legal understanding of what are permissible actions that educational leaders can take to pursue vital goals like creating diverse schools. We need just as much change in our political understanding so that we can reconceive what might be possible—redrawing boundary lines, ensuring that choice is equitable, continuing the use of race-conscious policies—as necessary and essential elements of preparing the future citizens and leaders for our democracy.

