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Income Integration as a Race-Neutral Pursuit of Equity and Diversity in Education After the Parents Involved in Community Schools Decision

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INCOME INTEGRATION AS A RACE-NEUTRAL PURSUIT OF EQUALITY AND DIVERSITY IN EDUCATION AFTER THE *PARENTS INVOLVED IN COMMUNITY SCHOOLS* DECISION

*L. Darnell Weeden**

I. INTRODUCTION

The issue to be addressed is whether it is permissible under the Constitution's equal protection of law principle to implement race-conscious decision-making in public elementary and secondary schools, when race-neutral income integration is equally effective in promoting efforts to obtain the benefits of a diverse student body. In theory, it is possible for a plan which, for the purpose of enhancing racial diversity, relies on race as a factor in making decisions about which school a student will attend to survive the narrowly tailored requirement.

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However, any plan to assign students using race is virtually certain to be viewed as unconstitutional because it is not likely to survive strict scrutiny. This is the case because income integration is likely to expand diversity while closing the academic achievement gap among students without any consideration of race.

In the field of public education, the Supreme Court has leveled the race-conscious constitutional law playing field by presuming that virtually any use of race in assigning children to a school in order to support racial diversity is constitutionally suspect and presumed to be invalid. In the era following the *Parents Involved In Community Schools v. Seattle School District No. 1 (Parents Involved)*[1] decision a challenger to the use of race-based student assignment only has to articulate an effective race-neutral alternative to defeat the use of race in making school assignments to promote either racial diversity or racial integration.[2] Supporters of integration in public schools may contend that racial integration and racial diversity in public elementary and secondary education are constitutionally permissible, and are considered compelling governmental interests under principles articulated by the Supreme Court in *Grutter v. Bollinger*[3] and *Gratz v. Bollinger*,[4] two cases from 2003 involving higher education.

There are many compelling reasons for prohibiting the government from using race as a factor in making decisions about assigning students to schools. Therefore, laws or policies using race as a factor in determining students' school assignments to advance diversity should be presumed unconstitutional, especially when public school officials fail to engage in a good faith consideration of household income. Such consideration of income is an effective race-neutral method to promote equal education and social diversity. In the future, America must mature into a nation that construes the equal protection principles of the U.S. Constitution as prohibiting the use of race as a factor in determining which school any child attends. Once the government is categorically and unequivocally mandated not to use race as a factor in making decisions about student assignment, Americans supporting equal education must demand a middle-class education for all students, regardless of the racial or social makeup of the student body. In *San*

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1. 551 U.S. 701, 728 (2007) (stating that in each case, relying on race was unnecessary to achieve the school's stated goals).

2. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 343 (2003) (holding that the Fourteenth Amendment's Equal Protection Clause is not violated when the use of race is used to further a compelling interest in obtaining the educational benefits that flow from a diverse student body); Gratz v. Bollinger, 539 U.S. 244, 275 (2003) (holding that a college's admissions policy must be narrowly tailored to achieve a compelling interest in diversity).

3. *Grutter*, 539 U.S. at 343.

4. *Id.* at 275.

Antonio School District v. Rodriguez,[5] the Supreme Court missed an opportunity to mandate greater educational equality for each and every student when it rejected the argument that equal protection principles rationally required a state to invest equal educational resources from available public funding in all schools, including those in property-poor school districts. A failure to adopt income integration, which would significantly expand the number of students receiving a middle-class education, places America at risk of becoming noncompetitive in the global marketplace because of a substantial number of uneducated people in its workforce.

Part II of this Article includes a discussion of the historical development of the requirement that public school officials not consider race in making decisions about which school a student should attend. Part III provides a review of the Equal Protection Clause and strict scrutiny. In Part IV, an analysis of *Parents Involved* reveals a manifest failure to consider race-neutral alternatives for advancing educational diversity under a student assignment plan. Part V makes the argument that the equal education promise of *Brown v. Board of Education* may be resurrected by dismantling income segregation among students in public schools.

II. A DISCUSSION OF THE HISTORICAL DEVELOPMENT OF THE REQUIREMENT THAT PUBLIC SCHOOL OFFICIALS NOT CONSIDER RACE IN MAKING DECISIONS ABOUT WHICH SCHOOL A STUDENT SHOULD ATTEND

On May 17, 1954, the U.S. Supreme Court delivered an opinion in *Brown v. Board of Education*[6] prohibiting racial discrimination in public schools. Professor Michael Ashley Stein contends that *Brown* may generally be regarded as more famous than all the other American civil rights cases of the twentieth century.[7] Other legal scholars also have asserted that the *Brown* decision is the most famous decision ever written by the U.S. Supreme Court.[8] In my opinion, *Brown* is an important Supreme Court decision, because it sent a necessary message that the white supremacy doctrine of separate but equal was unconstitutional under the Equal Protection Clause. *Brown* was a pragmatic game changer, because it put the Supreme Court on record as rejecting white supremacy as the law of the land in the field of public

5. 411 U.S. 1, 54-55 (1973).

6. 347 U.S. 483 (1954).

7. Michael Ashley Stein, *Foreword: Disabling* Brown, 14 WM. & MARY BILL RTS. J. 1421, 1421 (2006).

8. *Id.* at 1428 n.2.

education. Although the *Brown* decision was a necessary first step in combating the evils imposed by state-enforced race-based segregation in education, the *Brown* opinion may be construed as containing a relatively narrow constitutional purpose.[9]

While Professor Michael J. Klarman acknowledges that *Brown v. Board of Education* is normally considered to be one of the most noteworthy decisions in the history of the Supreme Court, he contends that very little scholarly attention has been devoted to supporting *Brown*'s historical significance.[10] Klarman stated that "[w]hile nearly everyone assumes that *Brown* has had momentous implications for American race relations, nobody has bothered to identify the precise channels through which *Brown* effected change."[11] The historical significance of *Brown* in advancing the civil rights movement is incremental.[12] Klarman acknowledges that although *Brown* failed to immediately desegregate southern schools, the *Brown* decision was significant because it provided judicial support for federal legislation outlawing racial segregation.[13] The belief that federal legislation demanding integration only occurred because of the rationale of the *Brown* decision is persuasive.[14] Professor David J. Garrow correctly contends that *Brown* was vital in raising the hopes of African-Americans that help in achieving racial equality was on the way.[15] Before the *Brown* decision, African-Americans understood, by both logic and experience, that "separate but equal" laws were intended to send the message of white superiority and black inferiority. Professor

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9. *Id.* at 1423.

10. Michael J. Klarman, Brown, *Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 8-9 (1994).

11. *Id.* at 9.

12. *Id.* at 9-10.

> Across the South as a whole, just over 0.15% of black schoolchildren in 1960 and 1.2% in 1964 were attending school with whites. Only after the 1964 Civil Rights Act threatened to cut off federal educational funding for segregated school districts and the Department of Health, Education, and Welfare in 1966 adopted stringent enforcement guidelines did the integration rate in the South rise to 32% in 1968-1969 and 91.3% in 1972-1973. As one commentator has rightly observed: "The statistics from the Southern states are truly amazing. For ten years, 1954-1964, virtually nothing happened."

Id. (citations omitted).

13. *Id.* at 9.

14. *Id.*

15. *See* David J. Garrow, *Hopelessly Hollow History: Revisionist Devaluing of* Brown v. Board of Education, 80 VA. L. REV. 151, 153-54 (1994) (rejecting Klarman's dismissal of the notion that *Brown* raised the hopes of African-Americans).

Gerald N. Rosenberg maintains that *Brown* transformed society's thinking about race relations and created significant legal and social reformations.[16] Although Rosenberg considers *Brown* to be one of the Court's greatest decisions, he suggests that *Brown* may not have done very much to advance school integration in the battle for civil rights.[17] Although public school desegregation was the narrow context in which *Brown* was branded a landmark decision, it is clear that *Brown*'s major significance was its denouncement of the Jim Crow "separate but equal" system of white supremacy. If one accepts Klarman's proposition that *Brown*'s success should be determined by the total number of African-American children who attend predominately white schools, then one can claim *Brown* is a disappointing failure.[18] If *Brown*'s historical goal is viewed simply as the achievement of a significant amount of public school integration among white and black children, it may be treated as a failure.[19] *Brown* is a giant in constitutional law in America because it gave supporters of racial equality a fighting chance to achieve racial justice by prohibiting the use of governmental power as a tool to enforce white supremacy.

Judge John Parker demonstrated an accurate understanding of the relatively narrow holding in *Brown*.[20] "The Constitution . . . does not require integration. . . . It merely forbids the use of governmental power to enforce segregation."[21] Denying a state the ability to use governmental power to enforce race-based separate but equal white supremacy laws is technically a narrow constitutional holding with major implications for destroying white supremacy under the rule of law. *Brown*'s very narrow constitutional ruling has been overshadowed by its historic value as an official judicial declaration of independence from the racial oppression created by the separate but equal doctrine.

Judge Parker's understanding that *Brown* did not require racial integration, but prohibited racial segregation by state action, was virtually universally accepted in the years directly following *Brown*.[22] School districts in Baltimore and St. Louis implemented, without challenge, freedom-of-choice and neighborhood plans that basically maintained the earlier patterns of racial segregation.[23] Judge Parker's

16. *See* Gerald N. Rosenberg, Brown *is Dead! Long Live* Brown*!: The Endless Attempt to Canonize a Case*, 80 VA. L. REV. 161, 171 (1994); *see id.* at 171 n.32.

17. *Id.*

18. Mark Tushnet, *The Significance of* Brown v. Board of Education, 80 VA. L. REV. 173, 175 (1994).

19. *Id.*

20. *Id.*

21. *Id.* (quoting Briggs v. Elliott, 132 F. Supp. 776, 777 (E.D.S.C. 1955)).

22. *Id.*

23. *Id.* (citing MARK TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961, at 234 (1994)).

treatment of *Brown* as removing the option to require racial segregation in public places by a state is correct.

Brown was intended not to bring about mandatory integration, but to begin the fundamental race-neutral principle of denouncing the philosophy of white supremacy in constitutional law.[24] However, a natural result of a vigorous enforcement of *Brown*'s prohibition against racial discrimination would lead to expanded integration based on common interests. Needless to say, *Brown*'s prohibition against racial discrimination has never been vigorously enforced. The argument that *Brown* articulated a race-neutral principle to attack the presumed racial inferiority of African-Americans is a controversial proposition. However, research reveals that the legal illusion of black inferiority has an oversupply of examples throughout American history and "[w]e must remember the lesson of history that those who most effectively perpetuated the myth of black inferiority were educated and powerful members of society, such as Chief Justice Roger Taney."[25]

A good faith reading of the race-neutral rule of law flowing from *Brown* demonstrates that race is not a permissible factor for the government to consider when making decisions about public benefits or burdens. *Brown*'s revolutionary race-neutral rationale placed the Supreme Court on record as rejecting the legend of black inferiority and white supremacy enforced under the separate but equal doctrine.[26] A proper view of *Brown* maintains that race is an unacceptable basis for government choices that subordinated African-Americans[27] or discriminated against whites because of race. Governmental pronouncements based on race after the *Brown* decisions were quickly deemed unconstitutional.[28] *Brown* is truly a decision announcing a principle to prohibit racial discrimination with the implicit understanding that racial integration would benefit directly from the destruction of the separate but equal doctrine. As a race-neutral doctrine, *Brown*'s judicial rejection of the separate but equal doctrine revolutionized the conceptual framework of race relations throughout American society because the doctrine "reached beyond the belief that Whites were superior to the premise that the superior group should also rule and dominate every aspect of culture."[29]

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24. *Id.* at 176.

25. A. Leon Higginbotham, *The Ten Precepts of American Slavery Jurisprudence: Chief Justice Roger Taney's Defense and Justice Thurgood Marshall's Condemnation of the Precept of Black Inferiority*, 17 CARDOZO L. REV. 1695, 1708 (1996).

26. Michael W. Combs & Gwendolyn M. Combs, *Revisiting* Brown v. Board of Education*: A Cultural, Historical-Legal, And Political Perspective*, 47 HOW. L.J. 627, 644-45 (2004).

27. *Id.* at 637-38.

28. Tushnet, *supra* note 18, at 176.

29. Combs & Combs, *supra* note 26, at 638.

Prior to the *Brown* decision, one commentator argued that "no institution of the national government" had approved the general principle laid out in *Brown* prohibiting the government from discriminating against individuals based on their race.[30] Congress, in the Civil Rights Act of 1875, made it illegal for private actors to discriminate against an African-American, or any other person, on the basis of race in places of public accommodation.[31] By holding in the Civil Rights Cases that the Civil Rights Act of 1875 was unconstitutional because of the lack of state action, the Supreme Court refused to permit Congress to prohibit racial segregation by private actors in public places.[32] If the Supreme Court had instead supported the Civil Rights Act of 1875 in 1883, the Court would probably never have approved the separate but equal doctrine thirteen years later. *Brown*'s endorsement of a race-neutral principle prohibiting the implementation of the separate but equal doctrine by the states in public schools officially invited the white political culture to adopt that race-neutral principle as a means of conducting the affairs of a historically racist society.[33]

The Seattle and Louisville school desegregation cases, which attempted to use race to promote racial diversity, raise the issue of whether a court should abandon the *Brown* race-neutral principle of prohibiting discrimination by the states in public schools in order to allow school officials to promote racial diversity at the expense of a rock solid principle of race neutrality. School officials would be well-served to use the race-neutral principle of *Brown* to implement cultural diversity in an increasingly multicultural America. Even if race does matter to the majority of Americans, it should not matter to any person making a decision about the use of governmental power.

In my opinion, the decision in *Parents Involved* once again invited the Supreme Court to apply the race-neutral principle articulated by

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30. Tushnet, *supra* note 18, at 177.

> By this . . . [Tushnet] mean[s] that prior acts against segregation, such as the desegregation of the armed forces and the several appearances by the Department of Justice as amicus curiae supporting African-American claims, were all discrete rather than general endorsements of a basic principle (though, on the whole, motivated by that principle). Note, too, that these prior acts were done by the executive branch; Congress did not act in support of a principle of nondiscrimination until after Brown.

Id. n.16.

31. Civil Rights Act of 1875, 43 Cong. Ch. 114, Mar. 2, 1875, 18 Stat. 335, 335-36, *invalidated by* the Civil Rights Cases, 109 U.S. 3 (1883).

32. *Id.*

33. *See* Tushnet, *supra* note 18, at 177.

Justice Harlan's dissenting opinion in *Plessy v. Ferguson*,[34] and, once again, the Supreme Court refused to hold that the Equal Protection Clause unequivocally prohibits the use of race by the government in making decisions about the use of public resources.[35] Justice Harlan forcefully articulated the principle that equal protection, as applied under the Constitution, should regard each individual as a person and not consider either his or her race or color when applying the law.[36] Justice Harlan was disappointed that the Supreme Court concluded that it was permissible under the Constitution for a state to deny African-American citizens the equal protection of the law because of the color of their skin.[37] Because the Supreme Court has failed to prohibit the government from considering race when making decisions, the Supreme Court has treated race as a suspect class that requires the government to meet a less-than-rigid level of scrutiny in making decisions that consider race as a factor.[38] The strict scrutiny standard should be regarded as inherently flawed, because it is not strict in theory, and is flexible in fact when the government articulates a plausible race-neutral justification for its conduct.[39]

III. A REVIEW OF THE EQUAL PROTECTION CLAUSE AND STRICT SCRUTINY

The Equal Protection Clause states that no State shall "deny to any person within its jurisdiction the equal protection of the laws."[40] In order for the Fourteenth Amendment Equal Protection Clause to truly protect individuals, as well as groups, from discrimination by governmental conduct using race as a factor, the use of race by public officials should be strictly and absolutely prohibited.[41] The strict scrutiny theory can only be effective as a prohibition on race discrimination if it absolutely bars the use of race as a factor in any decision or policy implemented by a governmental official.

Unfortunately, the Supreme Court has stated that the strict scrutiny concept as applied to racial classifications is not "strict in theory but fatal in fact."[42] The strict scrutiny standard has evolved from being strict

34. 163 U.S. 537, 559 (1896) (Harlan, J. dissenting).

35. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720 (2007) (applying strict scrutiny).

36. *Plessy*, 163 U.S. at 559.

37. *Id.* at 560.

38. *See* Korematsu v. United States, 323 U.S. 214, 223 (1944).

39. *See id.* (applying strict scrutiny).

40. U.S. CONST. amend. XIV, § 1.

41. *Contra* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).

42. *Id.* at 237 (quoting Fullilove v. Klutznick, 448 U.S. 448, 519 (1980)).

in theory but fatal in fact to serving as a flexible factor in the consideration of the use of race by state actors.[43] When it comes to prohibiting intentional racial discrimination by public officials, strict scrutiny has proven to be a paper tiger, because it does not always prohibit the use of race as a factor in government decisions.

The Supreme Court concedes too much and compromises the Equal Protection Clause by concluding that the clause does not invalidate all governmental use of race. It stated that, "[a]lthough all governmental uses of race are subject to strict scrutiny, not all are invalidated by it."[44] A realistic utilization of the strict test should invalidate any and all use of race as a factor for classifications and actions by the government.

Until the Supreme Court adopts a strict scrutiny "reality check" rule that truly prohibits the use of race as a factor by the government in all circumstances, strict scrutiny is merely legal conjecture, and not a pragmatic rule of constitutional law designed to invalidate all race preferential treatment by governmental actors. The current strict scrutiny theory, as applied to race, encourages a variety of actors to articulate creative group generalizations to establish enough compelling interest to justify the intentional use of race-based classifications by governmental officials. Unfortunately, the Supreme Court has rejected the argument that the Equal Protection Clause absolutely prohibits the use of race as a factor, and has held that, if the narrow-tailoring requirement is met, race may be utilized as a factor to advance a compelling governmental interest by public school officials without violating the constitutional guarantee of equal protection.[45]

The Supreme Court has stated that "[n]ot every decision influenced by race is equally objectionable, and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental 'decisionmaker' for the use of race in that particular context."[46] The narrow tailoring requirement is not an appropriate measure for determining a compelling interest justification for the use of the inherently toxic racial classification, because the concept of narrow tailoring is too imprecise to serve as a barrier to the use of race by public officials who intend to impose either good or evil on individuals in our society. In my view, the

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43. *See Grutter*, 539 U.S. at 326-27. "Although all governmental uses of race are subject to strict scrutiny, not all are invalidated by it. . . . Context matters when reviewing race-based governmental action under the Equal Protection Clause." *Id.* "Not every decision influenced by race is equally objectionable, and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decision maker for the use of race in that particular context." *Id.* at 327.

44. *Id.* at 326-27.

45. *Id.* at 327.

46. *Id.*

2007 opinion of the Court in *Parents Involved*[47] represents a future where the Supreme Court will implement the strict scrutiny test in a manner which absolutely prohibits the use of race in making decisions about student assignments to public schools.

The logic of the Supreme Court's holding in *Parents Involved*[48] supports the proposition that the Fourteenth Amendment to the Constitution of the United States prohibits segregation of the races in the public schools and requires that formal de jure equal opportunity be given to children on a race-neutral basis.[49] However, if the Supreme Court takes the position in a future opinion that integration of children in public schools is a per se compelling governmental interest, it would be permissible for school officials to use race as a predominant factor in making decisions about where to assign students. The strictly enforced separate but equal doctrine was rejected, and school officials in the *Brown* opinion were ordered to take the necessary and proper steps to admit to students to public schools on a race-neutral basis.[50] The most natural reading of *Brown* is its simple requirement that a state not consider race as a factor in making decisions about which public schools children will attend.

As observed by a District Court interpreting *Brown*, it is important to consider what the Supreme Court decided the role of race was in its *Brown* holding.[51] In *Brown*, the Supreme Court did not hold that federal courts have a duty to regulate public schools.[52] The *Brown* opinion did not hold that states are required to mix people of different races to advance multicultural diversity.[53]

In rejecting white supremacy, the Supreme Court decided under *Brown* that a state cannot deny to a person, because of her race, the right to attend any public school that it sponsors.[54] Since the *Brown* decision, if public schools

> [are] open to children of all races, no violation of the Constitution is involved even though the children of different races voluntarily attend different schools, as they attend different churches. Nothing in the Constitution or in the decision of the Supreme Court takes away from the people freedom to choose the schools

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

48. *Id.*

49. Briggs v. Elliott, 132 F. Supp. 776, 777 (E.D.S.C. 1955) (discussing the *Brown* opinion in detail).

50. Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955).

51. *Briggs*, 132 F. Supp. at 777.

52. *Id.*

53. *Id.*

54. *Id.*

they attend.[55]

Although I am a strong supporter of racial integration as good public policy, nothing in the Constitution compels racial integration. Under the *Brown* rationale, the Equal Protection Clause strictly outlaws policies implementing racial discrimination in public schools.[56] However, the Constitution does not prohibit public school segregation that is the result of voluntary conduct of private individuals.[57]

The Constitution strictly prevents the use of governmental power to implement racial segregation.[58] The Fourteenth Amendment is properly regarded as a limitation upon the exercise of power by the states, and not as a restraint upon the freedom of individuals to select schools on a race-neutral basis.[59] The Supreme Court, in school desegregation cases, requires public school officials to exercise good faith when applying the constitutional principles that strictly prohibit using race as a predominant factor in making decisions about student assignment.[60]

The Supreme Courts sent the pragmatic message in *Parents Involved*[61] that the Equal Protection Clause requires that the use of race by public school officials, when making decisions about who will be assigned to a specific public school, should be rejected as unconstitutional, unless the state can demonstrate that it is trying to correct the continuing illegal effects of its past intentional racial discrimination.[62] Professor Eboni S. Nelson correctly contends that all racial classifications in the context of education and admission of students are subject to strict scrutiny, to protect against encroachment on the individual rights granted through the Equal Protection Clause of the Constitution.[63] Strict scrutiny is required to limit the potential impact a person may suffer as a result of the stigmatic harms inflicted by group-based racial burdens.[64]

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55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. Parents Involved in Comty. Schs. v. Seattle Sch. Dist. No. One, 551 U.S. 701, 721 (2007).

62. *Id.* at 720. "One interest a school district might assert, it suffices to note that our prior cases, in evaluating the use of racial classifications in the school context, have recognized two interests that qualify as compelling. The first is the compelling interest of remedying the effects of past intentional discrimination." *Id. See* Freeman v. Pitts, 503 U.S 467 (1992).

63. Eboni S. Nelson, Parents Involved & Meredith*: A Prediction Regarding the (Un)Constitutionality of Race-Conscious Student Assignment Plans*, 84 DENV. U. L. REV. 293, 324 (2006) (citing Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995)).

64. Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989)).

A court has a duty to apply the strict scrutiny test to reduce the potential psychological harm that a schoolchild of any color or race may suffer after being told that he or she will not be permitted to go to a specific school because of his or her race.[65] I contend that the Equal Protection Clause prohibits any and all use of race in the admissions process of students to elementary and secondary education, because a flexible strict scrutiny test does not adequately protect each individual student from the foreseeable psychological injury proximately caused by being denied admission to the public school of her choice because of her race.[66] In spite of the psychological harms imposed upon children exposed to racial discrimination, some public policymakers seek to implement race-conscious or race-preferential admission policies.[67]

Issues involving racial identity, cultural traditions, and ethnic relations are an important part of our national public debate about how to create a more equal society.[68] Unlike one commentator, I believe that any race-conscious climate renews the call for constitutional colorblindness in order to accommodate and respect the need for racial equality as a human right. I reject the argument that it "would be premature for the judicial branch simply to abolish all governmental considerations of race."[69] I think that *Parents Involved*[70] represents a commitment to the reality in multicultural twenty-first century American that effective race-neutral solutions must be utilized to correct the continuing societal effects of past racial discrimination.

IV. AN ANALYSIS OF *PARENTS INVOLVED* REVEALS A MANIFEST FAILURE TO CONSIDER RACE-NEUTRAL ALTERNATIVES TO ADVANCE EDUCATIONAL DIVERSITY UNDER A STUDENT ASSIGNMENT PLAN

According to the Supreme Court, the Seattle and Jefferson County

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65. Nelson, *supra* note 63, at 324.

66. Brown I, 347 U.S. 483, 494 (1954).

> To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs.

Id.

67. Susan M. Maxwell, *Racial Classifications Under Strict Scrutiny: Policy Considerations and the Remedial-Plus Approach*, 77 TEX. L. REV. 259, 278 (1998).

68. *Id.* at 279.

69. *Id.*

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

school districts voluntarily embraced student assignment plans that depended upon race in deciding which public schools individual children could attend.[71] Seattle classified children as white or nonwhite; in Jefferson County children were categorized as black or "other."[72] In Seattle, racial classifications were utilized to distribute openings in overpopulated high schools.[73] In Jefferson County, race was considered as a factor when deciding specific elementary school assignments and transfer requests.[74] In both cases, the school district depended upon the race in assigning students to specific schools; as a result, the racial balance at each school fell "within a predetermined range based on the racial composition of the school district as a whole."[75] Parents of students denied assignment to particular schools under these plans solely because of their race properly claimed that assigning children to separate public schools on the basis of a racial classification violates the Fourteenth Amendment guarantee of equal protection of the law.[76] The decisions of the Courts of Appeals upholding these plans were reversed by the Supreme Court.[77]

The Seattle School District's framing of the race and law issue presented in the case strongly suggests that it believed that it could use race as a significant factor in assigning students to a specific school to promote racial diversity for the benefit of a society suffering from racial isolation. Seattle did not have any history of implementing legally-mandated racial segregation in the schools now wanting to consider race when assigning students.[78] The Jefferson County School District contended that, in spite of its long history of state-sponsored school segregation based on race, its relatively recent status as a unitary school district allowed it to consider race as a factor to regulate racial isolation.[79] The true race card issue presented in *Parents Involved* is whether the Equal Protection Clause prohibits a public school district from considering race for the express purpose of regulating the racial makeup of a public school's student body, when that makeup is the result of private choice. The Supreme Court in *Parents Involved* advanced the goal of colorblindness in public education by declaring that all who play the race game must play by the same strict scrutiny, race-neutral, equal protection rules.

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71. *Id.* at 709-10.
72. *Id.* at 710.
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.* at 710-11.
77. *Id.* at 711.
78. *Id.*
79. *See id.* at 709-11.

Generally speaking, the dissent's disapproval of the holding in the *Parents Involved* decision is directly linked to its energetic rejection of any suggestion that the Constitution's Equal Protection Clause contains a true colorblind requirement.[80] Although *Brown I* did not spell out how school districts were to bring an end to government-sponsored intentional discrimination, the federal district courts responsible for putting into practice the *Brown I*[81] holding and its cohort case, *Briggs v. Elliott*, interpreted *Brown I* as requiring officials to take race-neutral steps to end state-sponsored racial discrimination in public school districts.[82] The *Briggs* colorblind theory to end racial segregation was the accepted constitutional approach in allowing African-Americans to attend previously all-white Jim Crow public schools until 1968, when the Supreme Court, in the *Green* decision[83] declined to follow its original, race-neutral interpretation of *Brown I*.[84]

Thirty-nine years after the *Green* decision the rationale of the Court in *Parents Involved* demonstrates that *Green*'s failure to follow the race-neutral, or colorblind, approach in assigning students to schools was a temporary measure designed to bring to an end the compelling disgrace of state-mandated racial segregation in public schools.[85] The rationale for permitting temporary race-conscious student assignment in *Green* was to advance the Court's compelling interest in promoting the end of racial isolation created by segregation in public schools.[86] The temporary race-conscious student assignments in *Green* were not intended to create an affirmative duty to pursue racial integration in public education as a compelling societal interest.[87]

Regrettably, the Equal Protection Clause of the Constitution does not promise us either a racially-integrated public education or the right to live in a multicultural society free of irrational fears.[88] The Equal Protection Clause guarantees a person the right to a public education free of intentional, state-sponsored, racial discrimination.[89] I am sorry to

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80. *Id.* at 772 (Thomas, J., concurring).

81. Jonathan Fischbach et al., *Race at the Pivot Point: The Future of Race-Based Policies to Remedy De Jure Segregation After* Parents Involved in Community Schools, 43 HARV. C.R.-C.L. L. REV. 491, 500 (2008) (citing Brown v. Bd. of Educ. of Topeka, 139 F. Supp. 468, 469-70 (D. Kan. 1955)).

82. *Id.* (citing Briggs v. Elliott, 132 F. Supp. 776 E.D.S.C. (1955).

83. Green v. Cnty. Sch. Bd., 391 U.S. 430 (1968).

84. *Id.* at 501 (citing *Green*, 391 U.S. at 442-43).

85. *See id.* at 496-97.

86. *Id.*

87. *Id.* at 440.

88. *Contra* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 803-04 (2007) (Breyer, J., dissenting).

89. *See* Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 493 (1954) (determining that segregation of children in public schools solely on the basis of race deprives children of the

say that the Equal Protection Clause fails to guarantee all students, regardless of their race or social economic status in our society, a middle-class education.

A race-neutral or colorblind approach to assigning students to a school should not allow a public school district to escape its moral and societal duty to provide each and every child within a single school district with a middle-class education. Sadly, the Supreme Court has held that local property taxes generated within a school district were a legitimate basis for denying students a middle-class education.[90] Although I support a race-neutral approach to student admission in public schools, I do not support the unfairness of allowing the tax value of local property to decide whether a child in America receives a middle-class education.[91]

A state does not have a legitimate interest or rational basis to adopt a policy for financing schools in a single district that provides a discrete social and economic class of students with a lifetime of educational and social advantages, while another social and economic class of students is exposed to a lifetime of employment hardship because of the inferior education they received under the state's discriminatory education policy.[92] In *Plyer v. Doe*, the Court, under the rational basis standard of review, refused to give constitutional deference to a state law that would create a lifetime of hardship for a discrete class of undocumented immigrant children by denying them the right to educational opportunity because of the illegal conduct of their parents.[93] The Supreme Court should decline to give constitutional approval to any public school funding plan that does not spend its money equally on each and every student in each and every school district in the state. This would prevent states from subjecting a discrete and foreseeable class of students to a lifetime of hardship created by a systematic environment of inferior education.

One goal of the No Child Left Behind Act of 2001 (No Child Left Behind or the "Act") is to address the racial disparity in academic success in American education.[94] Since the Coleman Report in 1966, commentators have attempted to adequately analyze the academic achievement gap among students with different racial identities.[95] Although No Child Left Behind appears to admit that the achievement

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minority group equal educational opportunities).

90. San Antonio Indep. Sch. Dist. v. Rodriquez, 411 U.S. 1, 54-55 (1973).

91. *Id.*

92. *See* Plyer v. Doe, 457 U.S. 202, 223-24, 230 (1982).

93. *Id.* at 220, 223-24, 230.

94. Joseph O. Oluwole & Preston C. Green, III, *No Child Left Behind Act, Race, and* Parents Involved, 5 HASTINGS RACE & POVERTY L.J. 271, 271 (2008).

95. *Id.*

gap exists among students of different races, it does not require race-conscious techniques for carrying out the Act's requirement to close the achievement disparity.[96] Professors Joseph O. Oluwole and Preston C. Green suggest that race-conscious implementation of No Child Left Behind has a favorable future in the Supreme Court, under an Equal Protection challenge.[97] However, a race-conscious No Child Left Behind might not be narrowly tailored, because socioeconomic factors might be a much more reliable indicator of the achievement gap among students of different races than the traditional race-based classifications.[98]

Although socioeconomic factors do not completely account for the racial achievement gaps in the education process, I believe that the socioeconomic status of the individual student is the predominant factor for the continuing presence of a disparity in educational achievement among students with different racial heritages. In my opinion, policymakers should be able to establish with empirical data that education equality from a group perspective is an intergenerational process, and that socioeconomic factors are primarily responsible for the educational achievement gap among whites and minority racial groups. In order for policymakers to conclude that socioeconomic factors are not the predominant factor in the educational achievement gap between blacks and whites, the research must analyze at least three generations of blacks and whites of similar socioeconomic statuses and de facto educational opportunity in order to achieve credibility with me.

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96. *Id.* at 271-72.

97. Joseph O. Oluwole & Preston C. Green, III, *No Child Left Behind Act, Race, and* Parents Involved, 5 HASTINGS RACE & POVERTY L.J. 271, 304-05 (2008). "Since race-conscious implementation of NCLB would satisfy each of the three articulated elements, it seems evident that the dissenters in *Parents Involved* would uphold race-conscious implementation of NCLB designed to close the achievement gap." *Id.*

> Considering the current Justices sitting on the Supreme Court, our analysis of *Parents Involved* reveals that the dissenting Justices (Breyer, Ginsburg, Souter, and Stevens) would likely be receptive to race-conscious implementation of NCLB's sanctions and remedies and race-conscious funding under the Act. In contrast, Justice Thomas would clearly be opposed to such race-conscious measures given his stringent standard for strict scrutiny of racial classifications and his color-blind approach. Justice Kennedy would likely be the swing vote in the decision. Based on his concurrence in Parents Involved, Kennedy would likely support race-conscious implementation of NCLB as long as it is designed to close the achievement gap.

Id. at 304-05 (Although Souter and Stevens are no longer members of the Supreme Court it appears under the rationale of Oluwole & Green that Kennedy remains the swing vote because Sotomayor and Kagan are likely to vote the same way on this issue as Souter and Stevens).

98. *Id.* at 300.

From an African-American perspective, it is a socioeconomic fact of life that intergenerational education matters when one looks for an educational advantage. A number of smart school districts do not use race as a factor but look at the socioeconomic status (SES) of students as a viable means for achieving a diverse school population.[99] SES is thought of as a promising solution by many supporters of educational diversity who agree with the assertion by James Coleman that student achievement is impacted predominantly by family and social class.[100]

The Seattle School District utilized the race factor in assigning students to schools because of its implicit belief that student achievement is predominantly impacted by the racial makeup of the student body rather than by family and social class. Seattle has never required de jure separate but equal schools for students based on racial identity, and it has never been required to desegregate its schools as the result of a court order.[101] Seattle made use of the racial tiebreaker to deal with the impact of particular housing configurations on school assignments.[102] However, Seattle could have implemented a housing configuration tiebreaker for school assignments to control the impact of particular low income housing configurations and worked toward closing the educational achievement gap among students on a race-neutral basis.

On the whole, white students lived in the northern portion of Seattle, while most of the students identified as racial minorities lived in the southern section of Seattle.[103] If, for the most part, more affluent housing configurations existed in the northern portion of Seattle while the majority of students within the less affluent housing was concentrated in the southern section of Seattle, the school district could have assigned students to specific schools based on the fair market value of the housing concentration. This would have promoted economic and cultural diversity while avoiding the strict scrutiny standard required when race is considered in order to promote diversity. School districts with educational diversity challenges similar to Seattle may advance their educational diversity goal by considering housing configuration when making race-neutral student assignments. School districts using housing configuration as a proxy for household income in making student assignment are very likely to avoid the costly litigation incurred by Seattle in defending a school diversity plan that considered

99. Craig R. Heeren, *"Together at the Table of Brotherhood" Voluntary Student Assignment Plans and the Supreme Court*, 24 HARV. BLACKLETTER L.J. 133, 175-76 (2008).

100. *Id.*

101. Parents Involved in Comty. Schs. v. Seattle Sch. Dist. No. One, 551 U.S. 701, 712 (2007).

102. *Id.*

103. *Id.*

race as a factor.

In the *Parents Involved* opinion, the original plaintiff is described as "a nonprofit corporation consisting of the parents of children who have been or may be denied assignment to their chosen high school in the district because of their race."[104] A plaintiff challenging a school district's use of housing configuration as a factor in assigning a student to a specific school would essentially allege that she is a parent of a child who has been, or may be, deprived of assignment to a selected high school in the district, because housing configuration as a proxy for household income was used by the school in violation of the Equal Protection Clause. However, such a challenge is not likely to be successful, because courts using traditional standards should give a great deal of deference to public officials using housing configurations to make decisions about promoting socioeconomic diversity in education.

In *Parents Involved*, Jill Kurfirst unsuccessfully attempted to enroll her ninth-grade son, Andy Meeks, in Ballard High School's distinctive Biotechnology Career Academy.[105] Andy had attention deficit hyperactivity disorder and dyslexia, but he improved with hands-on teaching, and his mother and teachers believed that the smaller biotechnology curriculum offered at Ballard High provided the greatest potential for his continued progress.[106] Andy was admitted into this particular program, but because of the racial tiebreaker, he was subsequently not assigned to Ballard High School.[107] The nonprofit corporation, Parents Involved in Community Schools, believed that children similar to Andy in the Seattle School District were being deprived of the school assignment of their choice because race was used as the predominant factor in assignments, so it filed a lawsuit alleging that Seattle's use of race in assignments was prohibited by the Equal Protection Clause of the Fourteenth Amendment,[108] Title VI of the Civil Rights Act of 1964,[109] and the Washington Civil Rights Act.[110]

The prior legal history of the *Parents Involved* decision demonstrates that reasonable judges are very likely to disagree on whether a public

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104. *Id.* at 713.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* "No person in the United States shall, on the ground of race . . . be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Civil Rights Act of 1964, 42 U.S.C. § 2000d (2010).

110. *Parents Involved*, 551 U.S. at 714. "The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." WASH. REV. CODE § 49.60.400(1) (2006)).

school system has demonstrated a compelling interest to support the voluntary use of race as a factor in making an individual student assignment decision in order to promote racial integration. In *Parents Involved*, the federal district court approved the summary judgment request of the Seattle School District, by ruling that state law did not prevent Seattle's use of the racial tiebreaker because the plan passed strict scrutiny, because it was narrowly tailored to carry out an implicitly compelling governmental interest in promoting either racial diversity or racial integration for the benefit of society.[111] At first, the Ninth Circuit Court of Appeals reversed the district court's decision by ruling that, under the Washington Civil Rights Act,[112] the school district's utilization of the integration tiebreaker was unconstitutional.[113]

However, after recognizing that the lawsuit would not be decided soon enough to affect student assignment decisions for the 2002-2003 school term, the Ninth Circuit did away with its opinion,[114] vacated the injunction, and, under section 2.60.020 of the Revised Code of Washington, certified the state-law issue involving the racial tiebreaker to the Washington Supreme Court.[115] The Washington Supreme Court concluded that the Washington Civil Rights Act forbids specifically those preferential access plans "that use race or gender to select a less qualified applicant over a more qualified applicant," and not those "[p]rograms which are racially neutral, such as the . . . [district's] open choice plan."[116]

The Washington Supreme Court sent the case back to the Ninth Circuit Court of Appeals for additional action.[117] A panel of the Ninth Circuit subsequently reversed the district court's decision for a second time and addressed the Equal Protection Clause question.[118] The panel decided that although accomplishing racial diversity and circumventing racial separation are compelling government interests,[119] Seattle's

111. Parents Involved in Comty. Schs. v. Seattle Sch. Dist. No. 1 (*Parents Involved I*), 137 F. Supp. 2d 1224, 1240 (W.D. Wash. 2001)).

112. Parents Involved in Comty. Schs. v. Seattle Sch. Dist. No. 1 (*Parents Involved II*), 285 F.3d 1236, 1253 (9th Cir. 2002)), *op. withdrawn on grant of reh'g*, 294 F.3d 1084 (9th Cir. 2002).

113. *Id.*

114. Parents Involved in Comty. Schs. v. Seattle Sch. Dist. No. 1 (*Parents Involved III*), 294 F.3d 1084, 1084 (9th Cir. 2002)).

115. Parents Involved in Comty. Schs. v. Seattle Sch. Dist. No. 1 (*Parents Involved IV*), 294 F.3d 1085, 1087 (9th Cir. 2002)).

116. Parents Involved in Comty. Schs. v. Seattle Sch. Dist., No. 1, (*Parents Involved V*) 149 Wash. 2d 660, 663, 689-90 (2003) (*en banc*)).

117. *Id.* at 690.

118. Parents Involved in Comty. Schs. v. Seattle Sch. Dist. No. 1 (*Parents Involved VI*), 377 F.3d 949, 988-89 (9th Cir. 2004)).

119. *Id.* at 964.

application of the racial tiebreaker was not narrowly tailored enough to support those interests under the Equal Protection Clause.[120] The Ninth Circuit granted a rehearing en banc,[121] and rejected the panel's judgment. The Ninth Circuit affirmed the district court's decision that Seattle's plan was narrowly tailored to carry out a compelling governmental interest under the Equal Protection Clause.[122]

The Seattle School District probably could have avoided problematic and protracted litigation over its diversity plan by implementing a student assignment plan devoid of racial classifications, and instead based on housing configurations and academic performance. Wake County, North Carolina, uses academic achievement and family income in its student assignment program to promote academic success for students.[123]

Jefferson County manages the public school structure in the urban Louisville, Kentucky community. In 1973, a federal court concluded that Jefferson County had preserved a segregated school organization,[124] and in 1975, the district court structured a desegregation order.[125] Jefferson County functioned under this command until 2000, when the district court ended the order after finding that the school district had reached unitary status by removing the effects of its past policy of racial segregation.[126] In 2001, subsequent to the order of the federal district court being dissolved, Jefferson County approved a voluntary race-based student assignment arrangement.[127] Roughly 34% of Jefferson's 97,000 students are black; nearly all of the other 66% are white.[128] The plan calls for all non-magnet schools to sustain a minimum black enrollment of 15%, and a maximum black enrollment of 50%.[129] Under the Jefferson County plan, decisions about student assignments were based on a combination of available openings within a school and the

120. *Id.* at 980.

121. Parents Involved in Comty. Schs. v. Seattle Sch. Dist., No. 1, 395 F.3d 1168, 1168 (9th Cir. 2005) (en banc)).

122. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 707, 714 (2007). Parents Involved in Comty. Schs. v. Seattle Sch. Dist. No. 1 (*Parents Involved VII*), 426 F.3d 1162, 1192-93 (9th Cir. 2005), *cert. granted*, 547 U.S. 1177 (2006), *rev'd and remanded*, 551 U.S. 701 (2007).

123. Elizabeth Jean Bower, Note, *Answering the Call: Wake County's Commitment to Diversity in Education*, 78 N.C. L. REV. 2026, 2029 (2000).

124. *Parents Involved*, 551 U.S. at 715 (citing Newburg Area Council, Inc. v. Bd. of Educ., 489 F.2d 925, 932 (6th Cir. 1973), *vacated and remanded*, 418 U.S. 918, *reinstated with modifications*, 510 F.2d 1358, 1359 (6th Cir. 1974)).

125. *Id.*

126. *Id.*

127. *Id.* at 716.

128. McFarland v. Jefferson Cnty. Pub. Schs., 330 F. Supp. 2d 834, 839-40 n.6 (W.D. Ky. 2004).

129. *Id.* at 842.

racial balancing required under the guidelines of the student assignment plan.[130] Jefferson County should have adopted a student assignment plan that was based on a combination of available openings within a school and a housing configuration balancing requirement without any consideration of race.

Crystal Meredith relocated to the Jefferson County School District in August 2002 and tried to register her child, Joshua McDonald, in kindergarten for the 2002-2003 school year.[131] One school was only a mile from Meredith's new home, but the school did not have any existing space because assignments were made in May, and the kindergarten class was already full.[132] Jefferson County assigned Joshua to Young Elementary.[133] Because Young Elementary was ten miles from their home, Meredith wanted to transfer Joshua to Bloom Elementary, another school that was only a mile from their new home.[134] Openings existed for students at Bloom, but Joshua's transfer request was rejected because granting him a transfer would have had a negative impact on the racial balancing requirements for Young Elementary.[135] If Jefferson County had a housing configuration balancing requirement, even if an opening existed for students at Bloom, Joshua's request to transfer to Bloom could be rejected without invoking strict scrutiny if granting him a transfer would have a negative impact on the housing configuration for Young Elementary. Under my hypothetical policy, Jefferson County would also argue that its housing configuration policy is a proxy for household income and not a proxy for race.

In the actual case, Meredith objected to Jefferson County's use of race in making student assignments.[136] Meredith filed suit in federal district court, alleging violations of the Equal Protection Clause of the Fourteenth Amendment.[137] The district court held that Jefferson County had established a compelling interest in keeping its schools racially diverse and that the use of race in the assignment plan was narrowly tailored to achieve that compelling interest.[138] The Sixth Circuit Court of Appeals agreed with the federal district court, adopting the rationale of the lower federal court, and expressly indicating that providing an

130. *Parents Involved*, 551 U.S. at 716.
131. *Id.* at 717.
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.* (citing McFarland v. Jefferson Cnty. Pub. Sch., 330 F. Supp. 2d 834, 837 (W.D. Ky. 2004)).

additional written opinion would not be useful.[139] In *Parents Involved*, the federal appellate courts in both the Sixth Circuit and Ninth Circuit failed to acknowledge that racial discrimination in assigning students to a specific school is constitutionally objectionable under equal protection principles, whether it is packaged under the guise of prejudice or racial preference.[140] The Supreme Court will only approve a race-preference plan involving student assignments which is attacked under equal protection principles in the unlikely event that the plan survives strict scrutiny.[141]

The student assignment plans in Seattle and Jefferson County were not narrowly tailored under the strict scrutiny test, because they unnecessarily relied on explicit racial considerations, rather than housing considerations and student achievement, in making student assignments to achieve their diversity goal.[142] "The court decisions that invalidated race-conscious student assignment plans mandate a colorblind approach to student assignments in sharp contrast with the long-standing deference granted to local authorities in the formulation of education policy."[143] The legal impetus for Wake County's race-neutral diversity plan was its correct understanding that the judicial momentum strongly suggests that courts utilizing strict scrutiny, when analyzing race-conscious student assignment plans under the Equal Protection Clause, will find them invalid.[144]

School administrators no longer operating under desegregation decrees must now put into practice student assignment procedures without considering race.[145] Race-neutral student assignment plans challenge school boards to prove their true commitment to real diversity in education by closing the academic achievement gap.[146] Wake County responded to this educational achievement challenge by cultivating a student assignment plan intended to guarantee a more diverse

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139. *Id.* at 718 (citing McFarland v. Jefferson Cnty. Pub. Schs., 416 F.3d 513, 514 (6th Cir. 2005)).

140. L. Darnell Weeden, *Affirmative Action California Style—Proposition 209: The Right Message While Avoiding a Fatal Constitutional Attraction Because of Race and Sex*, 21 SEATTLE U. L. REV. 281, 284 (1997) (evaluating racial prejudice and racial preference by asserting that old-fashioned discrimination is supported by racial prejudice while new age discrimination has racial preference as its foundation).

141. Leslie Yalof Garfield, *Adding Colors to the Chameleon: Why the Supreme Court Should Have Adopted a New Compelling Governmental Interest Test for Race-Preference Student Assignment Plans*, 56 U. KAN. L. REV. 277, 278 (2008).

142. *Parents Involved*, 551 U.S. at 726; Bower, *supra* note 123, at 2029.

143. Bower, *supra* note 123, at 2029.

144. *Id.* at 2029-30.

145. *Parents Involved*, 551 U.S at 721; *see also* Bower, *supra* note 123, at 2030.

146. Bower, *supra* note 123, at 2026.

educational experience without adopting race-based classifications.[147]

The Supreme Court has not outlawed all types of intentional state-sponsored racial segregation of individuals. Under the flawed strict scrutiny standard, a public school may be able to practice intentional racial segregation of students in order to control potential racial tension on campus. The Supreme Court has indicated that the California Department of Corrections' (CDC) unwritten policy of intentionally racially segregating prisoners for up to sixty days every time they enter a new correctional facility should be subjected to the strict scrutiny standard of review for an equal protection analysis.[148]

The CDC's stated reason for practicing intentional racial segregation is to avoid violence caused by racial gangs.[149] An associate warden testified that if race was not a factor in managing preliminary housing assignments, racial clashes in the cells and in the yard would increase.[150] In my opinion, compelling state interest, whether narrowly tailored or not, is too fluid a constitutional theory to ever justify the use of race as an acknowledged intentional factor in making a governmental decision.

Justice Thomas's hands-off approach and willingness to support race-based segregation as articulated by the CDC in the prison case,[151] is very difficult to reconcile with his full endorsement of a colorblind government requirement for public school officials making decisions about where to assign students in an effort to promote the racial integration of schools.[152] I think Justice Thomas's failure to require a colorblind approach in all governmental decision-making, including assignment of prisoners to jail cells, leaves him open to the criticism that he is not a true follower of the colorblind philosophy articulated by Justice Harlan's dissent in *Plessy*.[153]

Unlike Justice Thomas, I think the government should never be allowed to classify persons based on race regardless of whether it is making decisions about housing prisoners, assigning children to public schools, or making judgments about who should be admitted to either medical or law school. I will be the first to concede that neither our society nor our government is colorblind, but I believe that a forward-thinking Supreme Court should construe the U.S. Constitution's Equal

147. *Id.*

148. Johnson v. California, 543 U.S. 499, 509 (2005).

149. *Id.* at 502.

150. *Id.* at 502-03.

151. *Id.* at 506 n.1; *id.* at 543 (Thomas, J., dissenting).

152. Parents Involved in Comty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 801, 779 (2007) (Thomas, J., concurring).

153. Plessy v. Ferguson, 163 U.S. 537, 554-55 (1896) (Harlan, J., concurring); *Parents Involved*, 551 U.S. at 779 (Thomas, J., dissenting).

Protection Clause to require the government to implement colorblindness in all of its policies. Our society should immediately endorse colorblindness as a necessary and proper first step to achieve equality and mutual respect for every person regardless of race.

V. THE PROMISE OF *BROWN* MAY BE RESURRECTED BY DISMANTLING INCOME SEGREGATION AMONG STUDENTS IN PUBLIC SCHOOLS

Some forward-thinking school districts do not use race as a factor in making student assignments, looking instead at the socioeconomic status (SES) of school children as a reasonable means to achieve diversity in school.[154] I lend my support to those who see SES as an effective race-neutral tool for advancing educational diversity. In 2006, the year before the Supreme Court's decision in *Parents Involved*, Richard Kahlenberg asserted that integration of public schools based on family income was a more effective way to achieve equal education than the consideration of race in making student assignments.[155] If the socioeconomic status of the student body is a more important factor in determining student achievement than the racial make-up of the student body,[156] a race-conscious student assignment plan promoting equal education violates the Equal Protection Clause's narrowly tailoring requirement.[157] When it is societal poverty and not state action based on consideration of race that creates an inherently unequal education for a disproportionate number of African-American students, the Equal Protection Clause is not violated.[158]

The Supreme Court has held that racial preference in secondary education cannot be rooted in a desire to remedy societal discrimination by providing minority students with positive minority role models.[159] Under *Brown v. Board of Education*,[160] promoting equal education with race-conscious student assignment, without first eliminating the concentrations of poverty that inherently produce unequal education programs, is a violation of the narrowly tailored requirements of the

154. Heeren, *supra* note 99, at 175.

155. Richard D. Kahlenberg, *Integration by Income*, AM. SCH. BOARD J., Apr. 1, 2006, *available at* http://www.equaleducation.org/commentary.asp?opedid=1332 [hereinafter Kahlenberg, *Integration by Income*].

156. *Id.*

157. Gratz v. Bollinger, 539 U.S. 244, 275 (2003). In *Gratz*, the Court held that because the University of Michigan's use of race in its current freshman admissions policy was not narrowly tailored to achieve the school's declared compelling interest in diversity, the admissions policy offended the Equal Protection Clause of the Fourteenth Amendment.

158. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276 (1986).

159. *Id.*

160. 347 U.S. 483 (1954).

Equal Protection Clause. Race-conscious remedies should be implemented only when effective race-neutral alternatives are not available.[161] There is plenty of evidence that reducing the percentage of economically disadvantaged students in the student body inherently promotes equal education for students without using race as a factor.[162]

Some school districts are adopting a socioeconomic integration strategy because traditional methods of promoting educational equality through the simple act of racial integration have proven to be inadequate.[163] Reliable research demonstrates that the academic advantages of racial desegregation stem not from granting African-American students an opportunity to sit next to whites, but from giving them the opportunity to attend primarily middle-class institutions.[164] In middle-class schools, students typically are together with peers who are expected to value academic success and are not as likely to disrupt class as students attending high-poverty schools.[165]

Middle-class peers usually possess superior vocabularies, which are casually conveyed to student colleagues in the course of conversation.[166] In middle-class schools, friends are not as likely to move away in the middle of the school year and disrupt the dynamic of the class. Middle-class students "have big dreams and are more likely to plan to go on to college."[167] In middle-class schools, "parents are four times as likely to be members of the PTA as low-income parents."[168]

As a general rule, middle-class schools appeal to the best teachers.[169] Teachers in middle-class schools possess higher teacher test scores, are expected to teach in their field of expertise, and tend to demonstrate higher expectations for students.[170] "One federal study found that the grade of 'A' in a low-income school is the same as the grade of 'C' in a middle-class school when students are compared on standardized tests."[171] The research suggests that middle-class children will not be hurt by attending economically mixed schools.[172] When a majority of the students remain middle-class (described as students who do not qualify for free and reduced-price lunch), their success rate does not

161. *Gratz*, 539 U.S. at 275.
162. Kahlenberg, *Integration by Income*, *supra* note 155, at 51.
163. *Id.*
164. *Id.*
165. *Id.* at 52.
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.*

deteriorate.[173] "This is true in part because the majority sets the tone in a school, and because research finds that middle-class children are less affected by school influences (for good or ill) than low-income children."[174]

Although racial isolation is not good public policy for an increasingly diverse American society, the research suggests that economic isolation has a greater negative impact on a child's education than racial isolation.[175] While discussing the negative impact of racial isolation in public schools on minorities, Professor Kimberly Jenkins Robinson contends that under federal regulations, racial isolation occurs at a school when more than fifty percent of its enrolled students are considered to be minorities.[176] However, it is my position that Robinson's analysis, regarding the adverse impact of racial isolation on the quality of education a student receives, applies with equal or greater force to the inherently inferior education any students receives because of income isolation in schools.[177]

One could make the argument that income isolation occurs in school when the population of low-income students enrolled at a school exceeds fifty percent. I think it is appropriate to characterize a student as being of a low-income household if she is eligible for free or reduced-price lunch at school.[178] I recommend that school districts attack inherently unequal education under the income isolation theory, because when it is properly implemented, it is race-neutral and advances the goal of giving every student a competitive middle-class education. Race-neutral efforts to attack income isolation in public schools promote equal education for all students attending public school without having to meet the narrowly tailored standards of the Equal Protection Clause required under *Parents Involved*.[179] The two school districts in *Parents Involved* failed to demonstrate that they considered alternative approaches to explicit racial classifications to realize their diversity

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173. *Id.*

174. *Id.*

175. *Id.*

176. Kimberly Jenkins Robinson, *Resurrecting the Promise of* Brown*: Understanding and Remedying how the Supreme Court Reconstitutionalized Segregated Schools*, 88 N.C. L. REV. 787, 789 (2010) [hereinafter Robinson, *Resurrecting*].

177. *See id.* at 815-16. "The Court's failure to address housing discrimination led many lower courts to ignore this important contribution to school segregation and thus, severely undermined the development of effective school desegregation remedies." *Id.*

178. *See* Kahlenberg, *Integration by Income*, *supra* note 155 ("An Economic Policy Institute study, for example, found that middle-class schools (those with fewer than [fifty] percent of students eligible for free and reduced-price lunch) are 24 times as likely to be consistently high performing as low-income schools (those with [fifty] percent or more of students eligible for subsidized lunch).").

179. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 735 (2007).

goals.[180] The narrow tailoring mandate requires serious, good faith efforts to find effective race-neutral alternatives.[181] In Seattle, a number of alternative assignment plans—which would not have used express racial classifications—were abandoned with little or no concern.[182] Jefferson County simply failed to provide any evidence that it considered any race-neutral options.[183]

Approximately five months after the *Parents Involved* decision, Richard D. Kahlenberg discussed the entrenched Metropolitan Council for Educational Opportunity (Metco) program to demonstrate the equal protection challenges confronting state officials utilizing race-conscious measures to promote diversity when an effective income integration alternative is available.[184] Since 1966, Metco has provided minority students in Boston the chance to go to more affluent, predominantly white suburban schools, in an attempt to introduce those students to an improved education, as well as to provide economically-advantaged schools with the benefits of a more socially diverse student body.[185] When the Supreme Court struck down voluntary race-conscious school diversity plans in Louisville and Seattle, Justice Anthony Kennedy made it clear that he specifically objected to diversity plans that assigned children by race without pursuing race-neutral alternatives.[186]

The Massachusetts Department of Education has maintained that Metco is perfectly legal and does not need any changes to meet the standards of the Supreme Court ruling.[187] However, Kahlenberg declares that "Metco's program does precisely what Kennedy's opinion forbids. The Metco program sorts individual students by race. It has not explored race-neutral alternatives. And it doesn't use race merely as a factor; it provides an absolute bar to white students."[188]

By asserting that changes to Metco's program are not necessary after *Parents Involved*, Massachusetts is endorsing a program that has the practical effect of inviting challengers of race-conscious diversity plans to sue.[189] Recent history suggests that right-wing enemies of school integration will seek an exceptionally sympathetic plaintiff, probably a low-income white girl attending a very bad Boston school, who wants to attend a suburban school but cannot participate in Metco because she

180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.*
184. Richard D. Kahlenberg, Op-Ed, *How to save Metco*, BOSTON GLOBE, Nov. 13, 2007, at 15A, *available at* 2007 WLNR 22427152 [hereinafter Kahlenberg, Op-Ed].
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.*

is white.[190] "The plaintiffs will almost surely win in the end, sending a disastrous signal to school districts nationally that they should back away completely from race-conscious integration plans."[191] I agree with Kahlenberg's conclusion that the plaintiff in this hypothetical challenge to the Metco program is likely to be successful. However, unlike Kahlenberg, I do not consider that result to be a disaster because the race-neutral alternatives available to Metco are likely to be very effective in promoting educational equality without discriminating against any student because of her race.[192]

Although Justice Kennedy, in *Parents Involved*, did not close the door completely on race-conscious plans to achieve racial diversity, he should have, because all race-conscious plans are divisive tools for undermining the colorblind principle. "Justice Harlan advocated for colorblindness as a positive expression of a principle of equal respect embedded in the Equal Protection Clause. Justice Kennedy argues against 'crude' methods of selecting for racial diversity because they express an attitude that violates that principle of equal respect."[193]

Nevertheless, Chief Justice Roberts signaled an end to race-conscious plans to achieve diversity by asserting that the way to end racial discrimination is to stop the practice of racial discrimination.[194] According to Justice Kennedy, the Metco plan does not qualify as a permissible use of a race-conscious plan because the Massachusetts Department of Education did not consider race-neutral alternatives before adopting race as a controlling factor.[195] Metco could save its societal diversity plan from a potentially successful constitutional attack

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190. *Id.*

191. *Id.*

192. *Id.*

193. Patrick S. Shin, *Diversity v. Colorblindness*, 5, 2009 B.Y.U. L. REV. 1175, 1215 (2009).

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

195. *Id.* at 789-90 (J. Kennedy, J., concurring).

> Each respondent has asserted that its assignment of individual students by race is permissible because there is no other way to avoid racial isolation in the school districts. Yet, as explained each has failed to provide the support necessary for that proposition ("the history of racial classifications in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis"). And individual racial classification employed in this manner may be
>
> considered legitimate only if they are a last resort to achieve a compelling interest.

Id.

by screening students for admission to suburban schools based on income rather than race.[196] "Boston public school students are [eighty six] percent minority to begin with, and if Boston is like other districts, the minority students are more likely than white students to qualify for a means-tested program."[197]

According to Kahlenberg, in the unlikely event that economically-challenged urban whites disproportionately apply to the Metco program, Metco should be allowed to use race as a secondary factor in assigning students, and it should be able to avoid a successful constitutional challenge because income, not race, is the predominant factor.[198] Unlike Kahlenberg, I believe that any use of race in assigning students to a public school is neither secondary nor minor when voluntarily done to promote racial integration. Instead, it is a thinly disguised pretext to engage in the prohibited act of discrimination without meeting the compelling state interest requirement. The method of integration based primarily on income used in Cambridge public schools, which still safeguards race as a permissible criterion by which to promote racial integration, is problematic under relevant equal protection analysis.

Under the Cambridge plan, "income integration is not a substitute for racial integration; it is a partner in achieving the goal,"[199] according to Kahlenberg. If public school officials in Cambridge are allowed to use race in assigning students only after the income integration plan has failed to meet an anticipated goal of racial integration, income integration will become an unacceptable substitute for racial discrimination. Income integration should not be misused and allowed to become a partner in the race card game.

True income integration should be designed to promote the educational equality goal of *Brown*, rather than to advance school integration by a simple numerical balance. "One of the great lessons of the Boston busing crisis of the 1970s was that racial integration, while very important, was limited by the failure to recognize the importance of economic class. Mixing poor whites and poor blacks did not raise academic achievement in the city schools."[200]

While I support Kahlenberg's conclusion that Metco and other public school officials have the chance to remedy the academic achievement gap problem among students by considering economic status,[201] I respectfully reject his recommendation to school officials to consider race when assigning students for purposes of closing the

196. Kahlenberg, Op-Ed, *supra* note 184, at 15A.
197. *Id.*
198. *Id.*
199. *Id.*
200. *Id.*
201. *Id.*

academic achievement gap if racial integration is not adequately increased by income integration.[202] A true income integration plan that does not consider race under any circumstances could serve as a model of how to close the achievement gap in education based on income is good for all our children who deserve to be free of racial discrimination.[203]

Robinson contends that school districts may seek to produce diversity by embracing a flawed race-neutral approach that permits the indirect consideration of race.[204] Under Robinson's theory of race neutrality, a student assignment plan that avoids classifying individual students based on their racial identity may nevertheless pursue racial diversity through the indirect consideration of race.[205] Robinson provides three allegedly race-neutral examples of indirect consideration of race: (1) student assignment plans that integrate based on socioeconomic status, (2) drawing school attendance zones to bring diverse groups together, and (3) offering magnet programs."[206] Because the three examples presumably would allow indirect or allegedly non-individual consideration of race as a significant factor along with socioeconomic status in assigning students, the examples are not truly race neutral from a colorblind perspective simply because they are called "indirect."[207] A watered-down version of equal protection review for student assignment plans allowing the indirect consideration of race as a factor, "effectively assures that race will always be relevant in American life,"[208] and serves as an impairment to the critical purpose of completely removing consideration of a person's race completely from any decision made by a governmental entity.[209]

First, a true socioeconomic integration plan would not consider race either directly or indirectly as a factor because the goal of income integration is colorblind, equal education, not racial integration. Secondly, a true race-neutral plan that draws school attendance zones to establish income diversity would not consider race, either directly or indirectly because its goal is to promote the societal interest in closing the academic achievement gap among various groups, regardless of the race of the individual. Third, a magnet program that is designed to promote educational diversity is only race-neutral if it is offered to

202. Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

203. *Id.*

204. Kimberly Jenkins Robinson, *The Constitutional Future of Race-Neutral Efforts to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools*, 50 B.C. L. REV. 277, 280 (2009) [hereinafter Robinson, *The Constitutional Future*].

205. *Id.*

206. *Id.*

207. *Cf.* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 495 (1989).

208. *Id.*

209. *Id.*

students without any consideration of race.

An approach is not race-neutral when it invokes an intentional indirect consideration of race as a factor.[210] When school officials make decisions about school assignments based on an intentional, indirect consideration of race as a factor, the strict scrutiny test applies because any intentional use of race by the state should be considered as suspect.[211] Because equal protection analysis is determined by intentional conduct, intentional indirect consideration of race as a factor to reduce racial isolation by denying whites an equal opportunity to attend a school inherently violates the theory of race neutrality.[212]

Virtually everything in Robinson's race-neutral examples invokes a little touch of race, as needed.[213] A flexible race-neutral concept could be used, purportedly to advance the goal of expanding racial diversity, to intentionally discriminate against some students because of their race in violation of true governmental race neutrality.[214] Robinson correctly observes that school "[d]istricts that want to use a racial classification to achieve diversity and to avoid racial isolation will encounter tremendous difficulty satisfying the Court's narrow tailoring requirements, particularly after *Parents Involved*."[215]

Those who oppose racial isolation, because it places some of the same negative burdens on the opportunity for a student to receive an equal education as low-income isolation, should join the fight to support income integration in public education. The Supreme Court is very likely to find that any plan that considers race as a factor in order to promote racial diversity does not meet the narrowly tailored requirement.[216] A true race-neutral plan which is not a proxy for race and which assigns students to a school based on income is founded on socioeconomic status diversity; therefore, the plan is subject to a court's minimal rational basis review and does not have to meet the narrowly tailored standard, because it promotes societal diversity without any consideration of race.[217]

While I share the commitment to create more diversity in public schools, I do not support the position that it is acceptable, under a proper race-neutral application of the Equal Protection Clause, to use

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210. *See* Hernandez v. New York, 500 U.S. 352, 362 (1991).

211. *See J.A. Croson*, 488 U.S. at 493.

212. *Hernandez*, 500 U.S. at 362.

213. Robinson, *The Constitutional Future*, *supra* note 204, at 280.

214. *See Hernandez*, 500 U.S. at 362.

215. Robinson, *The Constitutional Future*, *supra* note 204, at 287.

216. *See id.*

217. Williamson v. Lee Optical Co., 348 U.S. 483 (1955). When applying minimal rationality, the Supreme Court allows public officials to take one step at a time when addressing social or economic issues. *Id.* at 489.

race to create diversity.[218] Robinson correctly believes that the end of racial desegregation litigation does not require diminished attention to the potentially negative impact of racial isolation in schools.[219] The ending of racial desegregation litigation provides a golden opportunity for supporters of equal education to energetically campaign for support for closing the education achievement gap among students by encouraging school officials to diversify schools based on income rather than race.[220]

School officials who choose to measure diversity by income rather than race are in a better position to concentrate "on improving the educational opportunities offered in all schools or in schools that primarily educate minority schoolchildren."[221] Public school officials should be persistent in establishing income diversity when implementing student assignment policies, because one commentator contends that racial diversity for the simple sake of racial diversity is not a legitimate government purpose to pursue.[222] "Presumably, the best objective an educational institution could pursue, by definition, is improving the education that all students receive, regardless of race."[223]

Research shows that income diversity, or income integration, improves educational outcomes for economically disadvantaged students in a number of well-defined ways.[224] Relying on this research, public school officials should immediately place income integration on their agenda as a means of nurturing successful outcomes of educational diversity and closing the academic achievement gap among students.[225]

Those who support using race as a factor to improve educational outcomes for all students will not feel like they have abandoned the fight for racial equality in education by supporting true race-neutral alternatives if they accept Professor Thomas Kleven's contention that race and class are highly interrelated.[226] Kleven asserts "that the United States is systemically a highly classist and racist society, that classism and racism are interrelated and overlapping phenomena, and that the achievement of a non-classist/non-racist society requires a mass movement of working-class people of all ethnicities for social and racial

218. Robinson, *Resurrecting*, *supra* note 176, at 843.

219. *Id.*

220. *See id.*

221. *Id.*

222. Derek Black, Comment, *The Case for the New Compelling Government Interest: Improving Educational Outcomes*, 80 N.C. L. REV. 923, 924 (2002)) (citing Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978)).

223. *Id.*

224. Kahlenberg, *Integration by Income*, *supra* note 155.

225. *Id.*

226. Thomas Kleven, *Systemic Classism, Systemic Racism: Are Social and Racial Justice Achievable in the United States?*, 8 CONN. PUB. INT. L.J. 207, 207 (2009).

justice for all."[227] I will articulate the argument that adopting a race-neutral income integration policy in assigning students to a public school in a highly classist and racist society is likely to improve the educational outcomes of working-class people of all ethnicities and races because, like race, money matters. After Barack Obama was elected the 44th President[228] of the United States of America on November 4, 2008, racism in America did not end; however, his election raised the very controversial question of whether class now matters more than race. Reasonable minds may disagree as to whether race matters more than class, but only the misguided will argue that race and class are not interrelated.

VI. CONCLUSION

In *Parents Involved*, Chief Justice Roberts recognized that the "heritage" of *Brown* requires public school officials to obey the code of colorblindness, articulated by Justice Harlan stating that the law is not free to classify our citizens based on their race.[229] Chief Justice Roberts recognized that *Brown* represents equality because it prohibits states from treating any person or groups differently because of their race.[230]

I agree that *Brown* represents egalitarian ideals. I believe that the egalitarian goals of *Brown* can best be achieved by requiring the school officials to aggressively integrate African-Americans into American society by adopting colorblind income integration with the specific goal of closing the education achievement gap in the nation's public schools. *Brown* symbolizes the American dream of colorblind equality by public school officials when assigning students to schools and "embodies the same ideals that were proclaimed in the Declaration of Independence."[231] A state does not have a constitutional obligation to provide a public education, but if the state elects to provide students with a public education, it should avoid any consideration of race. This will allow the state to achieve educational equality by demonstrating that colorblind income integration is a rational means of achieving the goal of leaving no child behind. I believe that a true race-neutral application of income integration which assigns an important, yet

227. *Id.*

228. *Before a Huge Grant Park Crowd, President-elect Obama Declares: "Change has come to America,"* CHI. TRIB., Nov. 5, 2008, at 1, *available at* http://www.chicagotribune.com/media/acrobat/2008-11/43200911.pdf.

229. Sharon L. Browne & Elizabeth A. Yi, *The Spirit of* Brown *in* Parents Involved *and Beyond*, 63 U. MIAMI L. REV. 657, 659 (2009).

230. *Id.* at 659-60.

231. *Id.* at 660.

limited, number of students from low-income households to middle-class schools without any consideration of race, may serve as a proper tool to attack the educational achievement gap that exists between middle-class schools and low-income schools.

Those among us who believe in equality in the educational process must work to remove race-neutral income discrimination as an unreasonable stumbling block to a middle-class education for too many of our children who live in low-income homes. Income integration represents a colorblind method to expand the opportunity for all children to receive a middle-class education. Mixing a critical mass of low-income students with a majority of middle-class students in a middle-class school, without any consideration of race is a colorblind strategy that appeals to those of us who believe that every child, even one who is a member of a low-income family, deserves a middle-class public education whenever possible. This author concedes that income integration may not be feasible in a school district where there are no middle-class schools and, in similar fashion, racial integration in middle-class suburban schools may not be feasible where a critical mass of racial minority students is not available. However, where middle-class schools are available, we should use this colorblind approach to provide all children with the education they deserve.