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COLORBLIND EDUCATION REFORM:  
HOW RACE-NEUTRAL POLICIES PERPETUATE SEGREGATION AND WHY  
VOLUNTARY INTEGRATION SHOULD BE PUT BACK ON THE REFORM AGENDA

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INTRODUCTION

Education has been heralded as the civil rights issue of our generation.<sup>1</sup> President Obama spent much of his 2011 State of the Union Address speaking about the importance of

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<sup>1</sup> Arne Duncan, U.S. Sec’y of Educ., Remarks at the National Urban League Centennial Conference (July 27, 2010), *available at* <http://www.ed.gov/news/speeches/secretary-arne-duncans-remarks-national-urban-league-centennial-conference> (“You are partners and allies in the cause of public education. This is a movement—a movement for social justice. This is the civil rights issue of our time.”).

education reform for the future of our nation.<sup>2</sup> Throughout the month of September in both 2010 and 2011, NBC aired a special series called “Education Nation,” aimed at engaging “policymakers and the public through persistent coverage on the state of education . . . .”<sup>3</sup> “Waiting for Superman,” a documentary released in 2010, challenged many of the current educational practices that may contribute to sub-standard achievement results for students in American schools.<sup>4</sup> Despite all of the media and political attention focused on the education crisis in America, very little discussion has centered on the racial nature of the educational achievement gap.

While education reform efforts in the past twenty years from the federal to the local level have aimed to improve student educational outcomes generally, the racial achievement gap still persists.<sup>5</sup> From national reading and math assessment data, to high school drop out rates, the picture is clear: students of color are scoring much lower on academic assessments than their white peers<sup>6</sup> and are dropping out of high school at much higher rates.<sup>7</sup> This achievement gap is even wider for students attending schools in high poverty, racially segregated, urban school districts.<sup>8</sup>

Racially segregated schools and districts have been on the rise since the early 1990s, reversing gains toward desegregation made between the 1950s and 1980s.<sup>9</sup> For example, in more than one-third of the 100 largest school districts in America, the student population is more than seventy-five percent non-white.<sup>10</sup> Additionally, segregated schools with high African American and Latino populations are much more likely to be high-poverty schools.<sup>11</sup> In eighty-six percent of schools that have high concentrations of African American and Latino students, over half of those students qualify for a free or reduced lunch.<sup>12</sup>

Despite the re-segregation of schools and clear disparities in achievement along racial and socioeconomic lines, the responses by the education reform movement, the federal government, and the courts have largely skirted around the issue of race. For example, President

<sup>2</sup> President Barack Obama, Remarks by the President in State of Union Address (Jan. 25, 2011), *available at* <http://www.whitehouse.gov/the-press-office/2011/01/25/remarks-president-state-union-address> [hereinafter *State of Union*].

<sup>3</sup> NBC News, *About Education Nation*, EDUCATION NATION, <http://www.educationnation.com> (follow “About” hyperlink; then follow “About Education Nation” hyperlink) (last visited Oct. 25, 2011).

<sup>4</sup> See Richard Corliss, *Waiting for ‘Superman’: Are Teachers the Problem?*, TIME, Sept. 29, 2010, <http://www.time.com/time/arts/article/0,8599,2021951,00.html>.

<sup>5</sup> NAT’L CTR. FOR EDUC. STATISTICS, INST. OF EDUC. SCIENCES, ACHIEVEMENT GAPS: HOW BLACK AND WHITE STUDENTS IN PUBLIC SCHOOLS PERFORM IN MATHEMATICS AND READING ON THE NATIONAL ASSESSMENT OF EDUCATIONAL PROGRESS iii (2009) [hereinafter *ACHIEVEMENT GAPS*].

<sup>6</sup> *Id.*

<sup>7</sup> CHRISTOPHER B. SWANSON, URBAN INST./EDUC. POLICY CTR., WHO GRADUATES? WHO DOESN’T? A STATISTICAL PORTRAIT OF PUBLIC HIGH SCHOOL GRADUATION, CLASS OF 2001 38 (2004) [hereinafter *GRADUATION*].

<sup>8</sup> *Id.*

<sup>9</sup> JONATHAN KOZOL, THE SHAME OF THE NATION: THE RESTORATION OF APARTHEID SCHOOLING IN AMERICA 19 (2005).

<sup>10</sup> NAT’L CTR. FOR EDUC. STATISTICS, INST. OF EDUC. SCIENCES, CHARACTERISTICS OF THE 100 LARGEST PUBLIC ELEMENTARY AND SECONDARY SCHOOL DISTRICTS IN THE UNITED STATES: 2008-2009, at 7 (2010) [hereinafter *CHARACTERISTICS*].

<sup>11</sup> KOZOL, *supra* note 9, at 20.

<sup>12</sup> *Id.*

Obama did not once mention race or poverty in his 2011 State of the Union Address, but rather focused on themes such as competition in a global marketplace, the importance of math and science training for a new generation of jobs, and the failure of the public education system to meet the needs of all students.<sup>13</sup> Meanwhile, the United States Supreme Court has held that school districts cannot use race as a tie-breaking factor when assigning students to schools in order to achieve integration.<sup>14</sup> Leaders in the education reform movement must place an increased emphasis on the racial nature of educational inequity and advocate for voluntary integration strategies to lessen racial segregation and ultimately close the racial achievement gap.

Section I explores the scope of the problem, giving an overview of the research on the racial achievement gap in America, and especially on the wider gap that persists in racially segregated high poverty schools. Section II examines the current legal landscape surrounding the ability of school districts to take race into account when designing race-conscious programs and policies. Section III looks to the current political climate, with a focus on post-racial liberalism in the era of Obama's presidency and the challenge that creates for directly confronting racial issues.

Section IV discusses the problems posed by the race-neutral approaches taken by most education reformers, with a specific focus on the No Child Left Behind Act chartered by President Bush, The Race to the Top Fund created by President Obama, and the growing charter school movement. Section V makes the case for a renewed focus on decreasing racial segregation and isolation in American schools as an essential component of any real effort to close the racial achievement gap. Section VI offers suggestions to overcome the legal, political, and cultural challenges to integrating schools effectively.

While the effort to improve racially segregated and under-performing schools should certainly continue, a long-term education reform movement truly aimed at closing the achievement gap must include efforts to implement voluntary integration strategies in its reform agenda.

#### I. SCOPE OF THE PROBLEM: THE RACIAL ACHIEVEMENT GAP IN AMERICAN EDUCATION AND THE RE-SEGREGATION OF AMERICAN SCHOOLS

In the years following the Supreme Court's decision in *Brown v. Board of Education* and Congress's enactment of the Civil Rights Act of 1964, the combination of court orders and executive enforcement led to a meaningful effort to integrate American public schools.<sup>15</sup> Unfortunately, this momentum was short-lived and never brought to fruition the ideals set forth in *Brown*.<sup>16</sup> By the 1990s, schools were becoming re-segregated at rates not seen since the 1960s, due in large part to court decisions limiting segregation orders.<sup>17</sup>

In the one hundred largest school districts today, there is evidence of intense racial isolation.<sup>18</sup> In seventy of the one hundred largest districts, whites comprise less than fifty percent

<sup>13</sup> State of Union, *supra* note 2.

<sup>14</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 735 (2007).

<sup>15</sup> GARY ORFIELD & CHUNGMEI LEE, THE CIVIL RIGHTS PROJECT, UCLA, HISTORICAL REVERSALS, ACCELERATING RESEGREGATION, AND THE NEED FOR NEW INTEGRATION STRATEGIES 5 (2007).

<sup>16</sup> *Id.*

<sup>17</sup> *See generally* *Missouri v. Jenkins*, 515 U.S. 70 (1995); *Freeman v. Pitts*, 503 U.S. 467 (1992); *Bd. of Educ. of Okla. City v. Dowell*, 498 U.S. 237 (1991) (allowing removal of segregation orders when a school system demonstrates earnest compliance, partial compliance, and good-faith compliance, respectively).

<sup>18</sup> CHARACTERISTICS, *supra* note 10, at 7.

of the student population.<sup>19</sup> In more than one-third of these districts, seventy-five percent of the student membership is non-white.<sup>20</sup> Seven of the ten largest school districts are comprised of student populations that are more than seventy-five percent non-white.<sup>21</sup> This data reveals a striking trend toward re-segregation in school districts across the country.

The education reform movement has largely shied away from directly addressing racial segregation in American schools, and has instead focused on strategies to improve the quality of schools. While couched in generalities that would seemingly apply across the board to all children in all schools, in reality these reforms are primarily targeted at children attending deeply segregated high-poverty schools. Among the reforms that have been implemented are high-stakes testing meant to hold schools accountable for student learning<sup>22</sup> and curricula consisting of scripted lesson plans that teachers can follow to deliver “teacher-proof” content to their students.<sup>23</sup> While some reforms give cause for hope, such as several charter school networks that have been able to make real academic gains and graduate large numbers of students into four-year colleges,<sup>24</sup> the education reform movement has not yet significantly narrowed the achievement gap nationally.<sup>25</sup>

According to data reported by the National Assessment of Educational Progress (NAEP), which is the largest nationally representative program assessing reading and math skills, a persistent achievement gap continues to exist between black and white students.<sup>26</sup> In the most recent report examining data from the 2007 assessments, the gap in math scores between black and white students in the fourth grade is twenty-six points and by the eighth grade is thirty-one points.<sup>27</sup> The reading gap between black and white students in the fourth grade is twenty-seven points and in the eighth grade is twenty-six points.<sup>28</sup> There was a very slight narrowing of the gap between 2005 and 2007. In math, the gap for fourth graders remained at twenty-seven points, but the gap for eighth graders went from thirty-three points to thirty-one points.<sup>29</sup> In reading, the gap for fourth graders went from twenty-nine points to twenty-seven points, and the gap for eighth graders went from twenty-seven points to twenty-six points.<sup>30</sup> Despite this slight narrowing, the gulf between white and black student achievement in both math and reading continues to be wide.

Additionally, high school graduation rates vary significantly by race, with 74.9 % of white students and 76.8% of Asian students graduating, while only 53.2% of Latino students, 51.1% of American Indian students, and 50.2% of African American students graduate.<sup>31</sup> Furthermore, in

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> KOZOL, *supra* note 9, at 202.

<sup>23</sup> *Id.* at 84-85.

<sup>24</sup> See CHRISTINA CLARK TUTTLE ET AL., MATHEMATICA POLICY RESEARCH INC., STUDENT CHARACTERISTICS AND ACHIEVEMENT IN 22 KIPP MIDDLE SCHOOLS xi (2010) (discussing the positive academic outcomes for students in the KIPP charter school network).

<sup>25</sup> ACHIEVEMENT GAPS, *supra* note 5, at 1.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 7.

<sup>28</sup> *Id.* at 29.

<sup>29</sup> *Id.* at 7.

<sup>30</sup> *Id.* at 29.

<sup>31</sup> GRADUATION, *supra* note 7, at 38.

schools where the majority of students are white, 74.1% of students graduate from high school, while in schools where the majority of students are racial minorities, the graduation rate is 56.4%.<sup>32</sup> In schools where less than 38% of students receive free or reduced lunch, 76% of students graduate, while in schools where more than thirty-eight percent of students receive free or reduced lunch, only 57.6% of students graduate from high school.<sup>33</sup> In 2000, 12% of black men aged twenty-six to thirty had graduated from college compared with 29% of white men, and 15% of black women graduated from college compared with 33% of white women.<sup>34</sup> The achievement gap that begins in the lower grades significantly reduces the chances that students of color will graduate from high school, enroll in college, or graduate from college, perpetuating racial inequality and economic stratification in America.

While there is a substantial correlation between race and socio-economic status (SES), and going to school in a high-poverty racially segregated school is linked with poorer academic outcomes,<sup>35</sup> SES does not account for the entire achievement gap.<sup>36</sup>

For example, a research study examining NAEP mathematics data indicated that white students with the lowest SES scored equal to or higher than black students with the highest SES.<sup>37</sup> One potential explanation for this racial gap is that within schools and classrooms, black students are exposed to different curriculum and teaching practices that focus more on rote memorization than critical problem solving.<sup>38</sup> Another common explanation for the persistence of the achievement gap regardless of SES is that “ability grouping” or “tracking” practices within integrated schools lead to white students being placed on higher tracks (such as Advanced Placement and honors courses), while students of color are often placed on the lower tracks and exposed to less rigorous course materials.<sup>39</sup> Integrated schools do not necessarily lead to integrated classrooms or equal access to opportunities.<sup>40</sup>

While integrated schools often do not provide equal educational experiences to students of all races, the vast majority of research indicates that students of color do achieve higher levels of academic success in integrated schools.<sup>41</sup> This effect is strongest when integration is voluntary and takes place in the early years of schooling, and it can lead to increased academic achievement measured by performance on assessments and high school graduation rates.<sup>42</sup>

Despite the efforts of education reformers to improve the quality of racially segregated schools, the racial achievement gap persists. That the achievement gap is widest in intensely segregated high-poverty schools casts doubt on the wisdom of continuing to place the sole

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> Michael B. Katz et al., *The New African American Inequality*, 92 J. AM. HIST. 75, 94 (2005).

<sup>35</sup> *Id.*

<sup>36</sup> Sarah Theule Lubienski, *A Closer Look at Black-White Mathematics Gaps: Intersections of Race and SES in NAEP Achievement and Instructional Practices Data*, 71 J. NEGRO EDUC. 269, 283 (2002).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> Roslyn Arlin Mickelson, *Subverting Swann: First- and Second-Generation Segregation in the Charlotte-Mecklenburg Schools*, 38 AM. EDUC. RES. J. 215, 221 (2001).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 220.

<sup>42</sup> Janet Ward Schofield & Leslie R.M. Hausmann, *The Conundrum of School Desegregation: Positive Student Outcomes and Waning Support*, 66 U. PITT. L. REV. 83, 85 (2004).

emphasis of the education reform movement on policies aimed at making segregated schools equal. Despite the various legal and political challenges to effective implementation, education advocates must place a renewed focus on voluntary integration strategies as part of the education reform agenda.

## II. THE LEGAL LANDSCAPE IMPACTING EDUCATION REFORM STRATEGIES

The Supreme Court's approach to race-conscious government policies, even when aimed at remedying past and current discrimination and promoting diversity, has limited the ability of government actors to take affirmative steps toward reducing racial inequality. The evolution of the Court's approach to race-conscious remedial policies has had a strong impact on the ability and will of state and local officials to racially integrate schools and districts.

When the Supreme Court of the United States put an end to *de jure* racial segregation in *Brown v. Board of Education*, it held that separate schools were inherently unequal because segregation was socially and psychologically harmful to black students.<sup>43</sup> This decision overruled *Plessy v. Ferguson*, in which the Court held that segregation did not stamp "the colored race with a badge of inferiority."<sup>44</sup> The *Plessy* Court argued that any feeling of inferiority was not caused "by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."<sup>45</sup> The *Brown* decision rejected this reasoning, focusing on the effects of segregation on black school children.<sup>46</sup> The *Brown* Court did not express the view that racial classifications of any kind violate the Equal Protection Clause of the Fourteenth Amendment, but rather addressed the nature of racial segregation as stigmatizing,<sup>47</sup> marking blacks as a racially inferior group.<sup>48</sup>

Because of *Brown*'s emphasis on the social meaning imbedded in segregation laws, it has largely been read to support an "anti-subordination" view of the Equal Protection Clause, meaning that state action harming a subordinated minority group should be subject to strict scrutiny<sup>49</sup> and likely should be found to violate the Constitution.<sup>50</sup> In subsequent cases, however, the Supreme Court shifted toward an anti-classification approach, finding that state action which classifies individuals either overtly or surreptitiously on the basis of race should be subjected to

<sup>43</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

<sup>44</sup> *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896).

<sup>45</sup> *Id.*

<sup>46</sup> Reva B. Siegel, *Equality Talks: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1481 (2004).

<sup>47</sup> The Supreme Court cited to social science research to support the proposition that segregation negatively affected the self-esteem and psyche of African-American children. *Brown*, 347 U.S. at 495. Particularly persuasive was the research of Dr. Kenneth Clark, whose famous study showed that black children preferred to play with white dolls rather than black dolls. See generally Kenneth B. Clark & Mamie P. Clark, *Racial Identification and Preference in Negro Children*, in READINGS IN SOCIAL PSYCHOLOGY (Theodore M. Newcomb & Eugene L. Hartley eds., 1947).

<sup>48</sup> See *Brown*, 347 U.S. at 495.

<sup>49</sup> Strict scrutiny is often called "fatal in fact" because it is a very difficult threshold to meet. Angelo N. Ancheta, *Contextual Strict Scrutiny and Race-Conscious Policy Making*, 36 LOY. U. CHI. L.J. 21, 21. Government action can only survive strict scrutiny if it is narrowly tailored to serve a compelling state interest. *Id.* at 23.

<sup>50</sup> See Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Traditions: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 10 (2003).

strict scrutiny and likely should be found to violate the Constitution.<sup>51</sup>

Under the anti-classification view, government practices that have a disparate impact on subordinated minority groups are not subjected to strict scrutiny because they do not intend to classify individuals based on race.<sup>52</sup> Affirmative action programs that aim to remedy the effects of racial discrimination are subjected to strict scrutiny, however, if they intend to classify individuals on the basis of race for purposes of administering the programs.<sup>53</sup>

In *Adarand Constructors v. Pena*, the Supreme Court adopted the anti-classification approach, holding that all race-based classifications are subject to strict scrutiny, regardless of whether they are based on benign or invidious motivations.<sup>54</sup> In reaching this conclusion, the Court cited to Justice O'Connor's plurality opinion in *Richmond v. J. A. Croson Co.*:

Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen 'fit' this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.<sup>55</sup>

O'Connor claimed in *Adarand* that subjecting all racial classifications to strict scrutiny would not be "fatal in fact" to race-conscious programs with remedial aims, stating that, "The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it."<sup>56</sup>

While O'Connor's reasoning is sympathetic, subjecting all racial classifications to strict scrutiny has led to the rejection of many remedial race-conscious policies, despite their benign nature. For example, in *Gratz v. Bollinger* the Court struck down the University of Michigan's affirmative action program, finding that it was not narrowly tailored.<sup>57</sup> Because the University's plan automatically gave extra points to applicants from underrepresented minority groups, it did

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<sup>51</sup> *Id.*

<sup>52</sup> Balkin & Siegel, *supra* note 50, at 11.

<sup>53</sup> *Id.*

<sup>54</sup> *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 235 (1995).

<sup>55</sup> *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 493 (1989).

<sup>56</sup> *Adarand*, 515 U.S. at 237.

<sup>57</sup> Ancheta, *supra* note 49, at 25.

not give individualized consideration to each candidate.<sup>58</sup>

In *Grutter v. Bollinger*, however, the Court upheld the University of Michigan Law School's admissions policy, finding that student body diversity was a compelling state interest for a university.<sup>59</sup> Because the law school's affirmative action plan gave individualized treatment to all candidates and used a broad definition of diversity, of which race was only one factor, the Court found the program to be narrowly tailored enough to survive strict scrutiny.<sup>60</sup>

While *Grutter* provided hope that remedial race-conscious programs could survive strict scrutiny, both *Grutter* and *Gratz* dealt with higher education. Several years later, however, the Court decided *Parents Involved in Community Schools v. Seattle School District No. 1*, which dealt with race-conscious integration strategies implemented by two school districts in Seattle and Louisville.<sup>61</sup> The Court contrasted the setting of higher education in *Grutter* and *Gratz* with the elementary setting in *Parents Involved*, and indicated that diversity may only be a compelling state interest in the higher education context.<sup>62</sup> The school districts had also raised other interests as compelling, such as the benefits of educating students in a racially integrated environment and avoiding racial isolation.<sup>63</sup> The Court's plurality opinion did not address whether these would qualify as compelling interests, moving straight to deciding that the plans implemented by the school districts were not narrowly tailored.<sup>64</sup>

The plurality opinion written by Chief Justice Roberts found the plans to be problematic because they involved "working backward to achieve a particular type of racial balance, rather than working forward from some demonstration of the level of diversity that provides the purported benefits."<sup>65</sup> Roberts concluded that this sort of approach constitutes "a fatal flaw under our existing precedent."<sup>66</sup> He also went on to espouse what has been called a "colorblind"<sup>67</sup> view of the Fourteenth Amendment, stating that "to the extent the objective is sufficient diversity so that students see fellow students as individuals rather than solely as members of a racial group, using means that treat students solely as members of a racial group is fundamentally at cross-purposes with that end."<sup>68</sup> To further this argument, Justice Roberts turned to *Brown*, interpreting it as an anti-classification case.<sup>69</sup> He analogized state-sponsored segregation with the school districts' attempts at integration by stating that both were about telling school children where they could go to school because of their race.<sup>70</sup> He concluded by stating that "the way to stop discrimination on the basis of race is to stop discriminating on the basis of race."<sup>71</sup> This statement epitomizes the anti-classification approach which views the identification of race as the harm,

<sup>58</sup> *Gratz v. Bollinger*, 539 U.S. 244, 275 (2003).

<sup>59</sup> *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003).

<sup>60</sup> *Id.* at 341.

<sup>61</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

<sup>62</sup> *Id.* at 725.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 726.

<sup>65</sup> *Id.* at 729.

<sup>66</sup> *Id.*

<sup>67</sup> Erwin Chemerinsky, *Turning Sharply to the Right*, 10 GREEN BAG 2d 423, 429 (2007).

<sup>68</sup> *Parents Involved*, 551 U.S. at 733.

<sup>69</sup> *Id.* at 747.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 748.

rather than recognizing that race remains salient in our society, regardless of whether it is outwardly acknowledged.

Much has been said in critique of Justice Roberts' approach.<sup>72</sup> Comparing state mandated segregation that forbade blacks from attending school with whites to good-faith efforts on the part of school districts to fulfill the broken promise of *Brown* by integrating schools is problematic both doctrinally and historically.<sup>73</sup> Furthermore, claiming that a race-conscious policy aimed at integrating schools is the kind of "discrimination" that perpetuates racial disparities in society is contrary to social science evidence about the existence of the racial achievement gap and the harms caused by intensely segregated high-poverty schools.<sup>74</sup> Although this approach is troubling, it is not the controlling opinion.<sup>75</sup> Justice Kennedy concurred in the judgment of the Court, but wrote a concurring opinion providing different reasoning, which now guides the current debate about which integration strategies can survive strict scrutiny.<sup>76</sup>

Justice Kennedy explicitly stated that avoiding racial isolation and achieving a diverse population are compelling state interests that school boards may choose to pursue.<sup>77</sup> Furthermore, he allowed for race to be a factor considered in striving for diversity.<sup>78</sup> Where Justice Kennedy departed from the dissent, however, was in requiring a broad view of diversity that takes into account other demographic factors, talents, and needs, in addition to race.<sup>79</sup> He stated, "What the government is not permitted to do, absent a showing of necessity not made here, is to classify every student on the basis of race and to assign each of them to schools based on that classification."<sup>80</sup> Justice Kennedy objected to this type of classification because he felt it threatened "to reduce children to racial chits valued and traded according to one school's supply and another's demand."<sup>81</sup> Justice Kennedy did acknowledge that this type of stigma may already befall children due to circumstances outside their control, but he argued that other approaches that do not rely on racial classification alone must be exhausted first.<sup>82</sup>

Encouraging continued efforts to achieve integration, Justice Kennedy stated, "Those entrusted with directing our public schools can bring to bear the creativity of experts, parents, administrators, and other concerned citizens to find a way to achieve the compelling interests they face without resorting to widespread governmental allocation of benefits and burdens on the basis of racial classifications."<sup>83</sup> He also acknowledges that, "This Nation has a moral and ethical

<sup>72</sup> See, e.g., Chemerinsky, *supra* note 67, at 429 (discussing how Roberts' view ignores history and the differences between segregation and integration); Goodwin Liu, "History Will Be Heard": An Appraisal of the Seattle/Louisville Decision, 2 HARV. L. & POL'Y REV. 53, 61 (2008) (arguing that Roberts' approach ignores the social meaning of segregation); James E. Ryan, *The Supreme Court and Voluntary Integration*, 121 HARV. L. REV. 131, 152 (2007) (stating that the Roberts plurality opinion's treatment of *Brown* is "radically incomplete").

<sup>73</sup> Chemerinsky, *supra* note 67, at 429.

<sup>74</sup> Liu, *supra* note 72, at 61.

<sup>75</sup> See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 782 (2007).

<sup>76</sup> ADAI TEFERA ET AL., THE CIVIL RIGHTS PROJECT, UCLA, SCHOOL INTEGRATION EFFORTS THREE YEARS AFTER PARENTS INVOLVED I (2010).

<sup>77</sup> *Parents Involved*, 551 U.S. at 797.

<sup>78</sup> *Id.* at 798.

<sup>79</sup> *Id.*

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

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Parents Involved*, 551 U.S. at 798.

obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its children.”<sup>84</sup> Justice Kennedy’s opinion leaves open room for continued efforts to integrate schools, using strategies that can be constitutionally deployed.

### III. THE POLITICAL LANDSCAPE IMPACTING EDUCATION REFORM STRATEGIES

After *Parents Involved* was decided, the Bush administration not only supported the Court’s decision,<sup>85</sup> but sent a letter to school districts misstating Justice Kennedy’s opinion as forbidding all integration efforts that are not completely race-neutral.<sup>86</sup> The Bush administration’s focus was clearly not on integrating schools, but rather on trying to make segregated schools equal,<sup>87</sup> at least in theory.<sup>88</sup> No Child Left Behind (NCLB), the landmark education legislation passed by the Bush administration, focused on increased “accountability” by relying on high-stakes testing, and penalized failing (and often already under-funded) schools by removing funding if schools failed to make “Adequate Yearly Progress” (AYP).<sup>89</sup> This punitive system had the effect of leaving many more children of color behind, by providing schools with an incentive to push out their most vulnerable students to avoid sanctions, and by providing states with an incentive to lower standards for students in order to more easily meet the required benchmarks.<sup>90</sup>

When President Obama was elected in 2008, he had the support of many educators who hoped that he would put an end to the punitive and underfunded NCLB, and the support of many civil rights leaders who thought integration strategies might once again be pursued.<sup>91</sup> Thus far, neither of these goals has come to fruition.<sup>92</sup> While President Obama has spoken extensively about the need for education reform, and has developed his own federal program, The Race to the Top Fund, he has avoided explicitly mentioning issues of racial segregation and the racial achievement gap.<sup>93</sup> Rather, he has focused his attention on race-neutral themes, such as competitiveness in the global economy and preparing all students for a new generation of jobs.<sup>94</sup>

<sup>84</sup> *Id.* at 797.

<sup>85</sup> ORFIELD & LEE, *supra* note 15, at 6.

<sup>86</sup> TEFERA ET AL., *supra* note 76, at 1. The Obama administration has finally issued new and legally correct guidance. See Office for Civil Rights, *Guidance on the Voluntary Use of Race to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools*, U.S. DEP’T OF EDUC. (last updated Jan. 3, 2008), [http://www2.ed.gov/about/offices/list/ocr/letters/race\\_assignment.html](http://www2.ed.gov/about/offices/list/ocr/letters/race_assignment.html).

<sup>87</sup> ORFIELD & LEE, *supra* note 15, at 5.

<sup>88</sup> See generally KOZOL, *supra* note 9 (explaining generally the ways in which various aspects of No Child Left Behind have actually done more harm than good in the attempt to improve segregated schools).

<sup>89</sup> *Id.* at 202-03.

<sup>90</sup> Linda Darling-Hammond, *Race, Inequality and Educational Accountability: The Irony of ‘No Child Left Behind,’* 10 RACE ETHNICITY & EDUC. 245, 245 (2007).

<sup>91</sup> TEFERA ET AL., *supra* note 76, at 1; Roger M. Smith & Desmond S. King, *Barack Obama and the Future of American Racial Politics*, 6 DUBOIS REV. 25, 30 (2009).

<sup>92</sup> TEFERA ET AL., *supra* note 76, at 1.

<sup>93</sup> Derrick Z. Jackson, *Apartheid in our Schools*, THE BOSTON GLOBE, Sept. 21, 2010, [http://www.boston.com/bostonglobe/editorial\\_opinion/oped/articles/2010/09/21/apartheid\\_in\\_our\\_schools/](http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2010/09/21/apartheid_in_our_schools/); see State of the Union, *supra* note 2.

<sup>94</sup> *Reforming Education Responsibility of Every American: Obama*, ECON. TIMES, Mar. 8, 2011, <http://www.economicstimes.indiatimes.com/news/politics/nation/reforming-education-responsibility-of-every-american->

While President Obama is undoubtedly aware of the racial nature of the achievement gap, he may feel that making education a racial issue will lose him the support of many moderate and independent white voters.<sup>95</sup> He may also be concerned about raising racial issues in the current contemptuous political climate while he is attempting to create a broad coalition of support for many of his other policy goals.<sup>96</sup> From tea party rallies where racial slurs are uttered at black Congressional representatives,<sup>97</sup> to state senate proceedings where children from disadvantaged backgrounds are analogized to “maggots,”<sup>98</sup> it is understandable why the nation’s first black president is reluctant to make race an issue.

Furthermore, many have heralded the election of the nation’s first black president as marking a post-racial age in America.<sup>99</sup> The post-racial approach is similar to the color-blind view espoused by Justice Roberts in *Parents Involved*.<sup>100</sup> The post-racial framework suggests that as a nation, we no longer see or give weight to the races of individuals, but rather regard individuals based on merit alone.<sup>101</sup> While this principle may on the surface resonate with Dr. King’s dream that we judge people “not by the color of their skin, but by the content of their character,”<sup>102</sup> a deeper analysis reveals that the post-racial framework assumes a baseline in which race is no longer of significance in American society.<sup>103</sup> Any close look at systems perpetuating inequality, research showing that widespread implicit racial bias persists,<sup>104</sup> and data on access to opportunity in America today,<sup>105</sup> proves that baseline does not exist.

Despite these broad political challenges, research conducted in Jefferson County, Kentucky following *Parents Involved* indicates that many Americans are angered by the continuing racial segregation in our country and would support strategies to integrate schools.<sup>106</sup>

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obama/articleshow/7654890.cms; see State of the Union, *supra* note 2.

<sup>95</sup> Smith & King, *supra* note 91, at 30.

<sup>96</sup> *Id.*

<sup>97</sup> Paul Kane, ‘Tea Party’ Protesters Accused of Spitting on Lawmaker, Using Slurs, WASH. POST, Mar. 20, 2010, <http://www.washingtonpost.com/wpdyn/content/article/2010/03/20/AR2010032002556.html>.

<sup>98</sup> Jeremy P. Meyer et al., *Tenure Bill Nears Passage*, DENV. POST, May 12, 2010, [http://www.denverpost.com/ci\\_15066164](http://www.denverpost.com/ci_15066164). Representative Max Tyler expressed concern for a bill holding teachers accountable for student performance, stating, “If you were running a business baking bread and the flour came in to you full of maggots and worms, you would not be able to produce a good product, would you?” He later apologized for using this analogy. *Id.*

<sup>99</sup> The post-racial framework is based on the premise that racism is much less of a problem in the United States today, and therefore, policies designed to address racial inequality may no longer be necessary. Gregory S. Parks & Jeffrey J. Rachlinski, *Implicit Bias, Election ‘08, and the Myth of a Post-Racial America*, 37 FLA. ST. U. L. REV. 659, 660 (2010). A postelection survey revealed that Barack Obama’s election to the Presidency has led many Americans to believe we now live in a post-racial age. *Id.*

<sup>100</sup> Chemerinsky, *supra* note 67, at 429.

<sup>101</sup> TIM WISE, COLOR-BLIND: THE RISE OF POST-RACIAL POLITICS AND THE RETREAT FROM RACIAL EQUALITY 18 (2010).

<sup>102</sup> Dr. Martin Luther King Jr., Address at March on Washington (Aug. 28, 1963), available at <http://www.mlkonline.net/dream.html>.

<sup>103</sup> WISE, *supra* note 101, at 18.

<sup>104</sup> Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969, 971 (2006).

<sup>105</sup> ACHIEVEMENT GAPS, *supra* note 5, at 1.

<sup>106</sup> More than 90% of parents believe that diverse schools have important educational benefits for their children, and 89% of parents think that the school district’s guidelines should “ensure that students learn with students from different races and economic backgrounds.” GARY ORFIELD & ERICA FRANKENBERG, THE CIVIL RIGHTS PROJECT,

Many more Americans may be unaware of how deeply segregated schools and communities have become because they are not exposed to segregated neighborhoods, and the color-blind post-racial rhetoric in politics today makes it easy to believe that racism is no longer an issue in our country.<sup>107</sup> While it is understandable why President Obama and education reformers have chosen to shy away from racial inequity in order to build broader support for reforms, they are missing an opportunity to engage in dialogue about the continued significance of race in our society. Furthermore, policies seeking to close the achievement gap while ignoring racial inequity in the education system may never truly reach their goal.

#### IV. RACE-NEUTRAL EDUCATION REFORM STRATEGIES

As schools became deeply re-segregated in the 1990s, the focus among education reformers began to shift from integration and equal funding strategies, toward attempts to make segregated schools in high-poverty areas “equal” to schools in wealthier white areas.<sup>108</sup> The catch phrase became “accountability,”<sup>109</sup> and George W. Bush promised the nation that “no child” would be “left behind.”<sup>110</sup> The new era of education reform policies and strategies from NCLB, to Race to the Top, to the charter school movement, have all focused on improving struggling schools, raising student achievement as measured by scores on high-stakes testing, and increasing school choice.<sup>111</sup> The impetus behind these reforms was to improve student achievement for the students most vulnerable in our schools—students from poor and minority backgrounds, those with special education needs, and English Language Learners (ELLs).<sup>112</sup> However laudable this goal, many of these reform strategies implemented in a race neutral way have actually perpetuated inequality and racial segregation and have failed to narrow the racial achievement gap nationally.<sup>113</sup>

##### A. *No Child Left Behind*

When NCLB was first signed into law, some civil rights advocates praised President Bush for shining the national spotlight on educational inequity and taking an important step forward in the effort to close the achievement gap.<sup>114</sup> As states began implementing the requirements of NCLB by increasing focus on high-stakes testing, and schools began being penalized for not making enough gains in student growth,<sup>115</sup> support for NCLB began to wane.<sup>116</sup>

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UCLA, EXPERIENCING INTEGRATION IN LOUISVILLE: HOW PARENTS AND STUDENTS SEE THE GAINS AND CHALLENGES 3 (2011).

<sup>107</sup> Gerardo R. López, *The (Racially Neutral) Politics of Education: A Critical Race Theory Perspective*, 39 EDUC. ADMIN. Q. 68, 71 (2003).

<sup>108</sup> KOZOL, *supra* note 9, at 209.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 202.

<sup>111</sup> Darling-Hammond, *supra* note 90, at 245.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 246.

<sup>114</sup> *Id.* at 245.

<sup>115</sup> KOZOL, *supra* note 9, at 202-03.

<sup>116</sup> Darling-Hammond, *supra* note 90, at 246.

President Bush continued to promote the law in the face of opposition, claiming that criticisms were symptomatic of low expectations, a form of “soft bigotry.”<sup>117</sup> He quoted the principal of Gainesville Elementary School in Georgia as saying, “We don’t focus on what we can’t do at this school; we focus on what we can do. And we do whatever it takes to get kids across the finish line.”<sup>118</sup> This “no excuses” mentality has become a mantra of the education reform movement.<sup>119</sup>

Holding high expectations for the ability of children of color to excel academically, despite the challenges of poverty, is an essential component of any real effort to close the achievement gap. In the case of NCLB, however, the rhetoric did not match reality. In practice, NCLB actually lowered expectations by providing students in high-poverty segregated schools with “teacher-proof” scripted curricula—materials designed so that even the worst teachers would be able to deliver to students the content necessary to pass the standardized tests.<sup>120</sup> The focus on high stakes testing also led to an increase in the amount of time spent on rote test preparation drills<sup>121</sup> and the removal of subjects critical to a well-rounded education, such as art, music, and social studies.<sup>122</sup>

Furthermore, the accountability systems NCLB set in place required the schools that were struggling the most to make the most substantial gains, without ever providing the funding, human capital, and resources necessary for them to meet their targets.<sup>123</sup> When already struggling schools failed to make AYP, they were penalized by losing funding, making it even harder for them to achieve higher results for their students.<sup>124</sup> Additionally, NCLB created perverse incentives for schools to push out or exclude from testing those students who were lowest achieving in order to make it seem as if they were meeting targets.<sup>125</sup> This led underperforming schools to become “dropout factories,” further contributing to the high dropout rates of students of color.<sup>126</sup> States also began to water down the standards being assessed through high-stakes tests in order to meet the benchmarks laid out by NCLB.<sup>127</sup>

While NCLB may not be with us much longer in its current form,<sup>128</sup> many of the ideas it brought to the forefront of the education reform agenda will remain.<sup>129</sup> The strategies being used

<sup>117</sup> President George W. Bush, Acceptance Speech to the Republican National Convention (Sept. 2, 2004), available at <http://www.washingtonpost.com/wp-dyn/articles/A57466-2004Sep2.html>.

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

<sup>119</sup> Michael Petrilli, *A New “Washington Consensus” is Born*, EDUC. NEXT (Jan. 28, 2011) <http://educationnext.org/a-new-washington-consensus-is-born/>.

<sup>120</sup> KOZOL, *supra* note 9, at 85-86.

<sup>121</sup> *Id.* at 113.

<sup>122</sup> *Id.* at 281.

<sup>123</sup> Darling-Hammond, *supra* note 90, at 246.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> ORFIELD & LEE, *supra* note 15, at 6.

<sup>127</sup> Sam Dillon, *Federal Researchers Find Lower Standards in Schools*, N.Y. TIMES, Oct. 29, 2009, <http://www.nytimes.com/2009/10/30/education/30educ.html> (citing a study that found fifteen states lowered standards in at least one area).

<sup>128</sup> Press Release, U.S. Dep’t of Educ., Obama Administration’s Education Reform Plan Emphasizes Flexibility, Resources and Accountability for Results (Mar. 15, 2010), available at <http://www2.ed.gov/news/pressreleases/2010/03/03152010.html>.

<sup>129</sup> U.S. DEP’T OF EDUC., A BLUEPRINT FOR REFORM: THE REAUTHORIZATION OF THE ELEMENTARY AND

today at the federal level, such as the Race to the Top program, and at the local level, such as the charter school movement, continue to aim to improve the quality of separate and unequal schools. These policies may have the effect of increasing segregation and perpetuating racial inequality.<sup>130</sup>

### B. *Race to the Top*

Unlike President Bush's focus on punishing schools for not meeting benchmarks by removing funding, President Obama's approach to education reform has been much more focused on providing incentives for states to make improvements.

When President Obama signed into law the American Recovery and Reinvestment Act of 2009, he provided 4.35 billion dollars for the Race to the Top Fund, "a competitive grant program designed to encourage and reward States that are creating the conditions for education innovation and reform."<sup>131</sup> States that want to compete for the funding must demonstrate that they have taken certain steps toward reforming their school systems.<sup>132</sup> The four general categories of reforms encouraged by the program are: 1) adopting standards and assessments that prepare students to succeed in college and the workplace and to compete in the global economy, 2) building data systems that measure student growth and success, and inform teachers and principals about how they can improve instruction, 3) recruiting, developing, rewarding, and retaining effective teachers and principals, especially where they are needed most, and 4) turning around the lowest-achieving schools.<sup>133</sup>

The program seeks to reward states that are "achieving significant improvement in student outcomes, including making substantial gains in student achievement, closing achievement gaps, improving high school graduation rates, and ensuring student preparation for success in college and careers . . . ."<sup>134</sup> However, only states with the "best plans to accelerate their reforms in the future" are awarded funding, with the hope that those models and reform ideas will spread around the country.<sup>135</sup>

Despite President Obama's shift from punitive sanctions to providing incentives for improvement, Race to the Top has come under criticism by civil rights groups for several reasons, including its focus on competitiveness and its lack of incentives for school integration plans.<sup>136</sup>

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SECONDARY EDUCATION ACT 3 (2010) (urging a continued focus on standards and assessments to track student growth and learning).

<sup>130</sup> ERICA FRANKENBERG ET AL., THE CIVIL RIGHTS PROJECT, UCLA, CHOICE WITHOUT EQUITY: CHARTER SCHOOL SEGREGATION AND THE NEED FOR CIVIL RIGHTS STANDARDS 4 (2010), available at <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/choice-without-equity-2009-report/?searchterm=charter%20school>; Philip Tegeler & Saba Bireda, *Incentivizing Integration? The Potential of New Funding Priorities at the U.S. Department of Education*, INTEGRATION REP. (Jan. 19, 2011), <http://theintegrationreport.wordpress.com/>.

<sup>131</sup> U.S. DEP'T OF EDUC., RACE TO THE TOP PROGRAM EXECUTIVE SUMMARY 2 (2009) [hereinafter RACE TO THE TOP].

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> LAWYERS COMM. FOR CIVIL RIGHTS UNDER LAW ET AL., FRAMEWORK FOR PROVIDING ALL STUDENTS AN OPPORTUNITY TO LEARN THROUGH REAUTHORIZATION OF THE ELEMENTARY AND SECONDARY EDUCATION ACT 4 (2010) [hereinafter OPPORTUNITY].

Strategies that only award federal funding to states that “win” the competition ignore the concern that “children in ‘winning’ states should not be the only ones who have the opportunity to learn in high-quality environments.”<sup>137</sup> Furthermore, an optional program conditioned on federal funding means that many states and districts will not compete, “either because they do not have the capacity or because they lack the political will. This increases the likelihood that better-resourced states and communities will win out”<sup>138</sup> and not enough will be done “to ensure equity.”<sup>139</sup>

The implementation of the Race to the Top Fund’s grant process thus far highlights some of these concerns: only fifteen states and the District of Columbia were “eligible” for possible funding after the first round.<sup>140</sup> These states contain only thirty-seven percent of students eligible for free and reduced lunch, twenty-six percent of Latino students, and fifty-three percent of black students going to school in the United States.<sup>141</sup> Overall, forty-two percent or 12.5 million of the nation’s children were left behind.<sup>142</sup>

Tennessee and Delaware were selected as the two winners of the first round, meaning that the Race to the Top Fund currently impacts only 2.5% of the students in the United States eligible for free and reduced lunch, three percent of the nation’s African American students, and less than one percent of Latino, Native American, and Hmong students.<sup>143</sup> Thus, Race to the Top has done little to provide students of color in high-poverty segregated schools with additional resources.

While federal incentives may be a useful way to encourage states to act, some civil rights groups have advocated for the use of conditional incentives, which would provide funding to all states that meet certain fair and equitable conditions and standards.<sup>144</sup> This would ensure that federal funding would reach more states, districts, and students, rather than providing resources to the very few “winners.”<sup>145</sup>

Furthermore, the specific list of criteria that can earn states points as they compete for federal funding focuses on everything from efforts to improve teacher quality<sup>146</sup> to the development of new assessments and data systems,<sup>147</sup> and yet conspicuously absent are any criteria regarding developing strategies to reduce racial and socioeconomic segregation.<sup>148</sup> Additionally, the development of innovative charter schools is given a lot of weight in evaluating state plans,<sup>149</sup> but many charter schools are highly segregated by race and socioeconomic status.

While Race to the Top does mark a significant federal effort at providing funding and incentives for reform to states, this federal funding will not reach many children who need it the

<sup>137</sup> *Id.* at 3.

<sup>138</sup> *Id.* at 4.

<sup>139</sup> *Id.*

<sup>140</sup> Press Release, U.S. Dep’t of Educ., 16 Finalists Announced in Phase 1 of Race to the Top Competition (Mar. 4, 2010), available at <http://www2.ed.gov/news/pressreleases/2010/03/03042010.html>.

<sup>141</sup> OPPORTUNITY, *supra* note 136, at 4.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> RACE TO THE TOP, *supra* note 131, at 9.

<sup>147</sup> *Id.* at 7-8.

<sup>148</sup> See generally RACE TO THE TOP, *supra* note 131.

<sup>149</sup> *Id.* at 11.

most, and some states will likely fail to pursue strategies that could reduce intense racial and socioeconomic segregation in their school districts.

### C. Charter School Movement

Charter schools are public schools that exist pursuant to a contract with a public entity such as a local school board or a state board of education, but are generally given more autonomy and can waive out of various district and state laws.<sup>150</sup>

Some education reformers talk about the development of charter schools as a “silver bullet” that has the potential to end educational inequity, if only they could be reproduced on a wide enough scale.<sup>151</sup> Others critique charter schools as being less effective overall than traditional public schools,<sup>152</sup> entrenching racial and socioeconomic segregation,<sup>153</sup> drawing from a self-selected group of students whose parents are already highly invested,<sup>154</sup> and siphoning funds from traditional public schools.<sup>155</sup>

Perspectives on the value of charter schools in education reform vary.<sup>156</sup> So too does the research on the success of charter schools: across the board, charter schools do not seem to be more effective than traditional public schools, and in some cases produce worse academic outcomes.<sup>157</sup> Students of color and students who qualify for free or reduced lunch on average have higher rates of proficiency in reading and math in traditional public schools than in charter schools.<sup>158</sup>

While some proponents of charter schools advocate for permissive state charter laws that grant autonomy to charter schools and encourage the creation of large numbers of charter schools, such permissive state laws often result in fewer positive academic outcomes for students.<sup>159</sup>

Furthermore, charter schools tend to be more racially isolated than traditional public schools, with charter schools in some areas serving mainly white students and charter schools in other areas serving almost exclusively poor African American and Latino students.<sup>160</sup> Charter

<sup>150</sup> Katrina Bulkley & Jennifer Fislser, *A Decade of Charter Schools: From Theory to Practice*, 17 EDUC. POL’Y 317, 318 (2003).

<sup>151</sup> James Vaznis, *Rise of Charter Schools*, BOSTON GLOBE, Feb. 7, 2011, [http://www.boston.com/news/local/massachusetts/articles/2011/02/07/charters\\_poised\\_to\\_burgeon/](http://www.boston.com/news/local/massachusetts/articles/2011/02/07/charters_poised_to_burgeon/).

<sup>152</sup> FRANKENBERG ET AL., *supra* note 130, at 14.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 13.

<sup>155</sup> Ralph E. Shaffer, *Why We Don’t Want Charter ‘Reforms’ in Our Public Schools*, L.A. TIMES, June 12, 2009, <http://www.latimes.com/news/opinion/opinionla/la-oew-snell-shaffer12-2009jun12,0,3003337.story>.

<sup>156</sup> *Id.*

<sup>157</sup> INST. OF EDUC. SCIENCES, AMERICA’S CHARTER SCHOOLS: RESULTS FROM THE NAEP 2003 PILOT STUDY 1 (2004) [hereinafter PILOT STUDY] (explaining that among fourth graders eligible for free or reduced-price lunch, students in charter schools did not score as high in reading or mathematics, on average, as fourth-graders in other public schools).

<sup>158</sup> *Id.* at 4, 8.

<sup>159</sup> GARY MIRON, EVALUATION CTR., W. MICH. UNIV., STRONG CHARTER SCHOOL LAWS ARE THOSE THAT RESULT IN POSITIVE OUTCOMES 1 (2005) (citing the Center for Education Reform as a charter school advocacy organization that pushes for permissive state laws, but arguing that the research demonstrates that charter laws emphasizing high academic standards produce better results).

<sup>160</sup> Bulkley & Fislser, *supra* note 150, at 331 (citing recent research showing that about seventeen percent of

schools are often less likely to serve students with special education needs and English Language Learners (ELLs).<sup>161</sup>

Charter schools are primarily created in urban settings, which to some extent accounts for the highly segregated nature of the schools in having large percentages of students of color.<sup>162</sup> In fact, charter schools are often even more intensely segregated than their neighboring district schools.<sup>163</sup> Furthermore, there is evidence of white isolation in charter schools in some districts, although it is less prevalent than minority isolation.<sup>164</sup> For example, in the Twin Cities, white segregated charter schools were found in close proximity to more diverse public schools.<sup>165</sup> Many of these white segregated charter schools employed sorting mechanisms, including interviews, requirements for parent involvement, and disciplinary policies, to selectively enroll applicants, creating a charter school haven for white flight.<sup>166</sup>

In ten states, the percentage of white students is higher in charter schools than in regular public schools.<sup>167</sup> Nine out of ten of the states are in the West, an area of the country with a very high non-white population.<sup>168</sup> Public schools in these states are at the extremes—they either have extremely high or extremely low white populations.<sup>169</sup> This may lead to charter schools being used by whites as a less diverse option than traditional public schools.<sup>170</sup>

While instances such as these are alarming, some charter schools and charter school networks have been highly successful at educating students who primarily come from racially segregated, high-poverty communities.<sup>171</sup> For example, the Knowledge is Power Program (KIPP) has 109 schools in twenty states and has an eighty-five percent rate of sending its graduates to college.<sup>172</sup> While many civil rights groups criticize charter schools for perpetuating racial isolation,<sup>173</sup> the most effective charter schools do prove that low-income minority students do not inevitably suffer from academic failure.<sup>174</sup> At a time when it was widely believed that students of

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charter schools had a higher proportion of students of color, and about fourteen percent had a lower percentage of students of color); GARY MIRON ET AL., THE GREAT LAKES CTR. FOR EDUC. RESEARCH & PRACTICE, SCHOOLS WITHOUT DIVERSITY: EDUCATION MANAGEMENT ORGANIZATIONS, CHARTER SCHOOLS, AND THE DEMOGRAPHIC STRATIFICATION OF THE AMERICAN SCHOOL SYSTEM 12 (2010).

<sup>161</sup> MIRON, *supra* note 160, at 20-21.

<sup>162</sup> PILOT STUDY, *supra* note 157, at 2.

<sup>163</sup> MIRON, *supra* note 160, at 13.

<sup>164</sup> *Id.* at 22.

<sup>165</sup> FRANKENBERG ET AL., *supra* note 130, at 10.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 31.

<sup>168</sup> *Id.* (The nine Western states are Hawaii, California, New Mexico, Nevada, Arizona, Colorado, Oregon, Utah and Idaho, and the one non-Western state is North Carolina.).

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> TUTTLE ET AL., *supra* note 24, at xi, xii (noting that while KIPP schools have higher percentages of students from minority backgrounds than surrounding district schools, they do have lower percentages of students with special needs and English Language Learners than surrounding district schools).

<sup>172</sup> *Questions About KIPP's Results*, KIPP.ORG, <http://www.kipp.org/faq> (follow "Questions About KIPP's Results") (last visited Nov. 6, 2011).

<sup>173</sup> See, e.g., FRANKENBERG ET AL., *supra* note 130.

<sup>174</sup> TUTTLE ET AL., *supra* note 24, at 28 (finding that the large majority of KIPP schools demonstrate positive and substantial academic impact in both reading and mathematics for all four years of middle school).

color were genetically inferior to their white peers,<sup>175</sup> or that the impact of poverty was too great to be overcome by high quality education,<sup>176</sup> many charter schools debunked those ideas.<sup>177</sup> The most effective charter schools, therefore, have played a vital role in challenging assumptions about the ability of students from minority racial and socioeconomic backgrounds to achieve academic success.<sup>178</sup>

Yet within the charter school movement, there has not been enough emphasis on creating integrated learning environments.<sup>179</sup> One of the purported benefits of charter schools is that they allow for increased innovation,<sup>180</sup> and yet little has been done to innovate around multi-cultural education in diverse schools settings.<sup>181</sup> The emphasis continues to be on creating “90/90/90” schools in which ninety percent or more of the students are eligible for free and reduced lunch, ninety percent or more of the students are members of ethnic minority groups, and ninety percent or more of the students meet the district or state academic standards in reading or another area.<sup>182</sup>

Furthermore, states that have highly permissive charter laws that do not hold charter schools accountable for student learning, or have poor civil rights enforcement, are problematic in that they offer what seems like an “equal” choice to low-income minority parents, yet perpetuate the same unequal outcomes.<sup>183</sup>

While some highly effective charter schools truly do offer a superior choice to parents and communities and can serve as hubs for innovative strategies and ideas, it is important to recognize the limits of charter schools in their ability to close the achievement gap.<sup>184</sup> An increased emphasis on creating diverse and integrated charter schools may be one effective way to reduce segregation, but energy and resources also need to remain focused on equalizing and integrating the traditional public schools that are left behind.

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<sup>175</sup> See generally RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* (1994) (concluding that there are ethnic differences in cognitive capacity).

<sup>176</sup> See generally Henry M. Levin & Carolyn Kelley, *Can Education Do it Alone?*, 13 *ECON. OF EDUC. REV.* 97 (1994) (arguing that education requires complimentary conditions to produce an academic payoff).

<sup>177</sup> See TUTTLE ET AL., *supra* note 24, at 28 (citing evidence of the ability of a high-performing charter school to produce strong academic results for students of color living in poverty).

<sup>178</sup> DOUGLAS B. REEVES, *CTR. FOR PERFORMANCE ASSESSMENT, HIGH PERFORMANCE IN HIGH POVERTY SCHOOLS: 90/90/90 AND BEYOND 2* (2003).

<sup>179</sup> FRANKENBERG ET AL., *supra* note 130, at 11 (arguing that charter programs have not lived up to their initial promise of transcending the segregating effects of traditional district boundary lines).

<sup>180</sup> Bulkley & Fisler, *supra* note 150, at 319.

<sup>181</sup> FRANKENBERG ET AL., *supra* note 130, at 11.

<sup>182</sup> REEVES, *supra* note 178, at 1 (explaining that the term was originally coined by the author in 1995 based on observations in Milwaukee, Wisconsin, where schools had been identified with 90/90/90 characteristics; the term has since been broadly applied to describe successful academic performance in schools with significant numbers of poor and minority students).

<sup>183</sup> FRANKENBERG ET AL., *supra* note 130, at 81.

<sup>184</sup> Charles Payne & Tim Knowles, *Promise and Peril: Charter Schools, Urban School Reform, and the Obama Administration*, 79 *HARV. EDUC. REV.* 227, 232 (2009) (noting the difficulty in scaling the success of the most effective charter schools, and the lack of evidence that such schools have spurred competition and improvement among neighboring district schools).

## V. WHY THE EDUCATION REFORM MOVEMENT SHOULD REFOCUS ON RACE-CONSCIOUS VOLUNTARY INTEGRATION STRATEGIES

While the education reform movement's current focus on generally improving the quality of schools has produced some important successes for students in high-poverty, racially segregated schools, the racial achievement gap persists and is widest in high-poverty, racially segregated schools. This should give cause to doubt that race-neutral policies aimed at making separate schools "equal" will ever be able to close the achievement gap without a refocus on voluntary integration strategies.

Voluntary integration must be folded back in to the education reform movement's agenda because integration has positive effects on children of all races and socioeconomic statuses in terms of academic achievement and social learning. Additionally, without a renewed emphasis on integration, it seems unlikely that the resources will ever be allocated or the policies implemented to truly create equal opportunity in high-poverty, racially segregated schools.

### A. Benefits of Integrated Schools

There are many potential benefits of children going to schools that are integrated by race and socioeconomic status, including increased academic achievement, cultural competency, appreciation of diversity, and access to opportunity. Furthermore, inclusive settings can help students avoid the stigma and inferiority they may feel when they are isolated in high-poverty areas and kept from accessing the benefits and opportunities that schools with better resources have to offer.

The academic benefits of integration for students of color have been researched at length and are well-documented.<sup>185</sup> In particular, studies have shown that desegregation may have the most positive impact on the achievement of students of color when it is carried out in the early elementary years, when it is voluntary rather than mandatory, and when metropolitan plans are used.<sup>186</sup> In addition, high school graduation rates are generally higher for students of color in integrated school settings.<sup>187</sup> The academic achievement of white students does not decline when schools becomes racially integrated, especially not when white students continue to constitute the majority of students in schools.<sup>188</sup>

Furthermore, looking beyond academic achievement as measured by test scores to other measures relating to the attainment of higher education and quality jobs, similar trends emerge.<sup>189</sup> For example, one study examining college enrollment and completion found that as the proportion of African American students in a high school went up, the number of years of college completed went down.<sup>190</sup> Several other studies have shown that students of color at integrated schools have higher college enrollment rates than students of color attending intensely segregated high

<sup>185</sup> See Schofield & Hausmann, *supra* note 42, at 83.

<sup>186</sup> *Id.* at 85 (surveying research that generally points to increased academic achievement for students of color in integrated schools).

<sup>187</sup> *Id.* (clarifying that these results were found for students in the North but not the South).

<sup>188</sup> *Id.* at 85-86. This may be a persuasive argument for building broad-based support for integration in predominantly white communities.

<sup>189</sup> *Id.* at 86.

<sup>190</sup> Michael A. Boozer et al., *Race and School Quality Since Brown v. Board of Education*, 1992 BROOKINGS PAPERS ON ECON. ACTIVITY: MICROECONOMICS 269, 303-05 (1992).

schools.<sup>191</sup>

In terms of career planning, African American students attending integrated schools have higher occupational aspirations than their peers in segregated schools.<sup>192</sup> Going to integrated schools has also been correlated with higher levels of access to fields in which African Americans have been traditionally excluded, such as science, engineering, and other white collar jobs.<sup>193</sup> There is also a correlation between attending integrated schools and earning higher wages.<sup>194</sup> Thus, attending racially integrated schools has an overall positive effect on academic achievement, college enrollment, and career prospects for students of color.<sup>195</sup>

Attending racially integrated schools also opens up access to opportunities for students of color that may otherwise have been unavailable to them.<sup>196</sup> The opportunities range from having access to basic supplies, broader course offerings, better curricula, higher quality teachers, and more support such as college counselors,<sup>197</sup> to the long-term impact of having a wide network of friends and colleagues who may be able to increase access to higher education and career opportunities.<sup>198</sup>

In addition to the concrete benefits of achievement and access to opportunities, integrated schools provide important chances for students of different races and socioeconomic statuses to learn from each other.<sup>199</sup> Integrated school settings prepare students to navigate an increasingly diverse world, and can also have the impact of reducing racial and cultural biases.<sup>200</sup> Students of color may benefit from learning how to navigate white culture<sup>201</sup> at an early age.<sup>202</sup> This may help to reduce the cultural difficulties of entering white space once students of color get

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<sup>191</sup> See JOMILLS H. BRADDOCK II & JAMES M. MCPARTLAND, CTR. FOR SOCIAL ORGANIZATION OF SCHOOLS, ASSESSING SCHOOL DESEGREGATION EFFECTS: NEW DIRECTIONS IN RESEARCH 23 (1981) (finding a positive correlation between attendance at a desegregated two or four year college and having attended desegregated schools earlier in life); ROBERT L. CRAIN ET AL., N.Y. INST. FOR URBAN AND MINORITY EDUC., FINDING NICHES: DESEGREGATED STUDENTS SIXTEEN YEARS LATER 55 (1992) (finding several main benefits to desegregated schools, including higher high school graduation rates, more years of college completion, fewer run-ins with police for male students, and a lower chance of having a child before age 18 for female students).

<sup>192</sup> Schofield & Hausmann, *supra* note 42, at 87.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 88.

<sup>195</sup> *Id.* at 87-89.

<sup>196</sup> Sabrina Zirkel, *What Will You Think of Me? Racial Integration, Peer Relationships and Achievement Among White Students and Students of Color*, 60 J. SOC. ISSUES 57, 59 (2004).

<sup>197</sup> See generally KOZOL *supra* note 9 (discussing the various ways in which students of color in segregated schools face concrete disadvantages).

<sup>198</sup> Zirkel, *supra* note 196, at 59.

<sup>199</sup> Erica Frankenberg, *Voluntary Integration After Parents Involved: What Does Research Tell Us About Available Options?* 5 (Dec. 2007) (Inst. For Race & Justice, unpublished working paper) [hereinafter *Race & Justice*], available at <http://www.charleshamiltonhouston.org/Publications/Item.aspx?id=100008> (explaining that interacting with students from diverse backgrounds increases critical thinking skills).

<sup>200</sup> *Id.* at 4.

<sup>201</sup> Research shows that white culture and black culture differ in several areas, including cognitive modes and non-verbal discourse styles of walking, talking and gesturing. Because whites comprise the majority, blacks may either resist white culture, or attempt to navigate it. John U. Ogbu, *Collective Identity and the Burden of "Acting White" in Black History, Community, and Education*, 36 URB. REV. 1, 19 (2004).

<sup>202</sup> Zirkel, *supra* note 196, at 59.

to college or begin working.<sup>203</sup> All students may benefit from integration by developing cultural competency and an appreciation for diversity—skills that are increasingly important in a world that is so interconnected<sup>204</sup> and a country that will become “majority minority” in the next few years.<sup>205</sup>

Furthermore, one of the best ways to reduce both explicit and implicit racial and cultural bias is for children to interact with other children from different backgrounds at early ages.<sup>206</sup> Racial integration in schools has a positive impact on perceptions of people of different races in adulthood.<sup>207</sup> In particular, social relationships that develop in racially integrated schools give students of color confidence about their ability to function in racially diverse settings, which increases the likelihood that they will feel comfortable taking advantage of opportunities in integrated settings as adults.<sup>208</sup> Students of color who have not experienced desegregation may overestimate the degree of hostility they will face from whites, or will underestimate their ability to cope with strains in interracial contexts.<sup>209</sup>

By increasing intercultural awareness and understanding, racial integration could also lead to whites taking a more active role in advocating for social change.<sup>210</sup> For example, there is a positive correlation between years of desegregated schooling and the willingness of white adults to live in desegregated communities.<sup>211</sup> Furthermore, whites experiencing early integration are less likely to harbor racial stereotypes and anti-black prejudices.<sup>212</sup>

Lastly, continuing to separate and stratify students according to race and SES can do psychological harm to poor children of color.<sup>213</sup> The stigmatizing effect of segregation that moved the Court in *Brown* is still just as relevant today.<sup>214</sup> A society where whites flee from people of color and establish their own privileged and exclusive institutions,<sup>215</sup> leaving communities of color shut out and economically deprived of opportunities,<sup>216</sup> is as clear a signal of racial superiority as state-sponsored segregation was fifty years ago.

<sup>203</sup> Schofield & Hausmann, *supra* note 42, at 90 (explaining that integrated school settings early in life are correlated with more positive experiences and perceptions of coworkers from different backgrounds later in life).

<sup>204</sup> Race & Justice, *supra* note 199, at 5.

<sup>205</sup> The term “majority minority” is used to explain that whites will no longer be the majority in terms of population when compared with all other minority groups combined. Conner Dougherty, *U.S. Nears Racial Milestone*, WALL ST. J., June 11, 2010, [http://www.online.wsj.com/article/SB100014240527487\\_04312104575298512006681060.html](http://www.online.wsj.com/article/SB100014240527487_04312104575298512006681060.html).

<sup>206</sup> Race & Justice, *supra* note 199, at 4.

<sup>207</sup> Zirkel, *supra* note 196, at 59.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> See Race & Justice, *supra* note 199, at 5 (citing research which finds higher levels of civic engagement from students attending diverse schools as opposed to segregated schools).

<sup>211</sup> Schofield & Hausmann, *supra* note 42, at 89.

<sup>212</sup> *Id.*

<sup>213</sup> Zirkel, *supra* note 196, at 71-72.

<sup>214</sup> Derek W. Black, *In Defense of Voluntary Desegregation: All Things Are Not Equal*, 44 WAKE FOREST L. REV. 107, 117 (2009) (explaining that the historic separation of blacks from whites which denoted inferiority still effects how schools that are majority black are perceived today).

<sup>215</sup> *Id.* (explaining that once a school is perceived as black, almost no white parents will send their child there or buy a house in the neighborhood).

<sup>216</sup> *Id.*

Even within segregated communities, there is a continuing stratification that sends signals to children about their own value and opportunities. Some of the most successful charter schools in New York City, for example, share building space with traditional public schools, leading to tensions within communities regarding allocation of resources such as building space.<sup>217</sup> Furthermore, charter schools tend to attract those with the most “contact with advantaged social networks through which information regarding school quality is exchanged, language barriers, socioeconomic status and the ability of parents to arrange transportation for their schoolchildren.”<sup>218</sup> School choice proponents hope that the existence of excellent charter schools in an area will force the local public schools to improve as well, increasing educational opportunity for all.<sup>219</sup> Thus far, this goal remains unmet, leaving many children in high poverty segregated schools even further behind with fewer financial resources.<sup>220</sup>

On the whole, integration produces better academic outcomes, increases access to college and high quality jobs, reduces racial biases, increases awareness of the challenges of poverty, and decreases feelings of stigma and inferiority. Education policies that focus solely on improving school quality and ignore the benefits of voluntary integration miss an opportunity to create equal access to quality education.

### B. *Lack of Political Will to Create True Equal Opportunity in Segregated Schools*

In addition to the benefits of integration, there is a converse concern about the ability of policies seeking to make separate schools equal to ever achieve that result on a large scale.<sup>221</sup> From the attitudes of the American public, to the doctrine of the Supreme Court, to the politics of legislators, it seems highly unlikely that the political will exists to ever truly equalize schools.<sup>222</sup> For example, an African American mother in Ohio named Kelley Williams-Bolar was recently jailed and fined for using her father’s residency information to get her child into a better school in a safer neighborhood.<sup>223</sup> Ms. Williams-Bolar was on her way to finishing her masters degree in teaching, but now will be hard pressed to find a teaching job because she has a criminal record.<sup>224</sup>

<sup>217</sup> Stephen Sawchuk, *Dispute Exposes Tensions Over Charters’ Role in Cities*, EDUC. WEEK (June 9, 2011) <http://www.edweek.org/ew/articles/2011/06/09/35charter.h30.html> (explaining the tensions that have exploded in New York City over a lawsuit filed by the NAACP and United Federation of Teachers to block co-location of new charter schools in buildings that are currently housing traditional public schools).

<sup>218</sup> ERICA FRANKENBERG & GENEVIEVE SIEGEL-HAWLEY, THE CIVIL RIGHTS PROJECT, UCLA, EQUITY OVERLOOKED: CHARTER SCHOOLS AND CIVIL RIGHTS POLICY 6 (2009) [hereinafter EQUITY].

<sup>219</sup> *Id.* at 4.

<sup>220</sup> *Id.* at 15 (arguing that limited or unequal access to charter schools makes it unlikely that increased choice will improve the quality of all schools).

<sup>221</sup> See generally KOZOL, *supra* note 9 (making the case for integrated schools, in part because of the evidence thus far that separate schools cannot be equal).

<sup>222</sup> Erwin Chemerinsky, *Separate and Unequal: American Public Education Today*, 52 AM. U. L. REV. 1461, 1462 (2003) [hereinafter *Separate and Unequal*].

<sup>223</sup> Andrea Canning & Leezel Tanglao, *Ohio Mom Kelley Williams-Bolar Jailed for Sending Kids to Better School District*, ABC NEWS (Jan. 26, 2011), <http://www.abcnews.com/US/ohio-mom-jailed-sending-kids-school-district/story?id=12763654>.

<sup>224</sup> Julie Carr Smyth, *Kelley Williams-Bolar’s Case: Ohio Governor Orders Parole Board To Investigate Felony Sentencing*, HUFFINGTON POST (Feb. 8, 2011), [http://www.huffingtonpost.com/2011/02/08/kelley-williams-bolar-parole-board\\_n\\_820515.html](http://www.huffingtonpost.com/2011/02/08/kelley-williams-bolar-parole-board_n_820515.html).

The school district officials who launched the investigation against Ms. Williams-Bolar stated, “Those dollars need to stay home with our students . . . .”<sup>225</sup> The judge presiding over her case said, “I felt that some punishment or deterrent was needed for other individuals who might think to defraud the various school districts.”<sup>226</sup> This incident highlights a serious problem for equalizing the financial resources of schools: parents who live in wealthier districts with better schools do not want to spread the wealth.<sup>227</sup> Whether this attitude stems from paternal protection, racial bias, or misconceptions about families and children with fewer resources (or a combination of all of the above),<sup>228</sup> the lack of willingness for those who have resources to contribute to those who do not is a serious political obstacle to creating equal schooling in segregated high-poverty schools.

Furthermore, the Supreme Court has hindered the effort to provide equal schooling to all children.<sup>229</sup> In *San Antonio Independent School District v. Rodriguez*, the Court held that education is not a fundamental right,<sup>230</sup> and therefore school districts only need to provide enough resources to ensure a basic level of education.<sup>231</sup> This decision removed any hope that the Court would act as a check on the unwillingness of wealthier school districts and legislatures to equalize funding.<sup>232</sup>

Even if *Rodriguez* had been decided differently, it is still unlikely that enough resources would be allocated to high-poverty racially segregated schools to produce equal educational outcomes.<sup>233</sup> In wealthy districts, students have attended private preschools, receive extra tutoring, spent afternoons at piano lessons, and received basic access to healthy food, health care, and counseling services if needed.<sup>234</sup> In poorer districts, students often lack access to all of those opportunities and advantages.<sup>235</sup> Providing the same amount of funding to wealthy and poor school districts is thus not real equality.<sup>236</sup> In order to truly provide equal resources, much more funding needs to be provided to poorer school districts than to wealthier ones.<sup>237</sup>

That is the Harlem Children’s Zone (HCZ) model, which takes a holistic approach to providing students in Harlem, and within their charter schools called “Promise Academ[ies],” with successful academic outcomes.<sup>238</sup> HCZ begins interventions early with “The Baby College,”

<sup>225</sup> Canning & Tanglao, *supra* note 223.

<sup>226</sup> *Id.*

<sup>227</sup> *Separate and Unequal*, *supra* note 222, at 1463.

<sup>228</sup> Black, *supra* note 214, at 117.

<sup>229</sup> *Separate and Unequal*, *supra* note 222, at 1463.

<sup>230</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37 (1973).

<sup>231</sup> *Id.*

<sup>232</sup> *Separate and Unequal*, *supra* note 222, at 1470-71.

<sup>233</sup> See KOZOL, *supra* note 9, at 245 (describing the vast differences in funding between wealthy and poor school districts).

<sup>234</sup> See, e.g., KOZOL, *supra* note 9, at 49-50 (explaining the gap in preschool accessibility between children growing up in poverty and their wealthier peers).

<sup>235</sup> *Id.*

<sup>236</sup> *Id.* at 245.

<sup>237</sup> *Id.*

<sup>238</sup> *The HCZ Project: 100 Blocks, One Bright Future*, HARLEM CHILDREN’S ZONE, <http://www.hcz.org/about-us/the-hcz-project> (last visited Nov. 6, 2011) [hereinafter *HCZ Project*].

a series of workshops for parents of children ages zero to three.<sup>239</sup> The program continues to support children, families, and the community all the way through college by providing in-school, after-school, social-service, and health and community-building programs.<sup>240</sup> For example, the “Single Stop” program was initiated as a tool to reduce poverty within the zone by providing the community with access to a broad assortment of useful services, including help securing public benefits, access to legal guidance, financial advice, debt relief counseling, and domestic crisis resolution.<sup>241</sup> This model has shown some success at boosting academic outcomes.<sup>242</sup> For example, 100% of third graders at Promise Academies I and II tested at or above grade level on the math exam.<sup>243</sup> In English and Language Arts (ELA), over 93% of Promise Academy I third graders tested at or above grade level and over 84% of Promise Academy II’s students scored at or above grade level.<sup>244</sup> In 2008, 93% of Promise Academy High School ninth graders passed the statewide Algebra Regents exam.<sup>245</sup> Furthermore, 90% of high-school seniors were accepted into college in the 2010-2011 school year.<sup>246</sup> HCZ’s comprehensive model is clearly providing access to opportunities and services that would otherwise be denied to low-income families in Harlem.

While this is a promising model, it is also an expensive one. The budget for the HCZ Project for fiscal year 2010 is over \$48 million.<sup>247</sup> Many of the HCZ programs do aim to support the entire community including local public schools in the area;<sup>248</sup> however, there are only three charter schools in the network and they invest more money per pupil each year (nearly \$19,000 in 2008) than the \$14,525 the city spends per pupil on students in traditional open enrollment public schools.<sup>249</sup> HCZ raises funds from a variety of sources to support its programs<sup>250</sup> and is aided in its success by its proven results and its charismatic leader Geoffrey Canada.<sup>251</sup> This model is not easily scalable, however, because of the amount of resources and political will it would take to provide comprehensive services and equal school funding to all students living in high-poverty

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> *The HCZ Project Pipeline: Family, Community and Health*, HARLEM CHILDREN’S ZONE, <http://www.hcz.org/programs/family-community-a-health> (last visited Nov. 6, 2011).

<sup>242</sup> *Our Results*, HARLEM CHILDREN’S ZONE, <http://www.hcz.org/our-results> (last visited Nov. 6, 2011) [hereinafter *Our Results*]. *But see* Sharon Otterman, *Lauded Harlem Schools Have their Own Problems*, N.Y. TIMES, Oct. 12, 2010, <http://www.nytimes.com/2010/10/13/education/13harlem.html?pagewanted=all> (explaining that after New York State made its state exams harder to pass in the summer of 2010, there was a drop-off in student performance).

<sup>243</sup> *Our Results*, *supra* note 242.

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> *HCZ Project*, *supra* note 238.

<sup>248</sup> *Id.*

<sup>249</sup> Helen Zelon, *Shaping Success*, CITY LIMITS (Feb. 9, 2010), <http://www.citylimits.org/news/articles/4019/shaping-success>; *Promise Academy Charter Schools: Going Beyond the Walls of the Classroom*, HARLEM CHILDREN’S ZONE, <http://www.hcz.org/programs/promise-academy-charter-schools> (last visited Nov. 6, 2011).

<sup>250</sup> *Musician Prince Announces 1 Million HCZ Donation*, HARLEM CHILDREN’S ZONE, <http://www.hcz.org/media/news/511-musician-prince-announces-1-million-hcz-donation> (last visited Nov. 6, 2011); Otterman, *supra* note 242 (explaining that HCZ has unusual access to large streams of capital with two billionaires on its board and a strong connection to Wall Street).

<sup>251</sup> Helen Zelon, *Is The Promise Real? The Harlem Children’s Zone Becomes a Template for National Change*, CITY LIMITS (Feb. 9, 2010), <http://www.citylimits.org/news/articles/4017/is-the-promise-real/2>.

racially segregated schools.<sup>252</sup>

Programs like HCZ and other charter networks that are shown to be effective at raising student achievement levels should be replicated to the extent possible. However, there are still many children living in poverty and attending racially segregated schools who do not have access to these schools and programs.<sup>253</sup> Therefore, integration options must be offered to such communities to ensure that all children are able to access quality education.

In addition, the current emphasis in education reform on making separate schools equal will be even more problematic if education reform does not remain at the center of national or local policy agendas.<sup>254</sup> President Obama has certainly brought attention to the need for reform in public education, as have other political figures across the country such as Michelle Rhee, former chancellor of the District of Columbia Public Schools.<sup>255</sup> However, in an ever-changing political landscape, the issues and people setting the agenda today may not be in office tomorrow.<sup>256</sup> If momentum wanes and other issues take hold of the nation's discourse, the progress that has been made in some segregated high-poverty schools and districts may stall or even reverse.

Without the national spotlight shining on this issue, families and communities in high poverty segregated areas who do not have the political capital and economic resources to make their voices heard are left without any options for providing quality education to children. Integration strategies can help to combat this problem because parents of students in majority white wealthy schools and districts do have the political power and financial ability to ensure a high level of school quality for the students in those schools.<sup>257</sup>

#### VI. RECOMMENDATIONS FOR EFFECTIVE INTEGRATION STRATEGIES THAT ADDRESS POTENTIAL LEGAL, POLITICAL, AND CULTURAL CHALLENGES

While it is certainly clear that giving communities the ability to pursue integration strategies has many benefits, there are also substantial challenges from legal, political, and cultural perspectives. There are also, however, specific policy approaches that can maximize the

<sup>252</sup> *Separate and Unequal*, *supra* note 222, at 1475 (arguing that as long as wealthy parents have the option to send their kids to private schools, there will never be enough political capital to provide quality schooling in high-poverty segregated schools); Otterman, *supra* note 242 (explaining there have been concerns about federal grant money going to develop "promise neighborhoods" in other areas of the country, given the lack of evidence that such programs would be effective).

<sup>253</sup> EQUITY, *supra* note 218, at 15.

<sup>254</sup> See Brian Montopoli & Jill Jackson, "Pledge to America" Unveiled by Republicans, CBS NEWS (Sept. 22, 2010), [http://www.cbsnews.com/8301-503544\\_162-20017335-503544.html](http://www.cbsnews.com/8301-503544_162-20017335-503544.html) (laying out the Republican platform which included spending cuts, but no support for education).

<sup>255</sup> Amanda Ripley, *Rhee Tackles Classroom Challenge*, TIME.COM, Nov. 26, 2008, <http://www.time.com/time/magazine/article/0,9171,1862444-1,00.html> (describing the buzz created when Rhee took on the D.C. school system and claimed she could turn it around); Helene Cooper, *Obama Urges Education Law Overhaul*, N.Y. TIMES, Mar. 15, 2011, at A24 (quoting President Obama as saying: "I want every child in the country to head back to school in the fall knowing that their education is America's priority.").

<sup>256</sup> See Michelle Rhee, *What I've Learned*, NEWSWEEK, Dec. 6, 2010, <http://www.newsweek.com/2010/12/06/why-michelle-rhee-isn-t-done-with-school-reform.html> (discussing that education reformers were shocked when Mayor Adrian Fenty was not re-elected to office, largely because of his support for Rhee's education reform policies, despite the fact that D.C. Public Schools were beginning to improve).

<sup>257</sup> *Separate and Unequal*, *supra* note 222, at 1475.

effectiveness of integration while reducing the potential challenges.

*A. Strategies for Overcoming Legal Challenges*

After *Parents Involved*, there was a general feeling that voluntary integration strategies were no longer constitutional—an idea that spread due to misinformation provided at the highest levels of government.<sup>258</sup> A close reading of Justice Kennedy's opinion in *Parents Involved*, however, indicates that there are in fact many strategies that districts and schools can pursue that would not run afoul of the Court's decision.<sup>259</sup>

Justice Kennedy notes that race may be considered when designing integration strategies, as long as demographic factors, talents, and needs are also considered.<sup>260</sup> Many school districts have already begun to take creative approaches to integration that likely pass constitutional muster under Justice Kennedy's framework.<sup>261</sup> There are four main models that districts have used to achieve racially integrated schools without violating *Parents Involved*: attendance zone plans, SES transfers, magnet schools, and racial diversity transfers.<sup>262</sup> Attendance zone plans divide school districts along residential lines and then assign students to schools close to their homes.<sup>263</sup> Magnet schools provide specialized curricula in a particular subject area and seek to attract students of different races and socio-economic backgrounds from local public and private schools.<sup>264</sup> SES transfers allow students to transfer schools based on socio-economic status.<sup>265</sup> Racial diversity transfers tend to use the attendance zone model to start, and then allow students to transfer on a voluntary basis to a school where their race is not in the majority.<sup>266</sup> All of these models have the potential to achieve racial integration and be within the limits placed by Justice Kennedy in *Parents Involved*.<sup>267</sup>

The attendance zone model is often utilized by smaller school districts that may not have enough schools for a transfer model to work.<sup>268</sup> School districts generally re-draw attendance boundaries every few years when they plan to open, close or consolidate schools, presenting an ongoing opportunity for school districts to take housing patterns and student demographics into account in striving to create racially and socio-economically diverse schools.<sup>269</sup> The attendance zone model does not run afoul of Justice Kennedy's decision in *Parents Involved* because students

<sup>258</sup> See TEFERA ET AL., *supra* note 76, at 1 (explaining that the Bush administration sent letters to school districts instructing them that *Parents Involved* restricted the use of any race-based classification).

<sup>259</sup> See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 798 (2007).

<sup>260</sup> *Id.*

<sup>261</sup> Danielle Holley-Walker, *After Unitary Status: Examining Voluntary Integration Strategies for Southern School Districts*, 88 N.C. L. REV. 877, 892 (2010) (explaining that nationally, about forty school districts that serve 2.5 million students pursue some form of socioeconomic integration).

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

<sup>264</sup> *Id.* at 893.

<sup>265</sup> *Id.* at 892.

<sup>266</sup> *Id.*

<sup>267</sup> *Id.* at 910.

<sup>268</sup> *Id.* at 898.

<sup>269</sup> NAACP LEGAL DEFENSE & EDUCATIONAL FUND & THE CIVIL RIGHTS PROJECT, UCLA, STILL LOOKING TO THE FUTURE: VOLUNTARY K-12 SCHOOL INTEGRATION 36 (2008) [hereinafter INTEGRATION].

are not being assigned to a school solely on the basis of their race, but rather are assigned to schools based on zoning.

The magnet school model (as well as other types of special school models like International Baccalaureate schools) is used in conjunction with other approaches in many districts.<sup>270</sup> Magnet schools are generally opened in high-poverty racially segregated neighborhoods, but by offering unique curricula or special programs, the schools also attract wealthier white students from surrounding areas.<sup>271</sup> Cambridge, Massachusetts is an example of a school district that relies heavily on the magnet school model.<sup>272</sup> Each school within the region is a magnet school with a special focus, and parents are asked to rank their top choices for which schools they would like their children to attend.<sup>273</sup> The district takes the parents' preferences into account, along with a variety of diversity factors to ensure that the schools are racially and socio-economically diverse.<sup>274</sup> Magnet schools are constitutional because they rely primarily on parental choice and are centered on the different thematic programs offered by schools, and to the extent that diversity factors are considered in conjunction with parental choice, race is certainly not the sole factor determining where children are assigned.<sup>275</sup>

After *Parents Involved*, school districts have also tended to replace racial criteria for student assignments with socio-economic criteria.<sup>276</sup> Because SES is not a protected class, programs relying on SES are not subjected to strict scrutiny.<sup>277</sup> Rather, SES-based programs are subjected to rational basis review,<sup>278</sup> which greatly increases the likelihood that they will not be struck down.<sup>279</sup> Therefore, using SES is an easy way for school districts to avoid constitutional challenges.<sup>280</sup> Since there is large overlap between SES and race, plans that rely on SES may be effective in producing racially integrated schools.<sup>281</sup> For example, Seminole County, Florida is a large and racially diverse school district.<sup>282</sup> The District's plan begins with an attendance zone strategy that aims to reflect diversity as measured by many factors including socioeconomic status, gender, race/ethnicity, English Speakers of Other Languages (ESOL), and disability.<sup>283</sup>

<sup>270</sup> Holley-Walker, *supra* note 261, at 904.

<sup>271</sup> *Id.* at 893.

<sup>272</sup> *Id.*

<sup>273</sup> Richard D. Kahlenberg, *Socioeconomic School Integration*, POVERTY & RACE, Sept./Oct. 2001, at 4.

<sup>274</sup> INTEGRATION, *supra* note 269, at 52.

<sup>275</sup> *Id.* at 38.

<sup>276</sup> Holley-Walker, *supra* note 261, at 899.

<sup>277</sup> *See generally* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (treating wealth disparities in schools under rational basis review).

<sup>278</sup> *Id.*

<sup>279</sup> *Separate and Unequal*, *supra* note 222, at 1472 (explaining that Texas's unequal funding system in *Rodriguez* easily met the rational basis test).

<sup>280</sup> *See* Holley-Walker, *supra* note 261, at 899 (explaining that Seminole County, Florida changed its integration plan from considering race to considering SES in the wake of *Parents Involved*).

<sup>281</sup> *Id.* *But see* Erica Frankenberg & Liliana M. Garces, *The Use of Social Science Evidence in Parents Involved and Meredith: Implications for Researchers and Schools*, 46 U. LOUISVILLE L. REV. 703, 748 (2007) (arguing that race-conscious plans are more effective than socioeconomic status diversity plans at creating racial diversity).

<sup>282</sup> The school district is large and racially diverse, with 64,977 students, of whom 57.3% are White, 13.6% are African American, and 18.5% are Hispanic. Holley-Walker, *supra* note 261, at 899.

<sup>283</sup> *Id.* at 900.

Additionally, SES transfers are available for students from schools with high levels of students receiving free or reduced price lunch to schools with low levels of students receiving free or reduced price lunch.<sup>284</sup>

Lastly, some school districts have continued to consider race in implementing integration strategies.<sup>285</sup> While there are ways to consider race without violating the rules set forth by *Parents Involved*, school districts should be careful in crafting these policies, as they are the most likely to face constitutional challenges.<sup>286</sup> For example, the Marion School District in Florida has continued to use a race-based transfer system.<sup>287</sup> The program offers voluntary transfers to students from schools in which their race is in the majority to schools in which their race is in the minority.<sup>288</sup> Although this plan authorizes transfers solely on the basis of race, it is still substantially different from the plans struck down in *Parents Involved* because the transfer is voluntary,<sup>289</sup> only occurs after attendance zone policies have failed to achieve racial diversity,<sup>290</sup> and the transfers are only allowed to schools where there is room.<sup>291</sup>

Other school districts have used race alongside other diversity criteria in allowing transfers.<sup>292</sup> Considering multiple diversity factors in addition to race reduces the possibility of a successful constitutional challenge.<sup>293</sup> Removing race altogether from consideration, however, may lead to increasing racial isolation.<sup>294</sup>

Many school districts use a combination of the four main models outlined above to achieve racially and socio-economically diverse schools.<sup>295</sup> Every district must analyze its own community needs in designing its integration plan, while carefully examining whether its plan meets the constitutional requirements set forth in *Parents Involved*.<sup>296</sup>

#### B. Policies that Can Be Implemented within the Current Political Landscape

The post-racial era that so many Americans believe we have entered since President Obama's election to President<sup>297</sup> may seem to create a challenging political climate for

<sup>284</sup> *Id.*

<sup>285</sup> *Id.* at 901.

<sup>286</sup> INTEGRATION, *supra* note 269, at 37.

<sup>287</sup> Holley-Walker, *supra* note 261, at 902.

<sup>288</sup> *Id.* at 903.

<sup>289</sup> *Id.*

<sup>290</sup> *Id.*

<sup>291</sup> This could diminish a standing claim because the white parents would not be able to point to a cognizable injury if they are not being pushed out of their zoned school. *Id.*

<sup>292</sup> See INTEGRATION, *supra* note 269, at 46, 58.

<sup>293</sup> *Id.* at 44.

<sup>294</sup> *Id.*

<sup>295</sup> Holley-Walker, *supra* note 261, at 904.

<sup>296</sup> *Id.* at 903.

<sup>297</sup> Parks & Rachlinski, *supra* note 99, at 659-60 (citing a postelection survey which revealed that Barack Obama's election to the Presidency has led many Americans to believe we now live in a post-racial age); see also *Whites Believe They Are Victims of Racism More Often Than Blacks, Study Suggests*, SCI. DAILY (May 23, 2011), <http://www.sciencedaily.com/releases/2011/05/110523124220.htm> (discussing a new research study showing that whites think they currently face more racism and bias in American society than blacks).

implementing the types of integration plans examined above, especially since school district policies are often heavily influenced by local politics.<sup>298</sup> However, the majority of families and communities of all colors and socioeconomic statuses support diverse learning environments and integration strategies, which provide quality educational opportunity to all children.<sup>299</sup>

Given that there is political support for integration strategies, there is much that can be done on the federal and local levels to encourage such strategies. At the local level, school districts should continue to work with communities to collect and analyze demographic data and use the information gathered to implement meaningful integration strategies.<sup>300</sup> Furthermore, the charter school movement, which has primarily focused thus far on creating 90/90/90 schools,<sup>301</sup> should expand to include more emphasis on creating racially and socioeconomically integrated schools.<sup>302</sup>

There are a few examples of charter schools that have done this successfully. For example, the Denver School of Science and Technology (DSST) is a charter school that attracts a very diverse student population: forty-four percent of students are low-income, thirty-four percent of students are white, thirty-four percent are African American, twenty-four percent are Latino, four percent are multiracial, and three percent are Asian.<sup>303</sup> The school is able to attract such a diverse student body because of its high-quality college-bound program.<sup>304</sup> It also produces better academic results for students of color than other local schools: an African American student at DSST was five times more likely to be proficient in math, three times more likely in writing, and twice as likely in reading.<sup>305</sup> A Latino student was thirteen times more likely to be proficient in math, three times more likely in writing, and four times more likely in reading.<sup>306</sup> Some other examples of charter schools that seek to enroll a racially diverse student body include High Tech High (HTH) in San Diego and Capital City Charter School in the District of Columbia.<sup>307</sup> Capital City Charter School uses a simple random lottery, while HTH and DSST take extra steps to ensure diversity by using a weighted lottery.<sup>308</sup>

More leaders in the charter school movement should aim to create academically excellent integrated charter schools, especially in regions where it is easier geographically to bring together racially diverse populations.<sup>309</sup>

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<sup>298</sup> Race & Justice, *supra* note 199, at 6 (explaining the importance of political support for integration strategies because school boards are popularly elected).

<sup>299</sup> *Id.* at 7 (citing research showing 90% of African Americans support integration, and 60% of white parents support integration).

<sup>300</sup> INTEGRATION, *supra* note 269, at 37.

<sup>301</sup> REEVES, *supra* note 178, at 1.

<sup>302</sup> FRANKENBERG ET AL., *supra* note 130, at 11 (arguing that charter programs have not lived up to their initial promise of transcending the segregating effects of traditional district boundary lines).

<sup>303</sup> Bill Kurtz & Alan Gottlieb, *Integrated Schools Can Excel*, DENVER POST, Mar. 5, 2006, [http://dsstpublicschools.org/uploads/pdf/Post\\_article\\_by\\_Bill\\_3-5-05.pdf](http://dsstpublicschools.org/uploads/pdf/Post_article_by_Bill_3-5-05.pdf).

<sup>304</sup> *Id.*

<sup>305</sup> *Id.*

<sup>306</sup> *Id.*

<sup>307</sup> FRANKENBERG ET AL., *supra* note 130, at 11.

<sup>308</sup> *Id.*

<sup>309</sup> INTEGRATION, *supra* note 269, at 39 (noting that in some regions meaningful racial integration is not possible, and in such areas focusing on providing high-quality education is of critical importance).

On the federal level, there are several ways the government can help incentivize racial integration and enforce civil rights more effectively. The Race to the Top program should include effective racial integration of schools as a factor to be considered as states compete for funding.<sup>310</sup> In providing incentives for states to create more charter schools, there should be specific goals around charter schools that seek to achieve racial diversity, especially since it may be easier for charter schools to integrate than it is for traditional public schools.<sup>311</sup> Funding should be provided to all states that make significant advances in integrating district schools and encouraging integrated charter schools.<sup>312</sup> In doing so, it is essential that funding be provided to states that invest communities in making these changes and that view communities as partners in reform, in order to avoid providing states with incentives to force integration onto communities from the top down.<sup>313</sup>

Additionally, Race to the Top should include more funding for magnet school programs.<sup>314</sup> Magnet schools provide an important choice for families, and have a track record of high academic achievement in racially diverse settings.<sup>315</sup> Although magnet schools still educate more children in the United States than charter schools, they receive less federal funding.<sup>316</sup> Magnet school funding from the federal government has remained stagnant over the past few years, and has not kept pace with inflation.<sup>317</sup> Given the potential for magnet schools to increase integration and provide strong academic outcomes for students, the federal government should renew efforts and resources to support magnet schools.<sup>318</sup>

Lastly, the Department of Justice should carefully examine new charter schools that are being created through federal incentives to ensure that such schools are complying with civil rights mandates.<sup>319</sup> States should not receive federal funding for creating charter schools that exclude students of color and create havens for white flight from integrated district schools.<sup>320</sup>

### C. *Approaching Integration in a Culturally Competent Way*

One of the most significant challenges to implementing integration strategies is that some leaders and families within communities of color oppose district attempts to integrate. For example, a recent case in the Lower Merion School District in Pennsylvania highlighted community resistance to the attempts by the district to integrate two local high schools.<sup>321</sup> Lower

<sup>310</sup> NATIONAL COALITION ON SCHOOL DIVERSITY, REAFFIRMING THE ROLE OF SCHOOL INTEGRATION IN K-12 EDUCATION 2 (2009) [hereinafter SCHOOL DIVERSITY].

<sup>311</sup> FRANKENBERG ET AL., *supra* note 130, at 57 (explaining that charter schools are in a unique place to integrate because they can attract students from different races, and can have more choice in where to place their schools).

<sup>312</sup> OPPORTUNITY, *supra* note 136, at 4.

<sup>313</sup> See INTEGRATION, *supra* note 269, at 34.

<sup>314</sup> See FRANKENBERG ET AL., *supra* note 130, at 83.

<sup>315</sup> *Id.*

<sup>316</sup> EQUITY, *supra* note 218, at 19.

<sup>317</sup> SCHOOL DIVERSITY, *supra* note 310, at 2.

<sup>318</sup> *Id.*

<sup>319</sup> EQUITY, *supra* note 218, at 19-20 (suggesting various policies that could be adopted to safeguard civil rights in charter schools).

<sup>320</sup> FRANKENBERG ET AL., *supra* note 130, at 5.

<sup>321</sup> Student Doe 1 v. Lower Merion Sch. Dist., No. 09-2095, 2010 U.S. Dist. LEXIS 62797 (E.D. Pa. June 24, 2010).

Merion's redistricting plan reassigned students between two high schools, taking away the traditional choice that students had in deciding which school to attend.<sup>322</sup> The students who brought the lawsuit were African American, and argued that the district's decision was based solely on race.<sup>323</sup> The district denied this, citing the use of many factors such as geography and travel time.<sup>324</sup> The District Court applied strict scrutiny, but ultimately found that the school district's plan was constitutional because it did not use race in an impermissible way.<sup>325</sup> Plaintiffs appealed to the Court of Appeals for the Third Circuit, where the court found that strict scrutiny should not apply in a case where race was discussed, but the plan did not rely on race as a factor in any way.<sup>326</sup> The Third Circuit thus applied rational basis and found the district's plan to pass constitutional muster.<sup>327</sup>

While many civil rights advocates supported this case as a matter of legal doctrine, this case does highlight the importance of *voluntary* integration strategies that are responsive to the needs and wants of the community.<sup>328</sup> In designing and implementing integration strategies, it is essential that school districts work closely with members of the community to design programs that will have community support.<sup>329</sup>

Furthermore, steps should be taken to ameliorate some of the concerns that communities of color may have regarding integration strategies. One such concern is that once students of color are integrated into predominantly white schools, they become segregated within the schools themselves.<sup>330</sup> Many integrated schools provide accelerated tracks for higher performing students, and these tracks end up being predominantly comprised of white students.<sup>331</sup> As school districts and charter schools implement integration strategies, it is of vital importance to ensure that classrooms are also integrated and that all students are given access to true educational opportunity.<sup>332</sup> This is the approach taken by successfully integrated charter schools like DSST, which do not separate students by "ability," but rather create integrated learning environments with high expectations and rigorous curriculum for all students.<sup>333</sup>

Even within integrated classrooms, there is also the concern that students of color will

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<sup>322</sup> Jeremy Roebuck, *Appeal Filed against Lower Merion in School Redistricting*, PHILADELPHIA INQUIRER, Dec. 8, 2010, [http://www.philly.com/philly/education/20101208\\_Appeal\\_filed\\_against\\_Lower\\_Merion\\_in\\_school\\_redistricting.html](http://www.philly.com/philly/education/20101208_Appeal_filed_against_Lower_Merion_in_school_redistricting.html).

<sup>323</sup> *Id.*

<sup>324</sup> *Id.*

<sup>325</sup> Doe v. Lower Merion Sch. Dist., No. 10-3824, 2011 U.S. App. LEXIS 24747, at \*2 (3d Cir. Dec. 14, 2011).

<sup>326</sup> *Id.* at \*3.

<sup>327</sup> *Id.*

<sup>328</sup> *Lawyers' Committee, NAACP LDF, and ACLU File Amicus Brief in Doe v. Lower Merion*, LAWYERS' COMMITTEE (Jan. 12, 2011), <http://www.lawyerscommittee.org/projects/education/clips?id=0218>; INTEGRATION, *supra* note 269, at 34.

<sup>329</sup> Race & Justice, *supra* note 199, at 22.

<sup>330</sup> Mickelson, *supra* note 39, at 216.

<sup>331</sup> *Id.* (explaining that tracking can undermine potential gains of desegregation by re-segregating students within desegregated schools, limiting access for students of color to the higher quality education available to white students).

<sup>332</sup> *Id.* at 242.

<sup>333</sup> Kurtz & Gottlieb, *supra* note 303 (explaining that all students at DSST are expected to be on the college-bound track, regardless of background).

either feel the need to “act white” and conform to the majority culture for fear of being treated differently by teachers and fellow white students, or will feel pressure to reject “acting white” in order to avoid facing social sanctions from other students of color.<sup>334</sup> Navigating these tensions can cause significant social and psychological distress and can impact academic success.<sup>335</sup> Furthermore, teachers who come from primarily white middle class backgrounds may hold certain stereotypes about their students of color that can lead to lower academic and behavioral expectations and harsher punishments for those students, all of which lead to lower academic outcomes.<sup>336</sup>

To combat this concern, school districts and charter schools should take several important steps. First, cultural competency training should be provided for all teachers in order to ensure that teachers are cognizant of the ways in which their implicit biases may impact how they relate to and teach students from backgrounds different from their own.<sup>337</sup> Second, school districts and schools should train teachers to implement multicultural education practices and use multicultural curriculum,<sup>338</sup> as such techniques provide academic benefits to students of all backgrounds.<sup>339</sup> Third, schools should provide professional development to teachers and staff regarding how to build classroom communities where students are respectful of each other’s differences and learn from each other’s diverse perspectives and experiences.<sup>340</sup>

Strategies that ignore these key components may produce integration on a surface level, but will miss the true opportunity of integration, which is to create learning environments that are rich with the diverse cultures, experiences, and strengths of students from different backgrounds. All students of all races benefit from such environments.

## VII. CONCLUSION

While the renewed energy and focus currently being dedicated to education reform is heartening in that it acknowledges how fundamental education is to a functioning democratic society, the race-neutral approach to education reform is problematic. We live in a country that, despite its wealth, is home to great economic and racial disparities that heavily influence whether individuals are able to access opportunities and maintain an adequate standard of living.

Couching education reform as a national movement to increase our competitiveness on a global scale ignores what should be education’s primary aim: to provide a basic civil right to our

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<sup>334</sup> See generally Ogbu, *supra* note 201 (explaining the various ways black students respond when faced with white culture, and how this can impact success in the classroom for black students).

<sup>335</sup> *Id.* at 28-29.

<sup>336</sup> Marvin Lynn et al., *Examining Teachers’ Beliefs About African American Male Students in a Low-Performing High School in an African American School District*, 112 TCHR. C. REC. 289, 293 (2010) (discussing research showing that teachers begin the school year with lower expectations for African American boys, and even when these students show they can meet higher expectations, teachers maintain low expectations).

<sup>337</sup> Race & Justice, *supra* note 199, at 22 (advocating for professional development for teachers on multicultural education, especially considering the fact that 85 percent of teachers in public schools are white).

<sup>338</sup> James A. Banks, *Multicultural Education and Curriculum Transformation*, 64 J. NEGRO EDUC. 390, 392 (1995) (describing content integration in multicultural education as the use of examples and content from a variety of cultures and groups to illustrate key concepts, principles, and generalizations).

<sup>339</sup> *Id.* at 392-93.

<sup>340</sup> *Id.* at 392 (arguing that democratic racial attitudes and values should be developed in classrooms, and that developing these attitudes is most effective when students are young).

children. Race-neutral policies ignore education's potential to break the cycle of poverty and provide real opportunity to children of color. Race-neutral policies ignore the failures of our society to meet the most basic needs of our poorest children of color, such as food and housing. Race-neutral policies ignore the power of education to inspire children to develop into socially conscious citizens who can advocate for their own rights and the rights of others in their communities.

The focus of the education reform movement on improving racially segregated high-poverty schools is important in many respects. The success stories have challenged the conventional attitude that growing up in poverty means that children cannot achieve academically, and that students of color are somehow innately inferior to white students. The reform movement has also provided real results to thousands of children who may have otherwise been denied the opportunity to graduate from high school and enroll in college. In regions where housing segregation is so entrenched that there are no neighboring communities with people of different races, integration may not be a viable possibility. In such areas, improving the quality of segregated schools (both traditional district schools and charter schools) must be a top priority.

In areas where integration can be more easily implemented, however, the education reform movement must consider taking on integration as an additional strategy necessary for closing the achievement gap. The benefits of integration for students of all races and socioeconomic backgrounds are clear, and communities deserve to have choices that offer them such benefits. In implementing integration strategies, it is essential to ensure that true integration occurs — not just in districts and schools, but also in classrooms. To reap the benefits of an integrated environment, schools must provide teachers and staff with the curricular tools, professional development, and support needed to create classrooms where all students are held to high expectations, and where teachers and students respect and learn from each other's cultural differences.

Although legal, political, and cultural challenges exist, they are certainly surmountable. Over fifty years ago, the *Brown* Court announced that separate could never be equal. In the past twenty years of racial re-segregation of schools, the evidence seems to support that claim. The achievement gap persists, economic inequality is widening, and each year America fails to provide thousands of students of color with a high-quality education. It is time to revisit the promise of integration — a promise our country never fulfilled, and one that may yet provide true educational equity.