IN DEFENSE OF VOLUNTARY DESEGREGATION: ALL THINGS ARE NOT EQUAL

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This Article analyzes the concept of racial stigma in Justice Kennedy's controlling opinion in Parents Involved in Community Schools v. Seattle School District No. 1. *The Article reveals that Kennedy's fundamental concern is that using racial classifications to achieve voluntary desegregation racially stigmatizes students. In particular, he assumes that the classifications undermine individualism and reduce children to "racial chits." He fails, however, to recognize the purpose of voluntary desegregation and the unique characteristics that distinguish it from other race-conscious programs. Kennedy is not alone. Commentators and schools may have "over-defended" voluntary desegregation, articulating multiple justifications rather than focusing on the core justification. Thus, this Article refines voluntary desegregation's purpose. Voluntary desegregation is not an attempt to obtain the benefits of diversity. It is an attempt to manage an educational crisis that undermines equal and quality education. The lingering effects of past school segregation continue to stigmatize predominantly minority schools. As a result, quality teachers and middle-income students flee to other schools, depriving minority schools of the key resources for success. Money cannot solve this problem. The only way to solve the problem is to create a racially balanced system where race is irrelevant in parents' and teachers' school choices. To do so, voluntary desegregation must use creative measures, including some that incorporate racial classifications. Relying on Supreme Court precedent and leading scholarship, this Article assesses whether voluntary desegregation stigmatizes students by: (1) promoting notions of racial inferiority, whites as racists, or any other stereotypes; (2) inciting racial politics; (3) undermining individuality; (4) relying on inappropriate racial labels; or (5) subordinating*

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relevant values. The Article concedes that Kennedy raises a valid concern in regard to the particular racial labels, but concludes that the labels can easily be remedied without affecting desegregation. In regard to the more substantive concerns, this Article demonstrates that rather than reinforcing stigma, voluntary desegregation actually sends an antistigmatic message. Kennedy's drive to secure compromise between competing ideologies causes him to miss the distinct characteristics and message of voluntary desegregation. Nonetheless, lower courts must respect the compromise to ensure that schools are not unduly constrained in their effort to deliver basic educational opportunities.

INTRODUCTION

The Supreme Court in *Parents Involved in Community Schools v. Seattle School District No. 1*[1] decided its first school desegregation case in over a decade, addressing the extent to which a school district can use race to desegregate. The case, however, was unique because it involved voluntary rather than mandatory desegregation. In the rush to distill the basic holding and practical import of the case, most commentators have yet to examine the theory underlying the entire decision.[2] At its core, Justice Kennedy's controlling opinion is premised on the notion that racial classifications stigmatize children. This premise, however, has two flaws. First, it assumes that all racial classifications are inherently stigmatic. Second, it misunderstands the context and purpose of voluntary desegregation. Kennedy conceptualizes voluntary desegregation assignments in primary schools as no different from the admissions selection process in colleges and universities. He assumes both use racial classifications to obtain the educational benefits of diversity. This Article seeks to correct this assumption.

The goal of voluntarily desegregating school districts is to meet their obligation under state constitutions to deliver a quality education and their obligation under the federal constitution to deliver an equal education, not obtain the educational benefits of

1. 127 S. Ct. 2738 (2007).

2. This is not to suggest that other scholarship on the point has not been valuable, but simply to note a different approach. *See, e.g.*, Stephan J. Caldas & Carl L. Bankston, III, *A Re-Analysis of the Legal, Political, and Social Landscape of Desegregation from* Plessy v. Ferguson *to* Parents Involved in Community Schools v. Seattle School District No. 1, 2007 BYU EDUC. & L.J. 217 (2007) (discussing the historical context surrounding the cases); Samuel Estreicher, *The Non-Preferment Principle and the "Racial Tiebreaker" Cases*, 2007 CATO SUP. CT. REV. 239 (2007) (outlining the opinions); 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 (2008) (dissecting the opinion and its principles to identify the future impact of the case).

diversity. In so far as racial isolation creates an educational crisis that undermines these obligations, voluntary desegregation is not a preference, it is an educational necessity.[3] Consequently, *Parents Involved* raises the most important questions of race and education to come before the Court in decades. Not only is the case part of *Brown v. Board of Education*'s legacy, it revisits the continual debate over whether racial classifications are inherently divisive and stigmatizing tools.

The Court expressed constitutional concern over stigma as early as 1879 in *Strauder v. West Virginia*.[4] There, the Court reasoned that some racial classifications not only deprived citizens of material benefits, but also stigmatized them.[5] In effect, the point of some racial classifications was to convey the message that African-American citizens were unworthy of the same rights as whites. Even if the message did not deprive African-Americans of tangible benefits, it harmed them by demeaning their humanity and intelligence and reinforcing the rationale of racial oppression. This concept of stigmatic harm became a central tenet in *Brown v. Board of Education*[6] and has continued to play a significant role in modern affirmative action cases.[7]

Justice Kennedy's opinion in *Parents Involved* marks a continuation of this stigmatic harm theory. His opinion primarily rests on the notion that by classifying students by race, regardless of material harm, the school districts stigmatize students.[8] In particular, the crudeness of racial classifications such as "white" versus "non-white" overgeneralizes.[9] Not only do the classifications inaccurately categorize students, they imply that whiteness is the standard by which everyone should be measured. One's similarity or dissimilarity to whites is a measure of value. This problem can be corrected simply enough with appropriate classifications, but Kennedy raises a deeper concern that the very act of classifying

3. As Wendy Parker points out, the real importance of desegregation is in ensuring equal access to "key educational resource[s]." Wendy Parker, *Desegregating Teachers*, 86 WASH. U. L. REV. 1, 7 (2008). Otherwise, schools perpetuate a racial hierarchy whereby white students are advantaged over minority students. *Id*. at 29–30.

4. 100 U.S. 303 (1879).

5. *Id.* at 308.

6. 347 U.S. 483, 494 (1954) (identifying the harm as the stigmatic message of inferiority).

7. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (asserting that racial preferences stigmatize minorities by promoting a notion of inferiority).

8. Kennedy assumes the racial classifications in voluntary desegregation cause a material harm, but he does not explore the assumption. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2789 (2007) (Kennedy, J., concurring in part and concurring in the judgment) (stating that the classifications allocate burdens and benefits, but providing no explanation).

9. *See, e.g.*, *id.* at 2790–92, 2796–97.

persons by race is an affront to their individuality.[10] In short, racial classifications inherently stigmatize because they define individuals based on an irrelevant characteristic.

Kennedy's concerns are warranted in some respects, but he extrapolates his notion of stigma too far. Stigmatic harms are a product of cultural context.[11] Because race has no inherent meaning, it has no inherent stigmatizing effects.[12] Thus, assessing the purpose and context of voluntary desegregation is necessary to determine whether its racial classifications stigmatize. Kennedy, however, pays scant attention to the context in which race is used. In particular, he fails to even mention or cite the extensive evidence regarding resegregation trends and the unique educational barriers they pose.[13] He only notes that "de facto resegregation" is a "problem" for schools trying to offer "equal educational opportunity."[14]

In Kennedy's defense, the schools and media may not have done the best job in refining the core mission of voluntary desegregation. The stated purpose of voluntary desegregation has vacillated from achieving diversity, eliminating racial isolation, and improving interracial relations to achieving the integration promise of *Brown*.[15] This vacillating articulation of voluntary desegregation has prompted higher courts to attempt to reduce or refine those interests themselves. An en banc panel of the First Circuit, for instance, noted six asserted compelling interests in voluntary desegregation, but concluded that they could be reduced to a single interest in achieving diversity, which was simply the flipside of eliminating racial isolation.[16] Justice Kennedy also followed this instinct, noting that eliminating racial isolation was a compelling interest, but focusing the whole of his analysis on diversity.[17]

The focus stems from the Court's previous holding in *Grutter v. Bollinger*[18] that the pursuit of diversity is a compelling interest. The context of higher education admissions, however, is entirely dissimilar to non-competitive K-12 school assignments. The attempt

10. *See infra* notes 210–218.

11. *See infra* notes 120–29.

12. *See* Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 27–28 (1994) (explaining race as a social construct).

13. *See, e.g.*, Brief of 553 Social Scientists as Amici Curiae Supporting Respondents, *Parents Involved*, 127 S. Ct. 2738 (2007) (Nos. 05-908, 05-915), 2006 WL 2927079.

14. *Parents Involved*, 127 S. Ct. at 2791.

15. *Compare* Brewer v. W. Irondequoit Cent. Sch. Dist., 212 F.3d 738, 742 (2d Cir. 2000) (finding that the school's interest was in reducing racial isolation), *with* Wessmann v. Gittens, 160 F.3d 790, 795–96 (1st Cir. 1998) (analyzing diversity as a compelling interest).

16. Comfort v. Lynn Sch. Comm., 418 F.3d 1, 14 (1st Cir. 2005).

17. *Parents Involved*, 127 S. Ct. at 2797.

18. 539 U.S. 306 (2003).

to situate voluntary desegregation plans as pursuits of diversity represent failures to understand exactly what these school districts are doing. It succumbs to convenience, forcing voluntary desegregation into pre-established precedent. The purpose of this Article is to refocus the conversation on the realities of voluntary desegregation, and then to evaluate the stigmatic harms that Kennedy raises. His concerns are appropriate, but different conclusions follow when one understands the actual problems to which the school districts are responding.

The point of voluntary desegregation is not to create diverse learning environments. The point is to control societal forces that have ravaged minority schools and seriously undermined their ability to deliver equal educational opportunities for every child.[19] Desegregating districts are attempting to create school systems that will allow them to deliver equal educational opportunities.[20] Racially balanced schools are certainly part of this effort, but racial balance or integration is not an end in itself. In this respect, voluntary desegregation is distinct from mandatory desegregation.[21] In voluntary desegregation, racially balanced schools are simply precursors to the conditions necessary to deliver equal educational opportunities.[22] So long as schools are racially identifiable, parents, teachers, and resources will gravitate toward some schools and away from others.[23] Moreover, the independent actions of these private parties are beyond the direct control of schools. The result is a vicious cycle that drives down the quality of educational opportunities in poor and minority schools, making them even less attractive. Thus, eliminating racially identifiable schools is a precondition to delivering equal educational opportunities.

Not only do racially isolated schools undermine equality among schools, they pose a serious threat to the basic quality of individual schools. Traditionally, the only serious qualitative check on public education was the watchful eyes of parents with influence. More recently, however, extensive state-based litigation, as well as various federal statutes, has created an obligation for schools to not just make education available, but to deliver a qualitative education

19. *See infra* notes 46–68 and accompanying text.

20. *See* Parker, *supra* note 3, at 7, 29–30 (indicating that the point of desegregation is to provide equal access to key educational resources and prevent whites' advantage in those areas).

21. In fact, some criticized mandatory desegregation's focus on racial balance, at the expense of quality educational opportunities. *See, e.g.*, Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 482–93, 505–15 (1976) (discussing the conflict between attorneys who seek to pursue the strategy of school integration and the community interest in obtaining an improved education).

22. Parker, *supra* note 3, at 38 ("Integrated education is thus a first, crucial step for quality of education for all children.").

23. *See infra* notes 94–95, 295–97 and accompanying text.

that prepares students for grade promotion, graduation, college, and the work force.[24] The constitutions of all fifty states obligate them to provide public education.[25] Moreover, the supreme courts in many states have interpreted those constitutional clauses to include specific substantive guarantees, such as the right to an adequate, high-quality, efficient, or thorough education.[26] Extensive state statutes expand on these rights.[27] Federal statutes, such as the No Child Left Behind Act and those on behalf of disabled, homeless, and language minorities, create an additional overlay that obligates states to close achievement gaps and ensure positive academic outcomes for all children.[28] Voluntary desegregation is not only a commitment to equitable opportunities, it is a response to state constitutions and various federal mandates to deliver a quality education.

Understood from this perspective, the legal analysis of racial classifications in voluntary desegregation is far different than Kennedy's. These specific racial classifications do not stigmatize. In fact, these racial classifications cross a threshold largely unseen in our history: they are the means by which to limit the relevance and stigmatic effects of race. Colorblindness theory argues that the way to make race irrelevant is to stop relying on race.[29] Schools that are voluntarily desegregating test that theory by showing that race only becomes irrelevant when race is used to make schools racially

24. *See generally* Michael A. Rebell, *Poverty, "Meaningful" Educational Opportunity, and the Necessary Role of the Courts*, 85 N.C. L. REV. 1467, 1500–05 (2007) (discussing the history of state-based education litigation and the rights it established).

25. Allen W. Hubsch, *Education and Self-Government: The Right to Education Under State Constitutional Law*, 18 J.L. & EDUC. 93, 96–97 (1989) (discussing the constitutional right to education in forty-eight states); *see also* Pauley v. Kelly, 255 S.E.2d 859, 884–86 (W. Va. 1979) (outlining the constitutional education mandates for thirty-five states).

26. *See, e.g.*, Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 212 (Ky. 1989) (finding education to be a fundamental right); Campaign for Fiscal Equity, Inc. v. State, 801 N.E.2d 326, 328, 339 (N.Y. 2003) (recognizing a state constitutional right to a "sound basic education"); Leandro v. State, 346 N.C. 336, 347, 488 S.E.2d 249, 255 (1997) (recognizing a state constitutional right to a "sound basic education"); Abbeville County Sch. Dist. v. State, 515 S.E.2d 535, 540 (S.C. 1999) (requiring "the opportunity for each child to receive a minimally adequate education"); *Pauley*, 255 S.E.2d at 877–78 (enumerating a number of rights implicit in the state's basic constitutional right to an education).

27. *See, e.g.*, N.C. GEN. STAT. § 115C-81 (2007); VA. CODE ANN. § 22.1-253.13:1 (West 2006).

28. *See, e.g.*, Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400–1482 (2006); Equal Educational Opportunities Act of 1974, 20 U.S.C § 1703(f) (2006); No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (codified as amended at 20 U.S.C. §§ 6301–6578 (2006)) (addressing the need to improve academic achievement of low-income students); McKinney-Vento Homeless Assistance Act, 42 U.S.C. §§ 11431–11435 (2000).

29. john a. powell, *An Agenda for the Post-Civil Rights Era*, 29 U.S.F.L. REV. 889, 892–97 (1995) (discussing colorblind theory).

indistinguishable. Race may matter in the hearts and minds of some people, but when schools are racially balanced, individual racial motivations become irrelevant in the choice of where to teach or send one's child to school. Thus, voluntarily desegregating school districts do not send a message of racial difference; they send a message that race will no longer divide schools.[30] This message furthers the notion that all schools are "our" schools, and the students therein are all entitled to a quality education.[31]

In these respects, voluntarily desegregating schools are no less than the flowering of *Brown*'s legacy. These schools' perspectives have entirely reversed. While they once resisted integration, they now see it as an educational imperative.[32] In addition, by improving the quality of schools and offering parents choice among them, voluntarily desegregating schools have secured widespread support among parents.[33] Thus, voluntary desegregation represents a convergence of interests between communities of color and whites that has rarely been seen since *Brown*.[34]

The holding in *Parents Involved* places this legacy in jeopardy. Kennedy's opinion erects new barriers to voluntary desegregation that can discourage litigation-averse school districts and embolden opponents. A careful reading of his opinion, however, suggests that his intent was not to stop desegregation, but to secure a compromise between competing ideologies. Lower courts must not transform Kennedy's ideological discussion into concrete legal prohibitions, which favors colorblindness, without also accounting for the factual predicates of his opinion. Those predicates envision different

30. Neil S. Siegel, *Race-Conscious Student Assignment Plans: Balkanization, Integration, and Individualized Consideration*, 56 DUKE L.J. 781, 837–38 (2006).

31. *See, e.g.*, McFarland v. Jefferson County Pub. Sch., 330 F. Supp. 2d 834, 854 (W.D. Ky. 2004).

32. *Compare* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2806–10 (2007) (Breyer, J., dissenting) (recounting Jefferson County's previous resistance to desegregation), *with McFarland*, 330 F. Supp. 2d at 854 (discussing the district's attempt to create a community of one). *See also* Derek W. Black, *The Uncertain Future of School Desegregation and the Importance of Goodwill, Good Sense, and a Misguided Decision*, 57 CATH. U. L. REV. 947, 953–54 (2008) (comparing the national shift in education that *Brown* created).

33. *See, e.g.*, Emily Bazelon, *The Next Kind of Integration*, N.Y. TIMES, July 20, 2008, (Magazine), at 43 (discussing an eighty-eight percent parental support rating for Louisville's desegregation plan).

34. *See generally* Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) ("The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites."). Bell indicates that the Civil Rights Act of 1964 also represented interest convergence, but the country quickly retreated from desegregation when it was no longer in whites' interest. Derrick A. Bell, Jr., *The Unintended Lessons in* Brown v. Board of Education, 49 N.Y.L. SCH. L. REV. 1053, 1059–62 (2005).

outcomes based on different facts in future desegregation plans. The failure to appreciate this will undermine both desegregation and the compromise Kennedy struck.

This Article begins by defining the contours of voluntary desegregation and exploring the social forces that make it necessary in carrying out constitutional obligations to deliver equal and quality educational opportunities to all students. Part II of this Article assesses whether racial classifications that do not involve a material benefit or burden can still harm individuals. This section relies on Supreme Court precedent and a rich body of scholarship, which reveal that racial classifications can also stigmatize individuals and occasion intangible harms. The scholarship, in particular, anticipated that this issue might arise in regard to future voluntary efforts to desegregate. Part III of this Article deconstructs the theory of stigmatic harm that forms the basis of Kennedy's holding. The Article then tests this theory against factual realities, Supreme Court precedent, and relevant scholarship, demonstrating flaws in Kennedy's opinion. The final part of this Article, however, finds that Kennedy's opinion must also be understood as an act of compromise rather than principle, which explains the various inconsistencies and inaccuracies of the opinion. The Article ends by emphasizing the opportunities and threats embodied in his inconsistencies.

I. THE RESPONSIBILITY TO DELIVER AN EQUAL AND QUALITY EDUCATION TO ALL

A. The Purpose and Necessity of Voluntary Desegregation

Voluntary desegregation is an act by a school district to reduce racial school segregation even though it has no legal obligation to do so. In the past, schools desegregated only because federal courts required desegregation as a remedy for past discrimination and segregation.[35] Today most schools are free from court orders.[36] Thus, desegregation is voluntary and not an attempt to remedy de jure segregation.[37]

35. Green v. County Sch. Bd. of New Kent County, 391 U.S. 430, 439 (1968) (demanding, in response to local recalcitrance, that schools adopt desegregation plans that work and work now to desegregate schools and eliminate the vestiges of discrimination); *see also* Philip T.K. Daniel, *Accountability and Desegregation:* Brown *and Its Legacy*, 73 J. NEGRO EDUC. 255, 263–64 (2004).

36. *See* U.S. COMM'N ON CIVIL RIGHTS, BECOMING LESS SEPARATE? SCHOOL DESEGREGATION, JUSTICE DEPARTMENT ENFORCEMENT, AND THE PURSUIT OF UNITARY STATUS 22–23 (2007), *available at* http://www.usccr.gov/pubs/092707_BecomingLessSeparateReport.pdf (indicating that the Department of Justice's school desegregation docket has been cut in half since 1984).

37. *See generally* Lia B. Epperson, *True Integration: Advancing* Brown*'s Goal of Educational Equity in the Wake of* Grutter, 67 U. PITT. L. REV. 175, 210 (2005) (discussing voluntary desegregation as distinct from court-ordered

Rather, schools might desegregate to obtain the educational benefits of a diverse learning environment,[38] to improve interracial interactions in and outside of schools,[39] to promote a message of racial unity,[40] to reduce residential segregation,[41] and for various other derivative purposes.[42] Providing equal and quality educational opportunities at every school, however, must be the foremost justification for voluntary desegregation. Other purposes may intersect with achieving equal and quality educational opportunities, but the pursuit of equal and quality opportunities is distinct from other purposes in terms of its urgency, rationale, and required methods.

State constitutions place an obligation on every public school in this country to deliver an education to its students.[43] Many state supreme courts have further specified that the constitutional obligation includes a qualitative component, described as sound basic, adequate, high-quality, or efficient education.[44] Thus, merely

desegregation).

38. *See* Johnson v. Bd. of Educ. of Champaign Unit Sch. Dist. No. 4, 188 F. Supp. 2d 944, 984 (C.D. Ill. 2002) (indicating an elementary school recruitment program should focus on racial and economic diversity); Hampton v. Jefferson County Bd. of Educ., 102 F. Supp. 2d 358, 379 (W.D. Ky. 2000) (explaining that racial balance is necessary "to prepare students to live in a pluralistic society").

39. Comfort *ex rel.* Neumyer v. Lynn Sch. Comm., 283 F. Supp. 2d 328, 344–45 (D. Mass. 2003) (discussing interracial conflict prior to the plan and the need to address it); *see also* ROBERT L. CRAIN ET AL., NAT'L INST. OF EDUC., A LONGITUDINAL STUDY OF A METROPOLITAN VOLUNTARY DESEGREGATION PLAN (1984) (finding that K–12 desegregation produced positive interracial contact later in life).

40. *See* McFarland v. Jefferson County Pub. Sch., 330 F. Supp. 2d 834, 854 (W.D. Ky. 2004) (recounting the school's mission as being to create "a system of roughly equal components, . . . not one Black and another White," and further that "[i]t creates a perception, as well as the potential reality, of one community of roughly equal schools").

41. Brief for Respondents at 3 n.2, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007) (No. 05-915), 2006 WL 2944684 (discussing how the Board believes the assignment plan has assisted in racially integrating housing since the 1970s).

42. GARY ORFIELD & CHUNGMEI LEE, THE CIVIL RIGHTS PROJECT/PROYECTO DERECHOS CIVILES, HISTORIC REVERSALS, ACCELERATING RESEGREGATION, AND THE NEED FOR NEW INTEGRATION STRATEGIES 11 (2007).

43. Pauley v. Kelly, 255 S.E.2d 859, 884–86 (W. Va. 1979) (outlining constitutional education mandates for thirty-five states).

44. Dupree v. Alma Sch. Dist. No. 30, 651 S.W.2d 90, 93 (Ark. 1993) ("[W]e believe the right to equal educational opportunity is basic to our society."); Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 211 (Ky. 1989) ("Equality is the key word here. The children of the poor and the children of the rich, the children who live in the poor districts and the children who live in the rich districts must be given the same opportunity and access to an adequate education."); *Pauley*, 255 S.E.2d at 878 ("[T]he Thorough and Efficient Clause requires the development of certain high quality educational standards, and . . . it is in part by these quality standards that the existing educational system must be tested.").

opening schoolhouse doors and providing books and teachers is far from sufficient to meet this obligation. Moreover, both state and federal laws require schools to deliver this qualitative education equally among their students.[45]

The unfortunate reality, however, is that racial segregation prevents many school systems from delivering an equal or quality education.[46] Various nuances and policies, from taxation rates and governmental neglect to municipal overburden, contribute to inequality.[47] But racially isolated minority schools fail to provide equal quality educational opportunities for two harsh reasons. Most white and high-income parents will not send their children to "black" schools,[48] and most quality teachers will not teach in "black" schools for any substantial length of time.[49] These two facts result

45. State-court decisions such as those in note 44, *supra*, require states to deliver a specific level of education to all students. The relevance of federal law to this delivery of education, however, is complicated by the United States Supreme Court's decision in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), in which it refused to recognize education finance or quality as raising equal protection issues. In a forthcoming article, I will explain why the principles established in these recent state-court decisions should also eliminate barriers to federal equal protection claims.

46. Comfort *ex rel.* Neumeyer v. Lynn Sch. Comm., 283 F. Supp. 2d 328, 355–56 (D. Mass. 2003) (discussing expert testimony on the effect of racial isolation); Linda Darling-Hammond, *Unequal Opportunity: Race and Education*, 16 BROOKINGS INST., Spring 1998, at 28–31, *available at* http://www.brookings.edu/articles/1998/spring_education_darling-hammond.aspx.

47. Abbott v. Burke, 575 A.2d 359, 394 (N.J. 1990) ("The social and economic pressures on municipalities, school districts, public officials, and citizens of these disaster areas—many poorer urban districts—are so severe that tax increases in any substantial amount are almost unthinkable.").

48. *See* JONATHAN KOZOL, THE SHAME OF THE NATION: THE RESTORATION OF APARTHEID SCHOOLING IN AMERICA 22–23, 49–51 (2005); Erica Frankenberg & Chungmei Lee, *Charter Schools and Race: A Lost Opportunity for Integrated Education*, EDUC. POL. ANALYSIS ARCHIVES, Sept. 5, 2002, at 6–7, http://epaa.asu.edu/epaa/v11n32 (revealing that giving parents vouchers or choice resulted in white flight that perpetuated racial stratification); Robert Hanley, *Island in a Sea of White Resistance: Englewood's Neighbors Oppose All Regional School Plans*, N.Y. TIMES, Dec. 21, 1995, at B1.

49. *See* ERICA FRANKENBERG, THE CIVIL RIGHTS PROJECT AT HARVARD UNIV., SEGREGATION OF AMERICAN TEACHERS 34–39 (2006), *available at* http://www.civilrightsproject.ucla.edu/research/deseg/segregation_american_teachers12-06.pdf (demonstrating that as the percentage of minority students in a school rises, the qualification and experience level of teachers therein tends to decrease); Catherine E. Freeman et al., *Racial Segregation in Georgia Public Schools, 1994–2001: Trends, Causes, and Impact on Teacher Quality, in* SCHOOL RESEGREGATION: MUST THE SOUTH TURN BACK? 148, 157–59 (John Charles Boger & Gary Orfield eds., 2005); Christopher Jencks & Meredith Phillips, *The Black-White Test Score Gap: Why It Persists and What Can Be Done*, BROOKINGS INST., Spring 1998, at 26, *available at* http://www.brookings.edu/articles/1998/spring_education_jencks.aspx ("Predominantly white schools seem to attract more skilled teachers than black schools . . . ."); Jay Mathews, *Top Teachers Rare in Poor Schools*, WASH. POST, Sept. 10, 2002, at A5 (discussing

in conditions that depress the quality of education in minority schools. The foregoing is not to suggest that minority students need to sit next to white children to learn, but to acknowledge that resources, high-income students, and quality teachers follow white schools and that those factors are crucial to learning.

Although some parents and resources follow white schools for legitimate nonracial reasons,[50] for many the reason stems from a history of state-imposed racial oppression. Decades of previous discrimination have a direct impact on private perceptions of race that continue to linger. Schools, in particular, were structured to send the message that blacks were inferior to whites.[51] Through schools and other institutions and policies, many individuals learned to perceive anything "black" or minority as negative.[52] Thus, today a public school that is identifiable as black is still almost invariably perceived as being a bad school.[53] Once a school is perceived as black, almost no white parents who can choose otherwise will send their child there or buy a house in a nearby neighborhood.[54] Many middle-class black parents react the same way.[55]

This negative perception leads to high-poverty minority schools that experience important resource deprivations in many areas, including teachers. Even a school with a diverse student body will become almost entirely segregated if parents perceive it to be a "black" school. The problem is not that the schools become all-minority, but that as a consequence of their makeup, most will become socioeconomically segregated. More than seventy-five

the dearth of high-quality teachers in low- income schools); Parker, *supra* note 3, at 35–37 (evaluating research showing that white teachers tend to leave high-minority schools).

50. *See, e.g.*, John W. Porter, *A Policy Statement on Urban School Desegregation, in* SCHOOL DESEGREGATION AND THE STATE GOVERNMENT 8–9 (1979); Parker, *supra* note 3, at 34 (indicating that teachers choose schools based on many factors, including but not limited to proximity, facilities, school leadership, curriculum, and friends); Hanley, *supra* note 48, at B6 (identifying lack of "educational quality" as a reason why whites do not send their children to urban schools).

51. *See generally* Kevin Brown, *Has the Supreme Court Allowed the Cure for De Jure Segregation to Replicate the Disease*, 78 CORNELL L. REV. 1, 11 (1992) (discussing the invidious value that segregation inculcated).

52. *See generally* Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241, 1257–59 (2002); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1202–03 (1995); Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 336–39 (1987).

53. *See generally* INGRID GOULD ELLEN, SHARING AMERICA'S NEIGHBORHOODS: THE PROSPECTS FOR STABLE RACIAL INTEGRATION 4–5 (2000).

54. *Id.* at 130 (discussing lack of white receptivity to the idea of a neighborhood with an increasing minority population).

55. *Id.* (finding that black families with children also fear black growth in their neighborhoods).

percent of predominantly minority schools are also high-poverty schools.[56] High poverty levels at predominantly minority schools deprive students of the invaluable influence of middle- and upper-class peers, which some argue is the most important factor in the success or failure of a school.[57]

The concentration of poverty in a school reduces students' chances of academic success, regardless of race. Both minority and nonminority students who attend schools with low levels of poverty score substantially higher on standardized tests than do students who attend high-poverty schools.[58] Some studies have found that the achievement gap between high- and low-poverty schools is equivalent to two years of learning.[59] Likewise, regardless of

56. ANURIMA BHARGAVA ET AL., NAACP LEGAL DEF. AND EDUC. FUND, INC. & THE CIVIL RIGHTS PROJECT, STILL LOOKING TO THE FUTURE: VOLUNTARY K–12 SCHOOL INTEGRATION 14 (2008) [hereinafter STILL LOOKING TO THE FUTURE]. Intensely segregated schools are schools whose student body is ninety percent or more students of color. *Id.* at 12.

57. *See, e.g.*, RICHARD D. KAHLENBERG, THE CENTURY FOUND., RESCUING BROWN V. BOARD OF EDUCATION: PROFILES OF TWELVE SCHOOL DISTRICTS PURSUING SOCIOECONOMIC SCHOOL INTEGRATION 6–7 (2007) [hereinafter PURSUING SOCIOECONOMIC SCHOOL INTEGRATION], *available at* http://www.tcf.org/publications/education/districtprofiles.pdf; ALAN GOTTLIEB, *Economically Segregated Schools Hurt Poor Kids, Study Shows*, NEWS & ANALYSIS ON SOC. REFORM FROM THE PITON FOUND., May 2002, at 1; Molly McUsic*, The Future of* Brown v. Board of Education*: Economic Integration of the Public Schools*, 117 HARV. L. REV. 1334, 1335 (2004) (arguing the best way to reach the goal of *Brown* is desegregation by economic class); *see also* John Charles Boger, *Education's "Perfect Storm"? Racial Resegregation, High-Stakes Testing, and School Resource Inequities: The Case of North Carolina*, 81 N.C. L. REV. 1375, 1419 (2003) (discussing findings of a report presented to Congress highlighting the achievement gap found between students in high-poverty and low-poverty schools, and noting the disproportionate number of minority students in high-poverty schools); Mary Jane Lee, *How* Sheff *Revives* Brown: *Reconsidering Desegregation's Role in Creating Equal Educational Opportunity*, 74 N.Y.U. L. REV. 485, 518 (1999) ("While they may disagree as to how to 'sort out the respective weights of the effects of race and class in perpetuating the . . . underclass,' it is indisputable that race and class interact.") (citation omitted); James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 272–96 (1999) (discussing the concentration of minorities in center-city schools and the fact that such schools are more expensive to run and tend to be isolated by poverty).

58. *See* DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, EQUALITY OF EDUCATIONAL OPPORTUNITY 21–22 (1966); KAHLENBERG, *supra* note 57; UNC CTR. FOR CIVIL RIGHTS, THE SOCIOECONOMIC COMPOSITION OF THE PUBLIC SCHOOLS: A CRUCIAL CONSIDERATION IN STUDENT ASSIGNMENT POLICY 1–4. (2005), *available at* http://www.law.unc.edu/documents/civilrights/briefs /charlottereport.pdf [hereinafter SOCIOECONOMIC COMPOSITION OF THE PUBLIC SCHOOLS]; McUsic, *supra* note 57, at 1355–56.

59. *See generally* SOCIOECONOMIC COMPOSITION OF THE PUBLIC SCHOOLS, *supra* note 58, at 1–4. One study found that schools with low levels of poverty are twenty-two times more likely to be high performing than schools with high poverty levels. DOUGLAS HARRIS, ENDING THE BLAME GAME ON EDUCATIONAL INEQUITY: A STUDY OF "HIGH FLYING" SCHOOLS AND NCLB (2006), *available at*

individuals' socioeconomic status, students who attend low-poverty schools perform at a higher level than those who attend high-poverty schools.[60] Thus, poor minority students have a better chance of academic success at schools with low levels of poverty than middle-class white students have at schools with high levels of poverty.

The second consequence of racially isolated minority schools is to deprive students therein of access to the best teachers. Research demonstrates that access to quality instruction is the most important factor, or ranks toward the top, in predicting academic success.[61] Predominantly minority schools experience high levels of teacher turnover.[62] This turnover undermines stability and consistency in teaching. In addition, minority schools are constantly forced to hire new teachers, who are often inexperienced.[63] Experienced and quality teachers simply will not teach in predominantly minority schools for any significant length of time.[64] Many will not come in the first instance, and others will leave as soon as they have the opportunity. The reasons teachers prefer nonminority schools can be both racial and nonracial. For instance,

http://epicpolicy.org/files/EPSL-0603-120-EPRU.pdf.

60. KAHLENBERG, *supra* note 57, at 6; SOCIOECONOMIC COMPOSITION OF THE PUBLIC SCHOOLS, *supra* note 58, at 1 ("[M]iddle-income students who attend high-poverty schools earn lower average test scores than do low-income students who attend middle class schools."). As a general matter, poor students who attend middle class schools have higher academic achievement than do middle class students who attend high-poverty schools. Russell W. Rumberger & Gregory J. Palardy, *Does Resegregation Matter?: The Impact of Social Composition on Academic Achievement in Southern High Schools*, *in* SCHOOL RESEGREGATION: MUST THE SOUTH TURN BACK? 127, 128 (John Charles Boger & Gary Orfield eds., 2005).

61. *See* STILL LOOKING TO THE FUTURE, *supra* note 56, at 20; SOCIOECONOMIC COMPOSITION OF THE PUBLIC SCHOOLS, *supra* note 58, at 4 (discussing research on the effect good teachers have on student achievement); Dan Goldhaber & Emily Anthony, *Teacher Quality and Student Achievement*, 115 ERIC CLEARINGHOUSE ON URBAN EDUC. 1 (2003) (writing that recent research shows "teacher quality is the most important educational input predicting student achievement"); Megan Hopkins, *A Vision for the Future: Collective Effort for Systemic Change,* 89 PHI DELTA KAPPAN 737 (2008) (indicating the quality of the teacher is the most important factor in student development, especially for low-income students of color).

62. *See* EDUC. TRUST, THEIR FAIR SHARE, HOW TEXAS-SIZED GAPS IN TEACHER QUALITY SHORTCHANGE LOW-INCOME AND MINORITY STUDENTS 6 (2008) [hereinafter THEIR FAIR SHARE], http://www.theirfairshare.org/resources /TheirFairShareFeb08.pdf (illustrating how most of Texas' districts, the poorest and mostly minority, also have the highest rate of teacher turnover); FRANKENBERG, *supra* note 49, at 25–26 (revealing that teacher dissatisfaction tends to rise as the percentage of minority students in a school rises, making it more likely that teachers will leave).

63. *See* THEIR FAIR SHARE, *supra* note 62, at 4; Parker, *supra* note 3, at 37.

64. *See* THEIR FAIR SHARE, *supra* note 62, at 6; FRANKENBERG, *supra* note 49, at 42.

many good teachers simply desire to teach high-achieving students,[65] which can have an unintended disparate impact. Yet, the predominant factor dictating a teacher's choice of school is more likely bound up in the lingering stigma toward black schools. As Wendy Parker's analysis of teacher mobility in Texas, North Carolina, and Georgia demonstrates, "race itself influences where teachers teach, not poverty or achievement rates."[66]

However, even if many teachers' school choices are simply reflections of preferences for teaching high-achieving students, those preferences combine with middle-income parents' refusal to send their children to high-minority schools to produce a vicious cycle. High-minority schools lead to high-poverty schools, which lead to lower achievement. Low achievement leads to teacher attrition and the inability to attract good new teachers, which further depresses scores and increases segregation. This vicious cycle creates predominantly impoverished minority schools where only four out of ten students graduate on time.[67] For instance, in the 2004–05 school year in Baltimore City Schools, a high-poverty and high-minority school system, only one-third of the students graduated on time.[68]

The imminent goal of schools faced with these circumstances is not improving interracial interactions or achieving the benefits of diversity. Their goal is academic survival. Racial isolation creates an educational crisis in which predominantly minority schools are unable to deliver a constitutionally required adequate education. Moreover, this can occur even though other schools in the school district have good teachers and are achieving at high levels. These school districts are delivering neither an adequate nor an equal educational opportunity for all.

School systems' options for remedying these problems, however, are more limited than one might think. Labor obligations often prevent them from simply reassigning teachers to the schools that need them.[69] Nor can they easily induce teachers to voluntarily transfer to these schools. Recent studies and evidence indicate that a school district would have to nearly double a teacher's salary to induce the teacher to teach at a high-poverty and predominantly

65. *See generally* STILL LOOKING TO THE FUTURE, *supra* note 56, at 21; Eric A. Hanushek et al., *Why Public Schools Lose Teachers*, 39 J. HUMAN RESOURCES 326, 337 (2004) (finding in a study of teacher transfers in Texas "strong evidence that teachers systematically favor higher achieving, nonminority, nonlow-income students"); James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 294 (1999).

66. Parker, *supra* note 3, at 37.

67. STILL LOOKING TO THE FUTURE, *supra* note 56, at 21.

68. *Id.* at 19 tbl.3.

69. *See*, *e.g.*, David J. Strom & Stephanie S. Baxter, *From the Statehouse to the Schoolhouse: How Legislatures and Courts Shaped Labor Relations for Public Education Employees During the Last Decade*, 30 J.L. & EDUC. 275, 280–81 (2001) (discussing a suit by public teachers challenging their reassignments pursuant to their labor agreement).

minority school rather than elsewhere.[70] Although a school system could alleviate the problem by reassigning students to different schools, doing so would prompt immediate parental objection and potentially result in those parents withdrawing their children from the system.[71]

Because race is a dominant factor in the unwillingness of parents and teachers to choose high-minority and high-poverty schools, changing the racial identity of schools is effectively a predicate to delivering equitable and quality educational opportunities to many minority children. Schools cannot change the racial attitudes of adults, but they can create school systems where race will not be a factor. Race ceases to be a factor when all schools in a district are roughly equal in terms of their demographics because no one can look at the schools and say one is white and another is black. The Jefferson County School Board made this point and emphasized its importance when arguing its case in district court:

> The Board also believes that school integration benefits the system as a whole by creating a system of roughly equal components, not one urban system and another suburban system, not one rich and another poor, not one Black and another White. It creates a perception, as well as the potential reality, of one community of roughly equal schools. . . . One of the ways JCPS meets the competition [with private schools] is by offering quality education in an integrated setting at every school.[72]

Once a school system achieves this, racial biases may exist among parents and teachers, but these biases do not interfere with the school system's ability to do its job. In effect, by using race to equalize schools, the school system separates or disentangles itself from the racial stigma of the society that surrounds it. By ignoring

70. *See, e.g.*, Bill Turque, *In Second Year, Rhee Is Facing Major Tests*, WASH. POST, Aug. 21, 2008, at DZ01 (discussing a proposal to raise teacher salaries to $120,000 and the resistance of teachers toward it); *see also* ALLIANCE FOR EXCELLENT EDUC., IMPROVING THE DISTRIBUTION OF TEACHERS IN LOW-PERFORMING HIGH SCHOOLS 7 (2008), http://www.all4ed.org/files/TeachDist_PolicyBrief.pdf (indicating that several states already have incentive pay for low-performing schools, but pay increase alone is insufficient to attract teachers); Hanusheck, *supra* note 65, at 350 (finding that a ten percent salary increase would be necessary for each increase of ten percent in minority student enrollment to induce white females to teach in the school); *id*. at 351 (finding that a twenty-five to forty percent salary increase would be necessary to induce white females with two or fewer years of experience to transfer from teaching in a suburban to an urban school).

71. *See, e.g.*, Bradley v. Milliken, 484 F.2d 215, 244 (6th Cir. 1973) (discussing white flight in Detroit).

72. McFarland v. Jefferson County Pub. Sch., 330 F. Supp. 2d 834, 854 (W.D. Ky. 2004).

race or leaving the racial composition of its schools to chance, however, a school system allows private societal discrimination to shape the face of its schools and determine the opportunities provided therein.

B. Voluntary Desegregation Methods

Voluntary desegregation, however, does not simply replicate past or mandatory desegregation methods. Compelled desegregation is more aggressive than voluntary desegregation, relying heavily on redrawing school attendance zones,[73] consolidating school buildings and districts,[74] and busing,[75] all of which entail the involuntary reassignment of students. Involuntary reassignment of students to schools outside their immediate neighborhood has engendered significant parental resistance.[76] Racial minorities were sometimes disgruntled,[77] but whites tended to be the only ones who withdrew their children from the system rather than submit to desegregation.[78]

Well-designed voluntary desegregation plans co-opt parents' reluctance rather than inflame it. They force nothing upon parents and, instead, allow them to be active rather than passive agents in school desegregation. Consequently, the effectiveness of voluntary desegregation is dependent upon the voluntary acts of parents. Given past resistance, reliance on voluntary parental acts would appear doomed on its face, but school districts have been able to create systems, options, and incentives that reshape parental choices.

First, a school district changes the entire perspective with which a parent approaches desegregation simply by making school

73. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 28–29 (1971) (finding that district courts have the authority to alter attendance zones).

74. Powell v. Studstill, 441 S.E.2d 52, 54 (Ga. 1994) (finding that a school consolidation plan ensured desegregation).

75. *Swann*, 402 U.S. at 29–30 (sanctioning a district court order to bus students to non-neighborhood schools); Borders v. Bd. of Educ., 290 A.2d 510, 516 (Md. 1972) (finding "it is constitutionally permissible to require busing to achieve racial balance").

76. *See, e.g.*, Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 470–71 (1982) (evaluating a Washington statute that was passed to prevent the busing of students to non-neighborhood schools); Regan Garner, *A School Without a Name: Desegregation of Eastside High School 1970–1987*, 16 U. FLA. J.L. & PUB. POL'Y 233, 253–54 (2005) (recounting white resistance to busing and school reassignment).

77. *See* Bell, *supra* note 21, at 485–86 (arguing that many in the African-American community preferred school improvement over integration); Joe R. Feagin, *Heeding Black Voices: The Court,* Brown*, and Challenges in Building a Multiracial Democracy,* 66 U. PITT. L. REV. 57, 77 (2004) (discussing African-American opposition to desegregation because of the fear that it "would harm or destroy black institutions").

78. *See, e.g.*, Bd. of Educ. v. Super. Ct., 448 U.S. 1343, 1348 (1980) (discussing "white flight" in response to desegregation).

assignments voluntary as opposed to mandatory.[79] Human nature dictates that parents are more receptive to sending their children to a school outside their immediate neighborhood if it is the parents' decision rather than the school district's.[80] No parent welcomes outside control or influence over the opportunities his child will receive. Second, some of whites' historical resistance to mandatory desegregation has stemmed from the uncertainty about whether their children would continue to receive a quality and safe education at another school.[81] Although some of this resistance is born of bias,[82] some is a fear of the unknown. But when a school system resolves these uncertainties and can offer quality, if not improved, schools throughout the system, resistance can be drastically reduced. Successful voluntary desegregation plans have done exactly this.[83]

Unfortunately, offering choice and improving school quality and safety alone are often insufficient to desegregate schools. Racial bias continues to motivate or influence enough individual choices to prevent overall desegregation. Thus, no desegregation plan that offers unfettered school choice is likely to be successful. Instead, desegregation plans must structure and monitor the choices available to parents. Thoughtful plans strike a careful balance between offering as many meaningful options as possible, so as to maintain parental attractiveness, and limiting those options in ways that ensure desegregation.

School districts can achieve this balance through at least two means. First, a school district can guarantee every student a neighborhood school,[84] but also give them the option of transferring to another school so long as the transfer has a neutral or positive

79. *See generally* Neal Devins, *New Federalism in Education: The Meaning of the Chicago School Desegregation Cases*, 59 NOTRE DAME L. REV. 1243, 1267 (1984) (discussing the shift from a desegregation plan that required mandatory reassignments to one based on voluntary reassignments because they are "the most effective and most practicable in achieving stable desegregation" (quoting United States v. Bd. of Educ., 554 F. Supp. 912, 917 (N.D. Ill. 1983)).

80. *See generally* Jessica Rae Patton, *A Rainbow's Arc*, TEACHING PRE K–8, May 2007, at 45–49.

81. *See, e.g.*, Garner, *supra* note 76, at 255 (discussing white concerns regarding school quality).

82. Amy Stuart Wells et al., *Tackling Racial Segregation One Policy at a Time: Why School Desegregation Only Went So Far*, 107 TEACHERS C. REC. 2141 (2005); Amy E. Wells, *Good Neighbors? Distance, Resistance, and Desegregation in Metropolitan New Orleans*, 39 URB. EDUC. 408, 412–13 (2004).

83. *See, e.g.*, Comfort *ex rel.* Neumyer v. Lynn Sch. Comm., 283 F. Supp. 2d 328, 352–53 (D. Mass. 2003) (describing the educational success of the plan); Patton, *supra* note 80, at 45.

84. *Comfort*, 283 F. Supp. 2d at 347–48 ("[U]nder the Lynn Plan every student in Lynn is entitled to attend the school in his or her neighborhood." "Students have options beyond their neighborhood schools if their proposed transfers are 'desegregative'—i.e., when they contribute to the districtwide integration effort.").

desegregative effect.[85] Comfort, Massachusetts has successfully facilitated these transfers by using state transportation funds to support desegregative transfers.[86] Such a plan poses no burden to parents who wish to keep their children in a neighborhood school, while those who wish to transfer have the option and resources to do so. Comfort also made curricular upgrades, including specialized class offerings at some schools, in order to increase the attractiveness of transfers.[87] The end result was a racially balanced system.[88]

Second, a district can expand the size of school attendance zones beyond traditional neighborhood zones.[89] For instance, a school district can combine a group of elementary schools into a single larger attendance zone. Parents can then indicate their preference of schools within this large zone. By carefully drawing attendance zones and selectively grouping elementary schools, districts can successfully reduce segregation.[90] Achieving racial balance, however, requires that they refrain from deferring entirely to parental preference. Districts must sometimes assign a child to his parents' second-preference school.[91] Resorting to a second-preference school primarily occurs when the first-preference school is oversubscribed.[92]

In these instances, it may be necessary to rely on racial tiebreakers, whereby those students who improve or maintain a school's racial balance are assigned first. Maintaining this balance is crucial because, even before a school becomes significantly imbalanced, it can reach a "tipping point" where it rapidly goes from being relatively integrated to entirely imbalanced.[93] For instance, a school might enroll whites as a slight majority for a period of years, but an increase to forty-five or fifty percent minority may be enough for others to perceive it as a "black" school. Perception can then quickly become reality, as nonminorities no longer voluntarily

85. *Id.* at 348.

86. *Id.* at 342–43; *see also* Racial Imbalance Act, MASS. GEN. LAWS ch. 71 §§ 37C, 37D; ch. 15 §§ 1I, 1J, 1K (2000).

87. *Comfort*, 283 F. Supp. 2d at 333–35.

88. According to the facts, all of the high schools in Lynn are "balanced," but only two out of five of the middle schools, and none of the elementary schools, are balanced. Therefore, transferring to these schools would be prohibited if it would promote racial imbalance. *Id.* at 348–49.

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

90. *Id.* at 845.

91. *Id.*

92. *Id.* at 844–45.

93. Christine H. Rossell & Willis D. Hawley, *Understanding White Flight and Doing Something About It*, *in* EFFECTIVE SCHOOL DESEGREGATION: EQUITY, QUALITY, AND FEASIBILITY 157, 165–71 (Willis D. Hawley ed., 1981) (reviewing research finding the tipping point of massive departure of whites to be thirty- to forty-percent minority enrollment).

attend the school and it becomes all-black in a matter of just a few years. Schools can control this tipping point by implementing race as a factor or tiebreaker in schools that are oversubscribed. By doing so early and before a school approaches the tipping point, schools need only rely on the racial tiebreaker in limited instances.[94]

II. RACIAL CLASSIFICATIONS THAT DO NOT OCCASION MATERIAL HARMS

A. The Constitutional Harm of Racial Stigma

As explained further in Part III, voluntary desegregation generally poses no material harm to students. Race discrimination, however, occurs not only through tangible harms such as the loss of a job, housing, or admission to a university but also through intangible harms that affect one's sense of self or the way in which society views an individual. For instance, intangible harms occur when the government acts in ways that send the message that a racial group is inherently different, intellectually inferior, or less worthy of citizenship.[95] Scholars refer to these injuries as stigmatic or expressive harms.[96] Often, material harm accompanies a stigmatic harm. For instance, school segregation laws sent a message of black inferiority and also deprived African-Americans of tangible educational resources and opportunities.[97] But material deprivation need not accompany a stigmatic harm for a violation of equal protection to occur.

The Supreme Court has developed stigma as an independent harm and, thus, a basis for standing in several of its most important race cases. "[W]here the material harm seems slight or problematic" in discrimination cases,[98] the Court has justified its holding with the need to prevent stigmatic messages of inferiority. For instance, in *Strauder v. West Virginia*,[99] the state excluded blacks from jury service.[100] The Court found the practice unconstitutional, in part, because the exclusion of blacks was stigmatizing. The Fourteenth Amendment, although stated in prohibitory terms, includes the positive right to be free from "unfriendly legislation . . . implying

94. *See, e.g.*, *McFarland*, 330 F. Supp. 2d at 861.

95. R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 817 (2004).

96. *See* Paul Brest, *Foreward: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 8 (1976); Lawrence, *supra* note 52, at 351; Lenhardt, *supra* note 95, at 817; *see also* ANDREW KOPPELMAN, ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY 57–99 (1996) (discussing the Supreme Court's stigma jurisprudence and the stigma theory scholarship that has followed it).

97. *See* Brown v. Bd. of Educ., 347 U.S. 483, 494–95 (1954).

98. Brest, *supra* note 96, at 9.

99. 100 U.S. 303 (1879).

100. *Id.* at 304.

inferiority in civil society."[101] Thus, the flaw in the West Virginia statute was not that it occasioned a material deprivation, but that

> singl[ing] out and expressly den[ying] by a statute all right to participate in the administration of the law, as jurors, because of their color . . . is practically a brand upon [blacks], affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.[102]

Picking up on the importance of this rationale, subsequent plaintiffs challenged other forms of segregation based on the theory that it stigmatized blacks.

In fact, the core theory of *Brown v. Board of Education*,[103] which led to the prohibition of all segregation, was that even when segregated schools were equal in all tangible respects African-American children were still injured by the stigmatic message that segregation conveyed.[104] "To separate [black children] 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."[105] The Court further noted that "the policy of separating the races is usually interpreted as denoting the inferiority of the negro group."[106] Thus, the Court held that segregated schools are inherently unequal because they stigmatize African-Americans.[107]

More recently, the Court has treated the threat of stigmatic harm as a justification for scrutinizing and overturning affirmative action plans. In *Richmond v. J.A. Croson Co.*,[108] the Court wrote that racial classifications, regardless of their intended purpose,

101. *Id.* at 308.
102. *Id.*
103. 347 U.S. 483 (1954).
104. The Court had previously held that segregation did not stigmatize. In *Plessy v. Ferguson*, 163 U.S. 537 (1896), the plaintiff argued that segregated train cars, although not denying blacks the benefit of riding the train, were an attempt to indicate their inferiority. The Court did not reject the notion that stigma could occasion a constitutional harm, but denied that "[l]aws permitting, and even requiring, their separation in places where they are liable to be brought into contact . . . imply the inferiority of either race to the other." *Id.* at 544. It further added that:

> We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.

Id. at 551.
105. Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954).
106. *Id*.
107. *Id.* at 495.
108. 488 U.S. 469 (1989).

"carry a danger of stigmatic harm" and "[u]nless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility."[109] Racial preferences in the marketplace and academic admissions "may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relation to individual worth."[110] In short, the Court argued that affirmative action programs not only materially harm the disfavored racial group, but stigmatically harm the preferred racial group.

The Court has also found that racial classifications can stigmatize without implying racial inferiority. They can send a more subtle but equally racially offensive or inappropriate message. For instance, in *Shaw v. Reno*,[111] the consideration of race in vote redistricting had not denied anyone the right to vote, nor had it diluted anyone's vote or occasioned any tangible effect on voting rights. The state had simply created a majority minority congressional district that resulted in a "bizarre" or unusually shaped district. The shape itself did not harm voters.[112] Thus, sustaining the plaintiff's claim required the identification of some other harm.

The Court found the shape of the district could not be explained on any grounds other than the consideration of race in drawing it. This predominant consideration of race harmed citizens by conveying a stigmatic message.[113] Reiterating its historical concerns with racial stigma, the Court wrote that racial classifications "threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility."[114] By drawing voting districts based on race, the state "reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls."[115] Although not suggesting racial inferiority, this message furthers a notion of racial difference that is offensive.

B. Explaining the Court's Theory of Stigma

Although the Court has established the importance of stigma, it has never articulated any legal standards for evaluating it. Instead,

109. *Id.* at 493.
110. *Id.* at 494 (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 298 (1978)).
111. 509 U.S. 630 (1993).
112. *Id*. at 634–36, 644.
113. *Id*. at 657–58.
114. *Id.* at 643.
115. *Id.* at 647.

it has recognized stigmatic harms on an ad hoc basis. Scholarship has attempted to fill this gap and explain the Court's motivations and its underlying rationales. When government action is "based on assumptions of intrinsic worth and selective indifference," the intent to "inflict psychological injury by stigmatizing . . . victims as inferior" is often unmistakable.[116] But in the modern context, intent and stigma are often less explicit. Consequently, the Court's jurisprudence becomes inconsistent.

Paul Brest finds that the Court has attempted to evaluate this sort of stigma through its compelling-interest analysis, weeding out illegitimate classifications based on racial generalizations and stereotypes from those that do not create stigmatic or material harms.[117] This analysis assumes that even well-intentioned uses of race can have stigmatic effects and involve subtle notions of racial inferiority or difference. Brest, for instance, reasons that racial quotas in public housing or schools are designed to maintain integration but they can "convey[ ] the stigmatic message that whites cannot tolerate too many minority persons."[118] In such cases, the Court must determine whether a policy actually conveys stigmatic messages and whether those messages are nonetheless outweighed by the benefits.[119]

Charles Lawrence, however, would argue that a compelling-interest analysis cannot fully evaluate stigma because it focuses too much on governmental intent and the basic operation of a policy.[120] To identify stigma, one must look to the social context that surrounds a legal dispute. Stigma becomes part of the social fabric and oppresses individuals in ways beyond the policy at issue in a case.[121] Moreover, because stigma is largely a function of the context in which it occurs, governmental intent may often be irrelevant.[122] Neither intent, nor a basic act itself, will necessarily stigmatize. A stigmatic "message obtains its shameful meaning from the historical and cultural context in which it is used and, ultimately, from the way it is interpreted by those who witness it."[123] For instance, asking women to use separate restrooms from men does not impose a stigma on either group, while asking African-Americans to use separate restrooms from whites would, because the latter derives a

116. Brest, *supra* note 96, at 8.
117. *Id.* at 15.
118. *Id.* at 19.
119. *Id.* at 21 (noting that the court's task is to "assess the extent to which [an apparently benign race-dependent practice] . . . seems to reflect assumptions of racial inferiority or selective indifference and whether it seems likely to inflict stigmatic injury or add to cumulative harms").
120. Lawrence, *supra* note 52, at 351–53.
121. *Id.* at 351 (stating that stigma signals an "inferior status [that] designates [one] as an outcast" from society).
122. *Id.* at 352–53.
123. *Id.* at 351.

negative meaning from our cultural and historical context, while the former does not.[124]

The state, however, can stigmatize individuals without even intending to.[125] For instance, Lawrence points out that, in an effort to improve the competency of its police officers, a city may rely on a standardized test in hiring that has a disparate impact on minority applicants.[126] Assuming a context where a police force formerly excluded African-Americans and still employs only a few, the community may interpret the test as indicating that African-Americans as a group lack the qualifications to be officers, or that the city does not want to hire them.[127] The relevant inquiry in determining stigma is not the defendant's intent but the "cultural meaning" of a particular act.[128] If the perceived meaning is stigmatic, the Constitution should prohibit it regardless of the actor's intent. In short, Lawrence concludes that the culturally contingent stigmatic message of a governmental act should be one of the measures of an equal-protection violation.[129]

Robin Lenhardt posits that stigma carries an even higher legal significance, arguing that stigma is more than simply an important component of discrimination.[130] "[R]acial stigma, not intentional discrimination or unconscious racism, is the true source of racial injury in the United States."[131] Thus, the law's primary objective must be to identify and limit stigma. Law, however, will not identify stigma by searching for a bad actor or perpetrator of discrimination. Racial stigma is a social construct that exists independent of the intentions or motivations of individuals.[132] Stigmatic meanings derive from the consensual meanings that communities share.[133]

Applying this theory to Supreme Court precedent, Lenhardt credits the Court for recognizing some stigmatic harms.[134] She, however, reveals the Court's inconsistency with regard to stigma.

124. *Id.* at 351–52.

125. *Id.* at 352–53.

126. *See, e.g.*, Washington v. Davis, 426 U.S. 229, 246 (1976) (finding that despite the differential racial effect of the test, there was no intentional discrimination).

127. Lawrence, *supra* note 52, at 373.

128. *Id.* at 370–72.

129. *Id.* at 323–24, 355–56.

130. Lenhardt, *supra* note 95, at 887–88 (arguing that her point, unlike Lawrence's or Brest's, focuses on racial stigma as the main source of injury to minorities on an individual as well as a group level).

131. *Id.* at 809. Moreover, racial stigma "accounts for the persistence of racial disparities" and intentional discrimination, not vice versa. *Id.*

132. *Id.* at 821–22.

133. *Id.* at 823–24.

134. *Id.* at 865 (arguing that since the Fourteenth Amendment's enactment, the Court has viewed it as the main tool to address the harm racial stigma creates).

She finds that the Court has overlooked stigmatic harms to minorities in various cases while identifying questionable stigmatic harms elsewhere.[135]

Most notably, the Court has suggested that stigmatic harm occurs simply by recognizing or calling attention to one's race. For instance, Lenhardt concludes that Justice O'Connor, writing for the majority in *Croson*, proceeds with the notion that to recognize blackness is to recognize "otherness," and otherness stigmatizes blacks.[136] Lenhardt rejects this notion because stigma is a function of context. Thus, recognizing race does not stigmatize unless some contextual meaning is attached to the recognition.[137] For instance, collecting census data by race does not stigmatize anyone, as the information itself has no social meaning. However, in a context where monolithic populations were socially equated with isolated, ignorant, and/or racist populations, one might argue that collecting census data to highlight those locations might stigmatize. Of course, such meaning does not attach in our culture and, thus, to say that a county in Wyoming is all-white is to do nothing but recognize its demographics and state a fact.

Lenhardt asserts that the Court fails to take these important contexts into account. Instead, the Court treats all racial recognitions and considerations the same: generally objectionable. According to Lenhardt:

> Racial stigma, for the Court, has become a sort of reputational harm, one that can arise by the mere acknowledgment (or failure to acknowledge) of racial difference. This superficial understanding comports with the very narrow, formalistic interpretation of the Equal Protection Clause and the notion of equality that the Court has adopted in its race cases in the last two or three decades.[138]

Because the Court has "jettisoned" a serious examination of context, stigma jurisprudence no longer has an objective foundation.[139] Thus, notwithstanding the fact that "the Court has often regarded racial stigma as a problem of constitutional dimensions, it is difficult to predict when or how the Court will deem it necessary even to mention the potentially stigmatizing effects of a challenged policy or action."[140]

Richard Pildes and Richard Niemi's scholarship develops a subcategory of stigma that does not involve racial inferiority or

135. *Id.* at 866–67 (contrasting Strauder v. West Virginia, 100 U.S. 303 (1879), with Plessy v. Ferguson, 163 U.S. 537 (1896)).
136. *Id.* at 870–71.
137. *Id.* at 914–24.
138. *Id.* at 875–76.
139. *Id.* at 877 (concluding the risk of stigmatization is being examined in a vacuum).
140. *Id.* at 876.

differential value. Relying on Supreme Court precedent, they identify, what they call, expressive harms in certain acts based on race.[141] They write that:

> [E]xpressive harms are violations of public understandings and norms. . . . Judicial validation of expressive harms reflects concern for the way in which public action can cause injury precisely by distorting or undermining [our norms]. The harm is not concrete to particular individuals, singled out for distinct burdens. The harm instead lies in the disruption to constitutionally underwritten public understandings about the appropriate structure of values in some arena of public action.[142]

The primary example of these expressive harms occurs in voting redistricting cases. In those cases, the Court focuses on the social perceptions of the messages sent by the shape of a voting district.[143] According to the Court, bizarrely shaped, majority minority districts send the message that race is the most important determining characteristic in voting.[144] Pildes and Niemi stress that the Court does not condemn race-conscious programs in general or imply that race is an illegitimate consideration.[145] Rather, the Court objects to the subordination of other normally relevant values to a single value.[146] In effect, the process is corrupted by a single-minded adherence to race, and conveys a message inconsistent with constitutional principles. In the context of voting, that message is that race is more important than geographic, socioeconomic, or any other political community. Pildes and Niemi further note that a similar rationale explains prohibitions on quotas in school admissions because they subordinate merit to race.[147]

In sum, the above scholarship confirms the importance of stigma in race discrimination cases. Even in the absence of material harm, racial classifications can stigmatize by implying racial inferiority or difference, or by subordinating other values to race. However, identifying stigma requires a careful examination of social context, which is not always developed in the evidence or opinions. Unfortunately, the scholarship also confirms the Court's inconsistency in fully considering this context. This failure poses a significant threat to voluntary desegregation. Although this Article

141. Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 MICH. L. REV. 483, 485 (1993).

142. *Id.* at 507.

143. *See, e.g.*, Shaw v. Hunt, 517 U.S. 899 (1996); Shaw v. Reno, 509 U.S. 630 (1993).

144. *Shaw*, 509 U.S. at 646–48.

145. Pildes & Niemi, *supra* note 141, at 495–99.

146. *Id.* at 499, 509.

147. *Id.* at 503–04.

demonstrates voluntary desegregation's unique context and purpose, a cursory examination of its use of race might lead one to lump it in with various other race-conscious programs, toward which the Court has already expressed various concerns about stigma.

C. Stigma in School Segregation and Desegregation

Kevin Brown's scholarship, in particular, helps establish a baseline for evaluating stigma in school desegregation by exploring its historical context. He identifies the central evil of school segregation not as the physical separation of students, but as the inculcation of racist values.[148] The courts, however, failed to directly address the value inculcation, and instead focused exclusively on desegregating school buildings.[149] Brown's analysis is particularly instructive for voluntary desegregation in so far as it is primarily reacting to the effects of this inculcative value.

Brown grounds his theory in Supreme Court precedent and educational theory, which posit that our public schools are cultural institutions with a primary purpose of indoctrinating values.[150] School segregation, however, directly misused this power. By separating white and black students, the state indoctrinated what he calls the invidious value, or the belief in the inferiority of blacks.[151] Socializing students in an environment premised on this value stigmatized blacks, but Brown emphasizes that it also harmed whites by corrupting their values.[152]

Although *Brown v. Board of Education* contemplated this stigmatic evil, the Court's subsequent holdings were not premised on remedying it. Remedying the invidious value would require resocializing students with nonracist values.[153] Desegregating schools might eliminate unequal opportunities, but desegregation does not necessarily respond to the continuing effects of the invidious value.[154]

Brown concludes that the Court overlooked this distinction because it proceeded with the notion that segregation did not just

148. Brown, *supra* note 51, at 5.

149. *Id.* at 6.

150. *Id.* at 7–11; *see also* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986); Bd. of Educ. v. Pico, 457 U.S. 853, 864 (1982); AMY GUTMANN, DEMOCRATIC EDUCATION 22–39 (1987) (evaluating the varying theories of education and each theory's argument regarding the state's right to socialize children through education).

151. Brown, *supra* note 51, at 5–6.

152. *Id.* at 11.

153. *Id.* at 37.

154. He does note, however, that desegregation is a necessary component of eliminating the invidious value. *Id.* at 36–37. As Brown writes, "[w]hile desegregation is not necessary to eliminate the stigmatic effects of segregation in other contexts, it is necessary in the context of public elementary and secondary education." *Id.*

send the message that blacks were inferior to whites;[155] it actually made blacks inferior to whites through unequal opportunities.[156] Thus, black students themselves were treated as the problem to be remedied, rather than the message that students had been taught. Brown asserts that this remedial perspective ignores the inculcative harm done to both whites and blacks: the notions of white superiority and black inferiority.

Ultimately, Brown's concept of intangible constitutional harm correlates with Pildes and Niemi's expressive harm theory. Like Pildes and Niemi, Brown sees public and private actors competing over what values public policy will reflect. With schools, some parents advocate policies that will perpetuate their personal values, which may, for instance, be religious or invidious. Schools, however, are limited in their ability to reflect these values. In fact, they are obligated to socialize and inculcate students only with those values that are consistent with the Constitution.[157] When schools go beyond these values, such as in inculcating racial inferiority, they violate the rights of all students, even those who might agree with the religious or invidious value.[158] Likewise, this warped inculcation violates students' rights regardless of whether it is accompanied by a material harm. In effect, the inculcative harm of invidious values is equivalent to Pildes and Niemi's notion that subordinating values creates an expressive harm. The harm in both flows from the state promoting a message that is inconsistent with constitutional values.

The foregoing contextualizes the obstacles schools face in maintaining equitable opportunities, but it also legitimizes voluntary desegregation as a necessary response to real social phenomena. The scholarship, however, goes beyond de jure segregation to consider whether voluntary desegregation might pose its own stigmatic risks. In general, the scholarship notes that voluntary desegregation can pose stigmatic harms, although the voluntary desegregation that the scholarship addresses is of a different nature than what is implemented today. Regardless, the scholarship suggests that, at worst, the benefits of voluntary desegregation outweigh the threat of stigma.

Whatever concerns might normally exist, recent experiences with voluntary desegregation largely resolve these stigmatic concerns. First, today's voluntary desegregation is far less rigid (allowing for parental choice, for instance) than earlier notions of voluntary desegregation that were premised on more aggressive

155. *Id.* at 6, 56–57.

156. *Id.* Brown concedes that inequality of resources certainly could have retarded the educational opportunities of blacks, but contends that particular harm, and its corresponding remedy, is not the primary harm of segregation. *Id.* at 36.

157. *Id.* at 17.

158. *Id.* at 17–20.

methods that mirrored mandatory desegregation. Paul Brest, for instance, conceptualizes voluntary desegregation as relying on rigid quotas.[159] Nevertheless, he still reasons that voluntary desegregation is distinct from other race-conscious programs because of the unique motivations for remedying school segregation: notions of differential value between racial groups motivate segregation, whereas notions of equal worth motivate integration.[160] Second, he conceives of voluntary desegregation as benefitting minorities at the expense of whites. He writes that desegregation "may effectively deprive white individuals of a desired benefit—attendance at a neighborhood school."[161] However, as explored later, current forms of voluntary desegregation do not necessarily deprive whites of anything. Current forms are aimed at and benefit all students. In short, the zero-sum game of voluntary desegregation that Brest conceptualizes no longer exists. However, even assuming this more drastic form of voluntary desegregation, Brest concludes voluntary desegregation is unlikely to stigmatize whites and does not "present any likelihood of cumulative disadvantage to whites based on race or of the frustration of being denied benefits because of an unchangeable trait."[162]

Brest's only real concern is that quotas requiring a particular level of white students could convey a stigmatic message of black inferiority because they suggest that the presence of whites and the prevention of all-black schools is the measure of school quality.[163] Again, this concern does not apply to current voluntary desegregation because it does not rely on rigid quotas that require mandatory student reassignments, nor is it premised on only desegregating black schools. The goal is to desegregate and integrate all schools to create nonracial schools. Only then can the educational system ensure a network of roughly equal schools. Thus, even if quotas were implemented in some form, the quotas would not be premised on the inferiority of any group, but on the interdependence of all groups. In any event, Brest is still willing to dismiss this concern because the schools' motivations are not stigmatic, and the benefits of desegregation far outweigh any costs.[164]

In fact, scholars who have addressed the causes of current de facto school segregation have suggested that redressing it is more than just a benevolent act of the schools. These scholars reason that it may be their legal responsibility. Placing his stigma concerns aside, Brest indicates that the causes of de facto segregation are

159. Brest, *supra* note 96, at 19–20.
160. *Id.* at 17–18.
161. *Id.* at 17.
162. *Id.*
163. *Id.* at 19–20.
164. *Id.* at 22.

likely the result, or continuing effect, of past violations of antidiscrimination principles.[165] Although a plaintiff might not convince a court to remedy so called de facto segregation, voluntary desegregation is necessary to control for racially biased private decisions that stem from past state discrimination.[166] David Strauss is even more certain in his approach to de facto segregation. He argues that voluntary desegregation is not voluntary at all, but in some instances can be constitutionally required.[167] In so far as the state-imposed stigmatic harms recognized in *Brown* persist today, they are the cause of de facto segregation.[168] Thus, eliminating de facto segregation attributable to this stigma is simply a remedy to the original harm of *Brown*.

Professor Kevin Brown adds even further depth in connecting de facto segregation with past de jure segregation. He argues current school and residential choices are directly connected to the history of school segregation. The state inculcated the invidious value through schools, and its desegregation remedies never attempted to counteract that value.[169] As a result, many of today's parents continue to hold and act upon those values, replicating the school segregation that they were taught is desirable.[170] Thus, like Brest and Strauss, Brown finds the state is obligated to affirmatively interrupt the cycle that it initiated.[171]

Brown also suggests that, whatever the state's past role in segregation, today's segregation can send dangerous messages to students. Those messages alone justify schools' efforts to voluntarily desegregate. Brown cautions that not all racial separation in schools can be presumed to be the result of the stigmatic effects of the invidious value, but:

> [The invidious] value can nevertheless still be inculcated when the educational quality of schools attended by African-Americans is inferior to that of schools attended by whites. For a district court to terminate its supervision in a situation where the quality of education to African-American students is not equal to that provided to Caucasian students clearly

165. *Id.* at 47.

166. *Id.*

167. David A. Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. CHI. L. REV. 935, 942–43 (1989).

168. *Id.* at 945.

169. Brown, *supra* note 51, at 6.

170. *Id.* at 66–69.

171. *Id.* at 48 (writing that "the state cannot rely on parents to fill its interest in the proper inculcation of values, because the parents' influence will often be what the state is attempting to counteract"). Brown also adds that "[t]o accept that the continued racial imbalance is justified because of parental belief about African-Americans, which may have also been a reflection of their acceptance of the invidious value, is a continuation of the prior harm, rather than a remedy for it." *Id.*

> means that invidious value inculcation continues to exist. Unlike residential segregation, inequities in school quality are completely under the control of the school district; therefore, explanations that do not rest upon an assumption of African-American inferiority will be difficult to make.[172]

Thus, even though a school district does not intend to segregate students, the existence of state-sponsored unequal opportunities in de facto segregated schools can deliver a stigmatic message.[173] Moreover, in so far as the racial isolation in those schools is a product of unfettered parental choices, students will understand why their schools are segregated and unequal, which can produce new and continuing stigmatic effects.

D. Future Applications of Stigma Theory

Although stigmatic harms have continually been at the core of equal protection law, identifying these harms is fraught with practical problems. First, as scholars readily acknowledge, no theory of stigma has provided much predictive power for future cases. The culturally-contingent and amorphous nature of stigmatic injuries has left their boundaries undefined. Scholars have proposed plausible tests to resolve the problem,[174] but courts have not concurred in the need to standardize stigma jurisprudence. As a result, scholars charge that the Supreme Court's holdings have been inconsistent with regard to stigma.[175]

Second, subjective differences in the perception of stigma or, worse, the conscious manipulation of stigma's undefined boundaries are the root of the inconsistent results. If manipulation is the explanation, stigma theory may suffer an inherent flaw that permits some courts to construct rationales consistent with their own theory of race rather than one grounded in objective facts. Brian Landsberg expands on this problem, writing: "Of late, some Justices have increasingly reverted to references to stigma in race discrimination cases; the term has become a double-edged sword."[176] For instance, members of the Court have attempted to justify continued court-ordered desegregative busing based on the need to

172. *Id.* at 39.

173. *See id.*; *see also* Donald E. Lively, *Desegregation and the Supreme Court: The Fatal Attraction of* Brown, 20 HASTINGS CONST. L.Q. 649, 675 (1993) ("To the extent stigmatization is a function of racial separation, no real difference exists with respect to whether segregation is characterized as de jure or de facto.").

174. *See, e.g.*, Lawrence, *supra* note 52, at 324 (proposing a cultural meaning test); Lenhardt, *supra* note 95, at 890–96 (proposing a structured analysis of stigmatic harm).

175. *See, e.g.*, Lenhardt, *supra* note 95, at 876.

176. Brian K. Landsberg, *Equal Educational Opportunity: The Rehnquist Court Revisits* Green *and* Swann, 42 EMORY L.J. 821, 836 (1993).

redress lingering stigmatic injuries of segregated schooling.[177] Conversely, other members argue that all race-conscious and affirmative action programs, including those that are well-intentioned or have minimal tangible effects, must be subjected to strict scrutiny because they pose stigmatic harm.[178] Justices Scalia and Thomas go further, seeking to prohibit certain de jure segregation remedies because they purportedly send a message of black inferiority.[179] Thus, claims of stigmatic harm are just as easily used to prevent integration efforts or race-based remedies as they are to demand them. An appreciation of context would limit manipulation of stigma theory, but a searching judicial review of context is often lacking.

The third, related problem with stigma theory is that, in so far as it reflects a race-conscious approach, it conflicts with the dominant conservative ideology of colorblindness. Colorblindness theory argues that race should be, and is, irrelevant.[180] It does not necessarily deny the existence of racial stigma, but suggests the only option is to live with it for a period of time. Racial stigma is a direct result of racial considerations and classifications.[181] Thus, stigma will not be eliminated by making further uses of race, but rather by ignoring race and removing it from decision-making processes.[182] Consequently, colorblindness holds that, regardless of context or stigma, the only relevant criteria in making decisions in admissions, employment, and contracting, for instance, are those related to individual merit.[183]

Stigma theory, in contrast, may demand a race-conscious remedy where colorblindness is inadequate. In fact, the Court's mandatory desegregation jurisprudence demonstrates that racial stigma can persist even when the government acts in a racially

177. *See* Bd. of Educ. v. Dowell, 498 U.S. 237, 257 (1991) (Marshall, J., dissenting).

178. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (applying strict scrutiny to all uses of race by the federal government); Shaw v. Reno, 509 U.S. 630, 646–47 (1993) (applying strict scrutiny even though no tangible harm existed); Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (applying strict scrutiny to all uses of race by state government).

179. *See* Missouri v. Jenkins, 515 U.S. 70, 114 (1995) (Thomas, J., concurring); United States v. Fordice, 505 U.S. 717, 761 (1992) (Scalia, J., concurring in part and dissenting in part); *see also* Landsberg, *supra* note 176, at 823–24, 835–38 (discussing the issue of black inferiority in both segregation and desegregation).

180. powell, *supra* note 29, at 892–93.

181. *See generally id.* at 892–97 (discussing colorblindness theory).

182. *Id.* at 897; *see also* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2768 (2007) (arguing that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race").

183. *See, e.g.*, Robert C. Power, *Affirmative Action and Judicial Incoherence*, 55 OHIO ST. L.J. 79, 95 (1994).

neutral manner.[184] Thus, ignoring race simply allows historical stigma to persist. Professor Brown makes the same point when he asserts that the invidious value of de jure segregated schools will continue to produce stigmatic harms until the invidious value is countered.[185]

A colorblind approach cannot counteract these harms. At best, colorblindness is a symbolic message itself, which over time might slowly erode stigma or allow stigma simply to pass. But in the meantime, colorblindness does not counter stigma because it ignores it. For instance, focusing solely on individual characteristics, with no appreciation of stigmatic harms that an individual might suffer, advantages nonstigmatized individuals and disadvantages the stigmatized. Even if the state is not responsible for the stigma, the stigma still affects one's past performance and experience. On this basis, stigma is a relevant criterion or factor, even in merit-based decisions. Thus, only by recognizing stigma can the government disassociate itself from its effects.

In sum, stigmatic harm and stigma theory can ultimately justify or require voluntary desegregation plans. From the perspective of the past stigmatic messages schools have sent, schools are bound to respond with measures to eliminate stigma. As Brown emphasizes, most have yet to do so. Similarly, schools' failure in this respect directly contributes to the value-based choices that today's parents make regarding schools. These choices often detrimentally affect the educational opportunities of poor and minority students. Thus, regardless of schools' past remedial efforts, they now have a responsibility to take actions that disassociate themselves from the effects of their past stigmatic messages. Otherwise, schools will continue to fall prey to their own past actions. Moreover, even if one assumes that stigma is not attributable to the schools themselves, stigmatic effects are real and have consequences for children and schools. Unless we are to wait decades for stigma to fade by indirect measures, recognizing and responding to stigma is crucial to delivering quality educational opportunities.

III. DECONSTRUCTING THE STIGMA OF *PARENTS INVOLVED*

The Court's opinion in *Parents Involved* is split. Four Justices in the plurality found that race could not be used in any respect to remedy de facto school segregation.[186] Justice Kennedy concurred in

184. *See, e.g.*, Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 210–11 (1973) (concluding neutral explanations do not justify segregation and that the remoteness in time of past discrimination does not eliminate the school's obligation); Green v. County Sch. Bd., 391 U.S. 430, 438 (1968) (rejecting a neutral assignment plan because it did not eliminate the continuing vestiges of discrimination).

185. Brown, *supra* note 51, at 66–69.

186. *Parents Involved,* 127 S. Ct. at 2792.

the plurality's holding that these plans were unconstitutional, but he did not join the rationale of their decision. Instead, he agreed with the four dissenters that schools have a compelling interest in diversity and in eliminating racial isolation.[187] He, however, broke from the dissenters by finding that the desegregation plans in Seattle and Louisville were unconstitutional because they were not narrowly tailored.[188] The plans relied too heavily on race and did not exhaust race-neutral alternatives.[189] With no opinion garnering five votes, Justice Kennedy's opinion is the controlling opinion in *Parents Involved*.

The basic holding of Justice Kennedy's opinion is that, although schools have a compelling interest in avoiding racial isolation and/or achieving diversity, their use of race is restricted to two methods. First, they can use race in a general way, through the site selection of schools, redrawing of attendance zones, and other policies that do not rely on individual classifications of students by race.[190]

Second, if race is to be used with regard to individual students, it can only be one of several factors.[191] Moreover, Kennedy sees this use of race as being for the pursuit of diversity. Thus, the schools need to make nuanced decisions analogous to those authorized in *Grutter v. Bollinger*.[192] As Kennedy writes, in the context of primary and secondary schools, "[r]ace may be one component of . . . diversity, but other demographic factors, plus special talents and needs, should also be considered."[193]

A. Justice Kennedy's Theory of Stigma

The wider significance of Justice Kennedy's opinion, however, is the premise upon which it stands. His opinion is premised on the theory that individual racial classifications necessarily stigmatize.

187. *Id.* at 2797 (Kennedy, J., concurring in part and concurring in the judgment).

188. *Id.* at 2789–91.

189. *Id.* at 2789–90.

190. *Id.* at 2792. Justice Kennedy also stated that:

> School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race.

Id.

191. *Id.* at 2793 ("[T]he small number of assignments affected [by the use of express racial classifications] suggests that the schools could have achieved their stated ends through . . . a more nuanced, individual evaluation of school needs and student characteristics that might include race as a component.").

192. *Id.* at 2792–93.

193. *Id.* at 2797.

Consequently, his opinion struggles to reconcile the compelling interests—the achievement of which may require the consideration of race—with what he finds to be the inherent stigmatic harms of using race. This tension produces a decision that, in some respects, is at odds with itself. He recognizes compelling interests in voluntary desegregation, but limits schools' ability to use race in order to achieve it. Ultimately, those limiting aspects of his opinion are a response to perceived stigmas.

Kennedy begins by lauding the efforts of schools "to teach that our strength comes from people of different races, creeds, and cultures uniting in commitment to the freedom of all."[194] As to this broad principle, he reaffirms the holding in *Grutter* that diversity is a compelling interest.[195] He then suggests he is expanding *Grutter* to recognize a compelling interest in reducing racial isolation in public schools.[196] In fact, he briefly acknowledges that de facto segregation threatens the well-being of public schools, and they must respond.[197] He, however, reveals no indication that he knows exactly what this threat is or what causes it. He simply contemplates that "[t]he enduring hope is that race should not matter; the reality is that too often it does."[198] On this basis, he concedes that colorblindness "cannot be a universal constitutional principle."[199]

The remainder of his decision, however, expresses uneasiness with the logical extension of these principles. He rhetorically rejects staunch adherence to colorblindness,[200] but his opinion's rationale is driven by the concern that, in the absence of a colorblind approach, individuals will be stigmatized. He writes, "[t]o make race matter now so that it might not matter later may entrench the very prejudices we seek to overcome."[201] In effect, stigmatic harm becomes the double-edged sword described by Landsberg.[202] On the one hand, Kennedy notes that "[f]rom the standpoint of the victim," the stigmatic injury of de facto segregation may be no less than the injury of de jure segregation.[203] On the other hand, using racial classifications to address segregation may simply replicate stigmatic

194. *Id.* at 2788.
195. *Id.* at 2789.
196. *Id.*
197. *Id.* at 2791.
198. *Id.*
199. *Id.* at 2791–92.
200. *Id.*
201. *Id.* at 2788.
202. *See supra* note 176 and accompanying text.
203. *Parents Involved*, 127 S. Ct. at 2795 (Kennedy, J., concurring in part and concurring in the judgment).

harms.[204]

Scholars and previous Supreme Court Justices have cautioned that desegregation remedies implicitly premised on black inferiority could produce new stigmatic harms,[205] but Kennedy's opinion is unconcerned with this specific stigma. His opinion is premised on a different notion of stigma. He equates the stigmatic harms of voluntary desegregation with those of affirmation action programs. His choice of language is telling on this point. He refers to racial classifications in desegregation as racial preferences,[206] which is the prevalent characterization in affirmative action cases.[207] Second, he states that "[t]hese plans classify individuals by race and allocate benefits and burdens on that basis,"[208] which again is characteristic of affirmative action. Last, he explicitly draws the connection between desegregation and competitive admissions or government contracting awards, quoting prior Courts for the premise that "there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics."[209] In these respects, he likens school desegregation to an affirmative action plan with its attendant stigmatic harms.

Beyond these generalized assertions of stigma, Kennedy also identifies a new stigmatic harm to individuality. Kennedy suggests that, by mere virtue of classifying individuals by race, the government stigmatizes them. Government need not prefer one race over another or attach benefits to the classifications. Classifying persons by race stigmatizes them by undermining the primary relevance of their individuality. Moreover, these particular classifications go a step further by treating racial groups as fungible.

Kennedy repeatedly indicates that these classifications are "crude" and inappropriately based on the binary categories of "white and non-white."[210] Thus, not only are individuals racially classified, they are classified inaccurately into catch-all groups that further obfuscate their individuality. Such racial classifications, regardless of preferences or benefits, present a "danger to individual freedom" and "cause [a] hurt or anger of the type the Constitution

204. *Id.* at 2796–97.

205. *See* discussion *supra* Parts II.A, II.B.

206. *Parents Involved*, 127 S. Ct. at 2795 (Kennedy, J., concurring in part and concurring in the judgment).

207. *See, e.g.*, Gratz v. Bollinger, 539 U.S. 244, 267 (2003); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 220 (1995).

208. *Parents Involved*, 127 S. Ct. at 2789 (Kennedy, J., concurring in part and concurring in the judgment).

209. *Id.* at 2789 (quoting Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989)).

210. *Id.* at 2790, 2792, 2797.

prevents."[211]

Kennedy's most poignant explanation of the exact nature of stigmatic harm to individuality comes at the end of his decision. He writes:

> To be forced to live under a state-mandated racial label is inconsistent with the dignity of individuals in our society. And it is a label that an individual is powerless to change. Governmental classifications that command people to march in different directions based on racial typologies can cause a new divisiveness. The practice can lead to corrosive discourse, where race serves not as an element of our diverse heritage but instead as a bargaining chip in the political process. On the other hand race-conscious measures that do not rely on differential treatment based on individual classifications present these problems to a lesser degree.
>
> The idea that if race is the problem, race is the instrument with which to solve it cannot be accepted as an analytical leap forward. . . . Under our Constitution the individual, child or adult, can find his own identity, can define her own persona, without state intervention that classifies on the basis of his race or the color of her skin.[212]

In essence, stigma flows from "crude measures" that "reduce children to racial chits."[213] It is not that one group is preferred over another, but that to classify one by race is to necessarily assign some value to race. Rather than being treated as individuals, students become racial chits "traded according to one school's supply [of a particular race] and another's demand."[214] Given this concern, he concludes that individuals can be classified by race only as a last resort.[215] And even at that point, he suggests factors in addition to race should be considered.[216] Presumably, the consideration of other factors protects individuality and reduces the likelihood of stigmatization.

This concept of stigma explains why Justice Kennedy rejects individual racial classifications, but has no concern over general uses of race that do not classify individuals.[217] In fact, he suggests that the general consideration of race, such as in the drawing of school district lines, would not even warrant strict scrutiny.[218] The implicit rationale is that a general use of race poses no threat to

211. *Id.* at 2793.
212. *Id.* at 2797.
213. *Id.*
214. *Id.*
215. *Id.* at 2792.
216. *Id.* at 2797.
217. *Id.* at 2792.
218. *Id.*

individuality or of stigmatization. In short, the threat of individual stigma is the dividing line between permissible and impermissible uses of race. Moreover, stigma forms the core of his rationale because no other theory of harm will support a holding in the plaintiffs' favor.

B. The Absence of Material Harm or Discrimination

Voluntary desegregation plans like those at issue in Seattle and Louisville are conceptually similar to vote redistricting in that neither involves a material harm. The consideration of race in redistricting, for instance, does not deny anyone the right to vote or entail vote dilution.[219] Rather, the only harm is that of expressive or stigmatic messages.[220] *Parents Involved* poses the same problem. Kennedy avoids this problem by blurring the distinction between intangible *stigmatic harms* directed at *racial groups* and *material harms* suffered by *individuals*. He articulates the stigmatic harm as a threat to individuals.[221] Combining the concepts, however, does little to establish an individual material harm or a general stigmatic racial harm. Racial stigma is, by its nature, a group concept. Thus, race either stigmatizes a racial group or it does not. If the harm is distinct to individuals, then it is not a racially stigmatic harm.

Nevertheless, the rationale for *Parents Involved*, like the voting cases, ultimately rests on a theory of stigmatic harm because properly constructed voluntary desegregation plans do not allocate benefits or burdens. Kennedy matter-of-factly asserts that the plans in *Parents Involved* do allocate benefits or burdens,[222] but provides no substantiation for his assertion. Moreover, the nature of public schooling and the details of voluntary desegregation contradict him. Every child in a school district is guaranteed a seat at one of the public schools, but no child has an entitlement to attend a particular school.[223] The only entitlement is to attend *a* school. Granted, many parents may expect their child to attend the school closest to their home. And for political reasons, effective voluntary desegregation plans may guarantee parents a neighborhood school.[224] But in the absence of such a guarantee, students have no choice but to go where the school district assigns them.[225] Thus, as a general matter,

219. Pildes & Niemi, *supra* note 141, at 494.

220. *Id.* at 506–07.

221. *Parents Involved*, 127 S. Ct. at 2797 (Kennedy, J., concurring in part and concurring in the judgment).

222. *Id.* at 2789.

223. *See, e.g.*, N.C. GEN. STAT. § 115C-366(b) (2007).

224. *See, e.g.*, Comfort v. Lynn Sch. Comm., 418 F.3d 1, 6 (1st Cir. 2005).

225. *See, e.g.*, Johnson v. Bd. of Educ., 604 F.2d 504, 515 (7th Cir. 1979); United States v. Perry County Bd. of Educ., 567 F.2d 277, 279 (5th Cir. 1978). *See generally* Jeffrey R. Henig & Stephen D. Sugarman, *The Nature and Extent of School Choice*, *in* SCHOOL CHOICE AND SOCIAL CONTROVERSY: POLITICS, POLICY, AND LAW 13, 14–31 (Stephen D. Sugarman & Frank R. Kemerer eds., 1999)

disgruntlements over school assignments do not give rise to a constitutional harm.[226]

Even if the schools within a district are significantly unequal in terms of facilities, curricula, and instructional quality, a parent's appropriate claim would be for the schools to be equalized, not for the district to change its assignment policies. Under federal law, there is no immediate prohibition on school inequality so long as discrimination based on race (or any other prohibited criteria) is not the cause of the inequality.[227] Even if race is the cause, the harm flows from allocating school resources in a discriminatory manner, not from the neutral assignment process. Thus, a court would not necessarily force a school to change its assignment process. The choice of how to assign students is one reserved entirely to the discretion of school districts.[228] The only limitation on that choice is a prohibition against unconstitutional motivations such as the intent to segregate students.[229] In short, the remedy for unequal schools is not to assign a student to the non-neighborhood school of his choice, but to equalize his original school.

Effective voluntary desegregation plans, however, avoid this issue entirely by creating a system of equal schools. When schools are qualitatively equal, school assignments neither occasion a burden, nor deny an educational benefit.[230] One might argue that harm befalls a student or parent because attending one school is more convenient, for instance, in terms of transportation. Such a claim, however, is flawed because this type of harm is not attributable to the school district. All the district owes students is

(noting that "[m]ost American children attend a public school to which they are assigned, usually on the basis of where they live," but exploring the various ways in which students have been permitted to exercise choice).

226. *See, e.g.*, Michael Alison Chandler, *Fairfax Parents Put Map to Test*, WASH. POST, July 30, 2008, at B1 (noting that a local court had rejected a lawsuit by parents challenging the rezoning and assignment of their children).

227. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriquez, 411 U.S. 1, 18–35 (1973) (stating that education is not a fundamental right and holding that relying on property taxes to fund schools does not violate the Equal Protection Clause, even if doing so creates inequalities). The above the line statement should not be taken to suggest that state law would permit this inequality. In fact, in many instances state law would prohibit this inequality. *See generally* Rebell, *supra* note 24, at 1500–05 (discussing the outcomes in state-based inequality litigation).

228. *See, e.g.*, N.C. GEN. STAT. § 115C-366(b) (2007) (assigning full and final authority to school districts in the assignment of students).

229. *See* Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 207–09 (1973) (prohibiting intentional segregation in the assignment of students).

230. *See* McFarland v. Jefferson County Pub. Sch., 330 F. Supp. 2d 834, 860 (W.D. Ky. 2004). For a further discussion of this point, see Brief for Pamela Freeman et al. as Amici Curiae Supporting Appellees at 5–22, Comfort v. Lynn Sch. Comm., 418 F.3d 1 (1st Cir. 2005) (No. 03-2415), *available at* http://www.naacpldf.org/content.aspx?article=74 (arguing that on this basis strict scrutiny did not even apply).

an equal education. The district is not obliged to provide it in a particular location. That obtaining education requires a student to travel to a specific location is not to occasion a harm, but merely a natural incident of receiving the benefit. In fact, some school districts offer no bus transportation at all, or limit it to certain students.[231] Some inconveniences can rise to a level that effectively bars a student from obtaining an education, but short of that, such inconveniences do not create harms attributable to the school. Moreover, real though an inconvenience might be, the Constitution does not deal in trivialities. A plaintiff must establish a concrete harm attributable to the government.[232]

A concrete harm might occur if a district extended the absolute right to choose a school to parents and then denied some parents that right. Even then, equal protection would only prohibit denials based on race or some other illegitimate consideration. Those who assert that voluntary desegregation plans deny choice based on race fail to distinguish between a denial of absolute choice based on race and an assignment that factors in parental preferences, individual race, and school demographics.[233] Successful voluntary desegregation plans never deny parents a choice while affording it to others based on race.

First, the only absolute choice that voluntary desegregation plans have offered parents is the choice to attend their neighborhood school, as in *Comfort v. Lynn School Committee*.[234] No evidence has ever indicated that any parent, regardless of race, has been denied this right once it has been extended. Second, voluntarily desegregating districts have not actually given parents the right to choose any school beyond their neighborhood school. If a parent declines the neighborhood school, the more accurate statement is that parents are asked to list or rank their preferences among non-neighborhood schools.[235] Allowing parents to rank or list schools rather than choose a school changes the very nature of the interest at stake. At most, the right is to rank schools and then be assigned to one of the listed schools, not to choose one's school. The final decision of which of a parent's preferred schools his child will attend belongs to the district, which assigns students based on several variables, one of which is race.[236] There is no indication, however,

231. *See, e.g.*, GA. CODE ANN. § 20-2-188 (West 2005) (indicating that school transportation is not required).

232. *See generally* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 62–63 (3d ed. 2006) (detailing the need for concrete harm).

233. *Compare* Memorandum of Facts and Law in Support of the Plaintiff at 2–4, McFarland v. Jefferson County Pub. Sch., 330 F. Supp. 2d 834 (W.D. Ky. 2004) (No. 3:02CV-620-H), 2004 WL 3951881, *with McFarland*, 330 F. Supp. 2d at 842–44.

234. 418 F.3d 1, 6 (1st Cir. 2005).

235. *See, e.g.*, *McFarland*, 330 F. Supp. 2d at 842–44.

236. *Id.* at 842.

that any parent has ever been denied the right to rank or list schools and be assigned to one of them, based on race or otherwise. In fact, the evidence in reported cases indicates that the districts have assigned all students to one of their top preferred schools.[237] In short, plaintiffs may claim they have been denied their choice of a non-neighborhood school based on race,[238] but schools have never extended such a right to parents. The rights they have extended—to a neighborhood school, or to express preferences and have them honored—have never been denied.

The notion of constitutional harm in voluntary desegregation is even less plausible when one considers that districts could assign students based on geography, special needs, socioeconomic status, race (so long as it is not the predominant factor), and/or other factors without even inquiring into parental preferences. Adding parental preference as a consideration in this assignment process does not transform the process from one of entire school discretion to one in which students suffer constitutional harm when their preferences are not given conclusive weight. Likewise, districts wishing to create racially equitable schools need not eliminate the valid consideration of race simply because they find it wise to elicit parental preferences, respect them, and create popular assignment processes.

Even if the interests at stake for students were tangible, it is not clear that voluntary desegregation plans "discriminate" in the traditional sense of denying opportunities based on membership in a disfavored racial group. This traditional discrimination makes race a crediting or discrediting factor because a differential value is assigned to particular racial groups. However, voluntary desegregation does not use race in a way that favors any racial group. All groups are valued equally.

First, the districts pay close attention to race to ensure that all schools are racially integrated, but no group is systematically favored or disfavored. Voluntary desegregation "prefers" multiracial schools, not individual racial groups. Moreover, the extent to which race will even play a role in any given assignment varies depending on the existing racial makeup of a school, the number of students seeking assignment, the number of available seats, the number of students who have siblings at the school, etc. In many instances, the circumstances are such that an individual's race is entirely irrelevant in his assignment,[239] but even when race becomes relevant, it does not advantage or disadvantage any racial group as a whole. Rather, it is merely a factor in the assignment of some

237. *Id.* at 845 ("[A]bout 95–96% of all elementary students receive their first or second choice cluster school.").

238. *See* Memorandum of Facts and Law in Support of the Plaintiff, *supra* note 233, at 3.

239. *See McFarland*, 330 F. Supp. 2d at 844.

members of some racial groups at some schools.

Second, because these plans do not assign students based on merit or individual characteristics, it is inaccurate to say that schools discriminate against students based on race. Because individual characteristics and merit are irrelevant in the school assignments, there are no relevant criteria that the school ignores, nor is there the elevation of one deserving student over another undeserving student. All students are subjected to the same assignment practices in the same respect; none have their race or individual characteristics considered any differently than other students. Thus, race is not used to disadvantage or "discriminate."

Third and similarly, these plans do not involve competition. Competition entails situations where individuals can control or improve their standing through performance or merit. But voluntary desegregation assigns students based on noncompetitive criteria. In fact, suggesting that the students are in competition is absurd when one considers the case of kindergartners. How could one five-year-old child be said to be more worthy of assignment to a particular elementary school than another student? One might argue they are in competition in the sense of a lottery, but even lotteries are not competitions. They may entail winners and losers, but they are not based on skill or worth. Moreover, a lottery analogy is inapplicable because voluntary desegregation plans do not have any losers. The assignment process is not a zero-sum game. All students are assigned to roughly equal schools.[240]

The point of the foregoing is that, once a system moves beyond individualized decisions to group-based decisions that do not assign benefits, the notion that the government is discriminating against someone based on race is not accurate. Goodwin Liu's distinction between merit-based *selection* decisions and vote redistricting *sorting* decisions captures this point best. Liu reasons that equal protection demands that the government treat its citizens as individuals rather than components of racial groups, "[b]ut the consequences of this principle . . . differ from one context to another."[241] For instance, "[i]n university admissions, the requirement that government 'treat citizens as individuals' forbids the deterministic use of race *for any applicant* because the selection process is understood to convey individual judgments about each applicant's merits."[242] But in sorting processes, such as assigning localities to a voting district, "there is no suggestion that

240. The only difference is that some are assigned to the schools they happened to prefer the most, but all are assigned to schools for which they express a preference. Brief for Respondents at 8, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007) (No. 05-915), 2006 WL 2944684.

241. Goodwin Liu, Seattle *and* Louisville, 95 CAL. L. REV. 277, 311 (2007).

242. *Id.*

government must 'treat citizens as individuals' in an equally strict sense" because "the use of race in sorting does not present the same hazards as the use of race in selection."[243] The only hazard in sorting is that race might become the predominant factor in the overall decision, which otherwise would have been balanced against additional relevant factors. In short, "the Court evaluates [sorting processes] at the wholesale (aggregate) not retail (individual) level in determining whether government has treated citizens as individuals."[244]

Liu categorizes student assignment in voluntary desegregation plans as a "sorting process" akin to redistricting, not a selection process akin to university admissions. In essence, a school district has to assign students to some school, and since both the students and schools are equal, the school simply sorts students into different schools. This is in contrast to a process where a school selects students based on merit and other individual criteria and entirely denies many students of any educational opportunity. The only extent to which a sorting process might discriminate is in creating an expressive harm that flows from the subordination of other important values to race. This harm, however, is one to society or racial groups in general.[245] It is not discrimination against an individual, or the denial of a benefit to a particular person.

In sum, voluntary desegregation plans do not materially harm students. The plans may pose a constitutional harm, but that harm is not material. At most, the harm is an expressive or stigmatic one that might flow from the predominant consideration of race, the preferencing of one racial group over another, or actions based on racial stereotypes. Thus, the most applicable legal analysis is that used in vote redistricting cases. But unlike vote redistricting, one could argue that race might be the predominant factor without creating an expressive or stigmatic harm because, as the following sections demonstrate, the messages that voluntary desegregation send are distinct and not based on racial politics or stereotypes.

C. Evaluating Stigma in Voluntary Desegregation

To the extent that any harm flows from the sorting process of voluntary desegregation, that harm must be stigmatic or expressive. Kennedy makes passing reference to a material harm, but his opinion consistently conceptualizes the harm as being a stigmatic harm to the individual and potentially a general expressive harm.[246] The flaw in Kennedy's opinion is not that he explores stigmatic harms, but that he assumes their existence. Using racial classifications to achieve voluntary school desegregation is a far

243. *Id.*
244. *Id.*
245. *See generally* Pildes & Niemi, *supra* note 141, at 507–09.
246. *See supra* notes 194–218 and accompanying text.

different context, if not a unique one, from the classifications in all other cases that have come before the Court. Moreover, accounting for context is necessary for any assessment of stigma; thus, it cannot be assumed here.[247] In fact, the following will show that stigma does not flow from these classifications. The only way Kennedy finds stigma is to assume that racial classifications inherently produce a stigmatic harm. In essence, persons are stigmatized by mere virtue of being classified by race, regardless of the results or conditions attached to the classification. This position may have appeal in theory, but a practical examination of voluntary desegregation fails to unearth a stigma and, thus, proves that the theory simply does not hold true.

1. Black Inferiority

Both Supreme Court Justices and scholars have asserted that desegregation, even when a remedy for de jure segregation, can stigmatize minorities.[248] They conclude that the general skepticism toward and rejection of all-black schools is premised on a notion of black inferiority.[249] The skepticism conveys the message that all-black schools are inherently problematic and that the presence of white children is required for a quality education. Professor Brown further argues that courts have perceived segregation as retarding the development of blacks, thus rendering them in need of special aid to overcome this retardation.[250] The remedial focus on blacks ignores the fact that segregation also harmed whites.[251] In short, desegregation remedies may assume that blacks have, in fact, been made inferior while whites have been unaffected.

One could query whether mandatory desegregation rested on these notions, but voluntary desegregation plans do not. First, voluntary desegregation plans do not prohibit one-race or imbalanced schools.[252] Voluntary desegregation plans certainly hope that one-race or racially imbalanced schools will be eliminated, but they do not mandate it. To the extent they are eliminated, it is a function of parents' voluntary preferences. In short, integrated schools are a preference, not an absolute. This more flexible approach helps avoid any potential message of black inferiority.

Second, the preference is for the elimination of both

247. Lenhardt, *supra* note 95, at 848.

248. *See* Missouri v. Jenkins, 515 U.S. 70, 114 (1995) (Thomas, J., concurring); United States v. Fordice, 505 U.S. 717, 761 (1992) (Scalia, J., concurring in part and dissenting in part); Brown, *supra* note 51, at 68.

249. *See* Brown, *supra* note 51, at 48.

250. *Id.* at 56–57.

251. *Id.* at 56.

252. *See, e.g.*, Comfort v. Lynn Sch. Comm., 418 F.3d 1, 8 (1st Cir. 2005) (indicating six schools were still racially imbalanced under the plan); McFarland v. Jefferson County Pub. Sch., 330 F. Supp. 2d 834, 863 n.51 (W.D. Ky. 2004) (noting a school that was outside the guidelines).

predominantly white and predominantly minority schools.[253] Professor Brown's concern with messages of black inferiority arose out of courts' single-minded objection to all-black schools. Voluntary desegregation plans, however, recognize that all-white schools can be as problematic as all-black schools. For instance, all-white schools can result from parents choosing to send their kids solely to such schools because they associate whiteness with superiority, which is just as pernicious as associating blackness with inferiority.[254] Consequently, voluntary desegregation plans seek to eliminate all one-race schools.

Third, even if all-black schools were the primary concern of a school district, the reason for that concern separates it from a message of black inferiority. Although Professor Brown has been vigilant in identifying messages of black inferiority, he still recognizes that when all-black schools are coupled with material deprivation they pose educational harm.[255] Recognizing this educational harm is not to assume black inferiority, but to recognize the material harm of inequity and the stigmatic harm that occurs when inequity is coupled with race. The goal of voluntary desegregation plans is not to eliminate black schools per se, but rather to eliminate the inequity that continues to follow them.[256] Unlike "black" schools, racially isolated "white" schools generally have not faced the same difficulty in gaining access to quality teachers, good facilities, and other resources.[257] Thus, a school system whose goal is equitable access to resources could conceivably focus on desegregating black schools without fostering notions of black inferiority, because black schools are primarily the ones that face barriers in that area. However, this desegregation would still necessitate eliminating at least some white schools as well.

Fourth, voluntary desegregation is actually a response to, rather than a cause of, racial stigma. Some might rush to assume that the assertion that all-black schools generally do not provide equal access to resources is a suggestion of black inferiority. The assertion, however, is not based on a normative bias against black schools, but rather on the fact that private racial biases cause individuals to avoid black schools. Thus, to the extent the statement raises a message of racial inferiority, the message is not attributable to school officials or policy. Rather, the officials are reacting to that message and attempting to counteract it. In short, preventing a stigmatic message is different than sending one.

253. *See, e.g.*, *McFarland*, 330 F. Supp. 2d at 842 (indicating that no school could be entirely white either, and requiring at least fifteen percent black enrollment).

254. *See* Brown, *supra* note 51, at 47–48, 66.

255. *Id.* at 37–39.

256. *See supra* notes 219–23 and accompanying text.

257. *See generally* STILL LOOKING TO THE FUTURE, *supra* note 56, at 10–15 (discussing the problems posed by resegregatation).

Finally, as Lenhardt points out, minorities already encounter racial stigma independent of governmental action. Thus, the relevant question is whether the government's action "*exacerbate*[s] the [existing] baseline stigma."[258] Voluntary desegregation poses the same question because, in the absence of desegregation, minorities already encounter significant stigma and their schools are abandoned as a result. No credible argument, however, exists that by integrating black schools, blacks suffer stigmatic harms beyond those posed by a system that offers unrestrained parental choice and results in near complete segregation.

2. Whites as Racial Perpetrators

Although not previously explored explicitly, one might argue that whites as a group could be stigmatized by a voluntary desegregation plan. Plans premised on the need to respond to racial bias—primarily that of white parents and teachers—could send the message that the white community is the perpetrator of a racial harm. As Alan Freeman concludes, the identification of a perpetrator has been central to the Court's antidiscrimination jurisprudence.[259] In the absence of an intentional perpetrator, racial harms are of no constitutional concern.[260] For the most part, state actors are only required to remedy racial harms that result from intentional discrimination.[261] By voluntarily desegregating, one could argue that a school is effectively saying that white perpetrators are harming minorities and the school must remedy it.[262] Of course, not all whites are acting on racial biases, but such a message could stigmatize whites by suggesting that they all hold and act upon racially biased attitudes.

The concern over such a message has powerful undercurrents. Being labeled a racist has significant social effects today. Although racism has not been eliminated in our society, its explicit expression largely has.[263] Mainstream society no longer condones facially racist

258. Lenhardt, *supra* note 95, at 911.

259. Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1052–57 (1978).

260. *Id.* at 1118.

261. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2752 (2007) (arguing that the pursuit of a remedy for intentional discrimination is one of only two compelling interests to justify racial integration); Grutter v. Bollinger, 539 U.S. 306 (2003) (Rehnquist, C.J., dissenting) (arguing race-conscious measures must be confined to remedies for intentional discrimination); Hopwood v. Texas, 78 F.3d 932, 944–45 (5th Cir. 1996) (holding that nonremedial interests are not compelling and do not justify affirmative action).

262. *See, e.g.*, Metro Broad., Inc. v. FCC, 497 U.S. 547, 635–36 (1990) (Kennedy, J., dissenting) (expressing concern that FCC affirmative action program harmed white nonbeneficiaries and implicitly labeled them racists).

263. *See* DERRICK BELL, RACE, RACISM, AND AMERICAN LAW xix–xxii, 1 (5th ed.

messages. Thus, one can easily imagine some defendants going to trial rather than accepting otherwise beneficial settlements in race discrimination cases simply because they wish to protect their image. Vindicating themselves as nonracist might be more important than the financial costs. Concern with labeling or stigmatizing white defendants may also explain the more stringent liability tests that courts have adopted over the years and their reluctance to impose liability even under the applicable standards.[264]

Regardless of whether these concerns are warranted, voluntary desegregation plans are unlikely to inappropriately stigmatize whites. The plans racially balance the schools, provide parents with the opportunity to choose integrated schools, and remove the ability to choose racially isolated white schools.[265] By doing so, they give whites the ability to distance themselves from the notion that they are a "perpetrator" when they voluntarily select integrated schools. Even those who might otherwise fall into the category of "perpetrator" are shielded because they cannot act upon their bias so long as they retain their child in the school system. In effect, their bias is hidden. Ultimately, the only stigmatic effect that might befall whites is one subjectively perceived based on personal ideology or biases. But the only legally relevant stigmas are objective ones based on collective cultural meaning.[266]

Moreover, even if one assumed some minor stigmatization to whites, it alone would be an insufficient basis upon which to invalidate these plans. White bias in school selection exists as a verifiable fact and produces deleterious results.[267] To allow

2004); Tristen K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 91–96 (2003) (discussing the shift in the nature of discrimination from conscious animus to unconscious bias); Lawrence, *supra* note 52, at 321–24 (finding that most discrimination is subconscious); *see also* Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 335 (1997) (discussing the Court's difficulty in shifting from a "segregation mentality").

264. *See* Freeman, *supra* note 259, at 1055 (indicating that the intent standard creates a class of "innocents" who have no responsibility for their actions); *see also* NAACP v. Lansing Bd. of Educ., 559 F.2d 1042, 1047–48 (6th Cir. 1977) (discussing the impossibility of finding liability under the current intent standard); Theodore Eisenberg & Sheri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 CORNELL L. REV. 1151 (1991) (detailing empirical findings that show a pattern of courts failing to infer discrimination); Selmi, *supra* note 263, at 293 (finding the "standard of proof probably cannot be met" in some intent cases); Strauss, *supra* note 167, at 965–68, 990–91.

265. *See supra* Part I.B.

266. *See* Lawrence, *supra* note 52, at 321–28; Lenhardt, *supra* note 95, at 809–11.

267. *See* ERICA FRANKENBERG & CHUNGMEI LEE, CHARTER SCHOOLS AND RACE: A LOST OPPORTUNITY FOR INTEGRATED EDUCATION 5, 8 (2003), *available at* http://www.civilrightsproject.ucla.edu/research/deseg/Charter_Schools03.pdf

stigmatic effects to prevent schools from remedying and separating themselves from racial bias would be to undermine the principles of antidiscrimination entirely. Any time the state remedies discrimination or bias, it potentially stigmatizes whites. But there is nothing inappropriate about stigmatizing those who actually act upon racial bias, and the indirect effect on innocent parties has never prevented courts from remedying demonstrated racial bias.[268] The need to remedy demonstrated harms outweighs incidental or minor effects.

3. Individuality

Classifying persons by race also could, in some instances, have stigmatic effects on individuals. For instance, classifying individuals by race and treating their race as more important than other individual characteristics that would otherwise be relevant to a decision-making process might stigmatize individuals. The harm results from classifications that suggest individuality is irrelevant and that a person's only value stems from membership in a racial group. This type of stigmatic harm to individuality is at the forefront of quota prohibitions and individualized review requirements in selective admission processes.[269]

Voluntary desegregation does not stigmatize individuals by ignoring otherwise relevant personal characteristics because there are no relevant individual characteristics to disregard. These plans do not assess individual merit, nor do they involve competitive selection procedures. Thus, minorities are not harmed by the notion that their admission is based on race, nor are whites or members of any other group labeled as unmeritorious when they are assigned to their second-preferred school. No one operates under the assumption that anyone "earns" a seat at a particular school, or that anyone is at a school even though they did not earn it. Ultimately, everyone is at a school for the same reason: they expressed a preference for it and there was room. The only question is whether a school was a student's first or second choice. Moreover, even on that point, no one would assume that one racial group always gets

(discussing how parental choice has led to the high levels of racial isolation in charter schools); Jeffrey R. Hennig, *School Choice Outcomes*, *in* SCHOOL CHOICE AND SOCIAL CONTROVERSY: POLITICS, POLICY, AND LAW 68, 90–97 (Stephen D. Sugarman & Frank R. Kemerer eds., 1999) (discussing the effect of selection bias on schools).

268. By analogy, one of the major functions of criminal law is to stigmatize certain conduct or express a social rejection of it. *See generally* Joel Feinberg, *The Expressive Function of Punishment*, *in* DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY 95, 98 (1970); Issachar Rosen-Zvi & Talia Fisher, *Overcoming Procedural Boundaries*, 94 VA. L. REV. 79, 93–94 (2008).

269. *See* Kenneth L. Karst & Harold W. Horowitz, *The* Bakke *Opinions and Equal Protection Doctrine*, 14 HARV. C.R.-C.L. L. REV. 7, 14–15 (1979) (discussing the issue of stigma in regard to quotas versus the Harvard plan).

its first choice while others do not. As discussed earlier, race does not even play a role in the overwhelming majority of assignments, but when it does, it is circumstantial, affecting different persons, different racial groups, and different schools in each instance.

Kennedy's suggestion that the Seattle and Louisville school districts could cure the constitutional deficiencies in their plans by incorporating other "demographic factors, plus special talents and needs" misses the point.[270] A voluntary desegregation plan whose purpose is to eliminate racial isolation and the inequitable educational opportunities that accompany it is not equivalent to pursuing diversity. Equity plans do not "select" students based on diversity or merit criteria. Thus, equity plans do not inappropriately exclude any relevant factor when they rely heavily on race, but not other individual characteristics. Kennedy's opinion, however, fails to distinguish between equity and diversity plans, almost exclusively conceptualizing voluntary desegregation as a pursuit of diversity.[271] Desegregation plans, as a practical matter, will result in greater diversity, but that schools welcome this incidental result does not entail that they are pursuing diversity as a primary end and, thus, are subject to admissions-style requirements.

Kennedy's general skepticism toward the Seattle and Louisville plans undermines his ability to appreciate the distinction between equity and diversity plans. He posits that "one can . . . identify a construction of Jefferson County's student assignment plan that, at least as a logical matter, complies with" the Constitution,[272] but he then faults the schools for not explaining exactly how race operates under these plans.[273] Louisville, for instance, stated its voluntary desegregation plan involves a "complex, comprehensive plan that contains multiple strategies for achieving racially integrated schools," and that "[t]here are no selection criteria for admission to [an elementary school student's] resides school, except attainment of the appropriate age and completion of the previous grade."[274] But Kennedy characterizes the complexities as "ambiguities."[275] In effect, he suggests that there is a veil behind which inappropriate decisions are occurring, such as haphazard assignments by race, when the plan actually operates just as the schools indicate. The

270. *See* Black, *supra* note 32, at 965.

271. *Id.* at 966–67 (analyzing Kennedy's confusion over the purposes and nature of the plans).

272. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2790 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

273. *Id.*

274. *Id.* (quoting Brief for Respondents at 5, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007) (No. 05-915), 2006 WL 2944684).

275. *Id.*

complexity should not signal obfuscation, but the fact that race only operates in limited, specific instances based on parental preferences and multiple other nonindividual factors. Moreover, the school is not trying to pass a multi-factor process off as a diversity inquiry, although Justice Kennedy may mistake it for as much. Consequently, he forces a sorting process into a selection process analysis. In the end, however, this is to assume that a desegregation plan is something it is not. So long as it does not pursue diversity or evaluate individuality, it cannot stigmatize by disregarding individuality.

Kennedy, however, also raises a different concern with regard to individuality: that individuals are stigmatized merely by virtue of recognizing their race. The notion is that, by recognizing race, the government makes an irrelevant factor relevant to an individual's identity. This notion is at the core of colorblindness theory, which argues that only by ignoring race and making it irrelevant can we eliminate racial stigma.[276] Otherwise, we just perpetuate it. Extensive scholarship explores colorblindness's efficacy or naïveté in producing racial justice,[277] but that scholarship is unnecessary to resolve the narrower question of whether the mere recognition or classification by race, with no adverse consequences attached to it, stigmatizes individuals. A simple review of context and precedent reveals that racial classifications do not inherently stigmatize individuals.

As an initial matter, Kennedy himself notes the allure of colorblindness, but concludes it cannot be a universal constitutional principle.[278] Second, nothing about stigma is natural or inherent. Context always matters because stigma is a social construct that results from shared cultural meaning and expectations,[279] which are subject to change. Thus, negative cultural meaning does not automatically attach to racial classifications. In fact, individuals are regularly classified by race with no effect. For instance, the collection of census data by race has no stigmatic effect.[280] Merely asking people to indicate their race and compiling data along with it does not send a negative or positive message about race. So long as the racial categories do not include derogatory or inaccurate categories, the process is neutral.

The Supreme Court's own jurisprudence also confirms this

276. *See* powell, *supra* note 29, at 892.
277. *See, e.g.*, *id.* at 892–97.
278. *Parents Involved*, 127 S. Ct. at 2792.
279. Lenhardt, *supra* note 95, at 822; López, *supra* note 12, at 27–28.
280. No court has ever prohibited the collection of this data. Some advocacy groups, however, have objected to the collection of data by race, arguing that it only facilitates our continued infatuation with race and inappropriate race-based actions. Thus far, this argument has only found an audience in California. CAL. CONST. art. I, § 31 (amended 1996) (further clarified by CAL. GOV'T CODE § 8315 (West 2008)).

point. Most notably, *Shaw v. Reno* and *Grutter v. Bollinger* reject the notion that racial recognition or classification alone stigmatizes individuals. *Shaw* recognized the appropriateness of racial considerations in vote redistricting, and *Grutter* recognized the importance of racial classifications as a component of diversity in competitive admissions.[281] In both cases, the Court only deemed racial classifications as stigmatizing individuals when they are used to the exclusion of other important values and considerations.[282] Thus, these cases demonstrate that racial classifications are not per se stigmatic.

Whether racial classifications cross the line and become stigma depends on context. In voting, racial considerations cross the line when they subordinate traditional redistricting criteria, such as compactness, and consequently produce bizarrely shaped districts.[283] In admissions, racial considerations cross the line if other diversity factors are not also considered or if they substitute for merit factors.[284] In short, racial classifications only stigmatize when combined with a specific context. Thus, Kennedy's notion that racial classifications themselves stigmatize is misguided. Instead, he must attach the classifications to a context that reveals a stigmatizing effect.

Had Kennedy attempted to identify stigma in context, he would have found it does not exist in voluntary desegregation. Although stigmatic messages can accompany desegregation, those messages do not flow from appropriately constructed voluntary desegregation plans. These plans are carefully tailored to avoid stigma in various ways discussed throughout this Article.[285] Most notably, they express no preference for any racial group.[286] Rather, the preference is for multi-racial schools, which operates to limit both all-white and all-black schools.[287] Thus, the notion that stigma inherently follows racial classifications cannot be supported by context. And as only context can explain cultural meaning and stigma, the supposition that voluntary desegregation stigmatizes is a reflection of an ideology, such as colorblindness, rather than reality.

4. Stigmatic Labeling

The particular categories or labels by which racial groups are classified can also stigmatize. For instance, African-Americans were

281. Grutter v. Bollinger, 539 U.S. 306, 328 (2003); Shaw v. Reno, 509 U.S. 630, 642 (1993).

282. *Grutter*, 539 U.S. at 328; *Shaw*, 509 U.S. at 640–49.

283. *Shaw*, 509 U.S. at 685.

284. *Grutter*, 539 U.S. at 334.

285. *See generally* Epperson, *supra* note 37.

286. Comfort v. Lynn Sch. Comm., 418 F.3d 1, 8 (1st Cir. 2005) (recognizing that a school can be imbalanced by having too many or too few white or black students).

287. *Id.*

previously referred to as "colored" or "negro" and by means of other terms.[288] The whole point of these racial labels was to draw upon negative cultural associations and stigmatize individuals. This sort of stigmatic harm, however, can be effected by more subtle means, such as failing to recognize an individual's ethnicity or overgeneralizing based on race. Thus, lumping all Koreans, Japanese, Chinese, and other Asian nationalities into the catch-all category of "Asian" might stigmatize by suggesting these groups are monolithic rather than distinct cultures. Although he does not explicitly state it, these sorts of stigmatic harms are part of what concern Justice Kennedy in regard to what he calls "crude" racial categories.[289]

On this point, Justice Kennedy raises a valid concern about the particular racial categories used in Seattle and Louisville. Justice Kennedy notes that the districts classified students as white and nonwhite, categories he characterizes as "crude" on several occasions.[290] This point correctly recognizes that racial classifications that lump everyone into binary racial groups can send negative messages. For instance, grouping students into white and nonwhite categories could suggest that whiteness is the standard by which all groups are measured, further implying that whites have an elevated value and minorities a diminished one.[291] This grouping also oversimplifies racial diversity and conveys the message that there are only two relevant racial groups, a presumption that disregards the ethnic identity and uniqueness of everyone who is not white.

The only potential responses to these charges would be that the district initially classifies students into several distinct racial categories consistent with students' own racial identification, and the white and nonwhite labels are only used as part of a second level of data calculation and comparison consistent with previous court-ordered desegregation.[292] Notwithstanding this distinction, binary categories may still stigmatize. The stigma, however, may be a preexisting one. Racial bias regularly manifests itself through a

288. *See, e.g.*, Terry v. Adams, 345 U.S. 461, 469 (1953) (referring to African-Americans as "[n]egroes"); *Ex parte* Virginia, 100 U.S. 339, 345 (1879) (referring to African-Americans as "colored").

289. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2792–97 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

290. *Id.* at 2790–92, 2797.

291. By analogy, Professor Brown argues that desegregation remedies that rely on the presence of white students in black schools as the measure of school quality promote a notion of black inferiority. *See* Brown, *supra* note 51, at 52–53, 60, 65, 67–68.

292. *See, e.g.*, Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955).

white/nonwhite framework. For instance, white and/or affluent families generally will not choose to live in neighborhoods or send their children to schools where a significant proportion of persons are people of color.[293] That no single racial minority group is a majority is irrelevant.[294] For that reason, when dealing with mandatory desegregation, district courts have regularly combined the percentages of Latinos and Blacks in a school and compared that percentage against whites to assess integration.[295] Based on these experiences, the binary racial categorizations employed by the Seattle and Louisville school districts may have been rational. One might argue that the only necessary limitation on the use of such categories would be that they not stigmatize individuals beyond the preexisting stigma attributable to private actors.

Regardless, eliminating stigmatic labels would have little practical effect on voluntary desegregation plans' overall efficacy. Racial classifications themselves do not inherently stigmatize; rather, only crude binary ones do. Therefore, the remedy would simply be to avoid these specific crude categories, not racial categories in general. A school can easily do this by using accurate and distinct racial categories. Thus, to the extent that Justice Kennedy's point about stigma is accurate, it is a minor one. In contrast, his larger points are misguided because voluntary desegregation plans overall do not threaten individualism or stigmatize racial groups.

5. Stereotyping

Racial classifications have also traditionally raised concerns about stereotyping. Racial classifications based on or motivated by stereotypes stigmatize both individuals and groups. The stereotype, however, need not be inherently derogatory to stigmatize. Stereotypes can cause stigmatic harm by simply suggesting that all persons of a racial group act or think the same way. Derogatory stereotypes can deprive individuals of opportunities and oppress, but nonderogatory stereotypes can also harm individuals by

293. *See* Amy Stuart Wells et al., *The Space Between School Desegregation Court Orders and Outcomes: The Struggle to Challenge White Privilege*, 90 VA. L. REV. 1721, 1745–46 (2004) (discussing white flight from schools that had become predominantly African-American). *See generally* KOZOL, *supra* note 48, at 49–51.

294. KOZOL, *supra* note 48, at 22.

295. *See, e.g.*, United States v. City of Yonkers, 833 F. Supp 214, 221 (S.D.N.Y. 1993) (comparing Latino and African-American test results to those of whites and Asians); *see also* Comfort *ex rel.* Neumyer v. Lynn Sch. Comm., 283 F. Supp. 2d 328, 379–80 (D. Mass. 2003) (explaining why a desegregation plan that classified students as either white or nonwhite was appropriate in the city of Lynn).

overgeneralizing and undermining their individuality.

Reliance on stereotypes and overgeneralization were at the root of the problem in the Court's vote redistricting cases.[296] In those cases, the Court objected to the consideration of race as a predominant factor in drawing districts because it was premised on the notion that all members of a racial group think and vote alike.[297] Similarly, in the educational context, the Court has been concerned that educators are equating race with some stereotypical trait. For instance, in *Regents of the University of California v. Bakke*, the university asserted that it reserved seats at the medical school for minorities to increase the number of doctors working in underserved communities. The Court responded that no evidence bore out that correlation.[298] Rather, the assertion was based on a stereotypical or generalized notion of minorities' backgrounds and where they would want to work.[299] If the university's goal was to increase the presence of doctors in underserved communities, the appropriate practice would be to screen applicants for the actual characteristics and interests that lead doctors to work in underserved communities.

Diversity rationales can raise similar issues in competitive admissions programs. Schools pursue diverse student bodies to ensure robust classroom discussion and the exploration of multiple perspectives.[300] Courts, however, caution that a diversity program that only considers race engages in the same type of stereotyping as that involved in the vote redistricting cases.[301] By limiting diversity to race, a school assumes that members of a racial group have a particular and distinct perspective or experience.[302] Race, without question, significantly affects an individual's life experience, but this

296. *See* Bush v. Vera, 517 U.S. 952 (1996); Miller v. Johnson, 515 U.S. 900 (1995); Shaw v. Reno, 509 U.S. 630 (1993).

297. *Vera*, 517 U.S. at 958–59, 968–71; *Miller*, 515 U.S. at 911–20, 927; *Shaw,* 509 U.S. at 647–48, 653.

298. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 310–11 (1978).

299. *Id.*; *see also* Richard A. Posner, *The* Defunis *Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1, 11–12 (1974).

300. *See* Grutter v. Bollinger, 539 U.S. 306, 330 (2003); Smith v. Univ. of Wash., 392 F.3d 367, 377 (9th Cir. 2004).

301. *See Bakke*, 438 U.S. at 315 (rejecting the premise that "genuine diversity" can be attained simply by pursuing "ethnic diversity"); Wessmann v. Gittens, 160 F.3d 790, 798–99 (1st Cir. 1998) (finding that a school's exclusive focus on racial/ethnic diversity in its admissions policy amounted to nothing less than racial balancing); *see also* Metro Broad., Inc. v. FCC, 497 U.S. 547, 619–20 (1990) (O'Connor, J., dissenting) (arguing that the plan was premised on the stereotype that "[i]ndividuals of unfavored racial and ethnic backgrounds are unlikely to possess the unique experiences and background that contribute to viewpoint diversity").

302. *See Metro Broad.*, 497 U.S. at 619–20; Johnson v. Bd. of Regents of the Univ. Sys. of Ga., 106 F. Supp. 2d 1362, 1373–74 (S.D. Ga. 2000).

experience is not monolithic and does not necessarily distinguish one's perspective from that of others. Thus, courts have allowed schools to pursue diversity, but it must be real diversity[303] rather than a pretext for minority admissions. Real diversity entails a consideration of factors beyond race that affect an individual's perspective.[304]

Voluntary desegregation plans premised on equity, however, do not pose a risk of stereotyping. Racial classifications only stereotype when some substantive meaning is attached to race. Although racial integration plans premised on achieving the educational benefits of diversity may rest on stereotypical notions, desegregation plans premised on providing equitable opportunities do not. Equity plans do not bring students of different racial groups together so that they might share their purportedly distinct perspectives. Equity plans bring students together so that they can prevent racially segregated schools that result in racially unequal opportunities. The districts must create schools that "look" equitable so that they can keep them equal in fact.

Given that desegregation brings groups together that otherwise are separated, it may also help achieve the educational benefits of diversity. But those benefits, although valuable, are incidental; thus, they are not premised on stereotypes. With that said, it is worth emphasizing that, to the extent students themselves hold racial stereotypes, integrated schools in particular can remediate those stereotypes.[305] A school pursuing this end would not be acting upon or furthering stereotypes. In short, any assumption that voluntary desegregation plans stereotype racial groups simply confuses desegregation with diversity, or mistakes a school's motivations when it welcomes the incidental educational benefits of diversity that often accompany desegregation.

6. Racial Politics

The last stigmatic concern that Justice Kennedy raises is that using racial classifications to achieve desegregation might "reduce children to racial chits valued and traded according to one school's supply and another's demand."[306]

This concern relates, as noted earlier, to individuality, but it also speaks to the Court's long-held concern that affirmative action

303. *Grutter*, 539 U.S. at 334 (requiring consideration of "all pertinent elements of diversity").

304. *Id.*

305. *See, e.g.*, *id.* at 319–20, 330.

306. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2797 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

plans use race to further a political agenda, or what the Court calls "racial politics."[307] Racial politics can divide individuals into competing racial groups.[308] Kennedy specifically points to this possibility in *Parents Involved*, writing that schools' race consciousness may "lead to corrosive discourse, where race serves not as an element of our diverse heritage but instead as a bargaining chip in the political process."[309]

Racial categories can, without question, serve these ends, but to assume that voluntary desegregation promotes racial politics is to overgeneralize. Just as racial categories do not inherently undermine individuality or stigmatize, the use of race to make decisions does not inherently involve racial politics. As a general matter, racial politics involves at least two characteristics: favoritism toward a racial group or groups and a zero-sum game that allows the favoritism to advantage one group and disadvantage another.[310]

Both of these characteristics are missing from voluntary desegregation. First, as discussed throughout this Article, voluntary desegregation is not based on a preference for any particular racial group. Producing schools that are racially unidentifiable, by necessity, will require the use of race, but there is no preferential or detrimental treatment to any race as a group, or across schools. In short, voluntary desegregation is free from charges of political favoritism because it does not use race to benefit one group and not another.

Second, voluntary desegregation avoids racial politics by ensuring that all students receive an equal educational opportunity. Higher education admissions create "winners" and "losers," admitting only some students. Moreover, the nonadmitted have no guarantee of admission elsewhere. Likewise, in government contracting, some people are awarded contracts while others receive smaller ones or none at all. Under these circumstances, individuals are in direct competition with one another for finite resources. When race is a factor in the award and denial of such benefits, individuals can easily interpret the process as a competition between racial groups. This perspective can further lead some to characterize the outcome as controlled by racial politics rather than

307. *See, e.g.*, Shaw v. Reno, 509 U.S. 630, 642 (1993); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989).

308. *Shaw*, 509 U.S. at 657.

309. *Parents Involved*, 127 S. Ct. at 2797 (Kennedy, J., concurring in part and concurring in the judgment).

310. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 322 (2003) (discussing *Bakke* as a case requiring sixteen out of one-hundred seats to go to minorities); *id.* at 334 (characterizing law school admissions as a competition for available seats and requiring race be limited in that process); *Croson*, 488 U.S. at 477 (evaluating a plan that required thirty percent of the contracts to go to minorities).

individual competition.[311] Voluntary desegregation, in contrast, does not involve finite resources. All students are assigned to a school, and all schools should be roughly equal. Thus, even though race is a factor in assignments, disgruntled parents would be hard-pressed to suggest racial politics are at play and working to the substantive disadvantage of their children.

In fact, what has been striking about voluntary school desegregation plans is that they have overcome much of the racial divisiveness of the past. Well-crafted voluntary desegregation plans have garnered widespread support within both minority and white communities.[312] Parents see the plans as offering school choices that they otherwise would not have. Whites who prefer their neighborhood school can have it, but parents who wish to explore other options have the freedom to do so.[313] Minorities, likewise, see the same benefit, particularly those who have previously clamored for the ability to leave their neighborhood schools, which may have formerly been racially isolated and burdened by poverty.[314] Most important to the popularity of the plans among all groups is that the quality of the schools overall is improved.[315]

Even if upgrades are directed primarily at poorer schools, the effect is to benefit all parents. First, upgrades help produce a school system as a whole in which parents can invest and take pride, as there are no schools of which to be ashamed or from which to flee. This is instrumental in districts' attempts to attract better administrators and teachers, maintain stability, and minimize the costs of continually replenishing teaching staffs.[316] Second,

311. *See generally Shaw*, 509 U.S. at 657 (discussing how racial classifications may lead to competing racial factions).

312. Bazelon, *supra* note 33 (indicating that eighty-eight percent of parents support voluntary desegregation); Comfort *ex rel.* Neumyer v. Lynn Sch. Comm., 283 F. Supp. 2d 328, 349 (D. Mass. 2003) (discussing actions to make the plan popular among all demographics).

313. *See, e.g.*, *Comfort*, 283 F. Supp. 2d at 347–48.

314. TERRY M. MOE, SCHOOLS, VOUCHERS, AND THE AMERICAN PUBLIC 164–65 (2001) (noting the appeal of vouchers and school choice among disadvantaged minority communities).

315. *See, e.g.*, *Comfort*, 283 F. Supp. 2d at 333–34 (discussing the vast improvement in school quality).

316. *See* HEATHER G. PESKE & KATI HAYCOCK, TEACHING INEQUALITY: HOW POOR AND MINORITY STUDENTS ARE SHORTCHANGED ON TEACHER QUALITY 1–3 (2006) (analyzing the difficulties that minority schools face in securing quality teachers), *available at* http://www2.edtrust.org/NR/rdonlyres/010DBD9F-CED8-4D2B-9E0D-91B446746ED3/0/TQReportJune2006.pdf; *see also* GARY BARNES ET AL., THE COST OF TEACHER TURNOVER IN FIVE SCHOOL DISTRICTS: A PILOT STUDY 4–5 (2007), *available at* http://www.nctaf.org/resources/demonstration_projects/turnover/documents/CTTFullReportfinal.pdf (discussing national data on the cost of teacher turnover); KAREN S. HERBERT & MICHAEL C. RAMSAY, TEX. STATE BD. FOR EDUCATOR CERTIFICATION, THE COST OF TEACHER TURNOVER 9 (2004), *available at* http://www.sbec.state.tx.us/SBECOnline/reprtdatarsrch/ReportforSenateEducationCommittee.pdf (discussing the financial drain that

equalizing schools can produce a direct benefit for middle- and lower-class whites. When the best schools are tied to the most affluent neighborhoods, parents, including white parents, must purchase their way into good schools.[317] In housing terms, "best" and "whiteness" are almost synonymous among consumers.[318] It is not that white neighborhoods are intrinsically better, but rather that "whiteness" has a social value.[319] Thus, homes of exactly the same quality sell for different prices, depending on neighborhood demographics.[320] The whiter the neighborhood, the more the home costs.[321] Because of this phenomena (driven by racial bias), home owners and realtors seek to maintain the whiteness of their neighborhood.[322]

In a school system that provides equal schools, however, whites who cannot afford the cost of "whiteness," or would rather invest their resources elsewhere, can live in cheaper neighborhoods without actually disadvantaging their children's education. Regardless of where these parents live or purchase a home, they can expect to send their children to a quality school. That school may be their neighborhood school or one they attempt to gain admission to elsewhere. From this perspective, disentangling residence from school assignment has the potential to produce better schools as well as to combat privilege. The phenomenon has not been explored extensively, but the data from Louisville may provide a good example of it in operation. Louisville found that, in contrast to national urban trends, residential segregation has actually decreased during its desegregation plan.[323]

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teacher turnover causes in Texas).

317. Boger, *supra* note 57, at 1442.

318. *See, e.g.*, Casey J. Dawkins, *Recent Evidence on the Continuing Causes of Black-White Residential Segregation*, 26 J. URB. AFF. 379, 390 (2004) (discussing the higher price of homes in white neighborhoods); David R. Harris, *"Property Values Drop When Blacks Move In, Because . . .": Racial and Socioeconomic Determinants of Neighborhood Desirability*, 64 AM. SOC. REV. 461, 461–63 (1999).

319. *See generally* Peggy McIntosh, *White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences Through Work in Women's Studies*, *in* POWER, PRIVILEGE AND LAW: A CIVIL RIGHTS READER 22, 23 (Leslie Bender & Daan Braveman eds., 1995) (describing whiteness, or white privilege, as being "like an invisible weightless knapsack of special provisions, assurances, tools, maps, guides, codebooks, passports, visas, clothes, compass, emergency gear, and blank checks"); *see also* Martha R. Mahoney, *Segregation, Whiteness, and Transformation*, 143 U. PA. L. REV. 1659, 1669–70, 1672 (1995) (discussing the impact of whiteness on housing opportunities).

320. Florence Wagman Roisman, *Teaching About Inequality, Race, and Property*, 46 ST. LOUIS U. L.J. 665, 670 (2002).

321. *See generally* Margalynne Armstrong, *Race and Property Values in Entrenched Segregation*, 52 U. MIAMI L. REV. 1051, 1059–60 (1998).

322. *Id.* at 1057.

323. The residential integration began during the period of forced school integration, but has continued. Brief for Respondents at 3, Parents Involved in

Finally, voluntary desegregation plans avoid racial politics because they do not threaten to work new injustices in the process of remedying old injustices. Detractors have previously objected to affirmative action plans because they feared the plans would work new injustices.[324] When the perpetrator of a harm and its direct causes cannot be identified exactly, remedying the harm poses the risk of overcompensating for harm and, in the process, extracting that remedy from the wrong defendant or innocent third parties.[325] Voluntary desegregation plans do not pose these concerns because they are not remedies for past discrimination or attempts at corrective justice. They are simply efforts to operate equitable systems in the here and now. Their goal is to curtail current racial biases from operating upon the school system. Moreover, even to the extent one applied corrective justice principles to this goal, schools implementing voluntary desegregation plans are responding with more precision and certainty than would programs responding to old injustices because the schools are reacting to current phenomena. Thus, the possibility of working new injustices is further minimized.

In sum, voluntary desegregation plans are not zero-sum games that ferment racial politics or work new injustices. Rather, they reflect the adage that a rising tide lifts all boats. They improve school systems overall and, in the process, all schools. Thus, they are popular among all demographics. In this respect, they help to heal old racial wounds and reverse trends, such as those in housing, that have previously proven intractable.

7. Subordination of Values

The only potential stigmatic harm of voluntary desegregation unexplored fully thus far is an expressive harm related to the subordination of values. Expressive harms result when traditionally relevant factors are subordinated to race.[326] In vote redistricting, this subordination was exemplified by bizarrely shaped majority minority districts that included most all possible

Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007) (No. 05-915), 2006 WL 2944684.

324. Robert J. Delahunty, *"Constitutional Justice" or "Constitutional Peace"? The Supreme Court and Affirmative Action*, 65 WASH. & LEE L. REV. 11, 26–28 (2008) (discussing corrective justice arguments against affirmative action).

325. Affirmative action in employment, for instance, has been susceptible to such charges. Although an employer has previously discriminated among job applicants, those applicants tend to move on. Thus, when courts later order remedial hiring policies that rely heavily on race or quotas, the benefit accrues to new minority applicants who may have never been discriminated against by the employer. Likewise, the remedy may disadvantage current white applicants who did not previously benefit from discrimination. Brest, *supra* note 96, at 36–40.

326. Pildes & Niemi, *supra* note 141, at 501, 507.

minority neighborhoods while districting out some white communities.[327] The Court, however, was clear that a bizarrely shaped voting district alone is not a basis to challenge redistricting.[328] Rather, the bizarreness correlated with race and, thus, indicated that the traditional values of compactness and contiguousness were subjugated to race.[329] The Court was, likewise, clear that only predominant considerations of race, not racial considerations in general, are problematic.

Kennedy does not suggest any expressive harm of this sort results from voluntary desegregation. His concern with the predominance of race is not with the subordination of values, but with the subordination of individuality discussed above. Although the two are distinct, one might equate the two. Thus, subordination of values is still worth addressing.

Ultimately, voluntary desegregation neither overlooks nor subordinates any important values to race. In fact, the schools' desire to offer and honor parental choice is the factor that, more than race or any other factor, drives the assignment process.[330] Race can be the final decisive factor in some instances, but it is not the predominant factor as a general matter. When parental choices by themselves produce racially balanced schools, race is not a factor.[331] Only when parental choices alone do not produce racial balance does race become a factor, but it still only applies to the limited number of assignments necessary to maintain balance.[332] However, parental preference, along with other special circumstances, such as sibling placement, remains relevant.[333] Only by focusing on the assignment of an individual student at the very final stage, and ignoring the preceding steps and all the other assignments that have been made without regard to race, can one charge that race predominates.

Even then, the question remains as to what traditional or legitimate factors voluntary desegregation could subordinate to race.

327. *Id.* at 494–95.

328. *Id.*

329. *Id.*

330. *See, e.g.*, McFarland v. Jefferson County Pub. Sch., 330 F. Supp. 2d 834, 842 (W.D. Ky. 2004) ("Prior to any consideration of a student's race, a myriad of other factors, such as place of residence, school capacity, program popularity, random draw and nature of the student's choices, will have a more significant effect on school assignment.").

331. *Id.* at 847 (discussing a school where seats where still available after names were assigned from a list, thus race would not have affected any of those students' assignments).

332. Transcript of Oral Argument at 46, Meredith v. Jefferson County Bd. of Educ., 127 S. Ct. 2738 (2007) (No. 05–915), 2006 WL 3486966 (stating race is dispositive in only two to three percent of assignments).

333. *See, e.g.*, *McFarland*, 330 F. Supp. 2d at 842 (noting a myriad of other factors); Comfort *ex rel.* Neumyer v. Lynn Sch. Comm., 283 F. Supp. 2d 328, 349 (D. Mass. 2003) (noting that sibling unification, hardship, etc. would override race).

Voluntary desegregation still honors geography and locality by either guaranteeing admission to a neighborhood school or creating school choices that correspond with one's larger neighborhood.[334] Individual autonomy is also honored, as no plans mandatorily assign students to non-neighborhood schools or schools for which they express no preference. For these reasons, voluntary desegregation plans regularly leave pockets of racial imbalance.[335] Ultimately, parental preferences are a limiting factor on racial balance, not vice versa. Thus, if any value is subordinated it would be racial integration.

D. Justice Kennedy's Conflation of Stigmatic Harms

As the above discussion demonstrates, voluntary desegregation plans do not stigmatize students. In many respects, the plans are simply unique. They do not involve merit selections, pursue diversity as a primary end, or make individualized judgments. They are not premised on notions of black inferiority, racial stereotypes, or differences in racial value. Nor do they involve racial politics or subordinate important values. At most, some plans have employed overbroad racial categories, but such categories are not inherent to voluntary desegregation plans. They can be remedied simply by employing appropriate categories. Thus, race-based voluntary desegregation plans can avoid stigmatic harms in all respects.

Kennedy's opinion, however, may rest on a theory of stigma that goes beyond the margins of all previously conceived harms. His insistence on the existence of harm here arises out of his conflation of what are two distinct forms of stigma into one. He borrows from both the theory of general expressive harms flowing from the subordination of values and the theory of stigmatic harms flowing from a disregard of individuality. In borrowing from both, he turns individuality into a value that cannot be subordinated, notwithstanding the fact that voluntary desegregation plans do not make individualized assessments.

Expressive harms flow from the subordination of *relevant traditional* values.[336] The Court, however, does not have the authority to unilaterally proclaim what values "should" be considered. Rather, the Court identifies those values that the government has considered in the past or are necessarily relevant in light of the government's current legitimate goals.[337] For instance,

334. *See, e.g.*, Comfort v. Lynn Sch. Comm., 418 F.3d 1, 6 (1st Cir. 2005) (guaranteeing neighborhood schools); *McFarland*, 330 F. Supp. 2d at 842–44 (creating a larger attendance zone, within which one can express school preferences).

335. *See, e.g.*, *Comfort*, 418 F.3d at 8 (indicating that five schools were still racially imbalanced under the plan).

336. Pildes & Niemi, *supra* note 141, at 500–01.

337. *See, e.g.*, Shaw v. Reno, 509 U.S. 630, 647 (1993) (requiring adherence to "traditional redistricting principles").

compactness, contiguousness, and other voting values are not protected in redistricting because the *Court* believes those values are important; the Court protects those values because the *state* itself has previously treated them as important.[338] Similarly, in educational diversity programs, the Court does not require universities to consider diversity factors beyond race, such as special talents or unique experiences, because the Court believes those individuals should be admitted or given special consideration. Rather, the requirement exists because, if a school's stated goal is diversity (not just racial diversity), those other characteristics are necessarily important to the decision.[339] In short, the government's past practices and values, or the values rationally related to its current goals, will determine the values to which it must adhere.

Kennedy's opinion runs afoul of this principle by taking liberty with the values at stake and ends pursued in voluntary desegregation. Individuality is not at stake because, as discussed throughout this Article, voluntary desegregation is not a selection or merit-based process. In fact, with the exception of specialized magnet schools that admit only high-performing or special needs students or base admissions decisions on student interests, individualized student assignment is an entirely foreign concept to public schools. Thus, individuality is simply not a value to which schools have traditionally adhered, nor a value relevant to the ends they are currently pursuing. In contrast, race, both for good and bad reasons, has always been an animating value in our public schools.[340] To consider it now, for purposes Kennedy recognizes are legitimate, is not to introduce a new value to schools or subordinate individuality or any other values.

Kennedy's opinion, however, obfuscates these points and treats individualism as a sacrosanct value and inherent end. In effect, he forces individualism as a value upon the schools. His opinion initially indicates a school district has only two options: use race in a general manner or use race to make individual decisions, with race being only one component of those decisions.[341] The rest of the decision largely limits schools' options to pursue diversity. First, as Justice Breyer notes in dissent, the general uses of race Kennedy

338. *Id.*

339. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 334 (2003) (requiring consideration of all pertinent factors); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 315 (1978) (rejecting the notion that diversity is simply an interest in "ethnic diversity"); Wessmann v. Gittens, 160 F.3d 790, 798–99 (1st Cir. 1998) (finding diversity that focused only on racial diversity amounted to nothing less than racial balancing).

340. *See generally* BELL, *supra* note 263, at 137–60 (discussing the historical evolution of race-based schooling).

341. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2792 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

suggests will not eliminate racial isolation.[342] Thus, they are not a real option. Second, although Kennedy indicates that eliminating racial isolation is a compelling interest, he does not distinguish between eliminating racial isolation and achieving diversity. Thus, the standards for achieving diversity are the only ones he provides.[343]

Third, he makes what appear to be blanket statements that would necessarily limit schools to diversity. For instance, he writes: "What the government is not permitted to do, absent a showing of necessity not made here, is to classify every student on the basis of race and to assign each of them to schools based on that classification."[344] Such statements suggests that any time a school uses race and assigns students one at a time, it must engage in individualized review. This approach falsely assumes that when race is considered the school is making an individualized decision rather than a group decision. The result is to elevate individualism to a preeminent value that must be considered any time race is considered in student assignments.

Yet forcing individualized merit review upon a system motivated by other legitimate ends, to which individualism is irrelevant, is an inappropriate use of judicial power. First, although judicial skepticism of racial classification is warranted given our history, it does not justify prophylactic rules. Kennedy himself rejects such rules in word,[345] but in practice he makes individualism into a subtle prophylactic requirement. However, if voluntary desegregation is unique and does not perpetrate any stigmatic harm, courts need not treat it as they would other programs. Second, when a school does not make individualized reviews in desegregation, it has not diverged from any prior pattern and practice, nor subordinated any relevant values. The only way to reach a contrary conclusion is to elevate individualism to a place of overarching importance in all governmental decisions. In short, voluntary desegregation simply does not stigmatize anyone on any basis. Kennedy's suggestion to the contrary is based on a misunderstanding of stigma and the creation of an expressive harm that does not exist in reality.

E. Voluntary Desegregation as an Antistigmatic Message

Rather than conveying stigmatic messages, voluntary

342. *Id.* at 2828 (Breyer, J., dissenting) (there is no "reason to believe that another method is possible to accomplish these goals").

343. *See id.* at 2797 (Kennedy, J., concurring in part and concurring in the judgment) (providing guidance only as to the consideration of diversity factors other than race).

344. *Id.*

345. *Id.* at 2791–92 (rejecting colorblindness as a universal constitutional principle).

desegregation actually conveys an antistigmatic message.[346] Moreover, this message takes on additional importance because it comes from schools. For the first time in the history of school desegregation, schools themselves are sending the antistigmatic message. Previous desegregation was based on mandatory court orders.[347] Thus, even to the extent the message was antistigmatic, it was not the schools' message. In fact, the many schools vigorously resisted the message.[348] Schools' current voluntary efforts to desegregate indicate that they have finally heard and received the Court's messages. That schools, like the Court, use race to express the message, however, does not change the message from an antistigmatic one to a stigmatic one.

Kennedy is correct that race matters,[349] and he may be correct that racial classifications convey a message to individuals. His oversight is in regard to *how* race matters. Race matters in the way society makes it matter and with the messages it uses race to convey. Race and stigma are social constructs and, thus, they have no predetermined message.[350] In voluntary desegregation, schools use race to send a positive message. Moreover, sending appropriate messages and fostering positive values, as the Court has always recognized, are at the heart of the purpose behind public schools.[351]

In particular, voluntary desegregation is used to convey a message that a school district is a community of one.[352] Brest asserts that racial discrimination and selective indifference are expressions of internalized feelings or notions that racial groups are

346. Siegel, *supra* note 30, at 837–38 (distinguishing voluntary desegregation from other affirmative action plans based on its message).

347. *See, e.g.*, Green v. County Sch. Bd., 391 U.S. 430, 439 (1968) (ordering school districts to desegregate now).

348. *See, e.g.*, *id.*; Cooper v. Aaron, 358 U.S. 1, 15 (1958).

349. *Parents Involved*, 127 S. Ct. at 2791 (Kennedy, J., concurring in part and concurring in the judgment) ("The enduring hope is that race should not matter; the reality is that too often it does.").

350. Lenhardt, *supra* note 95, at 821–22; López, *supra* note 12, at 27–28.

351. *See, e.g.*, Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271–72 (1988) (upholding the authority of public school officials to censor a student newspaper); Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 681 (1986) (upholding the discipline of a student for vulgar speech based on a public school's authority to promote good civic values); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 640–42 (1943) (finding that compelling students to salute the American flag while at school was inimical to fostering the message of "intellectual individualism" that was public schools' responsibility to engender); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534 (1925) (noting the power of the State to reasonably regulate public schools to ensure that "certain studies plainly essential to good citizenship . . . be taught, and that nothing be taught which is manifestly inimical to the public welfare"); Meyer v. Nebraska, 262 U.S. 390, 400 (1923) (noting that a teacher's "calling . . . always has been regarded as useful and honorable, essential, indeed, to the public welfare").

352. *See, e.g.*, McFarland v. Jefferson County Pub. Sch., 330 F. Supp. 2d 834, 854 (W.D. Ky. 2004).

of differential value.[353] Voluntary desegregation counteracts this notion with a message that indicates the quality of every school in a district matters. Thus, the quality of African-American students' educational opportunities is equal in importance to whites', making it unacceptable to allow some schools to languish while others prosper. In short, school districts are putting the community on notice that the district has a collective responsibility and is receptive to it.[354]

A voluntarily desegregating district also conveys a second message that private bias and predilection will not dominate and shape the way the school district educates children. Instead, a principle of equity will direct the schools. Making this affirmative statement can be crucial in orienting parents', teachers', and students' approach to the schools.[355] In effect, the school is reaffirming the basic principle on which it should stand: that public schools are *public* and, thus, will promote democratic values. Moreover, if a parent is going to live or a teacher is going to work in the district, they too must buy into these principles. Without question, some will object to aspects of these principles, but setting them rests in the authority of the community as expressed through its school board, not in that of individual parents.[356] The point of the schools' message is not to stigmatize individuals or deprive persons of the ability to go to particular schools. Rather, the point is to make race irrelevant to those who would otherwise think or make it relevant. In this respect, voluntary desegregation conveys the best and most important of expressive messages.

IV. *PARENTS INVOLVED* AS COMPROMISE RATHER THAN PRINCIPLE

A. Finding Compromise in Contradiction

If voluntary desegregation occasions neither material nor stigmatic harm, the question remains as to why Justice Kennedy cast the deciding vote as he did. Either he was honestly mistaken in many of his assumptions, or the very contradictions of his opinion signal another end. The internal contradictions of Kennedy's opinion speak as much to diametrically opposed ideological positions as they do to the particulars of voluntary desegregation. At various points in his opinion, Kennedy seeks to legitimize the positions of both sides of the debate over race consciousness, with voluntary desegregation as just the happenstance backdrop. He echoes the

353. Brest, *supra* note 96, at 8.

354. As Brown notes, this is particularly important because it is often private values that the school must counteract. Brown, *supra* note 51, at 48.

355. *Id.*

356. *Id.* at 17 (concluding that children have a right to be inculcated with those values consistent with constitutional principles, not with their own personal beliefs).

general mantras of civil rights and racial justice advocates at certain points, only to balance or undermine them with the general mantras of colorblindness or conservatism elsewhere.

For instance, he concurs with civil rights rhetoric when he writes: "The enduring hope is that race should not matter; the reality is that too often it does. . . . The plurality's postulate that '[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race' is not sufficient to decide these cases."[357] Likewise, although he applauds the concept expressed in Justice Harlan dissenting opinion in *Plessy v. Ferguson*[358] that "[o]ur Constitution is color-blind,"[359] Kennedy concludes that "[i]n the real world, it is regrettable to say, [colorblindness] cannot be a universal constitutional principle."[360]

Kennedy, however, just as boisterously expresses rhetorical language at odds with the foregoing. In his opening paragraph, Kennedy writes: "To make race matter now so that it might not matter later may entrench the very prejudices we seek to overcome."[361] His expansion of this notion throughout his opinion motivates his concerns over individuality and correlates with his warning that these plans threaten to reduce children to racial chits.[362] Thus, although he states colorblindness cannot be a universal principal, a rhetoric consistent with colorblindness forms the basis of his reversal of these desegregation plans.

The competition between these ideological poles, however, extends beyond rhetorical statements. Kennedy holds that schools have a compelling interest in pursuing diversity and addressing the effects of racial isolation.[363] This holding is a rebuke to those who object to all nonremedial uses of race. In response to them, Kennedy writes:

> School districts can seek to reach *Brown*'s objective of equal educational opportunity. The plurality opinion is at least open to the interpretation that the Constitution requires school districts to ignore the problem of *de facto* resegregation in schooling. I cannot endorse that conclusion. To the extent the plurality opinion suggests the Constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools, it is, in my view, profoundly

357. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2791 (Kennedy, J., concurring in part and concurring in the judgment) (citation omitted); *see also id.* at 2767–68 (discussing Brown v. Bd. of Educ., 347 U.S. 483 (1954)).

358. 163 U.S. 537, 552–64 (1896) (Harlan, J., dissenting).

359. *Id.* at 559.

360. *Parents Involved*, 127 S. Ct. at 2792 (Kennedy, J., concurring in part and concurring in the judgment).

361. *Id.* at 2788.

362. *See supra* notes 213–16 and accompanying text.

363. *Parents Involved*, 127 S. Ct. at 2797.

mistaken.[364]

Kennedy, however, as a practical matter, undermines this idea just as solidly as he makes it by severely limiting the means by which schools can achieve this end. Although recognizing the elimination of racial isolation as a compelling interest, he fails to account for the actual harms and the race-conscious remedies necessary to address them, effectively making his compelling interest holding irrelevant. As discussed previously, he transforms the desegregation plans into diversity plans, requiring a *Grutter*-style analysis, regardless of whether diversity is the intended end.

The competition between ideological sides also manifests itself in the basic application of strict scrutiny. Kennedy praises the schools' ends, writing:

> The Nation's schools strive to teach that our strength comes from people of different races, creeds, and cultures uniting in commitment to the freedom of all. In these cases two school districts in different parts of the country seek to teach that principle by having classrooms that reflect the racial makeup of the surrounding community. That the school districts consider these plans to be necessary should remind us our highest aspirations are yet unfulfilled.[365]

Thus, by his own admission Kennedy establishes that voluntary desegregation, unlike other race-conscious plans, does not pose an ambiguity of purpose where the Court has no way of knowing whether a plan is benign or malevolent.[366] Moreover, the absence of a concrete, material harm further distinguishes voluntary desegregation. Kennedy, however, elsewhere retreats to a skepticism of all racial classifications, including those in desegregation plans, writing: "Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics."[367] Kennedy could have distinguished voluntary desegregation from this precedent, but by refusing to, he subjects it to a narrow-tailoring analysis that renders these measures unconstitutional.

Consistent with his validation of both sides, however, Kennedy reserves a partial victory for civil rights advocates regarding strict scrutiny. In fact, he indicates he would not question a school's motivations if they stopped short of classifying individuals by race.

364. *Id.* at 2791.

365. *Id.* at 2788.

366. For a discussion of why strict scrutiny is required in such situations, see City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (applying strict scrutiny).

367. *Parents Involved*, 127 S. Ct. at 2789 (quoting *Croson*, 488 U.S. at 493).

School districts "are free to devise race-conscious measures to address the problem [of de facto segregation] in a general way."[368] And if their measures do not classify individual students by race, Kennedy writes, "it is unlikely [they] would demand strict scrutiny."[369] As promising as such a holding might be, Justice Stevens's dissent reveals that the general uses of race that Kennedy suggests will not lead to effective desegregation. Thus, this principle is less meaningful in reality than in word.

As the above demonstrates, Kennedy's opinion is riddled with what appear to be internally contradictory principles. Taken to its logical conclusion, some statements in his opinion provide a basis upon which to justify most any voluntary desegregation plan one could imagine. These portions, in effect, would render voluntary desegregation a special exemption to strict scrutiny and provide latitude in its uses of race. But other portions of his opinion provide a basis to prohibit the use of race in any respect to achieve voluntary desegregation.

Although the details of voluntary desegregation are unique, the ideological issues that *Parents Involved* raises are not unlike those in many other race cases. On an ideological level, *Parents Involved* retreads the same loggerhead that has preceded it. Advocates on one side believe there is a distinction between malevolent and benign uses of race,[370] and also that race-consciousness is an absolute necessity in accounting for and responding to past and current racial inequity and discrimination.[371] In contrast, the other side believes that the use of race is only justified when necessary to remedy acts of intentional discrimination.[372] In all other instances, strict colorblindness is the only means to ensure that individuals are treated equally.[373] The dilemma in cases such as *Parents Involved* is that no principled middle ground can be had between these polemic positions. And to sanction the argument of either would be to ensure a complete victory for one and deal a death blow to the other. Thus, Kennedy takes neither side but rather picks and chooses from both.

368. *Id.* at 2792.

369. *Id.*

370. *See, e.g.*, John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 735 (1974); Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 789–90, 798 (1985) (arguing that the Fourteenth Amendment was not intended to prohibit benevolent affirmative action programs).

371. *See generally* T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1079–91 (1991).

372. L. Darnell Weeden, *Yo,* Hopwood*, Saying No to Race-Based Affirmative Action is the Right Thing to Do from an Afrocentric Perspective*, 27 CUMB. L. REV. 533, 534 (1997); Posner, *supra* note 299, at 19; *see also* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989).

373. Posner, *supra* note 299, at 25. *See generally* TERRY EASTLAND, *ENDING* AFFIRMATIVE ACTION: THE CASE FOR COLORBLIND JUSTICE (1996).

A comparison of Kennedy's opinion to those in the redistricting cases suggests we should interpret Kennedy's opinion as nothing less than a compromise. Pildes and Niemi point out that the voting cases involved a collision between alternating concepts of political representation,[374] and the Court's holdings were ultimately a compromise between these differing views.[375] The difficulty of the compromise, however, results in decisions that appear internally inconsistent or unprincipled because they fail to follow the various competing principles that they validate to their logical conclusions.[376]

Delahunty concludes that affirmative action or race-conscious cases, in particular, have precipitated these compromises. He likewise finds that these compromises lead to unprincipled and illogical decisions.[377] Delahunty, however, suggests that the compromise may be far more than the ideological battle than Pildes and Niemi contemplate. Delahunty characterizes these cases as attempts to secure a "constitutional peace" between aggressively competing constituencies.[378] The issues in *Bakke*, for instance, posed the threat of racial conflict.[379] At the time, minorities were demanding full remedial or corrective action as a response to decades of discrimination.[380] In contrast, many whites were resentful of affirmative action remedies based on imprecisely identified harms. Such remedies could work new injustices and undermine whites' economic and social status.[381] Confronted with this conflict, the Court secured a constitutional peace by relying on a diversity rationale that sidestepped the demands of both sides and rested on grounds that made neither happy, but with which both could live.[382]

Compromise decisions, however, leave the core ideological issues undecided and permit the tension between the two poles to persist. Yet Pildes and Niemi reason that compromise standards and continued tension can produce a net good because they force governmental decision makers to continually consider the values on both sides, thus ensuring that no legitimate values are subordinated.[383] Pildes and Niemi's notion is heavily contextualized by what they see as the nature of the political process, but

374. Pildes & Niemi, *supra* note 141, at 483.
375. *Id.* at 505–06.
376. *Id.*
377. Delahunty, *supra* note 324, at 18.
378. *Id.* at 54.
379. *Id.* (quoting JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 470 (2001)).
380. *Id.* at 54–56 (discussing the black power movement and civil disobedience).
381. *Id.* at 44.
382. *Id.* at 43–46.
383. Pildes & Niemi, *supra* note 141, at 505–06.

Delahunty makes a similar point. He writes that compromise cases are amoral decisions that express an utter indifference to issues such as racial justice, but it is only amorality that allows the Court to secure peace: "And peace, no less than justice, is a great good."[384]

Kennedy's opinion in *Parents Involved* demonstrates several of these same characteristics. It involves an ideological competition that he, ultimately, does not resolve. Rather, his opinion is riddled with inconsistencies as it vacillates between the poles. Most tellingly, he almost entirely avoids the central motivation and necessity of voluntary desegregation—the negative educational impacts of racial isolation—so as to focus on and extend the diversity compromise first rendered in *Bakke* and repeated in *Grutter*. Moreover, the need for and pull of compromise likely weighs heavily upon him now that he sits at the center of the Court, just as Powell did in *Bakke* and O'Connor in *Grutter*.

The flaw in his opinion, however, is the notion that *Parents Involved* raises the same interests that were at stake in *Bakke* and *Grutter*, and that necessitated a constitutional peace. In the context of higher education in *Bakke* and *Grutter*, diversity admissions arouse white interests in tempering affirmative action plans and jeopardize race-neutral admissions policies that, by the percentages, are to whites' advantage. Likewise, the vote redistricting cases pitted established voting patterns, traditional political power, and geographic cohesiveness against the interests of minorities in improved political representation.

Competing interests of this nature, however, are not present in voluntary desegregation. Without question, some people may be concerned only with individual prerogative and see no connection between the overall health of a school district and the health of individual schools, communities, and workplaces. But these interests are not in competition with African-American interests in particular; they are at odds with the interests of the overall community, which finds value in these plans.[385] Thus, to the extent these interests even compete against voluntary desegregation, they lack a significant constituency. Moreover, as Pildes and Niemi note, the disgruntlement of a few individuals is not sufficient to sustain a claim of constitutional expressive harm.[386] Only the wholesale expressive harm to a group, resulting from subordination of communal values to race, gives rise to such a claim.[387] As discussed extensively above, voluntary desegregation plans simply do not

384. Delahunty, *supra* note 324, at 70.

385. *See, e.g.*, Comfort *ex rel.* Neumeyer v. Lynn Sch. Comm., 283 F. Supp. 2d 328, 349 (D. Mass. 2003) (discussing actions that made the plan popular among all demographics); Bazelon, *supra* note 33, at 43 (discussing an eighty-eight percent parental support rating for Louisville's desegregation plan).

386. Pildes & Niemi, *supra* note 141, at 506–07.

387. *Id.* at 513–15.

create that type of harm.

The compromise in *Parents Involved*, therefore, is not one necessitated by a meaningful conflict of interest between racial or other demographic groups. Rather, it is ultimately a compromise between ideological viewpoints. One could, at least, posit that voluntary desegregation plans threaten the ideology of colorblindness and extreme individualism, or the politics of entitlement and privilege that allow a select few to purchase educational advantages through the housing market.[388] But these ideologies would appear seemingly irrelevant to most parents who have limited options in securing quality educational opportunities for their children. Yet by elevating the ideology of individualism to a level on par with the substantial interests in voluntary desegregation, Kennedy's opinion artificially necessitates a compromise and divides the spoils at the expense of the collective judgment of the school community.

B. Opportunity in Compromise

The inconsistency and indefiniteness of Justice Kennedy's opinion, however, is also its saving grace. In so far as the opinion balances ideology rather than secures specific outcomes, its purpose may be merely to make an ideological statement. Kennedy reaffirms colorblindness by stressing the crude nature of the plans' racial categories and reaffirms individuality by demanding that race cannot be the single individual criterion in assignments.[389] But his opinion, on a practical level, contemplates that schools should be allowed to achieve the exact ends they desire. He even leaves open the possibility that schools could rely on their current plans if they could demonstrate a necessity in doing so.[390] The school districts' failure was one of proof, and Kennedy does not rule out the possibility that they could overcome this failure in the future.[391] Thus, his opinion is carefully tempered in important respects.

Some school districts should be able to show this necessity. In fact, the history of failed race-neutral desegregation efforts in *Comfort ex rel. Neumeyer v. Lynn School Committee* appears to make this showing.[392] Even with its current plan, Lynn considered

388. *See* PURSUING SOCIOECONOMIC SCHOOL INTEGRATION, *supra* note 57, at 5 (noting that nontraditional assignment plans, such as mandatory desegregation assignments, "likely will face opposition from some middle-class parents who believe that with their home selection, they have 'purchased' the right to send their children to economically homogeneous neighborhood public schools").

389. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2745 (2007).

390. *Id.* at 2797.

391. *Id.*

392. 283 F. Supp. 2d 328, 344–47 (D. Mass. 2003) (reviewing the previous failed attempt to achieve successful desegregation).

and studied extensive race-neutral alternatives,[393] thus going beyond Seattle's and Louisville's efforts. Regardless of whether the alternatives are realistic, the symbolic value of exhausting them is meaningful from an ideological perspective. Thus, one might argue that Seattle's and Louisville's plans were not inherently flawed, but rather the flaw was in their failure to substantiate the need for the plans.

Kennedy's only unambiguous stance in the case is his objection to "crude" racial classifications.[394] Otherwise, he is at least theoretically open to the use of race as a determining factor. Even to the extent he prefers a multivariable diversity analysis over a race-determinate one, he would require an analysis less complex than that detailed in *Grutter*. *Grutter* requires holistic individual assessments of students, in which no single factor is determinative.[395] But in *Parents Involved*, Kennedy pays scant attention to other factors. He simply indicates: "Race may be one component of that diversity, but other demographic factors, plus special talents and needs, should also be considered."[396]

One could envision a process that simply expanded the demographic groups that are equally sorted among schools. Doing so would not limit racial desegregation or the role that race plays in decisions. Rather, it would simply add other decisive factors. For instance, students could be sorted into schools based on race. Then they could again be sorted based on special education or needs status. Thus, if an African-American special-education student expressed a preference for two schools that were predominantly white, but one school had fewer special-needs students than the other, the district would assign the student to the school with fewer special-needs students, even if that school was the student's second preference. Under previous plans, the student would have gotten his first choice.

The overall effect of such a plan would be to set imbalance levels for race, special needs, and/or other social factors like income. Consequently, the plan could not be reduced to one in which race was entirely decisive, but rather the plan would have multiple decisive factors, equitably distributing students among schools based on multiple characteristics. The primary drawback of such a plan is that it would, as the example shows, reduce the weight given to parental preferences and, hence, the plans' popularity. Moreover, this point simply reaffirms that choice, more than anything, drove assignments in the old plans. Regardless, changes of this sort could respond to Kennedy's concerns without affecting the overall level of

393. *Id.* at 335.
394. *Parents Involved*, 127 S. Ct. at 2745.
395. Grutter v. Bollinger, 539 U.S. 306, 335–42 (2003).
396. *Parents Involved*, 127 S. Ct. at 2797.

desegregation.[397]

At this point, it suffices to say that Kennedy's opinion leaves open additional options for achieving voluntary desegregation. First, although they have their limitations, Kennedy notes several himself in his discussion of "general" uses of race to draw school boundaries or site new schools.[398] Second, others have also suggested that socioeconomic status is a measure by which to desegregate schools.[399] However, the effectiveness of these alternatives is particularly dependent on circumstances. For instance, plans based on socioeconomics can certainly reduce socioeconomic isolation, but they will not yield significant levels of racial desegregation in most geographical locations.[400] Moreover, even when socioeconomic desegregation occurs, without racial desegregation, the schools will still allow for the perception of white and black schools. This perception can then still lead to other problems of school inequity discussed above. With that said, using socioeconomic status, along with race and potentially other factors, could reduce racial segregation, as well as respond to Kennedy's concerns about single-factor race decisions. Some schools, for instance, have created "diversity indexes" that assign particular weights to race, housing segregation, family income, family education, and analogous factors.[401] The schools then use the index to assign students to schools.[402] If these factors are weighted appropriately, they may produce desegregation on par with purely race-conscious measures.[403]

The primary concern with many of these multivariable assignment plans is their administrative burden or feasibility. Collecting the necessary data, calculating a workable index, and then administering these options may not be immediately feasible for many districts.[404] Many would lack the financial and staff

397. *See generally* STILL LOOKING TO THE FUTURE, *supra* note 56, at 46–59 (reviewing various plans that rely on factors in addition to or other than race).

398. *Parents Involved*, 127 S. Ct. at 2792.

399. PURSUING SOCIOECONOMIC SCHOOL INTEGRATION, *supra* note 57, at 5; McUsic, *supra* note 57, at 1335.

400. *See* Brief of 553 Social Scientists as Amici Curiae Supporting Respondents at 49, Parents Involved in Cmty. Sch. v. Seattle Dist. No. 1, 127 S. Ct. 2738 (2007) (Nos. 05-908 & 05-915), 2006 WL 2927079; Sean F. Reardon et al., *Implications of Income-Based School Assignment Policies for Racial School Segregation*, EDUC. EVALUATION & POL'Y ANALYSIS, Spring 2006, at 50.

401. *See, e.g.*, BERKELEY UNIFIED SCH. DIST., BUSD STUDENT ASSIGNMENT PLAN/POLICY, http://www.berkeley.net/index.php?page=student-assignment-plan [hereinafter BERKELEY ASSIGNMENT PLAN].

402. *Id.*

403. For further discussion of these indexes, *see* STILL LOOKING TO THE FUTURE, *supra* note 56, at 46–47, 52–53, 56–57.

404. *Compare* City of Berkeley, Who We Are, http://www.ci.berkeley.ca.us/ContentDisplay.aspx?id=7164 (indicating that over sixty percent of its population has a bachelors or professional degree), *with* Nicole Stoops, *Current Population Reports*, *in* EDUCATIONAL ATTAINMENT IN THE UNITED STATES:

resources needed to implement them.[405] And those who have the capacity would be utilizing these resources, possibly for no reason other than to obfuscate their constitutionally legitimate end of reducing racial isolation. These resources could be saved with plans that rely more heavily on race. The savings could fund important educational objectives rather than administrative ones.

Regardless of what option school districts pursue, reviewing courts should be careful to not broadly construe the restrictive portions of *Parents Involved*. Lower courts should recognize that Kennedy did not condemn voluntary desegregation, but struck a complicated comprise. He sanctioned the schools' purposes and indicated that he would contemplate sanctioning their particular methods under the right circumstances. As indicated above, the purpose of a compromise decision is to ensure that all legitimate values are considered. So long as schools do so, courts should not strike down their plans and, in the process, subordinate the value in voluntary racial desegregation to other ideological ends. Just as schools send messages with their plans, so do courts with decisions.[406] Those that too broadly construe the prohibitions from *Parents Involved* will send the message that schools cannot devise plans that rely on race to desegregate schools.[407] Kennedy is clear that this should not occur. Moreover, *Parents Involved* does not change the long-standing deference courts owe to schools regarding their judgment as to how to educate children.[408] Once a district decides equitable, adequate, desegregated schools are in children's best interests, courts must not create unjustified barriers.

The key in maintaining this balance is for courts to appreciate

2003, at 3 (2004), *available at* http://www.census.gov/prod/2004pubs/p20-550.pdf (indicating that the national average is half that of Berkley), *and* BERKELEY ASSIGNMENT PLAN, *supra* note 401 (indicating that Berkeley, unlike many school districts, is particularly affluent).

405. Most racially isolated schools are already resource-deprived. *See, e.g.*, CARMEN G. ARROYO, EDUC. TRUST, THE FUNDING GAP (2007), *available at* http://www.nvasb.org/Publications/Research_Data/the_funding_gap.pdf; *see also* McUsic, *supra* note 57, at 1351–52 (discussing the higher costs minority districts face and the insufficient funds they have to meet them).

406. Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2028–29 (1996).

407. *See* STILL LOOKING TO THE FUTURE, *supra* note 56, at 23–24 (responding to the confusion *Parents Involved* created and its potentially discouraging messages); *see also* Derrick Bell, *Racial Equality: Progressives' Passion for the Unattainable*, 94 VA. L. REV. 495, 496 (2008) (finding a clear message that the majority of justices on the current Supreme Court will "strike down any laws or policies intended to remedy past and continuing racial discrimination").

408. *See, e.g.*, Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988); Bd. of Educ. v. Rowley, 458 U.S. 176, 207–08 (1982); Goss v. Lopez, 419 U.S. 565, 574 (1975); Wood v. Strickland, 420 U.S. 308, 326 (1975); Epperson v. Arkansas, 393 U.S. 97, 104 (1968); *see also* Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 225–26 (1985) (affording deference to institutions of higher education).

the factual predicate of *Parents Involved*. Although the Supreme Court reaches holdings based on specific facts—or the lack thereof in *Parents Involved*—sometimes lower courts ignore the precise predicate, particularly in cases that address sensitive issues such as race.[409] Lower courts may seize upon the broad principles on which the Supreme Court seemingly relied.[410] If they do, the result would be to extend principles to facts in a way that the Court did not intend.[411] In *Parents Involved*, those key facts revolved around whether other alternatives were sufficient to reduce segregation.[412] In the absence of affirmative evidence by the school districts, Justice Kennedy was free to assume that individual racial classifications were not narrowly tailored.[413] The second key factual issue was the certainty regarding the manner in which race was used. This Article posits that race was not the sole factor in assignments, but the schools' failure to clearly articulate how race factored into the process left Kennedy free to speculate that it was inappropriate.[414] However, if a district substantiates its position on these points, Kennedy's preference for diversity or individualized review may be irrelevant. In short, *Parents Involved* must be read in context and used as a tool to facilitate voluntary desegregation, not limit it. Otherwise, the ideological compromise will become a total victory in practice for those who oppose race-conscious measures.

CONCLUSION

Justice Kennedy's opinion in *Parents Involved* raises as many questions as it answers. Yet every question is of utmost importance both to our future understanding of race and to the future of educational opportunities in America. The unique circumstances of voluntary desegregation force Kennedy to revisit very basic questions about the effect of racial classifications on citizens. When these classifications are used to denigrate and divide, their effects are obvious. Sometimes they are coupled with denials of job and educational opportunities, while at other times they only stigmatize. Regardless, as the Court has always recognized, the stigmatizing effects of racial classifications are no less pernicious than their material effects.

Voluntary desegregation, however, provides the opportunity to explore a concrete alternative to our old patterns of misusing race. It presents a context entirely different from all previous ones

409. Pildes & Niemi, *supra* note 141, at 523–24.
410. *Id.*
411. *Id.*
412. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No.1, 127 S. Ct. 2738, 2797 (2007) (Kennedy, J., concurring in part and concurring in the judgment).
413. *Id.* at 2789–90.
414. *Id.*

because, although it relies on race, it does not use race as a preference for any particular group, nor does it allocate benefits and burdens. Thus, unlike affirmative action, it does not create winners and losers. Rather, it simply sorts students into racially balanced schools, where everyone receives an equal and quality education. By rendering traditional concerns irrelevant, voluntary desegregation allows us to focus on the core question of whether racial classifications inherently stigmatize individuals.

The answer is encouraging. One can ponder any number of ways that race has previously stigmatized individuals and, in each case, voluntary desegregation avoids the problem. In fact, the point of voluntary desegregation is to counteract stigma. The unfortunate truth is that the history of de jure school segregation has not left us, and the invidious racial values that it indoctrinated continue to linger. As a result, parents and teachers make decisions based on race that only further exacerbate inequality. Voluntarily desegregating schools, however, does not run from this reality; it confronts it. By creating racially balanced schools, voluntary desegregation attempts to make our racial biases irrelevant. For once, it makes us choose our schools based on factors other than race. In short, it uses race to make race irrelevant. Moreover, by making race irrelevant, and schools better, it succeeds where all other desegregation measures have failed: it wins the support and collaboration of both whites and communities of color.

Our failures and divisions, however, run far too deep to assume that we have crossed a milestone and cannot be turned back. In fact, it is not even clear that Justice Kennedy appreciated the distinction between achieving diversity and eliminating the harmful educational effects of racial isolation. Rather, his opinion reveals a greater concern with balancing competing ideologies than with securing the future of our schools. That future remains very much in jeopardy. Across the nation, many schools experienced significant integration starting in the 1960s and lasting until the 1990s, but they have lost ground ever since and are as segregated today as they were in 1970.[415] Moreover, although their numbers are growing, voluntarily desegregating school districts are far from a large contingent.[416] With that said, these school districts are the unmistakable flowering of *Brown*'s lessons. They have gone from using race to divide to using it to unite. They have gone from being districts concerned with the education of the few to ones concerned

415. GARY ORFIELD & CHUNGMEI LEE, HARVARD UNIV. CIV. RIGHTS PROJECT, *BROWN* AT 50: KING'S DREAM OR *PLESSY*'S NIGHTMARE? 19 (2004), *available at* http://www.civilrightsproject.ucla.edu/research/reseg04/brown50.pdf.

416. *See generally* James E. Ryan, *The Supreme Court and Voluntary Integration,* 121 HARV. L. REV. 131, 145 (2007) ("[E]ven if we accept the highest estimate—that roughly 1,000 school districts make some use of race when assigning students—that still leaves approximately 15,000 school districts that do not.").

with the many. *Parents Involved* strikes a tenuous balance that would allow them to grow. Emphasizing the context of voluntary desegregation and the factual predicates of Kennedy's opinion will be crucial in ensuring that lower courts do not interrupt that balance.