

# Notes

## AFTER *PICS*: MAKING THE CASE FOR SOCIOECONOMIC INTEGRATION

By Nancy Conneely\*

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“*Brown v. Board* was never just about sitting next to white children—it was about sharing the same resources they had access to.”

—Cheryl Brown Henderson

Daughter of the lead plaintiff in *Brown v. Board of Education*.<sup>1</sup>

## I. INTRODUCTION

In June 2007 the Supreme Court held, in *Parents Involved in Community Schools v. Seattle School District No. 1 (PICS)*,<sup>2</sup> that race cannot be used as a determining factor in K-12<sup>3</sup> public school admission plans. Prior to the Supreme Court’s decision, school districts used these plans as a way to create more racially balanced school populations. School districts are now faced with the choice of operating racially segregated schools or devising new plans that will both pass constitutional muster and create desegregated schools. With school districts prohibited from using race in admission plans, socioeconomic status may be the next best admissions factor for achieving desegregation

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1. Joseph Serwach, *Brown Sisters Explore Half-century of Desegregation*, THE UNIVERSITY RECORD ONLINE, Jan. 19, 2004, [http://www.umich.edu/~urecord/0304/Jan19\\_04/06.shtml](http://www.umich.edu/~urecord/0304/Jan19_04/06.shtml) (last visited Nov. 3, 2007).

2. 127 S. Ct. 2738 (2007).

3. The term “K-12” refers to elementary and secondary schools in U.S. public school districts. This designation encompasses grade levels from kindergarten to the twelfth grade.

of the sort required by *Brown v. Board of Education*.<sup>4</sup>

It is not enough to place white and minority students next to each other in class. While poor white and poor black children can teach each other about cultural differences and tolerance, such a concentration of poverty in one school will continue to hinder overall student achievement.<sup>5</sup> The key to improving equal educational opportunity for each student while maintaining some racial diversity may be to use socioeconomic status as an admissions factor in public elementary and secondary schools.

This note explores whether the use of socioeconomic status is an effective proxy for race in future school choice plans. Section II outlines the background of school desegregation and details previous Supreme Court decisions and federal laws that show a progression from overturning *de jure* desegregation to wrestling with *de facto* desegregation.<sup>6</sup> Section III provides an analysis of PICS. Section IV outlines socioeconomic integration plans currently used by three school districts. Section V analyzes the policy arguments for and against using socioeconomic status as a proxy for race and advises school administrators to use socioeconomic status in K-12 admission plans as a means to maintain some racial diversity and to improve student achievement. Section VI offers recommendations to school administrators for implementing socioeconomic integration plans. Section VII concludes that the use of race in admission plans was a beneficial way to create racial diversity, but socioeconomic status is a better way to improve student achievement. The proposals set forth in this paper can be useful tools for school administrators and policy-makers who are now at a crossroads in determining how to successfully integrate public elementary and secondary schools.

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4. See Stacy Teicher Khadaroo & Patrik Jonsson, *Schools Grapple with How to Integrate*, THE CHRISTIAN SCIENCE MONITOR, July 2, 2007, at 2 (quoting Richard Kahlenberg of The Century Foundation, who advocates for using socioeconomic status as an admission factor after PICS).

5. CTR. FOR CIVIL RIGHTS, UNIV. OF NORTH CAROLINA SCH. OF LAW, THE SOCIOECONOMIC COMPOSITION OF THE PUBLIC SCHOOLS: A CRUCIAL CONSIDERATION IN STUDENT ASSIGNMENT POLICY 1 (2005), available at <http://www.law.unc.edu/documents/civilrights/briefs/charlottereport.pdf> (citing NAT'L CTR FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., THE CONDITION OF EDUCATION (2003)).

6. *De jure* segregation is segregation "resulting from intentional state action." *De facto* segregation, on the other hand, is segregation that occurs without such intent or purpose. *Keyes v. Sch. Dist. No. 1, Denver, Colo.*, 413 U.S. 189, 205, 208 (1973). For example, housing patterns based on race may result in segregated schools without intent, purpose, or state action, creating *de facto* segregation.

## II. HISTORY AND PRIOR LAW

### A. The Reconstruction Era

In 1865 slavery became illegal in the United States.<sup>7</sup> With freedom came new rights for the former slaves and future generations. The Civil Rights Act of 1866 granted citizenship to all persons born in the United States,<sup>8</sup> while the Fourteenth Amendment, ratified the same year, provided new civil rights including an expanded definition of citizenship, equal protection under the law, and due process.<sup>9</sup> However, these new rights did not extend to education. During the post-war Reconstruction era, the Freedmen's Bureau<sup>10</sup> founded schools for blacks throughout the South, but they remained segregated by race and lacked resources and funding.<sup>11</sup>

Those citizens and lawmakers who were uneasy with the new-found freedoms of former slaves took action in the form of legislation. Jim Crow laws,<sup>12</sup> which were enforced from 1877 to 1964, mandated "separate but equal" treatment for African-American citizens.<sup>13</sup> These laws required blacks and whites to use separate public transportation and accommodations and to attend segregated public schools.<sup>14</sup> In 1896 the Supreme Court upheld these laws in *Plessy v. Ferguson*, stating that separate facilities for blacks and whites were constitutional as long as they were equal.<sup>15</sup>

### B. "Separate but Equal" Overturned

Segregated black schools were inferior to white schools in terms of

7. U.S. CONST. amend. XIII.

8. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27 (1866) (current version at 42 U.S.C. § 1981 (2000)).

9. U.S. CONST. amend. XIV.

10. The Bureau of Refugees, Freedmen, and Abandoned Lands, also known as the Freedmen's Bureau, was a federal agency formed during the Reconstruction to give educational and employment support to freed slaves after the Civil War. See W.E.B. DuBois, *The Freedmen's Bureau*, THE ATLANTIC, Mar. 1901, available at <http://www.theatlantic.com/issues/01mar/dubois.htm>.

11. See Michael J. Klarman, *The Plessy Era*, 1998 SUP. CT. REV. 303, 378-79 (1998).

12. Laws commonly called "Jim Crow" laws were state laws that maintained segregation and permitted discrimination against African-Americans in public places (e.g., public schools, accommodations, and transportation). See RICHARD WORMSER, *THE RISE AND FALL OF JIM CROW* xi-xii (2003). The laws were named after a stereotypical and offensive black minstrel character portrayed by white men donning blackface, created to amuse whites. See JERROLD M. PACKARD, *AMERICAN NIGHTMARE: THE HISTORY OF JIM CROW* 14 (2002).

13. See WORMSER, *supra* note 12; Anthony Ramirez, *A Gift Shop in Harlem Finds Customers for the Memorabilia of Racist America*, N.Y. TIMES, July 5, 2006.

14. See WORMSER, *supra* note 12 for more examples of Jim Crow laws.

15. 163 U.S. 537, 551 (1896).

teacher quality, teacher pay, funding, and resources.<sup>16</sup> Black schools were inferior to white schools from the end of Reconstruction until the *Brown* decision because less funding was given to minority schools.<sup>17</sup> As a result, black children who attended these schools were given fewer educational opportunities.<sup>18</sup> In turn, fewer blacks had the opportunity to go on to higher education,<sup>19</sup> and those that did were forced to attend segregated colleges that were inferior to their white counterparts.<sup>20</sup> There were other injustices as well. Black students were required by law to attend a black school, in some cases forcing these students to be bused to schools miles away and to walk through dangerous parts of a city or town.<sup>21</sup> The backdrop of the *Brown* decision was a public school system that was separate but unequal.

In 1954's *Brown v. Board of Education (Brown I)*, the Supreme Court overturned the application of the "separate but equal" doctrine with regards to public education by holding that state laws that mandate or permit segregation in public schools violate the Equal Protection Clause.<sup>22</sup> In *Brown I*, the Court held that "separate but equal" public schools were inherently unequal because racial segregation had a detrimental effect on students.<sup>23</sup> The Court reasoned that even a minority school that is equal to a white school in terms of objective and tangible factors (e.g., building, curricula, and teacher qualifications) remains unequal because segregation fosters and maintains both inequality and feelings of inferiority.<sup>24</sup> Relying on social science research, the Court found that segregation negatively affects the educational and mental development of black students and deprives them of benefits that they would receive in an integrated school.<sup>25</sup>

After the Court's ruling that "separate but equal" public schools were unconstitutional, it addressed the issue of how to remedy such a constitutional violation. The Court's holding in *Brown v. Board of Education (Brown II)* the following year ordered the desegregation of

16. Virginia Historical Society, The Civil Rights Movement in Virginia, Beginnings of Black Education, <http://www.vahistorical.org/civilrights/education.htm> (last visited Nov. 17, 2007).

17. See Pamela Barnhouse Walters, *Educational Access and the State: Historical Continuities and Discontinuities in Racial Inequality in American Education*, 74 SOC. OF EDUC. 35, 41 (2001).

18. *Id.*

19. ROY LAVON BROOKS, ATONEMENT AND FORGIVENESS: A NEW MODEL FOR BLACK REPARATIONS 61 (2004).

20. See, e.g., *Sweatt v. Painter*, 339 U.S. 629, 632-34 (1950) ("[W]e cannot find substantial equality in the educational opportunities offered white and Negro law students by the State."); see also Jean Preer, *Lawyers v. Educators: Changing Perceptions of Desegregation in Public Higher Education*, 53 J. HIGHER EDUC. 119, 120 (1982).

21. Library of Congress, Information Bulletin, May/June 2004, *Brown v. Board at Fifty: When School Integration Became the Law of the Land*, <http://www.loc.gov/loc/lcib/0405-6/brown.html> (last visited Oct. 20, 2008) (The *Brown* case was brought on behalf of black students who were bused to school five miles from home and had to walk through a railroad yard to get to school.).

22. 347 U.S. 483, 495 (1954).

23. *Id.* at 493-95.

24. *Id.* at 492-94.

25. *Id.*

public schools with “all deliberate speed.”<sup>26</sup> Rather than proclaim a national desegregation plan, the Court left the remedy to school districts which were, in turn, monitored by the district courts. District courts were left with the task of determining whether a school district acted in good faith when crafting and implementing plans to end racial discrimination. Because educational issues are so complex and locally based, the district courts were thought to be in a better position than the Supreme Court to determine if a plan would work for an individual school district.<sup>27</sup>

### C. A Slow Response Until 1964

Despite the *Brown* Court’s mandate, change was slow. Some schools did nothing, while others actively resisted desegregation plans implemented by the lower courts.<sup>28</sup> The situation changed in 1964 when Congress passed the Civil Rights Act (“the Act”), which prohibited segregation in schools and in other public places.<sup>29</sup> The Act was passed to counteract the Jim Crow laws that had developed during the Reconstruction era.<sup>30</sup> The other impetus for the Civil Rights Act was to compel schools to desegregate.<sup>31</sup> Title VI of the Act gave school districts real incentives to desegregate by providing that any federally assisted program that discriminated on the grounds of race, color, or national origin could lose federal funding.<sup>32</sup>

The Act also gave minorities greater access to costly judicial remedies by authorizing the Attorney General and the Department of Justice to bring suit against school districts on behalf of black students who were seeking redress for alleged discrimination.<sup>33</sup> This allowed individuals with few financial resources to have their day in court. The Department of Education was also authorized to collect enrollment data,

26. 349 U.S. 294, 301 (1955).

27. *Id.* at 299.

28. In 1957 nine black students known as the “Little Rock Nine” enrolled in Central High School in Little Rock, Arkansas. While the Little Rock School Board allowed the students to enroll, they met opposition from Governor Orval Faubus, who deployed the Arkansas National Guard to block their entry into the school. The Justice Department and local NAACP officials requested and were granted an order enjoining the National Guard from obstructing the entry of Negro students. The Little Rock Nine were physically and verbally terrorized by white students and parents. President Eisenhower sent in the 101st Airborne Division of the U.S. Army to escort and protect the black students and to enforce integration. See Wiley A. Branton, *Little Rock Revisited: Desegregation to Resegregation*, 53 J. NEGRO EDUC. 250, 260-65 (1983).

29. 42 U.S.C. § 2000a.

30. See Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1787-88 (2007) (stating that, with the Civil Rights Act, “Americans had managed . . . to affirm their support for a series of landmark statutes that broke the back of Jim Crow in this country”).

31. See Frank Brown, *The First Serious Implementation of Brown: The 1964 Civil Rights Act and Beyond*, 73 J. NEGRO EDUC. 182, 182 (2004).

32. 42 U.S.C. §§ 2000d, 2000d-1.

33. Brown, *supra* note 31, at 182-83.

which could be used by the government to prove racial discrimination in schools.<sup>34</sup> Once this law was enacted, school districts had a greater incentive to desegregate.

#### D. Desegregation

This new push towards desegregating schools resulted in racial balancing<sup>35</sup> and busing in the 1970s. Courts handed down judicial decrees ordering the desegregation of public schools. Some school districts enacted plans that used quotas to ensure that a certain percentage of students came from a racial minority group.<sup>36</sup> These plans involved busing students from one part of a school district to another in order to achieve racial diversity within the different schools. Busing was often met with opposition and violence from whites in affected communities.<sup>37</sup>

Some school districts used “freedom of choice” plans to integrate their districts, allowing students to attend the school of their choice regardless of their race.<sup>38</sup> However, in *Green v. County School Board*, the Court found that these plans did nothing more than maintain a segregated dual school system because no black students chose to attend the white schools, and vice versa.<sup>39</sup> While the Court did not hold that all freedom of choice plans were invalid, they looked at the results of the plan in *Green* and held that school districts have an affirmative duty to eliminate discrimination.<sup>40</sup> The Court ordered the school system to “take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.”<sup>41</sup> The

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34. *Id.* at 182.

35. Racial balancing is a practice whereby a school sets a goal of achieving racial diversity related to the racial composition of the school district in which the school is located. For example, if a school district is comprised of 60% white students and 40% African-American students, a school district may require that individual school demographics come within 15 percentage points of the district’s racial composition. See Suhrid S. Gajendragadkar, *The Constitutionality Of Racial Balancing In Charter Schools*, 106 COLUM. L. REV. 144, 155 (2006).

36. See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 6-9 (1971) (involving a school district desegregation plan that used the district-wide ratio of black pupils to white pupils as the goal towards which to direct efforts).

37. During the busing era in Boston, racial tensions ran high. In 1974 a white teenager was stabbed by a black teenager at South Boston High School. The black students at the school were evacuated by police personnel, while an increasingly hostile crowd of white residents gathered outside the school in a violent protest. See *Southie Boils Over*, TIME MAGAZINE, Dec. 23, 1974, available at <http://www.time.com/time/magazine/article/0,9171,911617-1,00.html>. In 1976 a black attorney named Theodore Landsmark was attacked by a group of white teenagers as he crossed Boston City Hall plaza. One of the teenagers attacked Landsmark with an American flag. See Celia Wren, *Stars and Strife*, SMITHSONIAN MAGAZINE, Apr. 2006, available at <http://www.smithsonianmag.com/history-archaeology/indelible-apr06.html>.

38. E.g., *Green v. County Sch. Bd. of New Kent County*, 391 U.S. 430, 433-34 (1968).

39. *Id.* at 441-42.

40. *Id.* at 437-38.

41. *Id.*

Court identified six areas, known as “*Green* factors,”<sup>42</sup> in which a school must become unitary:<sup>43</sup> composition of student bodies, faculty, staff, transportation, extracurricular activities, and facilities.<sup>44</sup>

In response to the Supreme Court’s order in *Green*, school authorities around the country implemented a variety of desegregation plans in their districts. In 1971, in *Swann v. Charlotte-Mecklenburg Board of Education*, the Court upheld the use of busing to integrate the Charlotte-Mecklenburg school district.<sup>45</sup> The Court found that allowing students to attend the schools nearest to their homes would not result in the “effective dismantling of the dual system.”<sup>46</sup> This holding was limited, however, three years later in *Milliken v. Bradley*, when the Court held that busing could not be used to integrate between districts where the constitutional violation only occurred in one district, and where the violation did not cause segregation in another district.<sup>47</sup> In that case, the Detroit School Board implemented a desegregation plan that involved busing students between inner-city and suburban schools.<sup>48</sup> In coming to this conclusion, the Court held fast to the notion that local control of schools is deeply rooted in history and that a multidistrict remedy would unfairly take that control away from districts not operating a racially segregated school system.<sup>49</sup>

### E. The Resegregation of Public Schools

The tide of desegregation began to turn in the 1990s as the Supreme Court limited desegregation.<sup>50</sup> As a result, busing within a school district was no longer required, and parents began sending their children to neighborhood schools.<sup>51</sup> Because residential housing patterns were

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42. See, e.g., *Freeman v. Pitts*, 503 U.S. 467 (1992) (referring to these factors as “*Green* factors”).

43. Unitary status is attained when a school system has transitioned from a segregated to a desegregated system. See NAT’L SCH. BDS. ASS’N, PRACTICAL GUIDE TO ISSUES RELATED TO UNITARY STATUS (1997).

44. See *Green*, 391 U.S. at 435 (stating that racial identification of schools extending to these factors created the sort of dual system held unconstitutional under *Brown I* and required to be abolished by *Brown II*).

45. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 30 (1971).

46. *Id.*

47. 418 U.S. 717, 745 (1974).

48. *Id.* at 717-18.

49. *Id.* at 741-43.

50. GARY ORFIELD & CHUNGMEI LEE, THE CIVIL RIGHTS PROJECT, *BROWN AT 50: KING’S DREAM OR PLESSY’S NIGHTMARE?* 18 (2004), available at <http://www.civilrightsproject.ucla.edu/research/teseg04/brown50.pdf>.

51. See GARY ORFIELD & SUSAN E. EATON, DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF *BROWN V. BOARD OF EDUCATION* 20-21 (1996). 52. See Gary Orfield, *Schools More Separate: Consequences of a Decade of Resegregation*, RETHINKING SCHOOLS ONLINE, Fall 2001, [http://www.rethinkingschools.org/archive/16\\_01/Seg161.shtml](http://www.rethinkingschools.org/archive/16_01/Seg161.shtml) (last visited Apr. 5, 2008) (noting that “central cities, many of them largely minority before desegregation, became overwhelmingly nonwhite, overwhelmingly poor, and showed the highest levels of segregation at century’s end”).



segregated, many schools became resegregated.<sup>52</sup> Another factor in resegregation was “white flight.” As schools and neighborhoods became integrated and busing took effect, middle-class whites moved to the suburbs, leaving inner-city schools predominantly populated by minorities.<sup>53</sup> Middle-class white parents that remained in the inner city often sent their children to private schools due to the high concentration of minority students in public schools.<sup>54</sup>

In 1991 the Court backed away from its approval of busing to integrate schools, holding in *Board of Education v. Dowell* that a school district may end its desegregation plan and go back to neighborhood schools so long as the school district had complied in good faith with its desegregation plan and “the vestiges of past discrimination had been eliminated to the extent practicable.”<sup>55</sup> This holding did not require that desegregation actually occur but merely that the school board made an effort to do so.<sup>56</sup> The Court reasoned that injunctions in school desegregation cases are not meant to last forever, and that local control should be returned to a school district that complies with a court order for a reasonable period of time.<sup>57</sup>

### III. PARENTS INVOLVED IN COMMUNITY SCHOOLS V. SEATTLE SCHOOL DISTRICT NO. 1

In response to the increasing resegregation of public schools, some school districts voluntarily adopted or retained plans to racially desegregate their schools.<sup>58</sup> Some of these schools had a history of segregation and simply continued with the remedial action of court orders that had been lifted,<sup>59</sup> while others adopted plans to combat new

53. DAVID J. ARMOR, FORCED JUSTICE: SCHOOL DESEGREGATION AND THE LAW 68-69 (1995) (citing JAMES A. COLEMAN ET. AL., URBAN INST., TRENDS IN SCHOOL INTEGRATION (1975)).

54. Carl L. Bankston III & Stephen J. Caldas, *White Enrollment in Nonpublic Schools, Public School Racial Composition, and Student Performance*, 41 THE SOC. Q. 539, 539-41 (2000) (observing that “white families may . . . tend to withdraw their children from public schools in order to avoid influences from minority students”); Robert W. Fairlie & Alexandra M. Resch, *Is There “White Flight” into Private Schools? Evidence from the National Educational Longitudinal Survey*, THE REV. ECON. & STAT. Feb. 2002, at 21, 28 (finding that “the minority share of the school-age population measured at the county level has a positive and statistically significant effect on the probability of private school attendance among whites”).

55. 498 U.S. 237, 249-50 (1991).

56. See *id.* at 250 n.2 (noting that residential segregation was the result of private decisionmaking and economics and that it was too attenuated to be a vestige of former school segregation).

57. *Id.* at 248.

58. Orfield & Lee, *supra* note 50 at 35; David J. Armor & Christine H. Rossell, *The Desegregation and Resegregation in the Public Schools*, in BEYOND THE COLOR LINE: NEW PERSPECTIVES ON RACE AND ETHNICITY IN AMERICA 253 (Abigail Thernstrom & Stephen Thernstrom, eds., 2001).

59. RICHARD D. KAHLBERG, ALL TOGETHER NOW: CREATING MIDDLE CLASS SCHOOLS THROUGH PUBLIC SCHOOL CHOICE 159 (2001) (noting that “some integration plans are voluntarily kept in place long after the court order stipulating them has expired”).

segregation.<sup>60</sup> School districts such as Seattle, Washington, and Jefferson County, Kentucky, adopted admission plans that assigned students to schools in a way that would ensure racial diversity. However, in *Parents Involved in Community Schools v. Seattle School District No. 1*, the Supreme Court struck down these admission plans, holding that they violated the Equal Protection Clause of the Fourteenth Amendment.<sup>61</sup>

Under the Seattle School District's enrollment plan, students could choose to enroll in any high school in the district, but since certain schools became over-enrolled, the district used tiebreakers to decide which students would be admitted to the more popular schools.<sup>62</sup> The most important tiebreaker was whether the student had a sibling at the school.<sup>63</sup> The second most important tiebreaker was a racial factor intended to maintain racial diversity and was only used when a school was racially imbalanced.<sup>64</sup> Parents sued the district, arguing that the racial tiebreaker violated the Equal Protection Clause and the Civil Rights Act of 1964.<sup>65</sup>

In Kentucky, the Jefferson County Public Schools had been integrated by court order from 1975 until 2000.<sup>66</sup> Since 2000 the school district had voluntarily continued with their desegregation plan. Students could enroll in any high school in the district, but since certain schools became over-enrolled, enrollment then was decided on the basis of several factors, including place of residence, school capacity, and race.<sup>67</sup> However, no school was allowed to have an enrollment of black students less than 15% or greater than 50% of its student population.<sup>68</sup> White parents sued the school district, arguing that the plan's racial classifications violated the students' rights guaranteed by the Equal Protection Clause.<sup>69</sup>

In the *PICS* plurality opinion, four justices held that the plans used by Seattle and Jefferson County violated the Equal Protection Clause.<sup>70</sup>

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60. See, e.g., *Eisenberg v. Montgomery County Pub. Sch.*, 197 F.3d 123, 125 (4th Cir. 1999), cert. denied, 529 U.S. 1019 (2000) (involving a school district that, having never been subject to a court order for desegregation, voluntarily dismantled its formerly segregated school system, by means of programs including magnet schools); *Comfort v. Lynn Sch. Comm.*, 418 F.3d 1, 6 (1st Cir. 2005), cert. denied, 546 U.S. 1061 (2005) (involving a school district that adopted a voluntary plan to achieve racial diversity, whereby students could request a transfer to schools not in their neighborhood, and where approval of such transfers depended on the requesting student's race and the racial makeup of the transferor and transferee schools).

61. 127 S. Ct. 2738, 2746 (2007).

62. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162, 1169 (9th Cir. 2005).

63. *Id.*

64. *Id.* at 1169-70.

65. *Id.* at 1171.

66. *McFarland v. Jefferson County Pub. Sch.* 330 F. Supp. 2d 834, 836 (W.D. Ky. 2004).

67. *Id.* at 842.

68. *Id.*

69. *Id.* at 836.

70. 127 S. Ct. 2738, 2759-60 (2007).

According to the Court, both school districts failed to satisfy the strict scrutiny test; their use of race as an admission factor did not serve a compelling state interest, nor were the plans narrowly tailored.<sup>71</sup> The plurality argued that race should never be used as a determining factor in racial admission plans; instead, they advocated for colorblind admissions, stating that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”<sup>72</sup>

Four justices dissented, arguing that these plans served a compelling state interest and were narrowly tailored.<sup>73</sup> They believed that the distinction between *de jure* and *de facto* segregation was meaningless because the effect on students is the same. In other words, it does not matter that segregation was caused by housing patterns and not state action. According to the dissenting justices, the remedy should be one that takes race into account to desegregate schools.<sup>74</sup> The dissent also relied on the district’s previous desegregation by court order and subsequent choice to continue the admission plan after the decree was lifted.<sup>75</sup>

Justice Kennedy’s concurrence became the controlling holding of the case because a majority of justices could not agree on the rationale for the holding. Justice Kennedy agreed that the racial admission plans used in Seattle and Jefferson County were unconstitutional because they were not narrowly tailored under the strict scrutiny test.<sup>76</sup> However, he refused to go as far as the plurality, which held that race could never be used to desegregate.<sup>77</sup> He simply held that it could not be a determining factor for placement in a school.<sup>78</sup> Justice Kennedy’s opinion in the *PICS* case is now the logical starting point for any school administrator who wants to maintain or increase diversity in her school district. From this point forward, such administrators will have to decide whether using race is still a viable option, or whether another factor would be more beneficial.

#### IV. SOCIOECONOMIC INTEGRATION

A handful of school districts currently use socioeconomic status, instead of race, as a factor in school integration. Some of these districts

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71. *Id.* (Remedying past discrimination and diversity in higher education have previously been held as compelling interests by the Court. Neither of these interests was implicated here.).

72. *Id.* at 2768.

73. *Id.* at 2830 (Breyer, J., dissenting).

74. *Id.* at 2800-01.

75. *Id.* at 2811 (“How could such a plan be lawful the day before dissolution but then become unlawful the very next day?”).

76. *Id.* at 2788-89 (Kennedy, J., concurring in part and concurring in judgment).

77. *Id.*

78. *Id.* at 2791.

use socioeconomic integration plans because they have recognized that a high concentration of poverty in the student body affects student achievement, while others are acting in compliance with court rulings prohibiting the use of race.

### A. La Crosse, Wisconsin

The first of these socioeconomic integration plans appeared in La Crosse, Wisconsin, in the 1980s.<sup>79</sup> Socioeconomic integration began here when one of the two high schools in the district was rebuilt to make room for more students.<sup>80</sup> The school board voted in 1979 to redraw district lines so that neither school would be overcrowded.<sup>81</sup> Affluent students who lived in the southern section of La Crosse attended Central High, the college preparatory school, while poorer students who lived in the northern part of town attended Logan High, a vocational school. The school board moved the boundary line several blocks to the south so that affluent students would be required to attend Logan High.<sup>82</sup>

Integration occurred at the elementary school level in La Crosse in the 1990s when two new schools were built to relieve overcrowding.<sup>83</sup> Instead of race, socioeconomic status was used in the admission plans<sup>84</sup> because teachers and administrators recognized that schools with high concentrations of poor students did not fare well academically and posed challenges to teachers.<sup>85</sup> Officials knew that poverty, not race, was the cause of low test scores.<sup>86</sup> Because poverty transcended racial lines in La Crosse—two-thirds of students receiving free lunches were white<sup>87</sup>—the school district could only solve this problem by integrating based on socioeconomic status rather than race.

Socioeconomic integration in La Crosse has resulted in greater academic achievement for low-income students. Compared to low-income students in Wisconsin generally, the low-income students in La

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79. RICHARD D. KAHLENBERG, THE CENTURY FOUND., *RESCUING BROWN V. BOARD OF EDUCATION: PROFILES OF TWELVE SCHOOL DISTRICTS PURSUING SOCIOECONOMIC SCHOOL INTEGRATION* 14-15 (2007), available at [http://www.tcf.org/publications/education/district\\_profiles.pdf](http://www.tcf.org/publications/education/district_profiles.pdf).

80. *Id.*

81. *Id.*; Richard Mial, *La Crosse: One School District's Drive to Create Socioeconomic Balance, in DIVIDED WE FAIL: COMING TOGETHER THROUGH PUBLIC SCHOOL CHOICE* 119 (The Century Foundation 2002).

82. Mial, *supra* note 81, at 119.

83. KAHLENBERG, *supra* note 79, at 16.

84. *Id.* at 123. Under the La Crosse plan, the criterion used to determine socioeconomic status was whether a student received a free lunch. District lines were redrawn to distribute students more evenly throughout the district. Once 15% to 45% of the students in each school were free lunch recipients, socioeconomic integration would be attained.

85. KAHLENBERG, *supra* note 79, at 16-18.

86. *Id.*

87. *Id.* at 19.

Crosse scored higher on standardized tests.<sup>88</sup> But as successful as this plan has been, it has not been without opposition. When the plan was put into place, parents were so upset that they voted several school board members out of office.<sup>89</sup> Parents who disliked busing their children to school across town would have preferred to send their children to neighborhood schools.<sup>90</sup> However, parents' real concern had to do with lack of control. Parents were upset that attendance at a particular school was compulsory and that they had no control over which school their children would attend.<sup>91</sup> As time has gone on and parents have become comfortable with the plan, support for integration has increased significantly.<sup>92</sup> In 2001, 64% of people polled in La Crosse favored socioeconomic balance while 21% opposed it.<sup>93</sup> Due to its success in improving student achievement, socioeconomic integration has been accepted by the La Crosse community and shows no signs of going away.

## B. Wake County, North Carolina

Another socioeconomic integration plan was introduced in North Carolina in 1998. The Wake County Public School System implemented a program with the goal of getting 95% of all students at or above grade level in reading and math by 2003.<sup>94</sup> One way the school district sought to achieve this goal was to assign students to magnet schools<sup>95</sup> on the basis of socioeconomic status.<sup>96</sup> Under this plan, socioeconomic diversity would be achieved when "the percentage of students [in each school] eligible for free or reduced-price lunch [is] no higher than 40 percent."<sup>97</sup> The district further defined appropriate and reasonable diversity as "an achievement level of less than 25% of students below grade level."<sup>98</sup> When the school district fell short of reaching its goal of

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88. *Id.* at 26.

89. TASK FORCE ON THE COMMON SCH., THE CENTURY FOUND., DIVIDED WE FAIL: COMING TOGETHER THROUGH PUBLIC SCHOOL CHOICE 39 (2002).

90. See KAHLENBERG, *supra* note 79, at 27.

91. *Id.* at 27-28.

92. *Id.* at 24.

93. *Id.*

94. Wake County Public School System, Goal and Mission, <http://www.wcpss.net/goal-mission.html> (last visited Nov. 11, 2007).

95. Magnet schools are public schools that offer a specialized curriculum as a way to "assist in the desegregation of public schools." See Office of Innovation and Improvement, U.S. Department of Education, Magnet Schools Assistance, <http://www.ed.gov/programs/magnet/index.html> (last visited Apr. 5, 2008).

96. U.S. DEP'T OF EDUC. & OFFICE FOR CIVIL RIGHTS, ACHIEVING DIVERSITY: RACE-NEUTRAL ALTERNATIVES IN AMERICAN EDUCATION (2004), available at <http://www.ed.gov/about/offices/list/ocr/edlite-raceneutralreport2.html>.

97. *Id.*

98. Wake County Public School System, Student Assignment Process, <http://www.wcpss.net/>

95% of students at or above grade level in reading and math by 2003, the district created a new plan aimed at reaching this goal by 2008.<sup>99</sup> This new plan was developed by the Board of Education in conjunction with parents and the community.<sup>100</sup>

The impact of this plan on academic achievement has been notable. In the mid-1990s, 40% of black students in grades three through eight scored at grade level; in 2005, 80% did.<sup>101</sup> Taken as a whole, 91% of students in Wake County schools in grades three through eight scored at grade level in 2005, compared with 79% ten years prior.<sup>102</sup>

The geographic layout and demographic makeup of the Wake County school system make it conducive to socioeconomic integration. The district is large, encompassing the entire 864-square-mile county, as opposed to one city or town.<sup>103</sup> This allows for the integration of students from a wide variety of socioeconomic backgrounds.<sup>104</sup> Students may be bused from the suburbs to the city of Raleigh and vice versa.<sup>105</sup> The county has a long history of busing students for racial integration, so parents and students are accustomed to busing to schools many miles away.<sup>106</sup>

But this is not to say that all parents support busing. Parents who opposed the admission plan formed a group called Assignment By Choice to advocate for parental choice in school assignments.<sup>107</sup> Polls taken when the plan was implemented reported that there was more support among Wake County residents for neighborhood schools than for socioeconomic integration.<sup>108</sup> However, now that the plan has been in effect for almost a decade, many parents tolerate busing because of the academic success of their children's schools.<sup>109</sup>

### C. Cambridge, Massachusetts

The school district in Cambridge, Massachusetts, a small city north of Boston, covers just 6.5 square miles and serves six-thousand students.<sup>110</sup> In response to an impending lawsuit from the Massachusetts

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growth-management/student-assign-process.html (last visited Nov. 11, 2007).

99. Wake County Public School System, *supra* note 94.

100. *See id.* (More than 1,850 citizens offered priorities, changes, and goals.)

101. Alan Finder, *As Test Scores Jump, Raleigh Credits Integration by Income*, N.Y. TIMES, Sept. 25, 2005.

102. *Id.*

103. KAHLENBERG, *supra* note 79, at 9.

104. *Id.* at 13.

105. *Id.* at 12.

106. *See* Finder, *supra* note 101.

107. KAHLENBERG, *supra* note 79, at 12.

108. *Id.*

109. *See* Finder, *supra* note 101.

110. KAHLENBERG, *supra* note 79, at 28.

Department of Education for engaging in *de jure* segregation, the Cambridge Public School System developed a plan to integrate its schools on the basis of race in 1981.<sup>111</sup> Under this plan, known as “controlled choice,” attendance zones<sup>112</sup> were abolished, all schools were turned into magnet schools, and parents selected and ranked three schools in order of preference.<sup>113</sup> A computerized lottery designed to achieve racial integration then assigned students to one of those three schools, giving school administrators some flexibility while maintaining parental choice.<sup>114</sup> Once the representation of a particular race at an individual school matched that of the district as a whole, no more students of that race could be admitted.<sup>115</sup> While this plan achieved racial diversity, it did not balance socioeconomic diversity within the schools, nor did it increase academic achievement.<sup>116</sup> This result, coupled with the First Circuit’s ruling in *Wessman v. Gittens*,<sup>117</sup> was the impetus for Cambridge to replace its racial integration plan with one that focused on socioeconomic status.<sup>118</sup>

In 2001 Cambridge implemented a new plan that required “each grade in each school to be within a range of plus or minus 15 percentage points of the District-wide . . . percentage of students who are eligible for free and reduced price meals” for the 2002-2003 school year.”<sup>119</sup> The remainder of the controlled choice plan did not significantly change: parents continue to choose and rank three schools to which their child may be sent, and the children are assigned to schools by a computer program.<sup>120</sup> Once a school’s demographics come within fifteen percentage points of the district total of children receiving free or reduced-price lunches, no more of those children may be admitted.<sup>121</sup>

It is too early to tell what effect the plan has had on academic achievement because the plan is being implemented one grade level at a time.<sup>122</sup> However, early data shows that low-income third-grade students in Cambridge scored slightly better on standardized tests than low-income third-grade students statewide.<sup>123</sup> This new plan has also not

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111. KAHLENBERG, *supra* note 79, at 28.

112. An attendance zone is the geographic area within a school district that includes schools which a student is allowed to attend. See Salvatore Saporito, *Private Choices, Public Consequences: Magnet School Choice and Segregation by Race and Poverty*, 50 SOC. PROBS. 181, 187 (2003).

113. KAHLENBERG, *supra* note 79, at 28-29.

114. *Id.*

115. *Id.*

116. *Id.* at 31-32.

117. 160 F.3d 790 (1st Cir. 1998).

118. KAHLENBERG, *supra* note 79, at 32.

119. CAMBRIDGE PUB. SCH., CONTROLLED CHOICE PLAN 8 (2001), available at <http://www.cpsd.us/Web/PubInfo/ControlledChoice.pdf>.

120. *Id.* at 7, 19.

121. See *id.* at 20 (“If students cannot be assigned . . . without exceeding the diversity goals of . . . +/- 15 percentage points . . . in a school, then the students will be assigned to another school.”).

122. KAHLENBERG, *supra* note 79, at 33.

123. *Id.*

brought down the scores of middle-class and upper-class students, as these students scored on par with students in their socioeconomic class statewide.<sup>124</sup> The Cambridge plan seems to be on its way to achieving levels of academic success similar to other, more established socioeconomic integration plans.

## V. LEGAL AND POLICY ANALYSES

### A. The Legal Considerations for School Integration

#### 1. *Legal Status of Socioeconomic Classifications*

In contrast to the strict scrutiny analysis that is applied to race-based classifications, classifications based on socioeconomic status are analyzed under the rational basis test.<sup>125</sup> Rational basis is an easier standard for the government to meet than strict scrutiny.<sup>126</sup> Consequently, the government defendant usually prevails in cases in which the law is analyzed under the rational basis test.<sup>127</sup>

Very few cases involving socioeconomic admission plans and their effects on educational opportunity have been brought to court. One reason for this may be that when socioeconomic status is analyzed under the rational basis test, plaintiffs know that they most likely will not prevail. Another reason may be that because so few schools use socioeconomic status as an admission factor, the public outcry has not been as great as it has been with respect to racial admission plans. In other words, because fewer people are affected by socioeconomic admission plans, fewer Equal Protection claims are filed.

#### 2. *Justice Kennedy's Options*

The crux of Justice Kennedy's controlling opinion in *PICS* is that while race-conscious measures may be used to diversify a school, students cannot be treated differently because of their race.<sup>128</sup> Justice

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124. *Id.*

125. The rational basis test demands that a law be rationally related to a legitimate state interest. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 40 (1973).

126. Richard L. Hasen, *Bush v. Gore and the Future of Equal Protection Law in Elections*, 29 FLA. ST. U. L. REV. 377, 389 (2001).

127. Erwin Chemerinsky, *The Supreme Court and the Fourteenth Amendment: The Unfulfilled Promise*, 25 LOY. L.A. L. REV. 1143, 1154 (1992).

128. 127 S. Ct. 2738, 2792 (2007) (Kennedy, J., concurring in part and concurring in judgment).



Kennedy offers several plans that school boards may implement to desegregate a school: “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.”<sup>129</sup> If a school were to implement one of Justice Kennedy’s options, creating a racially diverse student population may be less likely than if race were used as an admission factor. As discussed below, many of these options can only be used in limited circumstances, while others may only yield limited results.

First, strategically placing new schools in areas that will maintain racial diversity is a limited option for school districts. Realistically, new schools can only be built when there is money in the budget to finance such a project.<sup>130</sup> Even if school districts have the money to build new schools, in order to sustain classroom diversity there would have to be an appropriate location in the district because some school districts are residentially segregated.<sup>131</sup> Advocates have found that the opportunity to site new schools is “relatively rare.”<sup>132</sup>

Second, Justice Kennedy’s suggestion of redrawing attendance zones could only create racial diversity if it were done in a district that is already racially diverse. A similar limitation applies to using socioeconomic status as an admission factor. In both instances, the amount of diversity in a given school is dependant upon the amount of diversity in the district. In the case of socioeconomic integration, 14% of school districts nationwide do not have enough middle-class schools to achieve socioeconomic integration.<sup>133</sup> Again, residential segregation will impede school desegregation efforts as people of differing socioeconomic backgrounds choose to live apart from one another.

Third, allocating resources for special programs is one potential way to attract students across varying demographics to a particular school. Special programs could include magnet schools or specialized academic programs.<sup>134</sup> For instance, magnet schools attract students

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129. *Id.*

130. See, e.g., Christina DeNardo, *District Has Less Money to Build, Fix Schools*, PALM BEACH POST, June 4, 2008 (citing declining property values and a reduction in tax rolls as the cause of a school district having to postpone many renovation and expansion projects aimed at lowering class sizes and replacing aging buildings).

131. See NAACP LEGAL DEF. AND EDUC. FUND & THE CIVIL RIGHTS PROJECT, STILL LOOKING TO THE FUTURE VOLUNTARY K-12 SCHOOL INTEGRATION; A MANUAL FOR PARENTS, EDUCATORS AND ADVOCATES 36 (2008), available at [http://www.naacpldf.org/content/pdf/voluntary/Still\\_Looking\\_to\\_the\\_Future\\_Voluntary\\_K-12\\_School\\_Integration;\\_A\\_Manual\\_for\\_Parents\\_Educators\\_and\\_Advocates.pdf](http://www.naacpldf.org/content/pdf/voluntary/Still_Looking_to_the_Future_Voluntary_K-12_School_Integration;_A_Manual_for_Parents_Educators_and_Advocates.pdf) (“School districts can attempt to place new schools in locations that are likely to create a racially diverse school.”).

132. *Id.*

133. Angela Ciolfi, *Shuffling the Deck: Redistricting To Promote a Quality Education in Virginia*, 89 VA. L. REV. 773, 793 (2003) (citing KAHLENBERG, *supra* note 59, at 150).

134. NAACP LEGAL DEF. AND EDUC. FUND & THE CIVIL RIGHTS PROJECT, *supra* note 131, at 36.

from across a district by emphasizing academic subjects such as mathematics, technology, or the performing arts.<sup>135</sup> However, the ability of magnet schools to increase diversity is limited.<sup>136</sup> Magnet schools cannot be used alone because districts generally have only a few magnet schools.<sup>137</sup> While magnet schools in a district may create diversity within themselves, the remaining public schools in that district will still face the challenges of integrating without explicitly using race as a controlling admission factor.

Fourth, targeted recruiting of students and faculty may work in school districts when there are incentives for students to attend one school over another. The NAACP's Legal Defense Fund advises school districts to use a variety of recruiting methods, such as "open houses for students of designated racial groups, mentoring programs, partnerships with community centers or local civic organizations, door-to-door outreach in particular communities, and information and leaflets."<sup>138</sup> These methods could be used to recruit minority students to participate in magnet schools and other special programs.<sup>139</sup> However, as mentioned above, magnet schools alone will not increase the racial diversity of non-magnet schools in a school district, thus leaving some schools segregated.

Justice Kennedy's final suggestion—tracking enrollments, performance, and other statistics by race—is a means for school districts to determine where more effort needs to be made to increase diversity. This data can be the basis for a school district to take any of the other actions suggested by Justice Kennedy in his concurring opinion, but simply tracking statistics will not increase diversity. In fact, none of Justice Kennedy's proposals taken alone will achieve the same level of racial diversity as using race as a determining factor in public school admissions.

### 3. *Boston Latin School: A Case Study*

Some commentators believe that school districts will not use any of

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135. See Office of Innovation and Improvement, *supra* note 95.

136. See OFFICE OF THE UNDER SEC'Y, U. S. DEP'T OF EDUC., EVALUATION OF THE MAGNET SCHOOLS ASSISTANCE PROGRAM, 1998 GRANTEES viii (2003) (Between 1998 and 2001, only 57% of magnet schools succeeded in "preventing, eliminating, or reducing minority group isolation.").

137. For the 2004-05 school year, forty-two of the one hundred largest school districts in the United States reported having magnet schools in their district. Of those forty-two districts, only twelve districts had 15% or more of their schools designated as magnet schools. NAT'L CTR FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., CHARACTERISTICS OF THE 100 LARGEST PUBLIC ELEMENTARY AND SECONDARY SCHOOL DISTRICTS IN THE UNITED STATES: 2004-05 A-16 to -17 tbl.A-7, available at <http://nces.ed.gov/pubs2008/2008335.pdf>.

138. NAACP LEGAL DEF. AND EDUC. FUND & THE CIVIL RIGHTS PROJECT, *supra* note 131, at 37.

139. *Id.*

Justice Kennedy's options out of fear of being sued and instead may do away with any efforts to desegregate.<sup>140</sup> The case of Boston Latin School (BLS) offers just one example of a school board backing away from racial admission plans after being sued multiple times. BLS is a school within the Boston Public School System that requires applicants to pass an exam in order to be admitted. In 1974, after a ruling by the First Circuit Court of Appeals, the school district was placed under a desegregation order that imposed a 35% quota for black and Hispanic applicants.<sup>141</sup>

The order was lifted in 1987 when the court found that BLS had reached unitary status as required by *Green*.<sup>142</sup> However, the Boston School Committee<sup>143</sup> continued using the quota to maintain diversity until 1995, when they were sued by a white student who was denied admission because of her race.<sup>144</sup> In response to that suit, the School Committee crafted an admission plan that admitted 50% of students based on merit,<sup>145</sup> while the other 50% had to reflect the racial makeup of the qualified applicant pool.<sup>146</sup>

The School Committee was sued again in 1999 by another white student who was denied admission because of her race.<sup>147</sup> The First Circuit ruled that the plan was essentially racial balancing and therefore did not meet the narrowly tailored prong of the strict scrutiny test.<sup>148</sup> Since the First Circuit's ruling, the School Committee has abolished all race-conscious admission plans and admits students solely on merit.<sup>149</sup>

As a result of the merit-based admission plan, BLS has become less diverse. Between 1994 and 2000, the number of black and Hispanic students dropped from 32.4% to 27.5%.<sup>150</sup> Minority students have lost the opportunity to attend an academically rigorous school and participate in classes offered at BLS,<sup>151</sup> and white students have become isolated

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140. See Brigid Schulte, *Charting a New Course toward Racial Integration: Districts Seek Legal Routes to Capture the Benefits of Diversity*, HARVARD EDUC. LETTER, Nov./Dec. 2007, available at <http://www.edletter.org/insights/newcourse.shtml>.

141. *Morgan v. Hennigan*, 379 F. Supp. 410 (D. Mass. 1974), *aff'd*, 509 F.2d 580 (1st Cir. 1974).

142. *Morgan v. Nucci*, 831 F.2d 313, 326 (1st Cir. 1987).

143. In Massachusetts, the governing body of each school district is referred to as the School Committee. HENRY SUZZALLO, *THE RISE OF LOCAL SCHOOL SUPERVISION IN MASSACHUSETTS: THE SCHOOL COMMITTEE 1635-1827* 39 (1906).

144. *McLaughlin v. Boston Sch. Comm.*, 938 F. Supp. 1001 (D. Mass. 1996) (granting preliminary injunction to admit McLaughlin to school), *dismissed as moot*, 952 F. Supp. 33 (D. Mass. 1996).

145. "Merit" consists of a student's GPA and entrance exam test score. Boston Latin School Association, *The Changing Face of Boston Latin School*, FALL BULLETIN 2000, at 2, available at [http://www.blsa.org/pub\\_bul\\_fall00\\_1.shtml](http://www.blsa.org/pub_bul_fall00_1.shtml).

146. *Id.*

147. See *Wessmann v. Gittens*, 160 F.3d 790 (1st Cir. 1998).

148. *Id.* at 807.

149. See Boston Latin School, About: Admission to BLS, Answers To Frequently Asked Questions About Entrance To Boston Latin School, [http://www.bls.org/doc\\_content/ISEE%20QUESTIONS.pdf](http://www.bls.org/doc_content/ISEE%20QUESTIONS.pdf) (last visited Nov. 17, 2007).

150. Boston Latin School Association, *supra* note 145, at 1.

151. REBECCA GORDON ET. AL., *THE APPLIED RESEARCH CTR., FACING THE CONSEQUENCES: AN*

from minorities with whom they will live and work in society.<sup>152</sup>

The case of BLS shows what can happen when a school district tries to make admission policies against the backdrop of a changing legal landscape. After being sued multiple times, the Boston School Committee gave up on admission plans that would create diversity, presumably for fear of being sued again.<sup>153</sup> In the wake of *PICS*, school districts may be unsure which plans are legally valid and which are unconstitutional. Rather than face a lawsuit, these districts may completely shy away from developing any admission plans that would desegregate schools and simply allow students to enroll in the school of their choice.

## B. Policy Rationales for Socioeconomic Integration

Racial diversity is an important state interest because adults must all live and work in a diverse society. However, as *PICS* indicates, the country is entering an era in which race may no longer be used as an admission factor to desegregate schools, which will likely lead to less diverse public schools. The question that school administrators and policy-makers must answer is whether socioeconomic status is an effective proxy for race, given its success in creating some racial diversity and even more academic achievement.

If the answer to that question is “yes,” and socioeconomic status is used, there may be problems with its implementation. Parents may have concerns with these admission plans similar to those they have had with racial admission plans. Additionally, socioeconomic status is harder to document and track than race. Despite these problems, socioeconomic integration should be used because there is immense societal value in having socioeconomically diverse public schools in the United States.

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EXAMINATION OF RACIAL DISCRIMINATION IN U.S. PUBLIC SCHOOLS 2, 15-17 (2000) (“Students of color have less access to advanced classes or programs for gifted students.”).

152. Gary Orfield & Susan E. Eaton, *Back to Segregation*, THE NATION, Mar. 3, 2003 (“Whites are the most racially isolated group in America’s public schools. Statistics from the 2000-01 school year show that the average white student goes to a school where 80 percent of students are white.”).

153. In a profile of Michael McLaughlin, Wessman’s attorney, Teacher Magazine reported that “McLaughlin’s victory . . . appears to have set the stage for Boston’s near-total retreat from its historic efforts to balance schools racially. On June 21 . . . parents filed a new, McLaughlinesque lawsuit, claiming their children had been denied their choice of kindergarten because they were white. School leaders declined to challenge the suit and agreed to stop using race as a factor when assigning students to schools.” Robert Keough, *Ten People Who Shaped the Decade, Colorblind: Is Michael McLaughlin a Racist or a Civil Rights Advocate?*, TEACHER MAGAZINE, Aug./Sept. 1999, available at <http://www.projectappleseed.org/mom%26pop.html#anchor5324488>.

### 1. *Diversity is an Important State Interest*

In 1966 James Coleman, a sociologist from the University of Chicago, published the now famous “Coleman Report,” which found that black students who attended desegregated schools demonstrated higher levels of academic achievement than black students who attended segregated schools.<sup>154</sup> Since that time, researchers have found evidence of more benefits than just academic achievement.<sup>155</sup>

Attending diverse schools serves the interests of all students by preparing them for life in a multicultural world. Because children will grow into adults who work in a pluralistic society, it is in their best interest to learn as early as possible how to interact with people whom they perceive to be different from themselves. It is beneficial to get different viewpoints, and to be exposed to and become comfortable with different cultures and ways of thinking.<sup>156</sup>

Integration also affects racial attitudes. As the Supreme Court has acknowledged, schools act as one of the most important socializing agents in a child’s life.<sup>157</sup> School is where children spend the majority of their days and where they learn how to interact with others. Integrated schools foster social tolerance and reduce racial prejudices.<sup>158</sup> Both white and minority students develop a greater understanding of other races when they attend a racially integrated school, an understanding that students can take with them to a diverse work environment in the “real world.”<sup>159</sup> This understanding is not as easily developed in a school in which students do not interact with peers of a different race.<sup>160</sup>

Integration also improves the educational and future employment levels of students. Minority students attending integrated schools are more likely to finish high school,<sup>161</sup> complete more years of education,

154. JAMES S. COLEMAN, U.S. DEP’T OF HEALTH, EDUC., AND WELFARE, EQUALITY OF EDUCATIONAL OPPORTUNITY STUDY 22 (1966), available at [http://eric.ed.gov/ERICDocs/data/ericdocs2sql/content\\_storage\\_01/0000019b/80/33/42/82.pdf](http://eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/33/42/82.pdf).

155. See, e.g., Brief of 553 Social Scientists as Amici Curiae Supporting Respondents at 6, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007) (Nos. 05-908 & 05-915), 2006 WL 2927079.

156. See *id.* (noting studies showing that students who have more interactions with peers of other races have more tolerant and inclusive viewpoints about different races than students who have less contact).

157. See *Plyler v. Doe*, 457 U.S. 202, 222 n.20 (1982).

158. Brief of 553 Social Scientists, *supra* note 155, at 5-6.

159. See *id.* at app. 24-25 (“Experiences in racially diverse classrooms make it more likely that people will bring fewer racial and ethnic stereotypes into the workplace, and will work more productively with other members of an increasingly diverse nation,” citing Willis D. Hawley, *Designing Schools that Use Student Diversity to Enhance Learning of All Students*, in LESSONS IN INTEGRATION: REALIZING THE PROMISE OF RACIAL DIVERSITY IN AMERICA’S SCHOOLS (Erica Frankenberg & Gary Orfield eds., 2007)).

160. *Id.* at app. 7 (“[B]enefits [of racial diversity] are difficult to attain in single-race classrooms,” citing THE CIVIL RIGHTS PROJECT, *Teacher Opinions on Racial and Ethnic Diversity: Clark County School District, Nevada* (2002)).

161. *Id.* at app. 20 (citing Janet W. Schofield, *Maximizing Benefits of Student Diversity: Lessons*

earn higher degrees, and study more varied subjects than their peers who attend segregated schools.<sup>162</sup> Income levels of minority students also increased in the years after desegregation was implemented.<sup>163</sup> Therefore, integration results in students who grow up to be individuals less likely to rely on government assistance.

## 2. *Is Socioeconomic Status an Effective Proxy for Race?*

Socioeconomic status may be the most useful factor in admission plans in order to achieve diversity and improve educational opportunities for all children now that race has effectively been taken off the table by the *PICS* case. Socioeconomic status strongly correlates to race. Black and Hispanic children under the age of eighteen live below the poverty line at higher rates than white and Asian children in the same age group. In 2005, 33% of black children and 28% of Hispanic children were living in poverty, compared with 14% of white children and 11% of Asian children.<sup>164</sup>

Despite this correlation, the social science data in this area also indicates that socioeconomic status is not a perfect proxy for race. Professors Reardon, Yun, and Kurlaender have found that integration based on socioeconomic status will not achieve the same level of racial diversity as does racial integration.<sup>165</sup> One reason for this is that not all whites are rich, nor are all blacks poor; therefore, there is not a perfect correlation between race and income.<sup>166</sup> In a district using socioeconomic status, poor white parents may choose to send their children to a school populated by middle-class and upper-class white students. Poor minority students may integrate into middle-class schools as well, but the racial diversity that occurs will be less than that created when race is the factor used to place students. In this scenario, socioeconomic integration will have occurred, but racial segregation will persist.

The leading expert in this area, Richard Kahlenberg, has also found that socioeconomic integration may be a better indicator of academic

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from *School Desegregation Research*, in *DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION 99-141* (Gary Orfield & Michal Kurlaender eds., 2001)).

162. *Id.* at app. 21 (citing Jomills Braddock & James McPartland, *How Minorities Continue to be Excluded from Equal Employment Opportunities: Research on Labor Market and Institutional Barriers*, 43 J. OF SOC. ISSUES 5 (1987)).

163. *See id.* at app. 22 (citing Michael A. Boozer et al., *Race and School Quality since Brown v. Board of Education*, in *BROOKINGS PAPERS ON ECONOMIC ACTIVITY, MICROECONOMICS 269-338* (Martin Neil Baily & Clifford Winston eds., 1992)).

164. T.D. SNYDER ET AL., U.S. DEP'T OF EDUC., *DIGEST OF EDUCATION STATISTICS 2006 37-39* (2007), available at <http://www.nces.ed.gov/pubs2007/2007017.pdf>.

165. Sean F. Reardon et al., *Implications of Income-Based School Assignment Policies for Racial School Segregation*, 28 *EDUC. EVALUATION & POL'Y ANALYSIS* 49, 67 (2006).

166. *Id.* at 56-57.

achievement than racial integration.<sup>167</sup> Increased academic achievement is related not to being in class with any particular race of children, but to being in a middle-class environment with better resources, fewer disciplinary problems, more parental involvement, better teachers, and higher expectations from teachers.<sup>168</sup> Poor children are influenced by three factors in middle-class schools: other students, parents, and teachers.<sup>169</sup>

First, what students learn from peers may be just as valuable as the facts they read in textbooks. For instance, poor students in middle-class schools have twice the vocabulary as students in low-income schools.<sup>170</sup> This may come from informal interactions with fellow students. Middle-class students are also more likely to graduate and to aspire to go on to college,<sup>171</sup> and talking about their goals and dreams may inspire low-income students to want to go to college as well.

Second, middle-class parents bring something to schools that low-income parents cannot easily provide—time. Low-income parents are often working one or more jobs to make ends meet, while middle-class parents have more time to actively engage in their child's schooling.<sup>172</sup> Parents in middle-class schools are more likely to provide greater support to schools and to hold school officials accountable.<sup>173</sup> When middle-class parents volunteer at their child's school, the academic achievement of all students at the school improves.<sup>174</sup> In the end, parental involvement in middle-class schools leads to schools that are better funded, better staffed, and better managed than poor schools.<sup>175</sup>

Finally, the effectiveness of teachers naturally has an impact on how well children learn the given material and how well they perform in school. High-quality teachers tend to work in middle-class schools because it is a better working environment.<sup>176</sup> These teachers are more likely to have scored higher on teacher certification exams and are more experienced.<sup>177</sup> Such a high concentration of quality teachers in middle-class schools puts poorer students at a disadvantage because they are often taught by more inexperienced teachers.<sup>178</sup>

167. See KAHLBERG, *supra* note 79, at 3-5 (noting that “research has long shown that concentrations of poverty—even more than concentrations of minority students—can impede academic achievement, and that providing all students with the chance to attend mixed-income schools can raise overall levels of achievement”).

168. TASK FORCE ON THE COMMON SCH., *supra* note 89, at 14-15.

169. KAHLBERG, *supra* note 79, at 7.

170. *Id.* (citing KAHLBERG, *supra* note 59, at 50-58).

171. KAHLBERG, *supra* note 59, at 54-55.

172. See KAHLBERG, *supra* note 79, at 7.

173. KAHLBERG, *supra* note 59, at 62-66.

174. *Id.* at 63.

175. See *id.* at 63-67.

176. TASK FORCE ON THE COMMON SCH., *supra* note 89, at 15.

177. *Id.*

178. *Id.*; see also Richard J. Murnane & Jennifer L. Steele, *What Is the Problem? The Challenge of Providing Effective Teachers for All Children*, 17 THE FUTURE OF CHILDREN 15, 20-21 (2007).

While socioeconomic status may not be an effective proxy for race if the goal is simply to achieve racial diversity, socioeconomic status is actually a better tool to use in integration plans if the goal is to improve academic achievement for racial minorities. And while both of these are important goals, in the aftermath of *PICS*, racial diversity will be harder to achieve now that schools are precluded from using race as a determining factor in school-assignment plans. Therefore, socioeconomic integration should be pursued by school districts to create some level of racial diversity, while at the same time improving the academic scores of the neediest students.

### 3. *Parental Concerns*

Because socioeconomic admission plans often involve busing, many parents oppose these plans. Just as busing in the 1970's created frustration and violence, using busing today to transfer children to schools far from home will similarly cause dissatisfaction among some parents and students.<sup>179</sup> But it is about more than just conviction; it is about convenience and comfort. The root of parents' opposition to busing is that the costs outweigh the benefits.<sup>180</sup>

Most parents did not want to send their children across the county, or even the town, to attend one school when a perfectly good school might have existed in the family's neighborhood. Today, parents of more than one child may have to coordinate work schedules to ensure that each child gets on the right bus at the right time.<sup>181</sup> Also, living close to their child's school allows parents greater access to teachers and administrators when problems arise.

Parents may have also been wary of more than just the distance. A new school is unfamiliar in terms of neighborhood, teachers, students, and other parents. Asking parents to step outside of their comfort zone is one thing, but asking them to subject their children to the same is another. Today, some white parents may also fear that the higher crime rates that they believe exist in black neighborhoods will affect their children.<sup>182</sup> For these parents, the safety and comfort of their children are

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179. Research regarding parents' opinions of busing has been sparse since the 1990s, when the Supreme Court's ruling in *Board of Education v. Dowell* resulted in the cessation of mandatory busing plans in many school districts. 498 U.S. 237 (1991); see also *supra* text accompanying notes 55-57. The most recent research regarding parents' opinions of busing is now more than ten years old. Therefore, this section analogizes between parents' opinions of busing in the last twenty-five years of the twentieth century and parents' potential reaction to busing in this new era of socioeconomic integration.

180. McKee J. McClendon, *Racism, Rational Choice, and White Opposition to Racial Change: A Case Study of Busing*, 49 PUB. OPINION Q. 214, 216-17 (1985).

181. Richard A. Pride, *Public Opinion and the End of Busing: (Mis)Perceptions of Policy Failure*, 41 SOC. Q. 207, 215 (2000).

182. See KAHLBERG, *supra* note 59, at 38.



paramount.

Neighborhood identity also played a role in parents' opposition to busing. Some parents did not want "outsiders" coming into their neighborhoods' schools and disrupting the community that they had cultivated over the years.<sup>183</sup> They may have also feared what the changing demographic of the neighborhood school would do to the identity of the neighborhood.<sup>184</sup> As the school becomes integrated, minority families may move into the neighborhood or otherwise change the landscape of the area. So, for some parents, the opposition to busing was based on self-preservation.

However, research has shown that parents' attitudes can be affected by the results of busing.<sup>185</sup> In other words, white parents who believed that their children's grades had risen—or at least not gotten worse—were less likely to oppose busing and perhaps more likely to support it.<sup>186</sup> This phenomenon was evident in La Crosse, where parents' support of busing increased after it became clear that students' test scores were rising.<sup>187</sup>

#### 4. *Using Free or Reduced-Price Lunches*

The main indicator normally available to schools for determining socioeconomic status is whether the student receives a free or reduced-price lunch under the National School Lunch Program.<sup>188</sup> Utilization of free or reduced-price lunch is a weak indicator of socioeconomic status because not all students who receive a free lunch live below the poverty line,<sup>189</sup> nor do all students that qualify for free lunch actually apply and receive it.<sup>190</sup> For example, older students sometimes refuse to apply for

183. See David Wood, *Why Southie Stands Fast*, TIME MAGAZINE, Oct. 28, 1974, available at <http://www.time.com/time/magazine/article/0,9171,908903-1,00.html>.

184. See Gary Orfield, *School Segregation and Residential Segregation*, in SCHOOL DESEGREGATION: PAST, PRESENT, AND FUTURE 235 (1980) (noting that "[c]hange in the racial identifiability of a school can influence the pace of change in racial composition in a 'changing' residential area," and that "[s]chool policies can serve to 'coalesce a neighborhood and generate confidence in its continued stability'").

185. See Pride, *supra* note 181, at 210-11 (citing Gary Orfield's findings that parents who believed that white students' scores had fallen after desegregation were twice as likely to oppose busing as parents who believed scores had not fallen. GARY ORFIELD, *MUST WE BUS?: SEGREGATED SCHOOLS AND NATIONAL POLICY* (1978)).

186. See *id.*

187. See U.S. DEP'T OF EDUC. & OFFICE FOR CIVIL RIGHTS, *supra* note 96 (support among residents rose from 60% to 64% from 1994 to 2001, corresponding with rising test scores).

188. Brief of 553 Social Scientists, *supra* note 155, app. at 46.

189. The National School Lunch Program sets eligibility for free lunch at or below 130% of the federal poverty line. Students are eligible for reduced-price lunch if their family income is between 130% and 185% of the federal poverty line. See CHILD NUTRITION PROGRAMS, U.S. DEP'T OF AGRIC., ELIGIBILITY MANUAL FOR SCHOOL MEALS 4 (2008), available at <http://www.fns.usda.gov/cnd/Governance/notices/iegs/EligibilityManual.pdf>.

190. Brief of 553 Social Scientists, *supra* note 155, app. at 46.

the free lunch program because of the social stigma attached to receiving a government-subsidized lunch.<sup>191</sup> For these reasons, some students may be considered poor who are not, while others that are in fact poor will not be counted as such.

Another flaw with using free or reduced-price lunch as the standard for determining socioeconomic status is that it is arbitrary.<sup>192</sup> Students whose families have incomes higher than 185% of the poverty line may very well struggle with the same socioeconomic obstacles as those who receive a reduced-price lunch. These students should be considered low-income, but are not under a system that uses free and reduced-price lunch to determine socioeconomic status.

The use of the federal poverty line, upon which the National School Lunch Program is based, also fails to take into account the differences in the cost of living in urban versus rural settings. For instance, a family of four living in Manhattan, Kansas, will be able to stretch their dollar further than a family living in Manhattan, New York. Therefore, the family in Kansas would likely have more disposable income than the family in New York and would not be mired as deeply in poverty.

One possible alternative to using free or reduced-price lunch as an indicator of socioeconomic status is to ask parents to report income when they enroll their student in a school district. Provided that all parents report their income, this would be a stronger indicator of a student's socioeconomic status. However, Doris R. Entwisle and Nan Marie Astone, researchers at Johns Hopkins University, found that individuals are less likely to report income than information such as education level or occupation.<sup>193</sup>

Another alternative is the one used by the Berkeley (California) Unified School District. There, the school district measures socioeconomic status using three factors: parental income, parental education level, and race or ethnicity.<sup>194</sup> However, rather than use the income, education, and race or ethnicity of individual parents, the school district assesses these factors within the "small geographic 'planning areas' in which a student resides."<sup>195</sup> Presumably, the rationale behind this plan is that the income and education levels of families living in close proximity to each other will be similar. This method sidesteps the problems that arise with self-reporting income levels, and could thus be a useful strategy for other school districts wishing to pursue socioeconomic integration plans.

191. Carol Pogash, *Free Lunch Isn't Cool, So Some Students Go Hungry*, N.Y. TIMES, Mar. 1, 2008.

192. The Civil Rights Project, University of California, Los Angeles, *The Integration Report*, Apr. 1, 2008, <http://theintegrationreport.wordpress.com/2008/04/01/issue-06> (last visited Apr. 12, 2008).

193. Doris R. Entwisle & Nan Marie Astone, *Some Practical Guidelines for Measuring Youth's Race/Ethnicity and Socioeconomic Status*, 65 CHILD DEV. 1521, 1526 (1994).

194. KAHLLENBERG, *supra* note 79, at 34.

195. *Id.*

### 5. *Socioeconomic Diversity is Beneficial*

Socioeconomic integration produces benefits beyond those produced by racial integration. Student achievement, as measured by test scores and graduation rates, is lower in segregated minority schools than in desegregated schools.<sup>196</sup> Segregated minority schools also tend to employ less qualified and less experienced teachers, which in turn results in lower student achievement.<sup>197</sup> These schools have fewer educational resources available, such as funding, classroom size, and Advanced Placement classes.<sup>198</sup>

However, race is not the reason why student achievement is lower in segregated minority schools. It is the concentration of poverty among the students that results in low academic achievement. Schools that have a high number of middle-class students fare better for many reasons. For example, performance of individual students depends on the overall level of poverty in the school they attend.<sup>199</sup> Also, wealthier parents advocate for better resources and more funding for their children's schools.<sup>200</sup> Therefore, being in a school with middle-class students will improve poor students' academic achievement.

## VI. POLICY COMMENT: RECOMMENDATIONS ON THE USE OF SOCIOECONOMIC INTEGRATION

Schools should implement admission plans that use socioeconomic status as a determining factor in student assignments. Due to Justice Kennedy's opinion in the *PICS* decision, the use of race as a determining factor is prohibited,<sup>201</sup> and schools may be wary of using Kennedy's alternative plans. Therefore, socioeconomic integration is the best option for improving academic achievement for all students while maintaining some racial diversity.

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196. Brief of 553 Social Scientists, *supra* note 155, at app. 30.

197. *See id.* at app. 32 (citing Charles Clotfelter et al., *Who Teaches Whom? Race and the Distribution of Novice Teachers*, 24 *ECON. OF EDUC. REV.* 377 (2005)).

198. *Id.* at app. 33 (citing Meredith Phillips & Tiffani Chin, *School Inequality: What Do We Know?*, in *SOCIAL INEQUALITY* 467-519 (Kathryn Neckerman ed., 2004)).

199. U.S. DEP'T OF EDUC. & OFFICE FOR CIVIL RIGHTS, *supra* note 96 (citing Brigid Schulte & Dan Keating, *Pupils' Poverty Drives Achievement Gap*, *WASH. POST*, Sept. 2, 2001).

200. TASK FORCE ON THE COMMON SCH., *supra* note 89, at 14.

201. 127 S. Ct. 2738, 2797 (2007) (Kennedy, J., concurring in part and concurring in judgment).

### A. Public Opinion

School desegregation has been a hotly debated issue since the Supreme Court handed down its decision in *Brown* over fifty years ago. Polls taken shortly after the Court's decision in *PICS* last year reveal the current opinion regarding integration and racial admission plans.

In a Quinnipiac University poll taken in August 2007 that asked whether people agreed with the Court's decision to restrict the use of race in public school admission plans, 71% of those polled agreed with the Court's ruling.<sup>202</sup> A Washington Post/ABC News poll taken in July 2007 couched the question in terms of diversity.<sup>203</sup> There, 56% of respondents disapproved of the Court's decision.<sup>204</sup> The results of these polls indicate that the public supports diversity in schools, but it does not want to reach that goal by using race as an admission factor.

Regarding busing, the overwhelming majority of people polled in 2004 felt that students should be allowed to attend neighborhood schools, even at the expense of integration.<sup>205</sup> Advocates of desegregation plans who want public support must keep this in mind.

### B. Lessons from Socioeconomic Plans Already In Place

The admission plans used by the geographically and demographically diverse school districts of La Crosse, Wake County, and Cambridge provide lessons on an effective way to use such plans. Certain conditions make integration easier on students, parents, and administrators—and make success more likely.

As the plans in La Crosse and Wake County demonstrate, parents' biggest concerns with integration plans are busing and parental choice.

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202. Quinnipiac University Polling Institute, Voters Back Supreme Court Limit on School Desegregation, Quinnipiac University Poll Finds; Approval of Congress Drops to Lowest Point Ever, Aug. 16, 2007, <http://www.quinnipiac.edu/images/polling/us/us08162007.doc> ("As you may know, the Supreme Court recently ruled that public schools may not consider an individual's race when deciding which students are assigned to specific schools. Do you agree or disagree with this ruling?").

203. Washington Post-ABC News Poll, The Washington Post, July 30, 2007, [http://media.washingtonpost.com/wp-srv/politics/ssi/polls/postpoll\\_072307.html](http://media.washingtonpost.com/wp-srv/politics/ssi/polls/postpoll_072307.html) ("As you may know, the Supreme Court recently restricted how local school boards can use race to assign children to schools. Some argue this is a significant setback for efforts to diversify public schools, others say race should not be used in school assignments. On balance, do you approve or disapprove of this decision?").

204. *Id.*

205. Associated Press-Ipsos Poll, Apr. 16-18, 2004, <http://www.pollingreport.com/educ2.htm> ("In your view, which of the following is better? Letting students go to the local school in their community, even if it means that most of the students would be the same race. Transferring students to other schools to create more integration, even if it means that some students would have to travel out of their communities to go to school.").

In Cambridge these issues are not implicated because parents are able to rank their preferences for which school their child will attend, and most parents get their first choice.<sup>206</sup> Also, because of the small size of the Cambridge school district<sup>207</sup> students do not have to travel very far to get to school, thus making busing less problematic than in larger districts. Therefore, socioeconomic integration may work best in school districts that are small and where parents have some say in which school their child attends.

In districts where busing is used, many parents do not feel comfortable sending their children on long bus rides each day to get to school. However, plans that use busing are among the most effective because they integrate populations that choose not to live near each other, whether they are black or white, rich or poor. Parents do, however, like the academic achievement produced by socioeconomic integration plans. As Wake County illustrates, some parents will overlook the inconvenience of busing if it means that their child will receive a better education.<sup>208</sup>

These types of integration plans will not work everywhere. The key to success in a place like Wake County is its vast size. In a school district that large, it is very easy to find families at every income level. Because the Wake County school district includes both the urban poor and more affluent suburbanites, socioeconomic integration is possible. At the other end of the spectrum, Cambridge was successful despite its small size and urban nature. Cambridge has a very diverse population: on one hand, there are families that live below the poverty line, but on the other, there are many parents who are professionals that work at or are alumni of local universities such as Harvard University and Massachusetts Institute of Technology.<sup>209</sup>

A socioeconomically diverse school district is crucial to effective integration. Socioeconomic admission plans will not work in larger inner cities where the majority of students that attend the public schools are poor. Middle-class and upper-class parents who live in the inner city are more likely to send their children to private schools because they have the financial means to do so, and because many public schools are failing. Therefore, one of the most difficult obstacles for school administrators who seek to implement socioeconomic integration plans will be to find ways to achieve socioeconomic integration in a school district that is predominantly low-income.

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206. KAHLENBERG, *supra* note 79, at 29.

207. *See id.* at 28.

208. *See FINDER, supra* note 101.

209. *See KAHLENBERG, supra* note 79, at 28, 30.

### C. Recommendation for Socioeconomic Integration: Controlled Choice

The controlled choice plan implemented by the Cambridge Public School System represents a workable solution to the resegregation problem facing public schools. An effective socioeconomic integration plan must be one that gives parents some say in where their child goes to school. As recent polls indicate, parents would prefer to send their children to school close to home.<sup>210</sup> For this reason, a controlled choice plan is ideal in a small school district that would not require busing. However, this should not rule out the implementation of controlled choice in a district where busing would be necessary. As practice has shown, some parents are willing to overlook their concerns with busing if the academic achievement of their child increases.<sup>211</sup> Also, giving parents a choice will offset some of the negative feelings associated with busing, because parents will be able to set a limit on how far they are willing to send their children.

Controlled choice plans vary slightly from district to district, but a general strategy could be employed as follows. The school district would ask parents to rank in order of preference a certain number of schools that they would like for their child to attend.<sup>212</sup> School districts could determine the socioeconomic status of students in a variety of ways: by determining the number of students receiving free lunch,<sup>213</sup> by asking parents to voluntarily report income,<sup>214</sup> or by using the income, education, and race or ethnicity of the population in a student's neighborhood.<sup>215</sup> As previously discussed, there are problems with using the first two methods, so the third method may be the best option to gauge socioeconomic status.

The next step would be to assign students to schools within the district. Equipped with parents' preferences and a general sense of socioeconomic status, school districts would assign students to schools in a way that would not group a large concentration of poor students in the same school. For example, in Cambridge, once a particular school's demographic composition comes within fifteen percentage points of the district total of children receiving free or reduced-price lunch, no more of those children can be admitted.<sup>216</sup> A plan such as this is one way to foster socioeconomic integration, while at the same time giving parents the power to control where their child will go to school.

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210. Associated Press-Ipsos Poll, *supra* note 205.

211. See Finder, *supra* note 101.

212. TASK FORCE ON THE COMMON SCH., *supra* note 89, at 19-20.

213. KAHLBERG, *supra* note 79, at 24.

214. Entwisle & Astone, *supra* note 193, at 1526.

215. KAHLBERG, *supra* note 79, at 34.

216. CAMBRIDGE PUB. SCH., *supra* note 119, at 8.

## VII. CONCLUSION

As school districts that want to maintain diversity grapple with how to do so after the Supreme Court's recent decision in *PICS*, they should give serious consideration to using socioeconomic admission plans. Many school districts may be wary of using any plans that implicate race, for fear of being sued. But, unlike racial admission plans, socioeconomic plans are far more likely to pass constitutional muster, because they are analyzed under the less stringent rational basis test.

While these plans are not as effective at creating racial diversity as are racial admission plans, they are better at improving academic achievement. In some districts, depending on size and demographics, these plans may not hinder racial integration in a meaningful way. They may still create some of the same concerns that parents and students have with racial admission plans. However, socioeconomic integration will improve schools, which will cause some parents to overlook the inconvenience of busing.

The days of racial admission plans may well be behind us. It is time for school districts to find alternative ways to create and maintain diversity. School administrators should embrace a controlled choice plan that creates socioeconomic diversity, while at the same time giving parents some input regarding which school their child will attend.