## Note

# The Diversity Formula: A Race-Neutral Playbook for Equitable Student Assignment and its Application to Magnet Schools

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> We deal here with the right of all of our children, whatever their race, to an equal start in life and to an equal opportunity to reach their full potential as citizens. Those children who have been denied that right in the past deserve better than to see fences thrown up to deny them that right in the future. Our nation, I fear, will be ill served by the Court's refusal to remedy separate and unequal education, for unless our children begin to learn together, there is little hope that our children will ever learn to live together.[1]

## INTRODUCTION

As the Biden-Harris Administration attempts to follow through on its commitment to advancing equity,[2] one important focus of the Administration will be school integration—particularly through magnet schools.[3] Magnet schools—schools of

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Dedicated to my students.

1. Milliken v. Bradley, 418 U.S. 717, 783 (1974) (Marshall, J., Douglas, J., Brennan, J. & White, J., dissenting).

2. *See* Exec. Order No. 13985, 86 Fed. Reg. 7009 (Jan. 20, 2021), https://www.federalregister.gov/documents/2021/01/25/2021-01753/advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government [https://perma.cc/2895-TWR3] (titled "Advancing Racial Equity and Support for Underserved Communities Through the Federal Government").

3. *See Fiscal Year 2022 Budget Summary*, U.S. DEP'T OF EDUC. (2021), https://www2.ed.gov/about/overview/budget/budget22/summary/22summary

choice that operate within an existing school district and provide a thematic or somewhat specialized education[4]—provide a helpful model for integrating schools and eliminating the relationship between a student's zip code and the quality of the education they receive because they pull students from all neighborhoods in a district.[5] Magnet schools are also less likely to be politically controversial compared to rezoning and other integration mechanisms because they involve an element of choice: each family gets to choose the school their child attends.[6]

Creating diverse-by-design schools, however, requires a well-designed model for distributing students; and, given current federal jurisprudence, a model based on socioeconomic status (SES) is probably best.[7] For decades integrationists have struggled to integrate schools and prevent them from resegregating after the Supreme Court stifled the reach of *Brown v. Board of Education* through the likes of *Milliken v. Bradley*[8]—

.pdf [https://perma.cc/W5ZK-Z59Z] (proposing a $40 million increase in funding for magnet schools from prior fiscal year); Proposed Priorities and Definitions—Secretary's Supplemental Priorities and Definitions for Discretionary Grant Programs, 86 Fed. Reg. 34,664, 34,668 (June 30, 2021) (to be codified at 34 C.F.R. pt. 75), https://www.federalregister.gov/documents/2021/06/30/2021-14003/proposed-priorities-and-definitions-secretarys-supplemental-priorities-and-definitions-for [https://perma.cc/JW7W-TBKB] (identifying the use of magnet schools as a method for increasing racial and socioeconomic diversity); *Notice of Proposed Rulemaking, Magnet Schools Assistance Programs*, U.S. DEP'T OF EDUC. (Sept. 1, 2021), https://mobile.reginfo.gov/public/do/eAgendaViewRule?pubId=202104&RIN=1810-AB61&operation=OPERATION_PRINT_RULE [https://perma.cc/M5EX-FRX5] ("The Department [of Education] plans to propose regulations to support local educational agencies in establishing and operating magnet schools that incorporate evidence-based designs and strategies that have been shown to both increase diversity and improve outcomes for students.").

4. *See, e.g.*, *What Are Magnet Schools*, MAGNET SCHS. AM., https://magnet.edu/about/what-are-magnet-schools [https://perma.cc/NV88-NC7H] (providing an overview and examples of magnet schools); Harold Hinds, *Drawn to Success: How Do Integrated Magnet Schools Work?*, REIMAGINING INTEGRATION (Feb. 2017), https://rides.gse.harvard.edu/files/gse-rides/files/rides_-_drawn_to_success_how_do_integrated_magnet_schools_work.pdf [https://perma.cc/3YJ2-27YD] (describing the history and approach of magnet schools).

5. *See* discussion *infra* Part IV (highlighting best practices for using magnet schools to integrate school districts).

6. *See* discussion *infra* Part IV.

7. *See* discussion *infra* Parts I–II (arguing that the current jurisprudence disfavors race-based desegregation models, that future Supreme Court decisions are likely to ban race-conscious models altogether, and that SES-based models are likely the best solution under this legal landscape).

8. 418 U.S. 717 (1974).

which banned interdistrict desegregation solutions when only one district is found to violate *Brown*—and *Parents Involved in Community Schools v. Seattle School District Number One* (*PICS*)[9]—which all but banned race-based student assignment. After these decisions, there has been a persistent nationwide trend of school resegregation and widening achievement gaps,[10] with almost no interference from the courts except in the most blatant cases of intentional resegregation.[11] For example, from 1991 to 2013 more than 200 school districts were released from court-ordered desegregation, and more than half of the Black students in those districts now attend racially isolated schools.[12]

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9. 551 U.S. 701 (2007).

10. *See* Kevin G. Welner, *K–12 Race-Conscious Student Assignment Policies: Law, Social Science, and Diversity*, 76 REV. EDUC. RSCH. 349, 361 (2006) (collecting articles documenting resegregation); Sean F. Reardon, Elena Tej Grewal, Demetra Kalogrides & Erica Greenberg, Brown *Fades: The End of Court-Ordered School Desegregation and the Resegregation of American Public Schools*, 31 J. POL'Y ANALYSIS & MGMT. 876, 899–901 (2012) [hereinafter Brown *Fades*] (finding that schools released from court oversight gradually resegregated); Sean F. Reardon & Ann Owens, *60 Years After* Brown*: Trends and Consequences of School Segregation*, 40 ANN. REV. SOCIO. 199, 201–07 (2014) (summarizing the literature on segregation and its effects following *Brown*); Sarah J. Reber, *Court-Ordered Desegregation: Successes and Failures Integrating American Schools Since* Brown Versus Board of Education, 40 J. HUM. RES. 559, 579–81 (2005) (finding that court-ordered desegregation plans successfully reduced resegregation but were limited by effects of white flight); Byron F. Lutz, *Post* Brown vs. the Board of Education*: The Effects of the End of Court-Ordered Desegregation*, BD. OF GOVERNORS OF THE FED. RSRV. SYS. (Dec. 2005), https://www.federalreserve.gov/econres/feds/post-brown-vs-the-board-of-education-the-effects-of-the-end-of-court-ordered-desegregation.htm [https://perma.cc/Q9KY-LSSN] (finding that the dismissal of court-ordered desegregation plans increased segregation and detrimentally impacted the average academic performance of Black students).

11. *See, e.g.*, Stout v. Jefferson Cnty. Bd. of Educ., No. 2:65-CV-00396-MHH, 2021 WL 4034088 (N.D. Ala. Sept. 3, 2021) (re-imposing payment of attorney's fees after school board members resigned in an attempt not to pay attorney's fees after the court found that the municipality created an independent school district with clear intent to resegregate); *see also* Nikole Hannah-Jones, *The Resegregation of Jefferson County*, N.Y. TIMES (Sept. 6, 2017), https://www.nytimes.com/2017/09/06/magazine/the-resegregation-of-jefferson-county.html [https://perma.cc/TY25-4XNT] (profiling a "school secession" in resistance to integration).

12. RUCKER C. JOHNSON WITH ALEXANDER NAZARYAN, CHILDREN OF THE DREAM: WHY SCHOOL INTEGRATION WORKS 207 (2019).

But, for the many districts that recognize the benefits of integration and are openly seeking to diversify their schools,[13] the picture of integration methods that are both effective and constitutionally permissible is becoming clearer. Studies on school integration methods are now abundant, as more than 100 schools and districts have implemented policies to attempt reintegration.[14] Scholars have published numerous case studies of individual districts attempting to diversify without racial classifications—such as studies of the Wake County, North Carolina school assignment plan;[15] Chicago's exam schools;[16] the

13. The Century Foundation has documented hundreds of desegregation plans across the country over the last decade and provides a map of each of them along with a short description of the plan. Halley Potter & Michelle Burris, *Here Is What School Integration in America Looks Like Today*, CENTURY FOUND. (Dec. 2, 2020), https://tcf.org/content/report/school-integration-america-looks-like-today [https://perma.cc/4WBG-879T] (finding 185 districts and charter schools use race or socioeconomic status in student assignment or admissions policies to attempt school integration); *see also* Sean F. Reardon & Lori Rhodes, *The Effects of Socioeconomic School Integration Policies on Racial School Desegregation*, *in* INTEGRATING SCHOOLS IN A CHANGING SOCIETY: NEW POLICIES AND LEGAL OPTIONS FOR A MULTIRACIAL GENERATION 187, 189–90 (Erica Frankenberg & Elizabeth DeBray eds., 2011) (finding that forty school districts either use or plan to use socioeconomic factors in their student assignment systems).

14. *See* Potter & Burris, *supra* note 13 (finding that 185 districts and charter schools use race or socioeconomic status in student assignment or admissions policies to attempt school integration).

15. *See, e.g.*, *Integrated Magnet Schools: Outcomes and Best Practices*, INST. ON METRO. OPPORTUNITY 16–17 (2013), https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1084&context=imo_studies [https://perma.cc/2BMT-H5PE] (quoting several studies of the Wake County plan); Elizabeth Jean Bower, *Answering the Call: Wake County's Commitment to Diversity in Education*, 78 N.C. L. REV. 2026 (2000) (describing Wake County's student assignment plan); Kathryn A. McDermott, Erica Frankenberg & Sarah Diem, *The "Post-Racial" Politics of Race: Changing Student Assignment Policy in Three School Districts*, 29 EDUC. POL'Y 504, 522–31 (2015) (discussing Wake County's student assignment plan and its political challenges); John Charles Boger, *Standing at a Crossroads: The Future of Integrated Public Schooling in America*, *in* INTEGRATING SCHOOLS IN A CHANGING SOCIETY: NEW POLICIES AND LEGAL OPTIONS FOR A MULTIRACIAL GENERATION 13, 21–25 (Erica Frankenberg & Elizabeth DeBray eds., 2011) (discussing Wake County's student assignment plan); Genevieve Siegel-Hawley, *Is Class Working? Socioeconomic Student Assignment Plans in Wake County, North Carolina, and Cambridge Massachusetts*, *in* INTEGRATING SCHOOLS IN A CHANGING SOCIETY: NEW POLICIES AND LEGAL OPTIONS FOR A MULTIRACIAL GENERATION 208, 210–19 (Erica Frankenberg & Elizabeth DeBray eds., 2011).

16. *See* Glenn Ellison & Parag A. Pathak, *The Efficiency of Race-Neutral Alternatives to Race-Based Affirmative Action: Evidence from Chicago's Exam Schools*, 111 AM. ECON. REV. 943 (2021).

Jefferson County Public Schools assignment plan;[17] and the Cambridge, Massachusetts controlled choice economic integration plan.[18] Even a state legislature—Minnesota's—is now exploring options for statewide integration[19] (albeit as part of a settlement from a civil rights lawsuit against the state).[20] And the federal Department of Education recently funded a $3.5 million study to evaluate the impact of magnet schools that receive funding from its Magnet School Assistance Program (MSAP),[21] including the schools' impact on diversity[22] and their implementation of admissions preferences based on SES.[23]

Still, many states and districts may be deterred because they are uncertain about what integration methods are legally

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17. *See* McDermott et al., *supra* note 15, at 531–39.

18. *See, e.g.*, Siegel-Hawley, *supra* note 15; Richard D. Kahlenberg, *Socioeconomic School Integration: Preliminary Lessons from More Than 80 Districts*, *in* INTEGRATING SCHOOLS IN A CHANGING SOCIETY: NEW POLICIES AND LEGAL OPTIONS FOR A MULTIRACIAL GENERATION 176–78 (Erica Frankenberg & Elizabeth DeBray eds., 2011).

19. *See* H.F. 2471, 92d Leg., Reg. Sess. (Minn. 2021) (proposing criteria and mechanisms for statewide school integration).

20. *See* Josh Verges, *Free Busing, New Magnet Schools, Integration Orders: MN Agrees to $63M Annual Plan to Settle Cruz-Guzman Lawsuit*, PIONEER PRESS (Apr. 27, 2021), https://www.twincities.com/2021/04/27/free-busing-new-magnet-schools-integration-orders-mn-agrees-63m-annual-plan-settle-cruz-guzman-lawsuit [https://perma.cc/WQ8S-ZGR4] (providing an overview of the settlement); Cruz-Guzman v. State, 916 N.W.2d 1, 13 (Minn. 2018) (holding that separation-of-powers principles do not preclude Minnesota courts from ruling on whether the Minnesota Legislature has violated its affirmative duty under the Education Clause of the Minnesota Constitution or has violated the Equal Protection or Due Process Clauses of the Minnesota Constitution, and, therefore, the district court did not err in denying the state's motion to dismiss a suit by parents of children enrolled in Minneapolis and Saint Paul public schools alleging such violations).

21. *Impact Study of Magnet Schools*, NAT'L CTR. FOR EDUC. EVALUATION & REG'L ASSISTANCE, https://ies.ed.gov/ncee/projects/evaluation/choice_impactmagnet.asp [https://perma.cc/GC5Z-3ZEQ] (summarizing background and objectives of an ongoing $3,466,240 study of magnet schools' impact on student achievement and student-body diversity).

22. *See Drawing Across School Boundaries: How Federally Funded Magnet Schools Recruit and Admit Students*, NAT'L CTR. FOR EDUC. EVALUATION & REG'L ASSISTANCE 15–16 (Jan. 2021), https://ies.ed.gov/ncee/pubs/2021003/pdf/2021003.pdf [https://perma.cc/KJ23-VM6V] (displaying data on magnet schools' recruitment of different demographic groups).

23. *See id.* at 10 (highlighting how many magnet schools consider socioeconomic status in admissions and "MSAP-funded schools are most likely to focus on socioeconomic status when using preferences explicitly related to the demographic composition of their student body").

permissible. Fortunately, recent cases like *Boston Parent Coalition*[24] provide a clear picture of methods that could desegregate schools without violating the *Milliken* and *PICS* bans. In April 2021, a federal district court in Boston found that the School Committee of the City of Boston's plan for diversifying the students admitted to Boston's elite "exam" schools by giving preference to certain students based on the SES of the students' neighborhoods was race-neutral and therefore constitutionally permissible.[25] The First Circuit affirmed the district court, agreeing that the plan did not warrant strict scrutiny, presumably because SES is not a suspect classification.[26] The Boston School Committee's formula provides an innovative approach to pursuing racial and SES parity in their district, and, assuming the Supreme Court stands by established principles, Boston's plan will likely continue to pass constitutional muster because it is facially race-neutral—unlike the explicitly race-based approaches previously utilized in cases such as *PICS*.

24. Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. of Bos., 996 F.3d 37, 41 (1st Cir. 2021); *see, e.g.*, Ass'n for Educ. Fairness v. Montgomery Cnty. Bd. of Educ., 560 F. Supp. 3d 929 (D. Md. 2021) (denying the school district's motion to dismiss where Asian American students alleged that the magnet school admissions scheme is designed to reduce overrepresentation of Asian Americanstudents); *see also* Christa McAuliffe Intermediate Sch. PTO, Inc. v. De Blasio, 364 F. Supp. 3d 253, 276–79 (S.D.N.Y. 2019), *aff'd*, 788 F. App'x 85 (2d Cir. 2019) (holding that an equal protection challenge to admissions criteria at eight specialized public schools is unlikely to prevail on rational basis review or strict scrutiny review because evidence is insufficient to support racially discriminatory intent).

25. Bos. Parent Coal. For Acad. Excellence Corp. v. City of Bos., No. CV 21-10330-WGY, 2021 WL 1422827, at *13 (D. Mass. Apr. 15, 2021), *aff'd*, 996 F.3d 37, 48 (1st Cir. 2021), *opinion withdrawn sub nom.*, No. CV 21-10330-WGY, 2021 WL 3012618 (D. Mass. July 9, 2021); *see also Judge: Boston Exam Schools Admissions Policy "Race Neutral"*, ASSOCIATED PRESS (Apr. 16, 2021), https://apnews.com/article/race-and-ethnicity-boston-lawsuits-coronavirus-pandemic-courts-3751727a9c0df3b7c7b95bd885d8eb13 [https://perma.cc/W5M3-JWLP] (summarizing the court's holding).

26. Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. of Bos., 996 F.3d 37, 48 (1st Cir. 2021) ("The fact that public school officials are well aware that race-neutral selection criteria—such as zip code and family income—are correlated with race and that their application would likely promote diversity does not automatically require strict scrutiny of a school system's decision to apply those neutral criteria.").

Because of the high correlation between race and SES arising from the racial wealth gap,[27] socioeconomic models for distributing students could have an important impact on achieving a more representative allocation of students of different races between schools. Though integration as a goal has been challenged by some progressive scholars in recent years,[28] empirical research continues to show the immense benefits of racially integrated schools for the academic achievement of *all* students at

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27. *See, e.g.*, *Examining the Racial and Gender Wealth Gap in America: Hearing Before the Subcomm. on Diversity & Inclusion of the H. Comm. on Fin. Servs.*, 116th Cong. 5–13 (2019) (statements of Kilolo Kijakazi, Dedrick Asante-Muhammad, Mariko Chang Pyle, Sally Krawcheck & Lisa Cook), https://www.govinfo.gov/content/pkg/CHRG-116hhrg42351/pdf/CHRG-116hhrg42351.pdf [https://perma.cc/WU7F-8BCP]; Cedric Herring & Loren Henderson, *Wealth Inequality in Black and White: Cultural and Structural Sources of the Racial Wealth Gap*, 8 RACE & SOC. PROBS. 4, 6 (2016) (reviewing literature on causes of racial wealth gap); Sean F. Reardon, School District Socioeconomic Status, Race, and Academic Achievement 9–11 (Apr. 2016) (unpublished manuscript), https://cepa.stanford.edu/sites/default/files/reardon%20district%20ses%20and%20achievement%20discussion%20draft%20april2016.pdf [https://perma.cc/3RCN-7ANB].

28. For example, Pamela D'Andrea Montalbano argues that *Brown* represents a "deficit-oriented and outright racist ideology" that led to desegregation and integration applied "through a lens of Black inferiority." D'Andrea notes that integration is often seen as benefitting the less fortunate and involving "sacrifice" by privileged groups who send their children to low-income schools "for the greater good." Pamela D'Andrea Montalbano, *Why the Goal Cannot Be School Integration?*, METRO. CTR. FOR RSCH. ON EQUITY & TRANSFORMATION OF SCHS. (2017), https://steinhardt.nyu.edu/metrocenter/perspectives/why-goal-cannot-be-school-integration-2017 [https://perma.cc/J8Z7-GQAP].

Similarly, Derrick Bell, a Harvard Law School professor recognized as one of the founders of Critical Race Theory, argued that generations of Black children may have been better off without *Brown* if the court had instead emphasized the need for an *equal* education—a promise which has still yet to be met. Lisa Trei, *Black Children Might Have Been Better Off Without* Brown v. Board, *Bell Says*, STAN. REP. (Apr. 21, 2004), https://news.stanford.edu/news/2004/april21/brownbell-421.html [https://perma.cc/68WW-8ULL]; *see also* DERRICK BELL, SILENT COVENANTS: *BROWN V. BOARD OF EDUCATION* AND THE UNFULFILLED HOPES FOR RACIAL REFORM 180 (2004).

Malcolm Gladwell, a well-known journalist and author, also summarizes arguments and research indicating that *Brown* resulted in worse outcomes for Black students who would have been better off with culturally affirming teachers. Malcolm Gladwell, *Miss Buchanan's Period of Adjustment*, REVISIONIST HIST. (June 29, 2017), https://www.pushkin.fm/episode/miss-buchanans-period-of-adjustment [https://perma.cc/7WP4-83XC].

those schools.[29] Of course, integration also has massive symbolic and sociopolitical benefits that span far beyond the immediate school environment. Plus, *socioeconomic* diversity within schools is also a desirable end in its own right, as it is also predictive of better academic outcomes.[30]

Though SES-based models have been proposed extensively over the last decade,[31] a clear playbook for integrating schools has not yet been widely disseminated and implemented. A well-designed model should be applied throughout the country by states and municipalities that are interested in fighting back against rampant school resegregation post-*Milliken* and *PICS*.[32] An SES-based model to guiding state and federal policies like the Biden-Harris Administration's upcoming funding for magnet schools[33] and commitment to advancing equity[34] could be a powerful tool for desegregating schools. To fulfill its commitment, the Administration needs to do more than provide funding or encouragement. Re-issuing Obama-era guidance on the voluntary use of race to integrate schools[35] will be insufficient—especially

29. *See, e.g.*, Krista Maywalt Aronson, Cristina Stefanile, Camilla Matera, Amanda Nerini, Jacopo Grisolaghi, Gianmarco Romani, Federica Massai, Paolo Antonelli, Laura Ferraresi & Rupert Brown, *Telling Tales in School: Extended Contact Interventions in the Classroom*, 46 J. APPLIED SOC. PSYCH. 229, 238 (2016) (demonstrating positive psychological effects of integrated classrooms, such as reduction in prejudice); Jeffrey M. Weinstein, *The Impact of School Racial Compositions on Neighborhood Racial Compositions: Evidence from School Redistricting*, 54 ECON. INQUIRY 1365, 1380–81 (2016) (demonstrating positive effect of school integration on neighborhood integration).

30. *See, e.g.*, discussion *infra* Part III.A.; Kahlenberg, *supra* note 18, at 170 ("[A] growing number of studies have linked a school's socioeconomic status with student achievement, after controlling for the individual socioeconomic status of a student's family.").

31. *See* Potter & Burris, *supra* note 13 (surveying recent desegregation efforts).

32. *See, e.g.*, *id.*

33. *See* sources cited *supra* note 3 and accompanying text.

34. *See See* Exec. Order No. 13985, 86 Fed. Reg. 7009 (Jan. 20, 2021), https://www.federalregister.gov/documents/2021/01/25/2021-01753/advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government [https://perma.cc/2895-TWR3] (titled "Advancing Racial Equity and Support for Underserved Communities Through the Federal Government").

35. As part of its civil rights agenda, the Obama Administration issued guidance to school districts on voluntary use of race to diversify schools while avoiding litigation. *See Guidance on the Voluntary Use of Race to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools*, DEP'T OF JUST., C.R. DIV. & DEP'T OF EDUC., OFF. FOR C.R. (Dec. 2, 2011) [hereinafter

given its sparse discussion of magnet schools[36] and the unanticipated conservative turn of the Supreme Court.[37] The need for a diversity formula—a constitutionally-permissible, effective method of integrating schools—is high. This Note attempts to provide this needed guidance.

This Note argues that, due to constitutional constraints, states and school districts should use a formula that balances the number of students of different socioeconomic statuses across schools, and that a district-wide and interdistrict magnet system is the ideal environment in which to use such a formula. Part I discusses important historical background regarding Supreme Court decisions on school integration to illustrate why race-based and race-conscious models are likely untenable under current jurisprudence. Part II demonstrates why new SES-based models for integrating schools, unlike race-based or race-conscious models, are far more likely to be found constitutional by federal courts. Part III discusses the details of a model for socioeconomic integration, identifying a race-neutral "diversity formula" that can be used to distribute students equitably while avoiding costly litigation. Finally, Part IV highlights the ideal context in which to implement the formula: a district-wide and interdistrict system of diverse-by-design magnet schools. As a whole, this Note should serve as a resource for federal, state, and local officials as they formulate new plans for school integration.

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*Obama Guidance*], https://www2.ed.gov/about/offices/list/ocr/docs/guidance-ese-201111.pdf [https://perma.cc/NQ9F-SP7V]. The Trump Administration revoked this guidance in 2018. *See* Mark Walsh, *Trump Rescinds Obama-Era Guidance on Diversity at Schools*, EDUC. WEEK (July 17, 2018), https://www.edweek.org/policy-politics/trump-rescinds-obama-era-guidance-on-diversity-at-schools/2018/07 [https://perma.cc/T747-7774].

36. *See Obama Guidance*, *supra* note 35, at 9.

37. *See, e.g.*, Laura Bronner & Elena Mejía, *The Supreme Court's Conservative Supermajority Is Just Beginning to Flex Its Muscles*, FIVETHIRTYEIGHT (July 2, 2021), https://fivethirtyeight.com/features/the-supreme-courts-conservative-supermajority-is-just-beginning-to-flex-its-muscles [https://perma.cc/GX8G-FPAT] (analyzing the political dynamics of the current Supreme Court). Presumably, a more conservative court will likely continue to follow reasoning similar to the conservative plurality in *PICS*, which argued that any consideration of race in school admissions or assignment is impermissible. *See* discussion *infra* Part I.A.2. *Obama Guidance*, *supra* note 35, assumed that Justice Kennedy's concurrence—allowing limited use of race as a measure—would remain the law of the land.

## I. THE UNCONSTITUTIONALITY OF RACE-BASED (AND, LIKELY, RACE-CONSCIOUS) MODELS AND THE NEED FOR A RACE-NEUTRAL ALTERNATIVE

Though the Supreme Court has permitted race-conscious desegregation plans under narrow circumstances,[38] the Court's trend away from allowing the racial classification of students indicates that districts should avoid using racial criteria as much as possible. Race-based and even race-conscious plans are likely to be rejected. As most school districts have been released from court-ordered desegregation plans[39] and—if they are pursuing desegregation at all—are now pursuing desegregation voluntarily,[40] school districts should craft desegregation schemes that utilize facially race-neutral criteria. The most-recent authorities on the issue—*Grutter* and *PICS*—demonstrate that any racial classification in a school district's integration policy will be subject to strict scrutiny.[41] Thus, to avoid strict scrutiny—the standard of review that will likely result in the policy being struck down[42]—school districts should craft a model that does not directly consider a student's race, even as a minor factor. This Part reviews the Supreme Court cases that make this conclusion necessary.

### A. THE ROAD TO THE CONSTITUTIONAL IMPERMISSIBILITY OF RACE-BASED INTEGRATION MODELS

Though race-conscious models have not been completely outlawed by the Supreme Court, the fate of integration schemes that consider race even as one factor among many has become tenuous.

Post-*Brown*,[43] there was little question that segregated school districts were to desegregate using methods explicitly

38. *See* discussion *infra* Parts I.A.1–2 (discussing two seminal cases on the constitutionality of race-conscious integration models).

39. *See generally* Brown *Fades*, *supra* note 10.

40. School districts that are pursuing desegregation voluntarily rather than by court order do not have the same tools at their disposal. For example, they can no longer use explicit racial balancing once they are released from a desegregation order. *See* discussion *infra* Part I.A.

41. *See* discussion *infra* Parts I.A.1–2.

42. *See* discussion *infra* Part II.A.

43. Brown v. Bd. of Educ., 347 U.S. 483, 483 (1954), *supplemented sub nom.*, Brown v. Bd. of Educ., 349 U.S. 294 (1955) (holding that any de jure racial segregation of schools was a violation of the Equal Protection Clause of the

based on the race of students. In *Swann v. Charlotte-Mecklenburg Board of Education*, for example, the Supreme Court explicitly held that courts finding de jure segregation[44] in a school district had the equitable power to integrate schools using tools as drastic as issuing racial quotas, drawing noncontiguous school zoning based on race, and bussing students between neighborhoods.[45] But shortly thereafter, the Court began to restrict the ways that courts could remedy segregation. In *Milliken v. Bradley*, the Court clarified that courts could not fashion an interdistrict remedy involving districts not found to have engaged in de jure segregation.[46] Despite the district court's finding that a solution that did not encompass all metropolitan districts would inevitably lead to predominantly Black urban districts surrounded by predominantly white suburban districts,[47] the Court rejected the district court's plan to desegregate Detroit schools.[48] *Milliken* all but eliminated courts' and school districts' ability to fashion desegregation orders that would withstand white flight[49] and clarified once and for all that *Brown* applied

Fourteenth Amendment of the Constitution and abrogating the "separate but equal" doctrine of Plessy v. Ferguson, 163 U.S. 537 (1896)).

44. De jure segregation is segregation that directly results from law and policy explicitly intended to enforce segregation. *See, e.g.*, Olivia Ivey, *Segregation and De Facto Segregation*, ANTIRACIST PRAXIS, https://subjectguides.library.american.edu/c.php?g=1025915&p=7749743 [https://perma.cc/G4FE-QLAY]. By contrast, de facto segregation is "a term used to describe a situation in which legislation d[oes] not overtly segregate students by race, but nevertheless [causes] school segregation [to] continue[]." *De Facto Segregation*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/de_facto_segregation [https://perma.cc/25K6-Z4A7].

45. 402 U.S. 1, 15 (1971); *see also* James Ryan, Brown *at 60 and* Milliken *at 40*, HARV. EDUC. MAG., Summer 2014, https://www.gse.harvard.edu/news/ed/14/06/brown-60-milliken-40 [https://perma.cc/XA74-X3UG].

46. Milliken v. Bradley, 418 U.S. 717, 752–53 (1974) ("We conclude that the relief ordered by the District Court and affirmed by the Court of Appeals was based upon an erroneous standard and was unsupported by record evidence that acts of the outlying districts effected the discrimination found to exist in the schools of Detroit.").

47. *Id.* at 735 (quoting Bradley v. Milliken, 484 F.2d 215, 245 n.3 (1973)) ("[A]ny less comprehensive a solution than a metropolitan area plan would result in an all black school system immediately surrounded by practically all white suburban school systems . . . .").

48. *Id.* at 753.

49. "White flight" is a term used to identify the tendency of white Americans to move out of a neighborhood when presented with information about changing racial and ethnic demographics in their neighborhoods. *See, e.g.*, *White*

only to de jure segregation. The Court would not support race-based attempts to eliminate de facto segregation.[50]

By the 1990s, courts had begun releasing school districts from desegregation orders at a relatively high rate.[51] Under a shift in ideology that scholars have described as the "we've done enough" theory,[52] the Court issued three decisions that relaxed the criteria for releasing school districts from court oversight,[53] leading some scholars to predict the end of school desegregation.[54] The result was that the prevailing downward trend in the percentage of Black students attending intensely segregated schools reversed course, and segregation has been rising ever since.[55]

Recognizing the trend of resegregation and desiring to further integrate, many districts and institutions designed new affirmative action policies.[56] And two important cases arose from challenges to these policies: *Grutter v. Bollinger*[57] and *Parents*

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*Flight May Still Enforce Segregation*, AM. PSYCH. ASS'N (Oct. 25, 2021), https://www.apa.org/news/press/releases/2021/10/white-flight-segregation [https://perma.cc/KJG5-KMH8]; Ingrid Gould Ellen, *Welcome Neighbors? New Evidence on the Possibility of Stable Racial Integration*, BROOKINGS (Dec. 1, 1997), https://www.brookings.edu/articles/welcome-neighbors-new-evidence-on-the-possibility-of-stable-racial-integration [https://perma.cc/DP57-HYWY]. The term originated as a way of describing the massive post-World War II exodus of white Americans out of urban centers and into the suburbs, but now has a more complex meaning as suburbs have diversified. *See, e.g.*, Greta Kaul, *White Flight Didn't Disappear—It Just Moved to the Suburbs*, MINNPOST (Mar. 21, 2018), https://www.minnpost.com/politics-policy/2018/03/white-flight-didn-t-disappear-it-just-moved-suburbs [https://perma.cc/KJG5-KMH8].

50. *See Milliken*, 418 U.S. at 738–45.

51. *See* Wendy Parker, *The Future of School Desegregation*, 94 NW. U. L. REV. 1157, 1192 (2000) (finding that eleven school districts were granted unitary status out of eighteen school districts seeking it in the eight years preceding *Dowell*).

52. *See, e.g.*, Mark V. Tushnet, *The "We've Done Enough" Theory of School Desegregation*, 39 HOW. L.J. 767, 767 (1996); Parker, *supra* note 52, at 1174 n.123 (collecting articles).

53. *See* Bd. of Educ. of Okla. City Pub. Schs., Indep. Sch. Dist. No. 89 v. Dowell, 498 U.S. 237, 250 (1991); Freeman v. Pitts, 503 U.S. 467, 498–99 (1992); Missouri v. Jenkins, 515 U.S. 70, 102 (1995).

54. *See* Brown *Fades*, *supra* note 10, at 878.

55. *See, e.g.*, Gary Orfield & Erica Frankenberg, *Increasingly Segregated and Unequal Schools as Courts Reverse Policy*, 50 EDUC. ADMIN. Q. 718, 728–30, 729 fig.2 (2014); GARY ORFIELD & JOHN T. YUN, RESEGREGATION IN AMERICAN SCHOOLS 3 (The C.R. Project ed.,1999).

56. *See generally* discussion *infra* Parts I.A.1–2.

57. *See* discussion *infra* Part I.A.1.

*Involved in Community Schools v. Seattle School District Number One*.[58] These cases provide the most authoritative indication of what a constitutionally permissible desegregation scheme might look like.

1. The *Grutter v. Bollinger* Model Is Likely Untenable for Most Schools and Is Likely to Be Overturned

Though it is not the most recent Supreme Court case addressing the pursuit of diversity in schools,[59] *Grutter v. Bollinger* is still important for determining whether a court will uphold a diversity scheme.[60] Indeed, for those who do not believe that *PICS* established a controlling precedent,[61] *Grutter* may be the prevailing standard. *Grutter* establishes that racial diversity can be a goal of an admissions scheme and can likely be used as one factor among many in the holistic review of a candidate for admission.[62] However, the case was decided on very narrow grounds by reasoning that, in the particular admissions scheme at issue, the admissions scheme overcame "strict scrutiny" because its use of race was "narrowly tailored" to the university's "compelling interest"[63] in a diverse student body.[64] Attempting to match the admissions plan in *Grutter* is therefore a risky endeavor because a policy even slightly different from the University of Michigan Law School's could be interpreted as insufficiently tailored to the government's interest in a diverse student body.

In *Grutter*, the Court heard a Fourteenth Amendment challenge to a University of Michigan Law School admissions policy that aspired to achieve student-body diversity by requiring admissions officers to look beyond just grades and test scores and consider a variety of soft variables.[65] Such variables included the enthusiasm of the student's recommenders, the reputation of

58. *See* discussion *infra* Part I.A.2.

59. *See* discussion *infra* Part I.A.2. (describing the most recent landmark case on race-conscious school admissions).

60. 539 U.S. 306 (2003).

61. *See infra* note 84 (discussing the difficulty of discerning the holding in *PICS*).

62. *Grutter*, 539 U.S. at 335.

63. For a brief overview of "strict scrutiny," including the terms "narrowly tailored" and "compelling interest," see discussion *infra* Part II.A.

64. *Grutter*, 539 U.S. at 334–35 (analyzing the admissions scheme's narrow tailoring).

65. *Id.* at 315.

their undergraduate institution, the quality of the student's admissions essay, and the ways that the student might contribute to the diversity of the institution.[66] The policy did not restrict its defined goal of a diverse student body to racial and ethnic diversity, noting that there were "many possible bases for diversity admissions."[67] But it clarified that the law school was particularly committed to enrolling students from historically marginalized groups and intended to admit a "critical mass" of those students.[68]

A five-justice majority of the Court found that the policy's consideration of race as a factor meant that it must be reviewed under strict scrutiny.[69] The Court agreed with the law school that it had a compelling interest in diversity within its student body—in large part because the law school made an "educational judgment that such diversity is essential to its educational mission" and demonstrated that the diversity would yield educational benefits.[70] Finding a compelling interest, the Court then

66. *Id.* (listing the admissions variables used by the University of Michigan Law School).

67. *Id.* at 316 (quoting the University of Michigan Law School's admissions policy).

68. *Id.* at 315–16 (quoting the University of Michigan Law School's admissions policy).

69. *Id.* at 326–27. For an explanation of strict scrutiny, see discussion *infra* Part II.A.

70. *Id.* at 328–33 ("The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer. The Law School's assessment that diversity will, in fact, yield educational benefits is substantiated by respondents and their *amici*. . . . In announcing the principle of student body diversity as a compelling state interest, Justice Powell invoked our cases recognizing a constitutional dimension, grounded in the First Amendment, of educational autonomy: 'The freedom of a university to make its own judgments as to education includes the selection of its student body.' . . . [T]he Law School's concept of critical mass is defined by reference to the educational benefits that diversity is designed to produce. These benefits are substantial. As the District Court emphasized, the Law School's admissions policy promotes 'cross-racial understanding,' helps to break down racial stereotypes, and 'enables [students] to better understand persons of different races.' These benefits are 'important and laudable,' because 'classroom discussion is livelier, more spirited, and simply more enlightening and interesting' when the students have 'the greatest possible variety of backgrounds.' The Law School's claim of a compelling interest is further bolstered by its *amici*, who point to the educational benefits that flow from student body diversity. In addition to the expert studies and reports entered into evidence at trial, numerous studies show that student body diversity promotes learning outcomes, and 'better prepares students for an increasingly diverse workforce and society, and better prepares them as

asked whether the scheme was narrowly tailored to that interest.[71] Because the law school's program did not implement a quota and was "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant,"[72] using race essentially as a "plus" factor in an individualized consideration of the candidate, the Court found that the plan was narrowly tailored and thus constitutionally permissible.[73]

Unfortunately for most school districts, the *Grutter* decision—which at first glance appears promising for race-conscious plans—may not actually be useful. Many schools are unlikely to have the resources to match the University of Michigan Law School's evaluation system, which requires individualized review of an applicant's whole application, including time-consuming materials such as essays and letters of recommendation.[74] Indeed, law schools invest significant resources in the evaluation of applications.[75] Yet, because *Grutter* rests on grounds that the particular plan was narrowly tailored to a goal of diversity, this individualized consideration of a holistic application using race as only one "plus" factor is likely necessary to withstand the

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professionals.' These benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.") (citations omitted).

71. *Id.* at 333.

72. *Id.* at 334 (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 317 (1978)).

73. *Id.* at 334 (upholding the law school's admissions scheme).

74. This logically follows from the fact that the average per pupil funding for public post-secondary students is about $28,976 per year, and the average per pupil funding for public K-12 students is about $13,185 per year. *See* Melanie Hanson, *U.S. Public Education Spending Statistics*, EDUC. DATA INITIATIVE (June 15, 2022), https://educationdata.org/public-education-spending-statistics [https://perma.cc/T83R-YMAJ]. Of course, the disparity between a law school's per-pupil spending and a K-12 school's per-pupil spending is likely even higher, given higher-than-average tuition costs at law schools. *See, e.g.*, Melanie Hanson, *Average Cost of Law School*, EDUC. DATA INITIATIVE (Nov. 30, 2021), https://educationdata.org/average-cost-of-law-school [https://perma.cc/4YF4-7AWZ].

75. For example, the University of Michigan Law School—which was the school at issue in *Grutter*—lists ten employees as part of its admissions office. *See Admissions Office*, UNIV. OF MICH. LAW, https://michigan.law.umich.edu/admissions-office [https://perma.cc/AH7L-F2YM]. Most school districts—if not all—are likely unable to afford ten or more full-time employees dealing only with admissions and recruitment. *See supra* note 74.

strict scrutiny triggered by the use of race. Consequently, the *Grutter* model is likely untenable for most school districts.

Further, many believe that *PICS*—a significant case that followed *Grutter*[76]—established that the arguably more-permissive *Grutter* standard does not apply to primary and secondary schools.[77] And the *Grutter* standard is likely to be gutted or overturned anyway, due to the conservative turn of the Supreme Court.[78] Though the Court upheld the standard in a subsequent

76. *See* discussion *infra* Part I.A.2.

77. Many assume that *Grutter*—among other cases involving institutions of higher education—does not apply to primary and secondary schools. *See, e.g.*, Enid Trucios-Haynes & Cedric Merlin Powell, *The Rhetoric of Colorblind Constitutionalism: Individualism, Race and Public Schools in Louisville, Kentucky*, 112 PENN ST. L. REV. 947, 948 (2008) ("[T]he Court draws a bright-line that separates secondary schools from post-secondary schools: race-based school assignments 'are not governed by *Grutter*.'"). This is likely because, in *PICS*, Chief Justice Roberts refers to *Grutter* as specific to "the context of higher education" and notes that *PICS* is "not governed by *Grutter*." Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 725 (2007) (quoting Grutter v. Bollinger, 539 U.S. 306, 327, 328, 334 (2003)). Chief Justice Roberts was likely trying to clarify that student body diversity only constitutes a "compelling interest" in the context of higher education—not in the primary and secondary context. *See id.* at 725. Justice Kennedy joined this portion of the plurality opinion. *See id.* at 782.

Yet Justice Kennedy's concurrence, which is arguably the Court's holding, seems to disagree that *Grutter* does not apply to primary and secondary schools. *See infra note 87*; *PICS*, 551 U.S. at 788 ("In the administration of public schools by the state and local authorities it is permissible to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body, one aspect of which is its racial composition.") (citing *Grutter*, 539 U.S. at 387–88) (Kennedy, J., dissenting); *id.* at 790 ("[A] more nuanced, individual evaluation of school needs and student characteristics that might include race as a component . . . would be informed by *Grutter*."). Indeed, Justice Kennedy appeared to believe that student-body diversity *was* a compelling interest in primary and secondary schools. *See id.* at 789 ("School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race.").

Another holding in the higher education context may clear up this ambiguity once and for all with as little as a footnote opining that diversity is not a "compelling interest" in primary and secondary schools. As such, surviving strict scrutiny, as Michigan Law did, may be impossible for primary and secondary schools.

78. *See supra* note 37 and accompanying text.

case,[79] the Court recently granted certiorari to a similar case which may result in the Court holding that any consideration of race in university admissions is impermissible.[80] Consequently, school districts need a formula that will not trigger strict scrutiny at all: a SES-based plan. Following *Grutter*, the next Supreme Court case to take up the issue—*PICS*—reinforces the need for a completely race-neutral scheme.

#### 2. *Parents Involved in Community Schools v. Seattle School District Number One* Indicates that Districts Should Avoid Using Racial Criteria

Four years later, the Supreme Court took up the desegregation issue in the context of primary and secondary schools and reached a different conclusion.[81] In *Parents Involved in Community Schools v. Seattle School District Number One* (*PICS*), the Court struck down two separate desegregation plans: (1) a plan in Seattle that used race as a tiebreaker when deciding assignment of ninth graders to high schools;[82] and (2) a plan in Jefferson County, Kentucky (metropolitan Louisville) that declined to

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79. *See* Fisher v. Univ. of Tex. at Austin, 570 U.S. 297, 314–15 (2013). *Fisher* was decided by a majority of only four justices (Justice Kagan recused herself because she had been involved in the case as the Solicitor General), and the Court's composition has changed significantly since then—as Justice Kennedy was replaced by Justice Kavanaugh and Justice Ginsburg was replaced by Justice Coney Barrett. *See* Amy Howe, *Court Will Hear Challenges to Affirmative Action at Harvard and University of North Carolina,* SCOTUSBLOG (Jan. 24, 2022), https://www.scotusblog.com/2022/01/court-will-hear-challenges-to-affirmative-action-at-harvard-and-university-of-north-carolina [https://perma.cc/DF9X-PG79].

80. *See* Howe, *supra* note 79; Adam Liptak & Anemona Hartocollis, *Supreme Court Will Hear Challenge to Affirmative Action at Harvard and U.N.C.,* N.Y. TIMES (Jan. 24, 2022), https://www.nytimes.com/2022/01/24/us/politics/supreme-court-affirmative-action-harvard-unc.html [https://perma.cc/4S2Z-L7XJ]; Order List, 595 U.S. 21-707 (Jan. 24, 2022); Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 807 F.3d 472, 477–78 (1st Cir. 2015); Students for Fair Admissions, Inc. v. Univ. of N.C., No. 1:14CV954, 2018 WL 4688388 (M.D.N.C. Sept. 29, 2018); Students for Fair Admissions, Inc. v. Univ. of N. Carolina, 142 S. Ct. 896, 896 (2022). Indeed, given the Court's willingness to overturn prior precedent in *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022), there is no reason to believe that the Court will hesitate to overturn *Grutter* and its progeny if the Court finds that those cases were incorrectly decided.

81. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 747–48 (2007).

82. *Id.* at 711–13.

assign a student of an overrepresented race to a school if the school was in danger of becoming racially imbalanced.[83]

After noting that the Jefferson County schools were no longer under a desegregation order and that the Seattle schools had never been under one, the Court subjected the desegregation schemes to strict scrutiny.[84] A plurality of justices opined that race-based school assignment plans could not withstand strict scrutiny.[85] In other words, a government interest in diverse schools was not enough to justify racial discrimination, particularly where the schemes were not narrowly tailored. According to the majority, "the way 'to achieve a system of determining admission to the public schools on a nonracial basis,' is to stop assigning students on a racial basis. The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[86]

However, because the outcome would have been different were it not for Justice Kennedy's concurring vote, most scholars and jurors assume that Kennedy's concurrence controls in *PICS*.[87] Justice Kennedy agreed that racial classifications are

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83. *Id.* at 715–18.

84. *Id.* at 720, 747–48.

85. *Id.*

86. *Id.* at 748 (citations omitted) (quoting Brown v. Bd. of Educ., 349 U.S. 294, 300–01 (1955) (*Brown II*)).

87. The general assumption that a concurring justice's opinion controls where there is only a plurality opinion is supported by the Court's holding in *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (Stewart, J., Powell, J. & Stevens, J.)) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'").

However, as now-Eighth Circuit Judge David Stras has pointed out, giving controlling weight to Justice Kennedy's discussion of race-conscious alternatives to the schemes at issue in the case may be inappropriate, because Kennedy's discussion of the alternatives is dictum. David Stras, *Commentary: Racially Conscious Alternatives for School Systems and the Power of the Swing Justice*, SCOTUSBLOG (July 3, 2007), https://www.scotusblog.com/2007/07/commentary-racially-conscious-alternatives-for-school-systems-and-the-power-of-the-swing-justice [https://perma.cc/86XV-JVQH].

Further, the Court in *Grutter* rejected an opportunity to take the *Marks* Rule to its logical end to find that the concurring opinion in a prior case was binding on the court. *See* Grutter v. Bollinger, 539 U.S. 306, 325 (2003). This may indicate that a future court will also decline to follow the *Marks* Rule when revisiting *PICS*.

subject to strict scrutiny but added that integration plans may stand if the government meets its burden of proving that the system is narrowly tailored to the government's interests.[88] Justice Kennedy found that Jefferson County failed to show that its use of racial classifications was narrowly tailored to its proffered interests because the record suggested the classifications had been applied in a "far-reaching, inconsistent, and ad hoc manner."[89] Regarding the Seattle schools' plan, Justice Kennedy found that the plan was not narrowly tailored because the plan failed to explain why, in a very diverse district, the government chose to use the "crude racial categories of 'white' and 'non-white'."[90]

Justice Kennedy also clarified that he disagreed with the plurality's outright ban on race-consciousness and rejected their postulate that "[t]he way to stop discriminating on the basis of race is to stop discriminating on the basis of race."[91] Kennedy opined that the Constitution does not require the government to ignore de facto segregation,[92] noting that "[t]he enduring hope is that race should not matter; the reality is that it often does."[93] Kennedy clarified that a *goal* of racial parity is acceptable and that school districts may use race-*conscious* measures so long as they are not racial *classifications*.[94] Consistent with

This Note assumes that most courts will take the view that Justice Kennedy's concurrence, including his dicta, controls—regardless of the propriety of that view. Indeed, all circuit courts that have heard a similar issue have decided the case as if Kennedy's concurrence controls. *See infra* Part II. But this Note also discusses *Grutter* in recognition that a court could find that *PICS* does not control. *See supra* Part I.A.1. In that case, *Grutter* would provide the most recent Supreme Court authority on the permissibility of race-conscious integration methods. *See supra* Part I.A.1.

88. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 783–84 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

89. *Id.* at 786.

90. *Id.*

91. *Id.* at 788.

92. *Id.*

93. *Id.* at 787.

94. *Id.* at 789 ("School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race. These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of

*Grutter*,[95] Kennedy argued that race can be one consideration among many when making admissions decisions, as long as the reliance on race is narrowly tailored and not a dipositive factor.[96]

### B. The Need for a Race-Neutral Model

*PICS* is the Court's most recent opinion addressing school desegregation plans at the primary and secondary levels, and some may still be tempted to consider race as at least one small factor among many in assigning students to schools following both *PICS* and *Grutter*. But savvy districts—knowing that an opinion from the current Court may be more likely to align with the *PICS* plurality rather than Kennedy's concurrence and knowing that the result in *Grutter* rested on narrow grounds—will create plans that satisfy the *PICS* plurality's standard. In other words, savvy school districts will pursue a facially race-neutral approach to admissions.

Indeed, schools may very soon be *required* to use a race-neutral approach if the Court holds in favor of the plaintiffs in two cases consolidated before the Court at the moment of this Note's publishing—the *Students for Fair Admissions* cases[97] (which might appropriately be nicknamed the "Students for Race-Blind Admissions" cases)—and opines that the Court's holding also applies at the primary and secondary levels.[98] And even if the Court takes a more incremental approach in 2022–23, it will be

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them would demand strict scrutiny to be found permissible.") (citing Bush v. Vera, 517 U.S. 952, 958 (1996) (plurality opinion)); *id.* ("Strict scrutiny does not apply merely because redistricting is performed with consciousness of race . . . . Electoral district lines are 'facially race neutral,' so a more searching inquiry is necessary before strict scrutiny can be found applicable in redistricting cases than in cases of 'classifications based explicitly on race.'") (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 213 (1995)).

95. Grutter v. Bollinger, 539 U.S. 306, 343 (2003).

96. *See PICS*, 551 U.S. at 783–98.

97. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 980 F.3d 157 (1st Cir. 2020), *cert. granted*, 142 S. Ct. 895 (No. 20-1199) (2022); Students for Fair Admissions, Inc. v. Univ. of N.C. (No. 21-707) (2022), https://www.supremecourt.gov/docket/docketfiles/html/public/21-707.html [https://perma.cc/BEW3-UKLZ]. See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/students-for-fair-admissions-inc-v-president-fellows-of-harvard-college [https://perma.cc/9T8U-VEYP], for ongoing updates and commentary on this pair of important cases.

98. *See supra* note 77 and accompanying text.

presented with several more challenges to race-conscious formulas by conservative groups in future terms.[99]

While considering race as one of many factors is possibly permissible for now under *Grutter* and the *PICS* concurrence, it probably will not be for long. Using an SES-based model for integration is therefore a far safer bet and can still have a positive racial effect.[100] A look back several decades to *San Antonio Independent School District v. Rodriguez*[101] and forward to several subsequent circuit court cases[102] provides an important indication that socioeconomic classifications are far less likely to violate the Fourteenth Amendment. The following Part reviews recent cases examining SES-based desegregation plans to predict which criteria may be used in a diversity formula while avoiding strict scrutiny.

## II. THE PERMISSIBILITY OF SOCIOECONOMIC DESEGREGATION MODELS

Though the Supreme Court has not reviewed any post-*PICS* desegregation schemes, several circuit courts have allowed plans that classify students based on income, qualification for public assistance, and geography to move forward.[103]

Decades ago, the Supreme Court also established that students and families of differing levels of wealth do not form an identifiable "suspect class," making it difficult for opponents of SES-based integration plans to argue that socioeconomic classifications of students are subject to strict scrutiny.[104] Though the permissibility of these classifications has allowed policies with segregative effects to stand,[105] they can also be used to uphold integrationist policies. This Part begins by reviewing the Fourteenth Amendment generally to reiterate why school districts should avoid desegregation schemes that courts would subject to strict scrutiny. Then, this Part reviews a selection of cases that provide some indication of diversity formula variables that could

99. *See* Stephanie Saul, *Conservatives Open New Front in Elite School Admission Wars*, N.Y. TIMES (Feb. 16, 2022), https://www.nytimes.com/2022/02/16/us/school-admissions-affirmative-action.html [https://perma.cc/ERV2-EC56].

100. *See generally* discussion *infra* Part III.

101. 411 U.S. 1 (1973); *see* discussion *infra* Part II.C.

102. *See* discussion *infra* Parts II.B & II.C.

103. *See* discussion *infra* Parts II.B & II.C.

104. *See* discussion *infra* Part II.C.

105. *See* discussion *infra* Part II.D.

avoid strict scrutiny and therefore be used in a constitutionally permissible diversity formula.

### A. STRICT SCRUTINY IS THE ENEMY: THE FOURTEENTH AMENDMENT, GENERALLY

The Fourteenth Amendment is the primary mechanism by which opponents challenge school diversification schemes.[106] Indeed, the Court in *Brown v. Board of Education* held that "separate but equal" educational facilities were inherently unequal, in violation of the Equal Protection Clause of the Fourteenth Amendment.[107] Since then, challenges both to segregated schools and desegregation schemes have been brought primarily under the Fourteenth Amendment.[108]

Whether a challenged government action violates the Fourteenth Amendment depends largely on what level of scrutiny a court applies to its review of the action. Strict scrutiny applies when a government action (1) affects a fundamental right,[109] (2) is motivated by a discriminatory purpose,[110] or (3) is facially discriminatory—i.e., the policy articulates a potential effect on a

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106. *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483 (1954).

107. *Id.* at 495.

108. *See, e.g.*, *supra* Part I.A.

109. Prior Supreme Court case law is clear that education is not a "fundamental right" under the federal constitution. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 37–39 (1973). Therefore, an allegation that a scheme affects a child's education does not automatically trigger strict scrutiny for impacting a fundamental right. Race-conscious schemes in education are subject to strict scrutiny because they involve race-based distinctions, *not* because they involve education.

110. The Supreme Court established a test for discriminatory purpose in *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). Under the *Arlington Heights* test, a discriminatory purpose is shown by the plaintiff if either (1) "a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action," or (2) "circumstantial or direct evidence of intent [is] available." *Id.* at 266. Circumstantial evidence of intent may include (a) the historical background of the decision, especially when it involves a series of discriminatory official government actions; (b) the specific sequences of events leading up to the decision; (c) departures from ordinary government procedures; and (d) the legislative or administrative history of the action, particularly when statements probative of discriminatory intent were made by legislators or administrators. *Id.* at 266–68.

"suspect classification" such as race,[111] for example, but not wealth.[112] Otherwise, rational basis review applies.[113]

Strict scrutiny often results in a court striking down a government action, because strict scrutiny requires that the government show both that it had a "compelling interest" and that the government's actions were "narrowly tailored" to that interest.[114] In other words, to withstand strict scrutiny a government must show that it had a rational, evidence-based goal and that it took significant steps to make its actions toward that goal as unintrusive as possible—a very difficult showing to make.[115] In the context of school desegregation plans, avoiding strict scrutiny is likely a necessity, because a court is likely to find either that the scheme could have been more narrowly tailored to the government's interest *or* that the government's interest is not compelling.[116]

Under the other relevant form of scrutiny—rational basis review—a government action is more likely to be upheld. Under rational basis review, the government is only required to show that its action was rationally related to some legitimate government purpose—a far easier showing to make.[117]

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111. *See, e.g.*, West's ALR Digest Constitutional Law k3051, ALRDG 92K3051 (Sept. 2022); *see also* Hunt v. Cromartie, 526 U.S. 541 (1999) (holding intentional discrimination invoking strict scrutiny is shown when a law or policy explicitly classifies citizens by race).

112. Part II.C discusses *San Antonio Independent School District v. Rodriguez*, which held that a class based on wealth/socioeconomic status is *not* a "suspect class." 411 U.S. 1, 28–29 (1973).

113. *See, e.g.*, West's ALR Digest Constitutional Law k3051, ALRDG 92K3051 (Sept. 2022).

114. *See, e.g.*, West's ALR Digest Constitutional Law k3062, ALRDG 92K3062 (Sept. 2022).

115. *See, e.g.*, Reed v. Town of Gilbert, Ariz., 576 U.S. 155, 171 (2015) ("[S]trict scrutiny . . . requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.") (citations and internal quotations omitted); *see also* Williams-Yulee v. Fla. Bar, 575 U.S. 433, 444 (2015) (emphasizing that it is rare for a restriction on speech to be narrowly tailored and serve a compelling government interest); *Reed*, 576 U.S. at 176 (Breyer, J. concurring) (explaining that strict scrutiny leads to almost certain legal condemnation).

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

117. *See, e.g.*, *id.*; *see also* City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (holding that government policy must be upheld if it is rationally related to a legitimate government interest); Heller v. Doe *ex rel.* Doe, 509 U.S. 312, 319–20 (1993) (holding that rational basis review affords the government's

For this reason, crafters of school desegregation plans should attempt to create a plan that will avoid strict scrutiny altogether, opting for a plan that will only be subject to rational basis review. Indeed, this is an important goal of the diversity formula[118]—to avoid strict scrutiny altogether rather than to test the bounds of *Grutter* and *PICS*.[119]

To achieve this goal, drafters of school integration plans should not consider race as a factor at all, opting instead for socioeconomic factors. Drafters should also avoid making any commentary or taking any action that could be viewed as promoting discrimination toward any group or reflecting any sort of animus toward that group. They should ensure that they follow all routine procedural steps, avoiding passage or implementation on an emergency basis and implementing plans as consistently as possible.[120]

The rest of Part II outlines cases that lead to this recommendation, reviewing two federal cases upholding SES-based schemes,[121] a Supreme Court case holding that education is not a fundamental right triggering strict scrutiny and that classifications based on wealth/income do not trigger strict scrutiny,[122] and several cases holding that geographic discrimination does not trigger strict scrutiny.[123]

### B. Recent Circuit Cases Indicate that SES-Based Models are Constitutionally Permissible

Several recent cases have provided promising outcomes for educators and policymakers hoping to undo the growing trend of resegregation through facially race-neutral criteria. The cases reveal that such plans are unlikely to violate the Equal Protection Clause of the Fourteenth Amendment. They are likely to be reviewed for a rational basis—a standard of review that is unlikely to result in a court overturning the government's action—as long as the plaintiffs cannot show that a discriminatory

policy "a strong presumption of validity" and government need not "actually articulate at any time the purpose or rationale" behind the distinctions set out in its policy) (citations omitted).

118. *See* discussion *infra* Part III.

119. *See supra* Part I.A.

120. *See supra* note 110 and accompanying text.

121. *See* discussion *infra* Part II.B.

122. *See* discussion *infra* Part II.D.

123. *See* discussion *infra* Part II.E.

purpose motivated the plan.[124] They also provide useful examples of different race-neutral criteria that school districts can use to identify and admit/distribute disadvantaged students equitably.

1. *Boston Parent Coalition for Academic Excellence Corp. v. School Committee of Boston*

In late April 2021, the First Circuit rejected an Equal Protection Clause challenge to Boston Public Schools' plan for admitting students to Boston's elite exam schools brought by parents of white and Asian students.[125] The school district designed a two-phase system for selecting students.[126] The first phase fills twenty percent of each school's seats by ranking students by grade point average (GPA) in English and Math,[127] and the second phase fills the remaining seats by classifying students by their zip code of residence in pursuit of a class of students representative of all zip codes—starting with the zip code with the lowest median income.[128] The court held that the plan was

124. *See supra* note 110 and accompanying text.

125. Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. of Bos., 996 F.3d 37, 41 (1st Cir. 2021).

126. *Id.*

127. *Id.* at 42 ("The Plan's admissions process plays out in two phases. In phase one, all eligible students are ranked city-wide by grade point average accumulated in English Language Arts and Math courses during the fall and winter of the 2019–2020 school year. The highest-ranking students are assigned to their first-choice schools until twenty percent of each school's seats are full. If twenty percent of the seats at a high-ranking student's first-choice school are already full, that student's application is considered during the process's second phase.").

128. *Id.* ("Phase two begins with the allotment of the remaining eighty percent of seats among the various zip codes based on the proportion of Boston schoolchildren residing in each zip code. Then, the remaining eligible students are ranked by grade point average within their zip code rather than city-wide as in phase one. Phase two assigns each zip code's allotted seats over the course of ten rounds. Each round fills ten percent of the seats remaining after phase one. In the first round, starting with the zip code that has the lowest median household income with children under age eighteen (hereinafter "family income"), the highest-ranking applicants in that zip code receive seats at their first-choice schools until ten percent of the zip code's allotted seats are filled. The first round continues by filling ten percent of the seats allotted to the zip code with the next-lowest family income and the round ends with the assignment of ten percent of the seats allotted to the zip code with the highest family income. In each round, if an applicant's first-choice school is full, that applicant gets an open seat at his or her next-choice school, if one is available. After this process cycles through nine more rounds, the Exam Schools are fully enrolled.").

subject only to rational basis review because the plan achieved facial neutrality by considering only GPA, zip codes rank-ordered by family income, and school preference.[129]

The court also engaged in an analysis of whether the plan was motivated by a discriminatory purpose which, if found, would subject the plan to strict scrutiny under *Arlington Heights*.[130] The plaintiffs argued that the plan would have an adverse impact on white and Asian students because it would reduce the proportion of white and Asian students attending the schools.[131] But the court rejected this argument both because white and Asian students would still be overrepresented under the new plan and because the plaintiffs could not show that the numerical decrease in overrepresentation would be statistically significant.[132] The plaintiffs also argued that the plan has a discriminatory purpose because the school district articulated goals of socioeconomic, geographic, and racial diversity to guide the plan's development.[133] The court rejected this argument, reiterating a prior holding that "the mere invocation of racial diversity as a goal is insufficient to subject [a facially neutral school selection plan] to strict scrutiny."[134] The court also explained that further evidence of racial goals by the crafters of the plan did not make the plan discriminatory because, under its interpretation of *PICS*,[135] considering the *effect* of a race-neutral plan on a school's racial makeup (i.e., crafting a *race-conscious* plan) does not trigger strict scrutiny—whereas crafting a race-*based* plan would.

Because the plan was subject only to rational basis review and the plaintiffs did not challenge that the plan had a rational basis for adoption,[136] the court denied injunctive relief.[137] *Boston Parent Coalition* indicates that student distribution and admission schemes based on geography and SES are likely to be found

129. *Id.* at 45 (citing Anderson *ex rel.* Dowd v. City of Bos., 375 F.3d 71, 90 (1st Cir. 2004)).

130. *See supra* note 110 and accompanying text.

131. *Bos. Parent Coal.*, 996 F.3d at 45–46.

132. *Id.*

133. *Id.* at 46.

134. *Id.* (quoting Anderson *ex rel.* Dowd, 375 F.3d at 87).

135. *See generally supra* Part I.A.2.

136. *Bos. Parent Coal.*, 996 F.3d at 45.

137. *Id.* at 51.

permissible in the First Circuit—and likely many other circuits.[138]

### 2. *Christa McAuliffe Intermediate School Parent Teacher Organization, Inc. v. de Blasio*

In a similar case, Asian American parents of students in New York City public schools brought suit alleging discrimination in violation of the Fourteenth Amendment when the public schools sought to expand its "Discovery program"—a program used to admit disadvantaged students to, and increase the diversity of, New York City's elite "specialized schools."[139] The vast majority of students admitted to the specialized schools receive admission based only on scores on a single standardized test; students are admitted to the schools starting with the highest test score and then descending.[140] However, in an effort to combat the highly unequal racial outcomes of the assignment system,[141] the school district planned to work its way up to eventually reserving twenty percent of seats for students who are "disadvantaged": defined as students who attended a school with an Economic Need Index of sixty percent or higher and either (1) qualify for free or reduced price lunch, (2) receive public assistance, (3) are in foster care, in the care of the state, or homeless, or (4) have been learning English within the past two years and enrolled in a Department of Education school for the first time within the last four years.[142]

The district court rejected the plaintiffs' contention that statements by New York City Mayor Bill de Blasio and Chancellor Richard Carranza that the program was intended to improve racial diversity constituted discriminatory intent, noting that the policy was facially neutral and sought only to remedy the underrepresentation of other racial groups—not to hurt Asian Americans.[143] Thus, the court subjected the Discovery program to rational basis review and rejected the plaintiffs' request for a

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138. *See* discussion *infra* Parts II.B.2 & II.D.

139. Christa McAuliffe Intermediate Sch. PTO, Inc. v. de Blasio, 364 F. Supp. 3d 253, 261, 268–70 (S.D.N.Y. 2019), *aff'd*, 788 F. App'x 85 (2d Cir. 2019).

140. *Id.* at 264–65.

141. *See id.* at 266–67.

142. *Id.* at 267–68.

143. *Id.* at 277–79 (citing Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 789 (2007) (Kennedy, J., concurring in part and concurring in the judgment)) ("In order for such facially neutral mechanisms to demand strict scrutiny, they must embody a discriminatory intent.").

preliminary injunction, holding that the challenge was unlikely to succeed on the merits.[144] In dicta, the court further opined that, even if the program is subject to strict scrutiny—which it is not—it serves a compelling interest and is narrowly tailored.[145] On appeal, the Second Circuit affirmed the opinion on grounds that the plaintiffs lacked standing.[146]

*Christa McAuliffe*[147] provides another example of a case where a court declined to subject a plan based primarily on SES factors—and no factors explicitly involving race—to strict scrutiny. Though the Discovery program's factors may not be the best criteria to use—as this Note will argue that neighborhood criteria rather than individual measures are more effective[148]—each of the factors are highly-correlated with race yet are non-racial, socioeconomic factors. Socioeconomic factors are unlikely to be subject to strict scrutiny, and socioeconomic integration schemes are therefore likely to be upheld by federal courts under rational basis review.

### C. *COALITION FOR TJ V. FAIRFAX COUNTY SCHOOL BOARD* MAY SIGNAL THE SUPREME COURT'S WILLINGNESS TO UPHOLD RACE-NEUTRAL, SES-BASED SCHEMES

In April 2022, the Supreme Court voted to deny an application to vacate a stay pending appeal, signaling the Court's willingness to uphold race-neutral, SES-based schemes.[149] Only

144. *Id.* at 280.

145. *Id.* at 280–84.

146. Christa McAuliffe Intermediate Sch. PTO, Inc. v. de Blasio, 788 F. App'x 85 (2d Cir. 2019); *see also* Christa McAuliffe Intermediate Sch. PTO, Inc. v. De Blasio, No. 18 CIV. 11657 (ER), 2022 WL 4095906 (S.D.N.Y. Sept. 7, 2022) (subsequently dismissing the case on summary judgment).

147. *Id.*

148. *See* discussion *infra* Part III. Arguably, though, the Discovery program's consideration of a student's primary school demographics serves as a proxy for their neighborhood SES—at least where the student attended a neighborhood school. So, the Discovery program is a decent alternative to what this Note proposes in Part III if a district is only willing to apply its equitable distribution scheme to secondary schools.

149. Order 21A590, Coal. for TJ v. Fairfax Cnty. Sch. Bd., 142 S. Ct. 2672 (Apr. 25, 2022) (mem.), https://www.supremecourt.gov/orders/courtorders/042522zr_3fb4.pdf [https://perma.cc/C4HK-R7NY]; *see also* Robert Barnes & Hannah Natanson, *Supreme Court Lets Thomas Jefferson High School Admissions Policy Stand*, WASH. POST (Apr. 25, 2022), https://www.washingtonpost.com/politics/2022/04/25/supreme-court-high-school-admissions-race [https://perma.cc/WMK4-3F8J].

Justices Thomas, Alito, and Gorsuch stated that they would have granted the application to vacate the stay.[150]

The Coalition for TJ, which includes a group of Asian American parents, sued the Fairfax County School Board to block an admissions policy using race-neutral factors to increase Black and Hispanic representation at one of its most-desired schools.[151] After the district court granted summary judgment for the Coalition and enjoined the use of the admissions policy, finding both disparate impact and discriminatory intent, the Fourth Circuit granted the School Board's motion for a stay pending appeal.[152] In a concurring opinion, Judge Heytens argued that the Board was entitled to a stay because it "'has made a strong showing that [it] is likely to succeed on the merits,' that it 'will be irreparably injured absent a stay,' that 'issuance of the stay will [not] substantially injure the other parties interested in the proceeding,' and that a stay is in 'the public interest.'"[153] Judge Heytens emphasized that the policy is facially race-neutral.[154] Students are "evaluated holistically on their GPA, answers to essay questions, and experience factors: whether the applicant qualifies for free or reduced-price meals, is an English language learner, has an Individualized Education Plan, or attends a historically underrepresented middle school. Evaluators are not told the race, ethnicity, gender, or even names of applicants."[155]

Though the Justices who declined to vacate the stay may not have entirely agreed with Judge Heytens's reasoning, they probably at least agreed that the Board was likely to succeed on the merits—otherwise, they would have vacated the stay. Thus, this order may signal that a majority of the Court—including Chief Justice Roberts, Justice Kavanaugh, and Justice Barrett—likely finds SES-based schemes that cause racial integration constitutionally permissible. At the very least, a majority of the Court appears relatively unconcerned about the use of a variety of SES-related factors.

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150. *Id.*

151. Coal. for TJ v. Fairfax Cnty. Sch. Bd., No. 1:21CV296, 2022 WL 579809, at *1–4 (E.D. Va. Feb. 25, 2022).

152. Coal. for TJ v. Fairfax Cnty. Sch. Bd., No. 22-1280, 2022 WL 986994, at *1–2 (4th Cir. Mar. 31, 2022).

153. *Id.* at *2 (Heytens, J., concurring) (quoting Nken v. Holder, 556 U.S. 418, 434 (2009)).

154. *Id.* at *1 (Heytens, J., concurring).

155. *Id.* at *2.

### D. UNDER *SAN ANTONIO INDEPENDENT SCHOOL DISTRICT V. RODRIGUEZ*, SES IS NOT A SUSPECT CLASSIFICATION

Long-standing precedent also indicates that SES-based integration schemes should be permissible. SES-based integration schemes should be upheld because wealthy people do not form an identifiable "suspect class" worthy of special protection under the Fourteenth Amendment; and education is not a "fundamental right" under the Constitution—so it does not trigger strict scrutiny without the presence of a suspect classification.[156]

Though focused on the topic of school funding rather than student distribution, *San Antonio Independent School District v. Rodriguez* provides two significant holdings that—somewhat ironically—can be useful for crafting a desegregation scheme based on socioeconomics.[157] In *Rodriguez*, the Court heard a challenge to Texas's system of school funding brought by a group of Mexican American parents on behalf of their children.[158] The parents alleged that students in districts with a low property tax base were disadvantaged by the state's funding system because of its significant reliance on local property taxes to fund schools.[159] The Court first asked whether low-income students formed an identifiable suspect class and therefore triggered strict scrutiny. The Court decided that there could not be a clearly defined line between a class of students receiving and a class of students not receiving a well-funded, quality education.[160] Therefore, the low-income students in *Rodriguez* did not form a suspect class, and strict scrutiny was not triggered.[161]

The Court also considered whether education was a fundamental right under the Constitution—which would trigger strict scrutiny regardless of whether a suspect class existed—and held that education—though highly important—is not a fundamental right under the Constitution.[162] The Court thus reviewed the funding system for a rational basis and upheld it.[163]

Though *Rodriguez* undoubtedly maintained the status quo instead of requiring more equitable school funding, the case

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156. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).
157. *See id.*
158. *Id.* at 4–5.
159. *Id.* at 6–17.
160. *Id.* at 19–29.
161. *Id.*
162. *Id.* at 29–39.
163. *Id.* at 40–41, 54–55.

provides drafters of integration plans with a strong argument that discrimination against wealthy students does not trigger strict scrutiny as long as they do not form a definable suspect class—i.e., so long as the line between those receiving the benefit of a better education and those not receiving the benefit cannot be clearly drawn for any individual student.[164] In other words, as long as there is not a defined cutoff line where one level of wealth will allow a student to attend a school and another will not, wealth discrimination is likely to be reviewed only for a rational basis.

Considering both the *PICS* plurality and *Rodriguez*'s denial of suspect class status for socioeconomic groups, many scholars have proposed racially-neutral plans to desegregate schools or prevent resegregation based largely or entirely on socioeconomics.[165] Socioeconomic integration has been discussed extensively over the last fourteen years as a viable option for avoiding strict scrutiny altogether by avoiding racial classifications[166]—which would create more risk of the plan being overturned.[167]

### E. EARLIER CIRCUIT COURT REDISTRICTING CASES UNIFORMLY AGREE THAT MODELS EMPLOYING GEOGRAPHIC AND SES DISTINCTIONS ARE NOT SUBJECT TO STRICT SCRUTINY

Considering the SES of a student's neighborhood rather than directly considering the individual student's SES may insulate an integration plan from strict scrutiny even further, as classifying students by geography also appears to avoid strict scrutiny.

*Boston Parent Coalition* and *Christa McAuliffe* both follow a few important decisions in other circuits holding that geographic distinctions are facially race-neutral. Several circuits have

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164. *See id.*

165. *E.g.*, Richard D. Kahlenberg, *Socioeconomic School Integration*, 85 N.C. L. REV. 1545 (2007); Genevieve Campbell, *Is Classism the New Racism? Avoiding Strict Scrutiny's Fatal in Fact Consequences by Diversifying Student Bodies on the Basis of Socioeconomic Status,* 34 N. KY. L. REV. 679 (2007); Eboni S. Nelson, *The Availability and Viability of Socioeconomic Integration Post-*Parents Involved, 59 S.C. L. REV. 841 (2008); L. Darnell Weeden, *Income Integration as a Race-Neutral Pursuit of Equality and Diversity in Education After the* Parents Involved in Community Schools *Decision*, 21 U. FLA. J.L. & PUB. POL'Y 365 (2010).

166. *See supra* note 153 and accompanying text.

167. Some scholars, however, have predicted that the Court will subject even facially race-neutral plans to strict scrutiny. *See, e.g.,* Stephen M. Rich, *Inferred Classifications*, 99 VA. L. REV. 1525, 1592 (2013).

upheld race-neutral schemes that use student residential geography as the criterion for redistricting. For example, after Black families sued a school district for a redistricting plan that would equalize the racial demographics of two high schools by zoning some neighborhoods to a different high school, the Third Circuit held that the plan was race-neutral and did not discriminate on the basis of race.[168]

The Fifth Circuit, under rational basis review, upheld a redistricting plan based on students' home addresses that maintained pre-existing racial segregation because it was rationally related to one legitimate purpose: alleviating overcrowding in one zone.[169] The Sixth Circuit upheld a resegregative plan in

168. Doe *ex rel.* Doe v. Lower Merion Sch. Dist., 665 F.3d 524, 529–38 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 2773 (2012). Out of several plans that the school board explored, the chosen plan equalized schools in part by rezoning one neighborhood with a high Black population from the higher-enrollment high school to the lower-enrollment high school located farther away with a reputation of being populated by wealthy white kids. *See id.* The plaintiffs alleged discrimination in violation of the Fourteenth Amendment because the plan mandated that their children attend a different school because they are minorities. *Id.* at 542.

After a bench trial, the district court found that race was one of several factors considered by the board and their consideration of race went beyond merely collecting general data; the neighborhood rezoned to the wealthy white school was targeted for redistricting in part because of its high concentration of Black students. *Id.* at 539. The court, however, also found that the board members were credible when they testified that race was not the basis for their votes on the chosen plan. *Id.* at 540.

The Third Circuit held that the district's plan was facially race-neutral and subject only to rational basis review because it assigned students based on the geographic areas where they lived rather than on their race. *Id.* at 545–46. The court distinguished the case from *Grutter* and *PICS* because in this case race was "not a factor merely because the decisionmakers were aware of or considered race when adopting the policy." *Id.* at 548. The court also rejected arguments that the plan had a discriminatory purpose, as the board members had several other motivations for adopting the plan such as minimizing travel time for students, requiring fewer buses, and developing a logical and contiguous feeder pattern from the elementary schools to the middle and high schools. *Id.* at 552–56. Ultimately, the court upheld the plan under rational basis review because it was rationally related to those legitimate government interests. *Id.* at 556–57.

169. In *Lewis v. Ascension Parish School Board*, the Fifth Circuit heard a challenge to a redistricting plan from a parent of two Black children. 806 F.3d 344, 350–51 (5th Cir. 2015), *cert. denied*, 578 U.S. 922 (2016). Unlike in *Lower Merion*, however, the board chose a plan that would not increase diversity in one of the schools; instead, the Ascension Parish School Board, on a split vote and knowing the demographic impacts of each plan, chose a plan that would

Nashville intended to fill underutilized schools in low-income neighborhoods by ending a decades-old system in which low-income Black students attended a higher-income, diverse high school outside their neighborhood—distinguishing the case from *PICS* because the students had not been classified based on race—only geography.[170] Though the task force that drafted the plan had made use of extensive racial and ethnic data in its development of the plan, the court held that "[r]acial classification requires more than the *consideration* of racial data."[171]

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maintain an unequal balance of racial minorities and "at-risk" students at one school over a plan that would have more equitably distributed students experiencing poverty and students of color. *Id.* at 347–50. The parent alleged that the redistricting was designed to maintain a feeder system that funneled students of color into one high school with significantly worse outcomes than the other high schools—denying the students who would have switched to a different school under the other proposal the right to an equal education. *Id.* at 347–51.

On appeal, the Fifth Circuit held that *PICS* did not apply because a redistricting plan that "relies exclusively on a student's home address is necessarily race-neutral . . . ." *Id.* at 356, 354–58. The court also rejected the Lewises' claim that the plan had a discriminatory purpose and effect because they failed to present sufficient evidence across multiple years of an adverse impact on test scores and other similar measures. *Id.* at 358–62. Consequently, the court reviewed the plan for a rational basis and upheld the plan because it had at least one legitimate purpose: to alleviate overcrowding in one zone. *Id.* at 363.

170. Spurlock v. Fox, 716 F.3d 383, 394 (6th Cir. 2013). The plan ended the practice of bussing students from a noncontiguous zone of predominantly Black and low-income students (the Pearl-Cohn Cluster) to a comparatively well-off and racially diverse cluster of schools (the Hillwood Cluster). *Id.* at 386–87. The new plan gave students from the low-income, predominantly Black neighborhood of North Nashville a choice between the school in their neighborhood and a different school farther away that was not as well-off as the Hillwood Cluster school they previously attended. *Id.* at 388–89. Though the plan did have its intended effect of reducing the number of underutilized schools, it did not reduce the number of overutilized schools. *Id.* at 390–91.

The plan's drafting committee had five Black members and five white members who considered diversity explicitly as a factor and originally intended to send students from more affluent neighborhoods to Pearl-Cohn Cluster and increase investment in the Pearl-Cohn Cluster. *Id.* at 387–90. But the plan resulted in the same concentration of Black students in all schools except the Hillwood Cluster, where Black student enrollment declined from thirty-seven and a half percent to twenty-five and a half percent. *Id.* at 391–92.

Subjecting the plan to rational basis review and finding that the board's interest in efficient allocation of educational resources was rational—while clarifying that the court did not endorse the "ill-advised" policy as an overall success—the court held that the policy did not violate the Fourteenth Amendment. *Id.* at 403 (quoting Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 281 (1979)).

171. *Id.* at 394 (emphasis in original).

Though these decisions are all in the context of school redistricting plans rather than admissions or assignment schemes, their rationale applies well to various policies. Due to high rates of residential segregation,[172] a student's geography may be highly predictive of their race.[173] Yet, under existing precedent, using geography to give some students preference or to choose which school they will attend does not violate the Fourteenth Amendment.

Between the various permissible race-neutral criteria used by the school districts for admissions in *Boston Parent Coalition* and *Christa McAuliffe*,[174] clear precedent from *Rodriguez* that classifications by family income do not create a suspect class and that education is not a fundamental right,[175] and three uncontested circuit court cases holding that geographic classifications do not give rise to strict scrutiny,[176] the permissibility of several race-neutral criteria for integration schemes is well established. Students likely may be classified and given preferential assignments based on their level of family income, qualification for public assistance, family circumstances, neighborhood of residence, and more. Knowing these criteria are likely constitutionally permissible, the remaining question is which criteria are most effective for integrating schools.

## III. THE DIVERSITY FORMULA

Having established that several SES-based criteria are likely constitutional, this Note now turns to which of these criteria are effective at increasing integration. One of the greatest impediments to integration attempts is the lack of guidance about methods that are both legally permissible and have a genuine integratory effect. Though no one-size-fits-all approach is

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172. *See, e.g.*, Tracy Hadden Loh, Christopher Coes & Becca Buthe, *The Great Real Estate Reset: Separate and Unequal: Persistent Residential Segregation Is Sustaining Racial and Economic Injustice in the U.S.*, BROOKINGS (Dec. 16, 2020), https://www.brookings.edu/essay/trend-1-separate-and-unequal-neighborhoods-are-sustaining-racial-and-economic-injustice-in-the-us [https://perma.cc/ZV2J-J8KZ]; Robert J. Sampson & Brian L. Levy, *Beyond Residential Segregation: Mobility-Based Connectedness and Rates of Violence in Large Cities*, 12 RACE & SOC. PROBS. 77, 77–78 (2020), https://par.nsf.gov/servlets/purl/10186800 [https://perma.cc/72XF-JXVT] (reviewing literature on residential segregation).

173. *See* discussion *infra* Part III.B.

174. *See* discussion *supra* Part II.B.

175. *See* discussion *supra* Part II.D.

176. *See* discussion *supra* Part II.E.; *supra* notes 168–71

possible—as any policy should be tailored to the particular demographics and needs of its locality[177]—this Part discusses the best criteria for a school district to use to integrate its schools.

School districts should apply the following methods to assign *all* their students to schools through a system of choice—not just those students with the social capital to request to move to better schools.[178] Further, though some districts consider the SES of individual families or rely on a student's eligibility for free- or reduced-price lunch, this Part cautions against the use of this measure. Instead, this Part recommends using neighborhood SES demographics to achieve the most racially integrative results[179] and maintaining relatively strict socioeconomic balance requirements in schools.[180] Part IV will discuss the application of this formula to a system composed entirely of magnet schools.

### A. Socioeconomic Integration Is a Worthwhile Goal in Its Own Right

As the previous Part shows, socioeconomic integration plans are more likely to withstand judicial scrutiny, but—regardless of this practical legal consideration—socioeconomic integration is also desirable in its own right. A growing number of studies have demonstrated that a school's SES affects a student's achievement irrespective of the student's SES,[181] and socioeconomic school integration may be even better at raising student outcomes than racial integration.[182]

Socioeconomic integration may also be more politically palatable. Voters on both the left and the right appear to support

177. *See, e.g.*, Sarah Lauren Diem, Design Matters: The Relationship Between Policy Design, Context, and Implementation in Integration Plans Based on Voluntary Choice and Socioeconomic Status, at viii (May 2010) (Ph.D. dissertation, University of Texas at Austin) (ProQuest).

178. According to Reardon & Rhodes, one study suggests that "strong" socioeconomic status-based plans (such as socioeconomic balancing in each school or using socioeconomics-based attendance zones) may be as effective as race-based plans, whereas "weak" plans (such as plans merely giving priority to low-income students during a school transfer request) may exacerbate segregation. Reardon & Rhodes, *supra* note 13, at 196–204. Thus, this Note recommends a plan that requires balancing and choice for *all* families, not just those with the social capital to seek a school transfer.

179. *See* discussion *infra* Part III.B.

180. *See* discussion *infra* Part III.C.

181. *See* Kahlenberg, *supra* note 18, at 170 n.14.

182. *See id.* at 170 n.15.

efforts to level the playing field between the rich and the poor, whereas opposition to racial affirmative action and related policies appears more prominent[183] despite the fact that polls find most parents believe racially integrated schools are better for their children.[184] While socioeconomic integration schemes have also proved politically fragile in some instances,[185] socioeconomic integration will likely receive more support in most communities under the current political climate. Pairing socioeconomic schemes with an element of choice—e.g., through systems such as that in Cambridge, Massachusetts in which all schools are designated magnet schools of choice[186]—likely makes socioeconomic schemes even more politically feasible.[187] Further, socioeconomic integration also withstands criticism from progressive opponents of racial integration who argue that racial integration is premised on the prejudiced belief that students of color are better off learning next to white students and that student of color are actually better off in culturally affirming environments.[188]

Though SES-based integration models with some race-based criteria—e.g., as a fallback measure—may be more effective at desegregating schools than purely socioeconomic models,[189] this Note encourages the use of purely socioeconomic models for three important reasons: purely socioeconomic models

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183. *See, e.g.*, Nikki Graf, *Most Americans Say Colleges Should Not Consider Race or Ethnicity in Admissions*, PEW RSCH. CTR. (Feb. 25, 2019), https://www.pewresearch.org/fact-tank/2019/02/25/most-americans-say-colleges-should-not-consider-race-or-ethnicity-in-admissions [https://perma.cc/F3L9-SJH7].

184. Erica Frankenberg, *Integration After* Parents Involved*: What Does Research Suggest About Available Options?*, *in* INTEGRATING SCHOOLS IN A CHANGING SOCIETY: NEW POLICIES AND LEGAL OPTIONS FOR A MULTIRACIAL GENERATION 53, 56 n.12 (Erica Frankenberg & Elizabeth DeBray eds., 2011).

185. *See, e.g.*, Boger, *supra* note 15, at 21–22 (documenting the demise of the Wake County, North Carolina socioeconomic integration plan after nearly a decade because changing political tides unseated incumbent school board members).

186. *See* Kahlenberg, *supra* note 18, at 174.

187. *See id.* at 178.

188. *See supra* note 28 and accompanying text. As far as the Author is aware, no one has taken issue with the idea that students experiencing poverty are better off learning in mixed-income schools. Indeed, taking issue with this idea would require making an argument that low-income students are better off in schools with concentrated poverty. The argument in favor of racially homogeneous but culturally affirming schools does not translate to socioeconomic status.

189. *See, e.g.*, Reardon & Rhodes, *supra* note 13, at 196–204.

(1) are most likely to withstand judicial scrutiny,[190] (2) are more likely to receive political support, and (3) may be just as effective at raising student outcomes.[191] The rest of this Part outlines the criteria that a school district should consider in assigning students based on SES.

### B. Grouping Students by Neighborhood Rather than By Income Is Most Effective

Unfortunately, measures of individual income are likely to be ineffective at achieving SES and racial integration because individual income data is difficult to collect and is likely to come from dichotomous measures.[192] Instead, districts should group students based on the SES demographics of their neighborhood of residence.

#### 1. Limitations of Income as the Sole Measure

Having established that socioeconomic integration is permissible and desirable, one's first instinct is likely to look at household income as the primary measure. Of course, income is a simple numerical measure highly correlated with—if not determinative of[193]—SES. But measures of individual income are not helpful for achieving racial integration.

Scholars Reardon, Yun, and Kurlaender show that even the most stringent forms of income-based integration are unlikely to produce racial integration.[194] Though race and income are highly

190. *See* discussion *supra* Part II.

191. *See, e.g.*, Reardon & Rhodes, *supra* note 13, at 196–204.

192. *See* discussion *infra* Part III.B.1.

193. Though many people believe that socioeconomic status and income are the same thing, socioeconomic status is far broader. Socioeconomic status also considers wealth, education, and social capital. *See, e.g.*, *Socioeconomic Status*, AM. PSYCH. ASS'N, https://www.apa.org/topics/socioeconomic-status [https://perma.cc/6H37-GADU] ("Socioeconomic status is the social standing or class of an individual or group. It is often measured as a combination of education, income and occupation. Examinations of socioeconomic status often reveal inequities in access to resources, plus issues related to privilege, power and control."). In fact, it is possible for someone to have a low income but have incredibly high SES. For example, there are many people in the United States who are unemployed or underemployed but live in a house gifted to them by wealthy parents, have an advanced degree, and have social connections with elites.

194. Sean F. Reardon, John T. Yun & Michal Kurlaender, *Implications of Income-Based School Assignment Policies for Racial School Segregation*, 28 EDUC. EVALUATION & POL'Y ANALYSIS 49, 67 (2006).

correlated,[195] residential segregation by race is far higher throughout the United States than residential segregation by income.[196] Thus, a race-neutral income-desegregation policy that considers the distance between a student and the student's chosen school as a factor could achieve income balance across schools without substantially reducing racial segregation.[197] Such a policy would simply redistribute students of the same race but varying income levels among racially homogeneous schools.

Even with perfect information—i.e., school districts having access to the full financial records of all families—it is possible for Black and white students to attend schools with only an average of forty-four percent as many members of the other group as in the overall district enrollment—a level of segregation that is higher than current levels in most urban school districts.[198] Additionally, access to full information is unlikely. School districts are unlikely to have the political power or the resources to access the full financial records or even just the tax returns of each student's family.

Thus, using income as a measure tends to require reliance on income data that is already available, and such data tends to be imprecise. For example, an oft-used measure of family income is a student's eligibility for free- or reduced-price lunch—a dichotomous measure in which a student either is or is not eligible. Dichotomous measures reduce the racially integrative effect of income-based integration.[199] According to Reardon, Yun, and Kurlaender's analysis, even at an optimal dichotomization point (a cutoff point that produces the lowest possible maximum level of segregation), a dichotomous income-integration policy guarantees twenty-five percent less integration than a policy based on perfect income information.[200] Free- and reduced-price lunch is

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195. For example, a 2019 Census Bureau report found the median income among white households was $76,057 per year, whereas the median income among Black households was $46,073 per year. *See* Valerie Wilson, *Racial Disparities in Income and Poverty Remain Largely Unchanged Amid Strong Income Growth in 2019*, ECON. POL'Y INST.: WORKING ECON. BLOG fig.A (Sept. 16, 2020), https://www.epi.org/blog/racial-disparities-in-income-and-poverty-remain-largely-unchanged-amid-strong-income-growth-in-2019 [https://perma.cc/69B3-DK7X].

196. *See* Reardon et al., *supra* note 194, at 64.

197. *Id.*

198. *Id.* at 62.

199. *Id.*

200. *Id.*

already a weak measure of SES,[201] as the thresholds for eligibility are based on consumption patterns of the 1960s.[202] Many students are also misclassified under the measure,[203] and participation rates in free- and reduced-price lunch programs tend to decline as students get older.[204] Finally, as many low-income schools become eligible for school-wide free lunch, many schools may not even have access to the measure.

Due to these extreme limitations on purely income-based integration methods, this Note recommends grouping students based on neighborhoods or census tracts rather than income.

2. Classifying Students by Neighborhood SES

Assigning differing levels of preference to students based on the SES of the neighborhood in which they reside accounts for the demographic reality that residential segregation by race is generally significantly higher than residential segregation by income.[205] Using neighborhood SES also has several advantages over using individual SES: data on neighborhood demographics is usually more sophisticated than the data a district could obtain from individual families on its own;[206] considering Census data in addition to individual family data may result in greater racial integration than individual family data alone;[207] and districts may even be able to consider racial demographics of neighborhoods without a court finding that the policy relied on racial classification[208]—unlike if the district considered the race of an individual family as a factor.

Information about average incomes, home ownership, home values, and more is readily available through census data and social surveys like the American Community Survey.[209]

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201. Reardon & Rhodes, *supra* note 13, at 191.

202. Michael Harwell & Brandon LeBeau, *Student Eligibility for a Free Lunch as an SES Measure in Education Research*, 39 EDUC. RSCH. 120, 124 (2010).

203. *Id.* at 124–25; Diem, *supra* note 177, at 222.

204. Harwell & LeBeau, *supra* note 202, at 126.

205. *See* Reardon et al., *supra* note 194, at 64.

206. *See* Kahlenberg, *supra* note 18, at 179.

207. *Id. See generally* John R. Logan, *Separate and Unequal: The Neighborhood Gap for Blacks and Hispanics in Metropolitan America*, ERIC INST. OF SCI. (Oct. 13, 2002), https://files.eric.ed.gov/fulltext/ED471515.pdf [https://perma.cc/9TCZ-D3SR].

208. *See* discussion *supra* Part II; Kahlenberg, *supra* note 18, at 179.

209. *See, e.g.*, *Explore Census Data*, U.S. CENSUS BUREAU, https://data

Researchers can get information on race, educational attainment, primary language, income, poverty status, and more, and available data is somewhat granular, coming down to the census tract or block group, which consists of between 2,500 to 8,000 people each.[210]

Schools likely have access to all students' home addresses,[211] and large districts may infer a student's SES based on the tract

.census.gov/cedsci [https://perma.cc/HD4H-4MBV]; *About the American Community Survey*, U.S. CENSUS BUREAU, https://www.census.gov/programs-surveys/acs/about.html [https://perma.cc/PN99-22DB].

210. *Census Tracts and Block Numbering Areas*, U.S. CENSUS BUREAU 10-1, https://www2.census.gov/geo/pdfs/reference/GARM/Ch10GARM.pdf [https://perma.cc/2VGK-ZG87].

211. Of course, many students may have multiple home addresses. For example, they may have multiple guardians who live apart, or their guardian(s) may own multiple homes. And the wealthiest families may even purchase homes or rent apartments to have residency in particular neighborhoods. School districts should anticipate that some students will attempt to "boundary-hop" by listing a residence that is either a secondary residence or is not their residence at all to gain a school-assignment advantage. This is already common among parents trying to get their children into better school districts—or even sports boosters trying to get talented student-athletes into their districts. *See, e.g.*, Kelly Phillips Erb, *Would You Lie About Where You Live to Get Your Child into a Better School?*, FORBES (Nov. 6, 2016), https://www.forbes.com/sites/kellyphillipserb/2016/11/06/would-you-lie-about-where-you-live-to-get-your-child-into-a-better-school/?sh=78b743622f48 [https://perma.cc/HQ4B-MYUT] (discussing cases of parents lying to get their child into a better school district); John D. McKinnon, *Student-Residency Rules Roil High-School Sports*, WALL ST. J. (Feb. 17, 1999), https://www.wsj.com/articles/SB919192012706692000 [https://perma.cc/L8LK-MF7Q] (discussing widespread deceptive practices of sports boosters to establish residency for talented high-school athletes).

Districts probably need not be concerned about students with guardians who live apart claiming residency in the neighborhood of a less-wealthy guardian. Large differences in SES between guardians are somewhat rare. *See, e.g.*, Richard V. Reeves, *The Rich Marrying the Rich Makes the Income Gap Worse, but It's Not Our Biggest Problem*, BROOKINGS (Apr. 8, 2016), https://www.brookings.edu/blog/social-mobility-memos/2016/04/08/the-rich-marrying-the-rich-makes-the-income-gap-worse-but-its-not-our-biggest-problem [https://perma.cc/QV8S-6HUS] (illustrating the tendency of parents/guardians to marry and generally associate with people of similar SES). And the residency of either guardian in a low-SES neighborhood likely indicates at least some association with the lower-SES community.

But school districts will need to combat boundary-hopping through home-buying/renting or simply lying about residency. This may require collecting proof of residency—which most districts already collect,—and asking detailed questions about who resides where and how often. *See, e.g.*, *Information on the Rights of All Children to Enroll in School: Questions and Answers for States, School Districts and Parents*, U.S. DEP'T OF EDUC. OFF. OF C.R. & U.S. DEP'T OF

or block where the student lives.[212] Tracts with relatively low average incomes, low rates of homeownership, low educational attainment, high minority populations, high rates of homelessness, high rates of single-parent households, and primary languages other than English may be considered low-SES neighborhoods and be given high priority in selecting their school. Neighborhoods with high average incomes and educational attainment may be considered high-SES and be given last priority in selecting their school. Many school districts that use neighborhood SES as a measure tend to group students into three or four SES categories and assign priority based on those categories,[213] but a district could easily assign priority to neighborhoods without doing any grouping. Students in the lowest-SES

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JUST. C.R. DIV., (Jan. 10, 2020), https://www2.ed.gov/about/offices/list/ocr/docs/qa-201101.html#:~:text=Districts%20typically%20accept%20a%20variety,is%20written%20on%20company%20letterhead [https://perma.cc/7KTD-F9BR]. It may also result in some cost to the district of investigating less-than-forthright home-buying and/or residence-listing behavior by wealthier families. But such deceptive behavior has a way of coming to light, and when it does, districts and/or states can have swift and serious punishments in place for families who abuse the process to deter other wealthy families from such deceptive practices. *See, e.g.*, Eddy Ramírez, *Schools Crack Down on Boundary Hopping*, U.S. NEWS & WORLD REP. (Mar. 2, 2009), https://www.usnews.com/education/articles/2009/03/02/schools-crack-down-on-boundary-hopping [https://perma.cc/5XJ9-CU7S]; James Orlando, *Criminal Penalties for Falsely Claiming Residency Within a School District*, CONN. GEN. ASSEMBLY OFF. OF LEGIS. RSCH. (May 5, 2011), https://www.cga.ct.gov/2011/rpt/2011-R-0214.htm [https://perma.cc/8EFA-FHFF] (listing state laws designed to deter and punish false claims of residency in particular school districts—which is analogous to falsely claiming residency in a particular neighborhood).

212. *See, e.g.*, Frankenberg, *supra* note 184, at 59 (describing a multifactor, race-neutral "diversity index" used by San Francisco and a model proposed by the Kirwan Institute at Ohio State University to identify "low educational opportunity" neighborhoods); *cf.* Stuart Biegel, *Court-Mandated Education Reform: The San Francisco Experience and the Shaping of Educational Policy After* Seattle-Louisville *and* Ho v. SFUSD, 4 STAN. J.C.R. & C.L. 159, 204–07 (2008) (arguing that San Francisco's race-neutral redistricting plan failed to halt resegregation but a plan that included geography as a factor may have succeeded).

213. For example, the San Antonio Independent School District categorizes each block into one of four categories. The highest-SES blocks are placed in category one, and the lowest-SES blocks are placed in category four. The district then pays special attention to blocks in categories three and four when encouraging students to apply to schools. Students from category four blocks also receive the highest priority in the assignment/admissions process. Beth Hawkins, *The Architect: How One Texas Innovation Officer Is Rethinking School Integration*, THE 74 (Sept. 25, 2018), https://www.the74million.org/article/the-architect-how-one-texas-innovation-officer-is-rethinking-school-integration [https://perma.cc/96E8-2ZKY].

neighborhood could receive the highest priority, students in the second lowest-SES neighborhood could receive the next highest priority, and so on.

Data analysts should find the mean, median, twenty-fifth and seventy-fifth percentiles of each of the above socioeconomic factors and should assign each neighborhood to one of at least four categories based on how the neighborhood's SES compares to the average. If one or two factors—particularly the most probative factors like mean/median household income—provide sufficient stratification between neighborhoods to categorize each neighborhood, districts should consider only those factors, because using a limited set of factors may actually prove more effective than using a multifactor test with competing variables.[214]

After categorizing each neighborhood based on the appropriate SES indicators, each student can be assigned a category based on their neighborhood. Districts can use these categories to assign preference to students from lower-SES neighborhoods and to ensure that schools maintain a representative balance of students from all SES categories.

Though grouping students based on neighborhood is likely the best solution, there are some potential disadvantages that should be acknowledged. Using neighborhood data rather than individual family data may result in some outliers. For example, preference could accidentally be given to a wealthy student living in a low-income Census tract.[215] Further, Census data is not updated as regularly as a district might prefer because it is only collected once every ten years.[216] Though related surveys such as the American Community Survey are updated quite regularly,[217] districts may sometimes find it challenging to secure data that accurately captures demographic changes in neighborhoods

214. Reardon & Rhodes, *supra* note 13, at 192 ("Student assignment plans that focus solely on socioeconomic integration may be more effective than those that attend to many factors and use other nonsocioeconomic factors in determining school assignments (such as prior achievement, language, proximity to schools, etc.) because the latter have to balance many competing demands. Attempting to balance schools on a number of factors, for example, makes it less likely that optimal balance will be attained on any one factor.").

215. Kahlenberg, *supra* note 30, at 180.

216. *See Decennial Census of Population and Housing*, U.S. CENSUS BUREAU, https://www.census.gov/programs-surveys/decennial-census.html [https://perma.cc/V4EK-RV94].

217. *See American Community Survey (ACS)*, U.S. CENSUS BUREAU, https://www.census.gov/programs-surveys/acs [https://perma.cc/96QC-RXQJ].

unless the district is willing to pay to update Census data.[218] Because of these limitations, many districts with the resources and infrastructure to collect individual family data may want to consider *both* neighborhood demographics and individual family data if they have the resources to do so. Efforts to collect individual data should be robust and detailed to root out attempts to "steal[] education"—Professor LaToya Baldwin Clark's term for some families' attempts to falsify their demographic information to gain access to a particular school.[219]

Some parents may consider moving to a lower-income neighborhood in order to secure preference for their child, but this behavior does not undermine the system so long as neighborhood demographics are updated regularly. When a wealthier family moves into a lower-income neighborhood, the average SES of the neighborhood shifts accordingly; and if many wealthy families move into a lower-income neighborhood, the neighborhood will move to a different SES bracket. Further, if this gaming behavior does occur, it has the arguably beneficial consequence of producing more SES-integrated neighborhoods, reducing geographic segregation—the root cause of school segregation. Indeed, researchers have already observed that magnet school systems may have a positive effect on neighborhood integration.[220]

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218. Kahlenberg, *supra* note 18, at 180.

219. *See* LaToya Baldwin Clark, *Stealing Education*, 68 UCLA L. REV. 566, 572–73 (2021).

220. *See* Ryan W. Coughlan, *Divergent Trends in Neighborhood and School Segregation in the Age of School Choice*, 93 PEABODY J. EDUC. 349, 362 (2018) ("Existing research indicates that magnet schools more commonly increase integration than charter schools, but more analysis is required.") (citing Erica Frankenberg & Genevieve Siegel-Hawley, *A Segregating Choice?: An Overview of Charter School Policy, Enrollment Trends, and Segregation*, *in* EDUCATIONAL DELUSIONS?: WHY CHOICE CAN DEEPEN INEQUALITY AND HOW TO MAKE SCHOOLS FAIR 129 (Gary Orfield & Erica Frankenberg eds., 2013)); Janel George & Linda Darling-Hammond, *Advancing Integration and Equality Through Magnet Schools*, LEARNING POL'Y INST. 19 (June 2021), https://learningpolicyinstitute.org/product/magnet-schools [https://perma.cc/NM56-ZEX5] ("[A] study . . . found that, while magnet schools did not lead to increased stratification of students of color, levels of integration were similar to those in traditional public schools, after controlling for district racial composition. This finding could be interpreted to mean that magnets did not increase integration; however, it could also be interpreted to mean that magnets—if created in racially isolated neighborhoods within larger city or county districts, as is often the case—increase the diversity of schools in their neighborhoods to the levels found in the district as a whole.") (citing T. M. Davis, *School Choice and*

### C. DISTRICTS SHOULD REGULARLY AUDIT SCHOOLS' SOCIOECONOMIC MAKEUP AND ENFORCE STRICT SES BALANCE REQUIREMENTS

School districts should also require that each school maintain a student body representative of each neighborhood through relatively strict balancing requirements. While admitting/distributing students, districts should set a cap on the number of students from each neighborhood/SES category and routinely audit schools' demographic balance as enrollment changes each school year. According to Sean F. Reardon and Lori Rhodes's analysis, SES-based "plans that require relatively strict balance among schools in student socioeconomic characteristics (such as requiring that no school have socioeconomic characteristics that differ by more than 5–10 percent from the district average) are likely to produce greater integration than those requiring only a much cruder level of balance."[221]

Mohammed Choudhury, an "innovation officer" who has received recognition for his work desegregating the San Antonio Independent School District, describes conducting "equity audits" regularly to ensure adequate demographic balance.[222] Equity audits will likely be necessary to ensure that schools remain balanced despite changing enrollment and community preferences for each school, and when a school fails an audit, districts should adjust the required number of students from each SES category for the following year. In other words, districts should take care to require minimal variance between the community's overall SES makeup and each school's SES balance, and they should adjust each school's numbers before every enrollment cycle to maintain this balance.

## IV. APPLYING THE FORMULA TO MAGNET SCHOOLS

Over the past decade, school choice has become a pervasive trend in education.[223] As parents increasingly embrace the opportunity to find an education that suits their child's unique

*Segregation: Tracking Racial Equity in Magnet Schools,* 46 EDUC. & URB. SOC'Y 399, 399–433 (2014)).

221. Reardon & Rhodes, *supra* note 13, at 191.

222. *See* Hawkins, *supra* note 213.

223. *See, e.g.*, Caitlin Dewey, *School Choice Movement Celebrates Its 'Best Year Ever' Amid Pandemic*, STATELINE (June 25, 2021), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/06/25/school-choice-movement-celebrates-its-best-year-ever-amid-pandemic [https://perma.cc/CX9N-5FT5].

needs and talents, magnet schools—schools that students bid to be enrolled in, which operate within an existing school district, are intentional about the makeup of their student body, and provide a thematic or somewhat specialized education[224]—are perhaps the most promising educational innovation through which a school district can create diverse-by-design schools.

Unlike other school choice innovations such as charter schools—schools managed by private boards independent of the local school district, which have come under criticism for alleged mismanagement and lack of oversight, and which have arguably exacerbated segregation[225]—magnet schools remain a promising method of integration.[226] Magnet schools are not prone to the same critiques as charter schools because they come with more direct accountability mechanisms. They are typically subject to the same oversight as traditional neighborhood schools,[227] and they were also originally developed as an explicit desegregation tool.[228]

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224. *See supra* note 4 and accompanying text.

225. *See* Erica Frankenberg, Genevieve Siegel-Hawley & Jia Wang, *Choice Without Equity: Charter School Segregation and the Need for Civil Rights Standards*, C.R. PROJECT (2010), https://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/choice-without-equity-2009-report/ [https://perma.cc/3TLF-3V4Q]; Gary Miron, Jessica L. Urschel, William J. Mathis & Elana Tornquist, *Schools Without Diversity: Education Management Organizations, Charter Schools, and the Demographic Stratification of the American School System*, BOULDER NAT'L EDUC. POL'Y CTR. (Feb. 5, 2010), http://nepc.colorado.edu/publication/schools-without-diversity [https://perma.cc/XVR2-JAXP].

226. *See, e.g.*, Virginia Riel, Toby L. Parcel, Roslyn Arlin Mickelson & Stephen Samuel Smith, *Do Magnet and Charter Schools Exacerbate or Ameliorate Inequality*, 12 SOCIO. COMPASS (2018) (reviewing the literature on magnet and charter schools and finding that magnet schools by and large promote integration, while charter schools exacerbate segregation).

227. Magnet schools are accountable to the district's school board, just like any other traditional school. They are significantly different from charter schools in this sense—as charter schools are run by private boards that are not accountable to the general citizenry via election or any other means. *See, e.g.*, Gary Miron, William Mathis & Kevin Welner, *Review of* Separating Fact & Fiction, NAT'L EDUC. POL'Y CTR. (Feb. 2015), http://nepc.colorado.edu/thinktank/review-separating-fact-and-fiction [https://perma.cc/LX3S-MUDE] (listing common critiques of charter schools, none of which apply to magnet schools); *see also* Riel et al., *supra* note 226, at 2.

228. *See, e.g.*, George & Darling-Hammond, *supra* note 220, at 4–5; Jennifer Jellison Holme & Amy Stuart Wells, *School Choice Beyond District Borders: Lessons for the Reauthorization of NCLB from Interdistrict Desegregation and Open Enrollment Plans*, *in* IMPROVING ON NO CHILD LEFT BEHIND: GETTING

Some believe that magnets only lost favor over the past few decades because they were underfunded and had moved away from desegregative goals post *PICS*—not because they are inherently flawed.[229]

Magnet schools also have the potential to be far more effective than simply rezoning traditional neighborhood schools, as they can attract students from diverse backgrounds and broad geographic areas, including from multiple school districts. This eliminates the geographic lines that are often barriers to integration. A comprehensive, or at least robust, magnet system prevents the pervasive problem of wealthy parents shopping for better schools through homebuying.[230] This has become an even greater issue as school performance data becomes more widely available on the internet—including through real estate websites.[231] Rezoning alone does not fix this problem, as some

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EDUCATION REFORM BACK ON TRACK 139 (Richard Kahlenberg ed., 2008); Erica Frankenberg & Genevieve Siegel-Hawley, *The Forgotten Choice?: Rethinking Magnet Schools in a Changing Landscape*, C.R. PROJECT 7 (Nov. 2008), https://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/the-forgotten-choice-rethinking-magnet-schools-in-a-changing-landscape/frankenberg-forgotten-choice-rethinking-magnet.pdf [https://perma.cc/NCT3-TA23]; INST. ON METRO. OPPORTUNITY, *supra* note 15.

229. *See* Frankenberg & Siegel-Hawley, *supra* note 220 ("The mission of magnet schools has shifted considerably from its historical focus on racial desegregation, perhaps due to realities facing magnet schools such as stagnant funding for magnet schools and a move away from focusing on race-conscious desegregation efforts in federal policy and judicial decision-making. Only one-third of schools in this sample still have desegregation goals while nearly as many schools no longer or never had desegregation goals.").

230. *See* JACK SCHNEIDER, BEYOND TEST SCORES: A BETTER WAY TO MEASURE SCHOOL QUALITY 76–79 (2017) (discussing how homebuyers often buy a house in part due to the neighborhood schools); Allison Roda & Amy Stuart Wells, *School Choice Policies and Racial Segregation: Where White Parents' Good Intentions, Anxiety, and Privilege Collide*, 119 AM. J. EDUC. 261, 263 (2013) ("[W]hen parents are choosing schools under these newer, more market-based policies, it is difficult for them to enroll their children in schools far from home, across race and class boundaries that divide communities and social networks the way school desegregation programs did.") (citations omitted).

231. *See, e.g.*, *Zillow Now Exclusive Real Estate Partner of Great Schools*, ZILLOW GRP. (July 11, 2013), https://www.zillowgroup.com/news/zillow-now-exclusive-real-estate-search-partner-of-greatschools [https://perma.cc/6329-PDYU] ("At Zillow, we know how well school and real estate information go together . . . ."); Trevor Tompson, Jennifer Benz & Jennifer Agiesta, *Parents' Attitudes on the Quality of Education in the United States*, ASSOC. PRESS-NORC CTR. FOR PUB. AFFS. RSCH. (Aug. 2013), https://apnorc.org/wp-content/uploads/2020/02/AP_NORC_Parents-Attitudes-on-the-Quality-of-Education-in-the-US_

studies suggest that rezoning might cause parents to relocate to another zone where they deem the demographic composition more desirable.[232] Successful rezoning plans must not only account for current demographics of neighborhoods but also project demographics over the course of several years[233]—a requirement that is very expensive and difficult to fulfill.[234] Further, rezoning is extremely difficult in many metropolitan areas where poor and nonpoor families live far from one another, making it hard to draw contiguous and compact zones.[235] And, of course, rezoning tends to be met with intense political opposition.[236] Magnet school admissions premised on achievement and socioeconomic factors eliminate these challenges altogether.

Additionally, and perhaps most importantly, many empirical studies have concluded that students in magnet schools perform better academically than their peers in traditional public

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FINAL_2.pdf [https://perma.cc/NS27-2NBW] (discussing a survey that found sixty-five percent of parents get school information from the district website and fifty-one percent used websites that rate schools); Marga Mikulecky & Kathy Christie, *Rating States, Grading Schools: What Parents and Experts Say States Should Consider to Make School Accountability Systems Meaningful*, EDUC. COMM'N STATES (June 2014), https://files.eric.ed.gov/fulltext/ED561935.pdf [https://perma.cc/D36U-SWC7] (discussing the annual reports of public school performance that are readily available online for parents to access).

232. Frankenberg, *supra* note 184, at 58; *see also* WILLIS D. HAWLEY, ROBERT L. CRAIN, CHRISTINE H. ROSSELL, MARK A. SMYLIE, RICARDO R. FERNÁNDEZ, JANET W. SCHOFIELD, RACHEL TOMPKINS, WILLIAM T. TRENT & MARILYN S. ZLOTNIK, STRATEGIES FOR EFFECTIVE SCHOOL DESEGREGATION: LESSONS FROM RESEARCH ch. 5 (1983) (discussing how white flight undermines the integrative impact of rezoning).

233. Frankenberg, *supra* note 184, at 58.

234. *See* Kahlenberg, *supra* note 18, at 180 (explaining that updating Census data to track demographic trends is expensive).

235. Reardon & Rhodes, *supra* note 13, at 191.

236. Examples of this opposition are endless, but—in case the reader is skeptical that rezoning would face political opposition—here are just a few random selections: *Parent "Coalition" Sends Scathing Letter Opposing School Rezoning, Threatens Legal Action*, W. SIDE RAG (Oct. 24, 2016), https://www.westsiderag.com/2016/10/24/parent-coalition-sends-scathing-letter-opposing-school-rezoning-threaten-legal-action [https://perma.cc/78A9-9L4D]; Travis Gibson, *Parents in Sprawling St. Johns County Community Upset over Proposed School Rezoning Proposal*, NEWS 4 JAX (Apr. 7, 2022), https://www.news4jax.com/news/local/2022/04/07/parents-in-sprawling-st-johns-county-community-upset-over-proposed-school-rezoning-proposal [https://perma.cc/KKR6-CVSF]; Patrick Wall, *In Gentrifying Brooklyn, Rezoning Plan That Sparked Diversity Debate Is Approved*, CHALKBEAT N.Y. (Jan. 6, 2016), https://ny.chalkbeat.org/2016/1/6/21092536/in-gentrifying-brooklyn-rezoning-plan-that-sparked-diversity-debate-is-approved [https://perma.cc/S3P6-THXK].

schools, are more motivated, and are more satisfied with their schools.[237] This is why magnet schools have recently received the support of respected education scholars and organizations such as Linda Darling-Hammond, the Learning Policy Institute, The Century Foundation, and the Institute on Metropolitan Opportunity,[238] and have resurfaced as an important tool for integration. For example, in Minnesota, magnet schools have become a crucial part of proposed legislation introduced to serve as a settlement in a school segregation lawsuit against the state.[239] In San Antonio, the school district has seen tremendous success integrating schools voluntarily through attractive magnet school options that are "diverse by design."[240] Meta-analyses have shown positive effects on student outcomes, especially at higher grade levels; and case studies—such as studies of the Los Angeles Unified School District and Connecticut magnet schools—have found higher graduation rates, higher academic proficiency, more positive academic climates, and even higher teacher retention at magnet schools.[241]

This Part outlines four best practices to create and sustain socioeconomically diverse-by-design magnet schools: providing easy access to information and applications, offering attractive instructional models, using convenient locations that pull

237. *See, e.g.*, INST. ON METRO. OPPORTUNITY, *supra* note 15, at 3–10 (comparing magnet schools and traditional public schools). Further, some studies have found that magnet schools outperform comparable charter schools as well. *See id.* at 10–11 (comparing magnet schools and charter schools).

238. *See generally, e.g.*, George & Darling-Hammond, *supra* note 220 (outlining recommendations for effective racially integrated magnet schools); Halley Potter, Kimberly Quick & Elizabeth Davies, *A New Wave of School Integration: Districts and Charters Pursuing Socioeconomic Diversity*, CENTURY FOUND. 15 (Feb. 9, 2016), https://tcf.org/content/report/a-new-wave-of-school-integration [https://perma.cc/CT6R-ZL9U] (explaining that magnet schools can be racially and socioeconomically integrated while maintaining high academic performance); Richard D. Kahlenberg, Halley Potter & Kimberly Quick, *A Bold Agenda for School Integration*, CENTURY FOUND. (Apr. 8, 2019), https://tcf.org/content/report/bold-agenda-school-integration [https://perma.cc/ZTX7-PFQB] (recommending that Congress double magnet school funding to advance school integration); INST. ON METRO. OPPORTUNITY, *supra* note 15 (analyzing racially diverse magnet schools in the Twin Cities).

239. *See* Verges, *supra* note 20 (explaining the terms of the settlement); Minn. H.F. 2471 (the proposed legislation); Cruz-Guzman v. State, 916 N.W.2d 1 (Minn. 2018) (the case that led to the settlement).

240. *See* Hawkins, *supra* note 213 (interviewing Mohammed Choudhury, one of the "Texas Innovation Officer[s]" who spearheaded the effort).

241. George & Darling-Hammond, *supra* note 220, at 20–21.

various demographics, providing robust transportation options, and using interdistrict solutions where possible.[242] Additionally, this Part discusses the diversity formula's application to a magnet schools system.[243] Magnet schools can be a powerful integrative tool if implemented correctly. This Part provides an overview of how schools districts can do so.

Of course, the success of magnet schools is also highly dependent on funding.[244] The Biden-Harris Administration should pour additional resources into magnet schools that use the diversity formula, or similar methods, and that adhere to the following best practices.[245]

### A. Diverse-by-Design Magnets Should Follow Four Best Practices

For a magnet school to reach its full potential as an integrative tool, school districts should keep four best practices in mind. First, parents should have easy access to information and applications in a way that reduces the unfair advantages of higher social capital as much as possible. Second, districts should continue to pursue innovative instructional models and curricular specialties to keep interest in the schools high—attracting families from all income levels. Third, and perhaps most importantly, districts should ensure that schools are physically accessible to a diverse array of families by locating schools in areas that pull a variety of income-levels and by providing robust and convenient transportation options to low-income students. Finally, an ideal magnet school system will provide interdistrict options, sharing students across district lines to achieve better SES and racial balance. These four practices work in tandem to attract families to diverse-by-design schools and to make the schools accessible to a diverse array of families so the schools remain sustainably integrated.

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242. *See* discussion *infra* Part IV.A.

243. *See* discussion *infra* Part IV.B.

244. *See, e.g.*, Chinh Q. Le, *Advancing the Integration Agenda Under the Obama Administration and Beyond*, *in* INTEGRATING SCHOOLS IN A CHANGING SOCIETY: NEW POLICIES AND LEGAL OPTIONS FOR A MULTIRACIAL GENERATION 75, 82 (Erica Frankenberg & Elizabeth DeBray eds., 2011) (recommending the Obama Administration and subsequent administrations elevate status of magnet schools and pour resources into strengthening magnet schools).

245. *See* discussion *infra* Part IV.C.

1. Outreach: Easy Access to Information and Applications

For a diverse-by-design magnet system to be successful, a district must ensure that low-income families have the same access to information as higher-income families.[246] Because social networks tend to be segregated economically and racially, higher-income families tend to have greater access to the information necessary to make informed choices about where to send their children for school.[247] Low-income parents tend to have less time and social connections to search for the best school.[248] Information on school options should be transparent and broadly disseminated through multiple platforms such as the mail, social media, print, television, and radio.[249] Further, the information should be readily available in all languages that are spoken in the district.

Ideally, each family should receive the same packet of information, and all families should be required to list their school preferences. Families should be able to share their school preferences in person, through the mail, over the phone, or online; and preference forms should be as short and simple as possible to ensure that families are not overwhelmed by the amount of information requested.[250] Further, application assistance should

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246. *See, e.g.*, INST. ON METRO. OPPORTUNITY, *supra* note 15, at 18–19 ("Effective outreach has also been shown to contribute to successful integration efforts. Frankenberg and Siegel-Hawley (2008) conclude that '[s]chools that outreach to prospective students were more likely to have experienced increasing integration over the last decade, while one-quarter of those without special outreach were one-race schools.'") (quoting Frankenberg & Siegel-Hawley, *supra* note 228).

247. *See generally* WHO CHOOSES? WHO LOSES? CULTURE, INSTITUTIONS, AND THE UNEQUAL EFFECTS OF SCHOOL CHOICE (Bruce Fuller, Richard F. Elmore & Gary Orfield eds., 1996) (compiling research regarding the school choice debate).

248. *See, e.g.*, Katie Bishop, *The "Time Poverty" That Robs Parents of Success*, BBC (Feb. 3, 2022), https://www.bbc.com/worklife/article/20220201-the-time-poverty-that-robs-parents-of-success [https://perma.cc/BRS9-EVKH] ("Time poverty overwhelmingly affects caregivers, but it also disproportionately affects the poor . . . .") (quoting Aleksander Tomic, Associate Dean for Strategy, Innovation and Technology at the Department of Economics, Boston College).

249. George & Darling-Hammond, *supra* note 220, at 23 ("Such outreach is most effective when conducted through multiple platforms, such as social media, print, television, and radio.").

250. *See id.* ("Having a streamlined, easy-to-manage application process is important, as is having transportation plans that make accessing the school a feasible option for families outside the immediate neighborhood.").

be provided if feasible,[251] and applicants should be given an abundance of time to submit applications. Districts should create clear and consistent systems to ensure that low-income families have the same information and opportunity to deliberate about what is best for their children.

2. Instructional Models that Attract Families of All Income Levels

Magnet school experts emphasize the importance of having clear goals and themes tailored to the community's wants and needs.[252] Though research on the effects of different magnet themes suggests that there are no clear advantages of one theme over another,[253] magnet schools with themes that are responsive to the community's preferences are more likely to have success attracting a diverse array of students. Themes such as science, technology, visual arts, drama, physical education, music, mathematics, Montessori, inquiry-based learning, personalized learning, dual-language instruction, and more can all provide attractive instructional focuses that attract students with particular talents or interests.[254] Further, university partnerships can be particularly attractive to families across the SES spectrum and provide unique mentorship, tutoring, interning, and enrichment opportunities for students.[255] For large districts, a variety of themes will help ensure that every student has a school that feels uniquely tailored to them. Every district should search for themes that will draw a diverse student body to each school, taking care not to tailor any school's theme too narrowly to any

251. *See id.* ("These outreach efforts are also most effective when accompanied by application assistance.").

252. *See, e.g.*, Off. of Educ. Rsch. & Improvement, *Ten Steps to a Successful Magnet Program*, ERIC INST. OF EDUC. SCIS., https://files.eric.ed.gov/fulltext/ED299363.pdf [https://perma.cc/8ZNM-YFUP] (providing a ten-step plan for successful magnets, starting with "[d]ecid[ing] what the program is supposed to do;" "[f]ind[ing] out what the community wants;" and "[d]ecid[ing] on themes . . . .").

253. INST. ON METRO. OPPORTUNITY, *supra* note 15, at 20–21.

254. *See, e.g.*, *id.* at 21–26 (listing Minnesota magnet programs that have successfully remained integrated and their themes); Hawkins, *supra* note 213 ("Three elements are indispensable in creating a system of schools that's equitable and sustainable . . . . The first is schools with attractive themes or instructional models, such as Montessori or dual language, in accessible locations.").

255. *See* INST. ON METRO. OPPORTUNITY, *supra* note 15, at 27–30 (providing several specific examples of successful partnerships between magnet schools and universities).

single demographic or make some schools significantly more attractive than others.

Further, the instructional models and curriculum within each school should encourage diversity. Magnets should have a strong curriculum with the magnet's theme embedded in it, and the curriculum should be as culturally responsive as possible—taking care to connect what students are learning to each student's cultural and community context.[256] Districts that carefully craft themes and curriculum to attract and retain a diverse student body at each of their schools are likely to see better integrative outcomes.

3. Locations That Pull Socioeconomically Diverse Families and Convenient Transportation

School districts designing magnet schools should consider locations that are near both low-income and higher-income neighborhoods when feasible. Schools located in areas convenient for several income levels are more likely to be chosen by families from a broader array of income levels. A school located on the edge of both a high-income and a low-income neighborhood will likely need to spend less money transporting students from farther away to maintain a diverse student body. And schools located near socioeconomically diverse workplaces like city centers, universities, and corporate or industrial areas may also attract families from a broad variety of backgrounds.

Having schools located near workplaces might also reduce transportation issues. But, for the many families that will still be located far away from their student's ideal school, offering convenient transportation options is also crucial.[257] A student's attendance at their ideal school may be untenable for a family that cannot afford the money or time to transport their student

256. George & Darling-Hammond, *supra* note 220, at 24–25.

257. *See, e.g.*, *id.* at 24 n.148–49 ("The provision of free transportation is another critical component of diversifying magnet schools. Without free and accessible transportation, magnet schools may only be realistic for those families with the resources and flexibility to provide their children with transportation . . . . A 2008 study of magnet school leaders found that magnet schools that provided free transportation were less likely to be racially isolated than those that did not. An earlier study of Midwestern districts found that, for parents of color, the availability of transportation was an important consideration in choosing a magnet school. This is often the case due to inaccessible or unreliable public transportation, even though many magnet schools are located in urban centers.").

to and from that school.[258] Provision of free transportation to each low-income student's school of choice should be a component of any magnet school plan.[259] Further, transportation

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258. *See, e.g.*, Frankenberg, *supra* note 184, at 61 (discussing how the Charlotte public school system's desegregation efforts in the early 2000s were unsuccessful in part because transportation was not provided to students who wanted to go to school outside their zones).

259. *Id.* at 56–57. Though the cost of transportation is likely the largest concern regarding the feasibility of a magnet school system, spending more on student transportation in general would be a worthwhile investment. The cost of transporting kids to better schools that are farther away should be no more of a concern than the cost of transporting adults to better workplaces that are farther away. And employers have certainly been able to develop creative solutions for getting adults to work. *See, e.g.*, Joseph Romsey, *How Employers Are Helping Workers Commute Safely During the Pandemic*, SOC'Y FOR HUM. RES. MGMT. (Oct. 21, 2020), https://www.shrm.org/resourcesandtools/hr-topics/employee-relations/pages/how-employers-are-helping-workers-commute-safely-during-the-pandemic.aspx [https://perma.cc/AG4Q-KT23] (listing creative commuter options that employers have developed).

Of course, increased funding for education in general is already necessary. And the amount currently spent per student on transportation is only a small percentage of the total spent per student. *Compare Fast Facts: Transportation*, NAT'L CTR. FOR EDUC. STAT. (2022), https://nces.ed.gov/fastfacts/display.asp?id=67 [https://perma.cc/M6EN-XCWB] (average of $1,152 per student spent on transportation in 2018–19), *with Fast Facts: Expenditures*, NAT'L CTR. FOR EDUC. STAT., https://nces.ed.gov/fastfacts/display.asp?id=66 [https://perma.cc/U4GV-DGLM] (average of $15,621 total spent per student in 2018–19). School districts are already spending money bussing more than fifty percent of students, so the percentage of students needing transportation would likely not change drastically. The routes would need to become more numerous, creative, and far-reaching, however.

The cost of transportation is difficult to estimate, but the federal government—which already heavily funds and regulates transit—could be heavily involved in funding and improving student transportation options if funding transportation is framed to appeal to both Republicans and Democrats. *See generally* Nathan Musick, *Government Spending on Public Transportation and Other Infrastructure*, CONG. BUDGET OFF. (May 12, 2022), https://www.cbo.gov/system/files/2022-05/58086-NTA.pdf [https://perma.cc/YF6G-W9LA] For example, proponents could emphasize that federally funded school transportation supports both school choice and equitable student assignment. And planning and support could be provided by both the Department of Education *and* the Department of Transportation. Better metropolitan public transit alone could already help many students who already rely on their free transit passes for commuting to school. *See, e.g.*, *Transportation*, METRO NASHVILLE PUB. SCHS., https://www.mnps.org/students-families/services/transportation [https://perma.cc/7WVW-K4M2] (noting that students receive free metro transit passes).

options should be almost as convenient for families as if the student were driving themself. Self-evidently, students who must spend significantly more time travelling to and from school each day—e.g., on an inefficient public transit system rather than a direct school bus route—are less likely to perform at the same level as students who are brought directly from home to school by their more affluent parents and have more time for homework and sleep.[260] Access to transportation after regular school hours is also an important component so that less-affluent students may be involved in the same extracurricular activities as more affluent students.

Districts should not underestimate the impact of location and transportation options both on students' ability to attend their chosen school and on the quality of their experience at the school.

4. Interdistrict Cooperation

For many—if not most—districts, cooperation with surrounding school districts will also be vital to developing diverse-by-design magnet schools. Changing demographics—as a result of white flight to suburbs or more recent gentrification of desirable urban areas, for example—have made whole districts racially and socioeconomically homogeneous.[261] Policies that transfer students between districts will result in more meaningful integration; and, where a city school district has a very high population of low-income students and its surrounding districts do not, a metro-wide plan may be the *only* solution that results in

For an interesting discussion of school choice and commuting, see Sean P. Corcoran, *School Choice and Commuting: How Far New York City Students Travel to School*, URB. INST. (Oct. 2018), https://www.urban.org/sites/default/files/publication/99205/school_choice_and_commuting_3.pdf [https://perma.cc/7CQD-QZFL].

260. The effect of time for sleep on student achievement should not be underestimated. The Author has taught many students who spent more than an hour each way on public transit to and from school and struggled to stay awake in class as a result. Further, evidence is abundant that inadequate sleep causes significant long-term adverse effects on a child's development. *E.g.*, Sue McGreevey, *Study Flags Later Risks for Sleep-Deprived Kids: Insufficient Amounts in Early Childhood Tied to Cognitive, Behavioral Problems*, HARV. GAZETTE (Mar. 10, 2017), https://news.harvard.edu/gazette/story/2017/03/study-flags-later-risks-for-sleep-deprived-kids [https://perma.cc/4XQX-YC7H].

261. *See* George & Darling-Hammond, *supra* note 220, at 24 (alluding to the issues of white flight and gentrification as an underlying cause of racially homogenous districts).

significant integration. Metro-wide plans,[262] including interdistrict magnet schools,[263] have the potential to bridge district lines and improve student outcomes. For example, a study of an interdistrict magnet school system in Hartford, Connecticut, found that students of color attending magnet schools in the greater Hartford area were in substantially more integrated peer environments.[264] The study also found that interdistrict magnet schools had statistically significant positive effects on the reading and math achievement of both the students from the city and

262. *See* Frankenberg, *supra* note 184, at 63–64 (citing Erica Frankenberg & Chungmei Lee, *Race in American Public Schools: Rapidly Resegregating School Districts*, C.R. PROJECT (Aug. 2002), https://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/race-in-american-public-schools-rapidly-resegregating-school-districts/frankenberg-rapidly-resegregating-2002.pdf [https://perma.cc/J7KC-JCEE]) (recommending a comprehensive, metro-wide plan based on a previous study).

263. An interdistrict magnet school is a "school operated by a local school district, regional educational service center, or institution of higher education. The purposes [of an] interdistrict magnet school [tend to be] 'to reduce, eliminate or prevent racial, ethnic or economic isolation while offering a high-quality curriculum that supports educational improvement.' The operators of each magnet school establish with individual school districts agreements that determine whether the district will participate in the magnet school and in some cases how many seats in the school will be reserved for district students. All students in the participating school districts are eligible to attend, and the magnet school operators must hold a lottery if there are more applicants than spaces. The state allocates special funding to sending districts and the magnet schools, and it provides transportation funding for students who attend an interdistrict magnet school located outside the district in which they live." Casey D. Cobb, Robert Bifulco & Courtney Bell, *Legally Viable Desegregation Strategies: The Case of Connecticut*, *in* INTEGRATING SCHOOLS IN A CHANGING SOCIETY: NEW POLICIES AND LEGAL OPTIONS FOR A MULTIRACIAL GENERATION 133 (Erica Frankenberg & Elizabeth DeBray eds., 2011) (quoting CONN. STATE DEP'T OF EDUC., PUBLIC SCHOOL CHOICE IN CONNECTICUT: A GUIDE FOR STUDENTS AND THEIR FAMILIES (2006)); *see also Family Guide to School Choice in the Greater Hartford Region*, CONN. STATE DEP'T OF EDUC., https://portal.ct.gov/-/media/SDE/School-Choice/RSCO/RSCOFamilyGuide.pdf [https://perma.cc/4U2V-ZL3D] (providing information about school choice in the Greater Hartford Region, including information regarding interdistrict magnet schools); *Regional Strategies to Integrate Twin Cities Schools and Neighborhoods,* INST. ON METRO. OPPORTUNITY (July 2009), https://scholarship.law.umn.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1075&context=imo_studies [https://perma.cc/G2CQ-9CF6] (outlining an interdistrict desegregation plan for the Twin Cities).

264. Cobb et al., *supra* note 263, at 134; *see also* INST. ON METRO. OPPORTUNITY, *supra* note 15, at 17 (explaining that students who attended magnet schools in Hartford outperformed students in their neighborhood schools).

the students from the suburbs.[265] Further, the magnet schools provided an academic climate that was more supportive of academic achievement than city schools; and magnet school attendees reported more positive influences from adults, higher expectations, stronger peer norms, and fewer classroom disruptions compared with attendees of city schools.[266]

Other programs have also seen success. For example, the State of Missouri required St. Louis suburban districts to participate in an interdistrict program that was initially funded by the state and was later funded by a voter-approved tax increase[267]—a notable mark of approval by citizens. A voluntary interdistrict program in Boston experienced remarkable academic success and, as of 2011, had a long waiting list.[268] Further, a race-neutral interdistrict model in Minneapolis called The Choice Is Yours, which based eligibility on qualifying for free- or reduced-price lunch[269] resulted in fifty-eight percent and sixty-four percent of participating schools performing better than expected in reading and math, respectively.[270] Consequently, the Institute on Metropolitan Opportunity found that The Choice Is Yours program has been successful and should be expanded, unlike other educational choice programs like charter schools.[271]

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265. Cobb et al., *supra* note 263, at 137–38. The positive effect on students from the suburbs was very small so as to not be statistically distinguishable from zero. However, this is still a promising result, as attending the interdistrict magnet clearly did not *negatively* impact the suburban students.

266. *Id.* at 139.

267. Frankenberg, *supra* note 184, at 65.

268. *Id.* In a full-district magnet system, a waiting list would not be a problem because students on a waiting list for their first-choice school would still be eligible to attend their second-, third-, fourth-, etc.-choice schools. No student would go unplaced. See *infra* Part IV.B for a discussion of the possibility of an all-magnet system.

269. Elizabeth A. Palmer, *The Choice Is Yours After Two Years: An Evaluation*, ASPEN ASSOCS. (Dec. 2003), https://education.mn.gov/mdeprod/groups/educ/documents/basic/mdaw/mday/~edisp/002924.pdf [https://perma.cc/VUP7-785L].

270. *Charter Schools in the Twin Cities: 2013 Update*, INST. ON METRO. OPPORTUNITY (Oct. 2013), https://law.umn.edu/sites/law.umn.edu/files/newsfiles/579fd7a6/Charter-School-Update-2013-final.pdf [https://perma.cc/Y6X5-8PLD]. Of course, given that using the SES of geographic areas is likely more effective than using free and reduced-price lunch as the measure, *see supra* Part III.B, one could predict that a similar program with even better SES measures (such as those proposed in this Note) would even exceed The Choice is Yours program's numbers.

271. *The Choice Is Ours: Expanding Educational Opportunity for All Twin*

Though interdistrict cooperation will be difficult to coordinate, city districts should attempt to collaborate with surrounding districts to benefit all students across district boundaries.

### B. Ambitious School Districts Should Apply the Diversity Formula in an All-Magnet System

This Note envisions school districts where a student's geographic location within the district has no bearing on the school the student attends except to the extent that the student prefers a school because of its convenient location. All too often, a student's neighborhood determines the quality of their school,[272] and an ideal system eliminates this tragedy. Historical justifications for neighborhood schools such as their usefulness for building community and facilitating social connections are no longer relevant in the age of social media and highways. Families can feel connected to any school community so long as the school systems and culture are conducive to community-building. Schools can still be used as community centers and gathering spaces without having a student body drawn exclusively from their immediate vicinity. This Note encourages districts to even consider a complete redesign their school system to be composed entirely of magnet schools—abolishing neighborhood schools altogether.

Each year, students who are at a grade level at which they must transition to a new school—e.g., before kindergarten and at the end of fifth grade and eighth grade—should be required to "apply" for schools. Applications should consist mainly of listing preferred schools and providing basic information[273]—except when a student applies to a selective school. Districts should provide significant additional supports in the form of information, outreach, and resources to neighborhoods falling in the lower-SES categories;[274] and students' school preferences should be honored with priority given to students from the lowest-SES neighborhoods. Selective schools could have a threshold level of

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*Cities Children*, INST. ON METRO. OPPORTUNITY (2007), https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1074&context=imo_studies [https://perma.cc/UZG8-P6P3].

272. *See, e.g.*, Jaap Nieuwenhuis & Pieter Hooimeijer, *The Association Between Neighbourhoods and Educational Achievement, A Systematic Review and Meta-Analysis*, 31 J. HOUS. & BUILT ENV'T 321, 321–47 (conducting a meta-analysis of eighty-eight articles studying both the United States and Europe and finding that neighborhood demographics impact educational outcomes).

273. *See supra* Part IV.A.1.

274. *See supra* Part IV.A.1.

achievement that a student must meet to be admitted but then should admit students from the lowest-SES neighborhoods first until the number of seats proportional to the number of low-SES students in the district is filled; then, the next-lowest SES neighborhood seats should be filled, and so on.[275]

A maximum number of students from each SES category proportional to the overall distribution of SES levels in the metro area should be established at each school, and the district should not allow any school to overrepresent or underrepresent any SES category by more than a small, but realistic, margin.[276] In districts or schools that take interdistrict transfers,[277] an appropriate percentage of seats should be reserved for in-district students and out-of-district students, with the same SES balance requirements. Districts should also conduct regular audits of the SES distribution at each school to ensure that the admissions/assignment process is achieving appropriate SES balance across schools.[278] Where one SES level becomes overrepresented or underrepresented, the next year's assignments should be adjusted to re-balance. Finally, districts should continually collect data and adjust quotas based on evolving neighborhood demographics; districts should expect that neighborhood demographics and target proportions from each SES category will change from year to year.[279]

Districts that are intentional about collecting neighborhood SES data, categorizing neighborhoods by SES, assigning preference to students based on neighborhood SES, and monitoring SES balance across schools should see improved SES and racial integration and improved academic results.

### C. States and the Federal Government Should Encourage School Integration by Facilitating Interdistrict Cooperation, Creating Funding Incentives, Creating an Office for Diverse-by-Design Schools, and Winning Litigation

School districts should not have to act alone. States can also assist in designing and implementing such systems. States that foster or even require interdistrict cooperation for a diverse-by-

275. *See supra* Part III.B.
276. *See supra* Part III.C.
277. *See supra* Part IV.A.4.
278. *See supra* Part III.C.
279. *See supra* Part III.B.2.

design magnet school system—particularly in metropolitan areas—are likely to see reduced segregation and improved integration on a scale far more meaningful than any individual district could achieve on its own.[280]

The federal government can also do far more to encourage such solutions. The Biden-Harris Administration, the Department of Education, and the Department of Justice's Office of Civil Rights should re-issue Obama-era guidance on methods for school integration[281] and update the guidance with more detail, accounting for recent circuit cases[282] and other developments in school integration—including this Note's recommendations for successful diverse-by-design magnet schools.[283] The Administration should also create and fund an Office for Diverse-by-Design Schools within the Department of Education consisting of a team of experts that will both issue general guidance and consult with individual districts to design integration plans that fit the specific needs and demographics of the district.

Because magnet schools are currently woefully underfunded compared to other educational innovations,[284] the Biden-Harris Administration should increase MSAP funding even more than planned[285] and provide additional funding to the school districts implementing systems such as the one described in this Note.[286] Increased funding could also be made available for districts that consult with the Office of Diverse-by-Design schools.

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280. *See supra* Part IV.A.4.

281. *Obama Guidance*, *supra* note 35; *see also* George & Darling-Hammond, *supra* note 220, at 27–28 (urging the federal government to reinstate such guidance as well).

282. *See supra* Part II.

283. *See supra* Part IV.

284. INST. ON METRO. OPPORTUNITY, *supra* note 15, at 2 ("According to data taken in 2009–10 by the National Center for Education Statistics, '[m]agnet programs enrolled more than twice the number of students served by charter schools, making magnets by far the largest sector of choice schools (more than 2.5 million students enrolled in magnet schools across the nation).' Nonetheless, 'charter schools received upwards of $250 million from the federal government, while magnet schools obtained roughly $100 million.'") (quoting Genevieve Siegel-Hawley & Erica Frankenberg, *Reviving Magnet Schools: Strengthening a Successful Choice Option*, C.R. PROJECTS (Feb. 2012), http://files.eric.ed.gov/fulltext/ED529163.pdf [https://perma.cc/3X25-DMB2].

285. *See supra* notes 3–4 and accompanying text (discussing the proposed increase).

286. *See also* George & Darling-Hammond, *supra* note 220, at 28–30 (advocating for expanded federal investments in magnet schools to improve diversity and school success).

Finally, winning each case that will inevitably follow any attempt to integrate schools will be vital. The Solicitor General and the entire Department of Justice should dedicate significant resources to aiding school districts in winning litigation, ensuring a uniform voice and excellent arguments as cases make their way through the courts. Ultimately, convincing the Supreme Court to—at a minimum—respect stare decisis and stick with the prevailing standard will be necessary.

## CONCLUSION

An SES-based integration model provides a promising method for integrating schools that is likely both constitutionally permissible[287] and politically feasible.[288] School districts may achieve integrated schools by designing and implementing a system of magnet schools[289] that give preference for admission/assignment and intentionally maintain balance among schools[290] based on the SES data of the neighborhood where each student lives.[291] Though such a method may not be as simple as a race-based integration plan, it is far more likely to be upheld as constitutionally permissible given the Supreme Court's holdings on race-based and race-conscious policies.[292] Districts and even states may use this Note as a playbook for designing a system that is likely to reduce segregation and improve student outcomes.

If states and school districts have the courage to implement diverse-by-design magnet school systems using the diversity formula, and if they are adequately funded and assisted by the federal government, Americans may begin to see schools where all children feel welcomed and valued and where students are prepared to cooperate across lines of difference in a diverse and globalized society. If the students of the United States finally "begin to learn together," we may find that a large portion of the next generation has "learn[ed] to live together."[293]

287. *See supra* Part II.

288. *See supra* notes 183–88 and accompanying text.

289. *See supra* Part IV.

290. *See supra* Part III.C.

291. *See supra* Part III.B.

292. *See supra* Part I.

293. Milliken v. Bradley, 418 U.S. 717, 783 (1974) (Marshall, J., Douglas, J., Brennan, J. & White, J., dissenting); *see also supra* text accompanying note 2.