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## Desegregating Teachers

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## DESEGREGATING TEACHERS

WENDY PARKER\*

*Our public schools are more segregated than is commonly recognized. Through an original empirical study of 157 school districts, this Article uncovers that teachers are resegregating, just as students are. Many educators, policymakers, and legal scholars would find no fault with this resegregation because they disconnect integration from quality of education. The consequences of teacher segregation, however, remain uncharted territory in this debate over the value of school integration. The resegregation of teachers exposes the truth of school segregation—it continues to impede structural equality and helps to perpetuate white supremacy. Segregated teaching staffs, which generally mean inexperienced white teachers in minority schools, are but one aspect of the inequality of segregation. Yet, this past term, the Supreme Court legitimated the current segregation in our public schools in its landmark opinion, Parents Involved. Our society's refusal to recognize the transformative potential of integration is, however, more of an obstacle to equality than the Supreme Court. That is, until society identifies integration with quality of education, the Supreme Court's refusal to do so is unimportant.*

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\* Professor of Law, Wake Forest University School of Law. I am grateful to Charles Clotfelter, Catherine Fisk, Mitu Gulati, Michael Olivas, Mike Selmi, Sid Shaprio, Suja Thomas, Tracy Thomas, Verna Williams, and Ron Wright for their many helpful suggestions. I am especially thankful to Aaron Goss, who provided outstanding research assistance. An earlier version of this paper was presented at AALS Annual Meeting Workshop on Remedies: Justice and the Bottom Line. I welcome comments via email at [parkerwm@wfu.edu](mailto:parkerwm@wfu.edu).

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The destinies of the two races, in this country, are indissolubly linked together.

—Justice John Marshall Harlan  
*Plessy v. Ferguson* (1896)<sup>1</sup>

Separate educational facilities are inherently unequal.

—Chief Justice Earl Warren  
*Brown v. Board of Education* (1954)<sup>2</sup>

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1. 163 U.S. 537, 560 (1896) (Harlan, J., dissenting).

The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.

—Chief Justice John G. Roberts, Jr.

*Parents Involved in Community Schools v. Seattle School District No. 1* (2007)<sup>3</sup>

Two years ago, my son, who is white, attended our neighborhood elementary school.<sup>4</sup> When I volunteered there, I was surrounded by white adult faces, from the office workers to the teaching staff to the principal. Exceptions, of course, existed. The assistant principal and one teacher were African American. Yet, the school clearly had a racial identity from both its students and staff. It felt like the school that it was and still is—a segregated white school. Its student population is 83% white, and its teaching population is 96% white.<sup>5</sup>

On some days, I would also travel a few miles from my son's school to tutor a kindergartener who is African American. At this public school, I encountered many African-American adult faces in positions of authority, from the front office to the classrooms to the principal's office. That school also had a racial identity from both its students and staff, a minority identity.<sup>6</sup> Its student population was 100% minority, and its teaching population was 50% minority.<sup>7</sup>

I am surrounded by indications that this school segregation—whether it be teachers, students, or both who are segregated—is nothing to be alarmed about, that an attempt to integrate these two schools could actually be foolhardy. First, the schools are not de jure schools; enrollment is not restricted by race or ethnicity.<sup>8</sup> Parents at both schools may choose

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2. 347 U.S. 483, 495 (1954).

3. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2768 (2007) (plurality opinion).

4. He eventually got lucky in a lottery for an integrated magnet school.

5. These figures are based on data provided by the North Carolina Department of Public Instruction for the 2005–06 school year for Forsyth County. The data is available online at Wendy Parker, Technical Appendix, Teacher Distribution Study, North Carolina Data & Analysis, <http://users.wfu.edu/parkerwm/teacher/> (last visited Aug. 5, 2008) [hereinafter Technical Appendix]; see *infra* note 76 (discussing online Technical Appendix).

6. To ease the readability of this Article, I sometimes use the term “minority” to refer to both African Americans and Latinos.

7. Technical Appendix, North Carolina Data & Analysis, *supra* note 5. More specifically, the students are 79% African American and 21% Latino. *Id.* The teachers are 42% African American and 8% Latino. *Id.* Eight percent of the teachers were listed as either “other” or “no data.” *Id.*

8. De jure segregation includes only segregation imposed explicitly by law. See *Parents Involved*, 127 S. Ct. at 2761. De facto segregation, on the other hand, references segregation due to private decision making. *Id.*; DOUGLAS LAYROCK, *MODERN AMERICAN REMEDIES* 282 (2d ed. 1994).

the other one, with a bus ride provided.<sup>9</sup> Nor are the schools as segregated and unequal as they were under de jure segregation. The predominately white school has *some* minority presence,<sup>10</sup> and the all-minority school receives extra funding to improve its educational offerings.<sup>11</sup>

Second, if the school board voluntarily chose to integrate the student bodies of these two schools, it could run afoul of the Equal Protection Clause. A majority of the Supreme Court has substantially limited the ways school districts can voluntarily integrate non-de jure schools.<sup>12</sup> Nor is it clear that the limited constitutional methods to integrate would be successful.<sup>13</sup>

Even if the school board could integrate its student bodies constitutionally, many would decry such efforts as meaningless or even harmful to minority students. A plurality of the Supreme Court this past term, for example, attached no constitutional value to student integration.<sup>14</sup> Justice Clarence Thomas, echoing his previous opinions, specifically praised the prospect of minority schools.<sup>15</sup>

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While both schools mirror their status when the school district was segregated by law, their school desegregation suit was dismissed decades ago.

9. The school district clusters elementary schools into groups of four or five, and parents can choose any of the schools in the group, with bus transportation provided. *See, e.g.*, Student Assignment—Kindergarten, Registering Your Child in Kindergarten, <http://www.wsfcs.k12.nc.us> (follow “Student Assignment” hyperlink; then follow “kindergarten” hyperlink) (last visited Feb. 9, 2008). This, of course, is reminiscent of the freedom-of-choice plan held unconstitutional in *Green v. County School Board*, 391 U.S. 430, 440 (1968).

10. *See supra* note 5 and accompanying text.

11. The minority school is designated an Equity Plus school. Teachers receive additional salary (typically between \$500 and \$1500) and teach smaller class sizes. The school also receives additional money for staff development. *See* Charles T. Clotfelter, Helen F. Ladd & Jacob L. Vigdor, Teacher Mobility: Enemy of Equity? 4 n.6 (Mar. 29, 2008) (unpublished manuscript on file with author) [hereinafter Clotfelter, Ladd & Vigdor, Teacher Mobility]. For the school district’s description of the Equity Plus program, *see* Winston-Salem/Forsyth County Schools—Equity Schools, <http://www.wsfcs.k12.nc.us> (follow “Schools” hyperlink; then follow “Equity+ Schools” hyperlink) (last visited Feb. 9, 2008). Yet, inequality between the two schools remains. *See infra* note 20 and accompanying text.

12. *See Parents Involved*, 127 S. Ct. at 2768 (plurality opinion); *id.* at 2789 (Kennedy, J., concurring in part and in the judgment); *see also infra* Part IV.A (analyzing *Parents Involved*).

13. *See Parents Involved*, 127 S. Ct. at 2827 (Breyer, J., dissenting) (challenging the effectiveness of race-neutral methods to achieve integrated schooling).

14. *Parents Involved*, 127 S. Ct. at 2767–68 (plurality opinion); *see infra* Part IV.A.

15. *Parents Involved*, 127 S. Ct. at 2777 (Thomas, J., concurring) (noting the “outstanding educational results” of predominately African-American schools); *id.* at 2787 n.29 (affirming historically black colleges); *see also* *Missouri v. Jenkins*, 515 U.S. 70, 122 (1995) (Thomas, J., concurring) (“[B]lack schools can function as the center and symbol of black communities, and provide examples of independent black leadership, success, and achievement.”); *United States v. Fordice*, 505 U.S. 717, 748 (1992) (Thomas, J., concurring) (discussing the success of historically black institutions).

And Justice Thomas is not alone. Many groups have embraced at least some student segregation as beneficial for minorities. School districts throughout the country, sometimes in the name of “leaving no child behind,” have specially designed programs (and even a few schools) for minority children.<sup>16</sup> Likewise, minority communities have often embraced school segregation, largely for integration’s failure to deliver educational quality and its assumption that all-minority schools are bad schools.<sup>17</sup> Prominent legal scholars similarly have faulted integration for its harmful effects on minority students and promoted some segregation as a better alternative.<sup>18</sup> As Professor Michelle Adams aptly summarizes: “Integration no longer captivates the progressive imagination; it no longer moves those concerned with eliminating racial inequality.”<sup>19</sup> Integration, in other words, has been divorced from equality and quality of education.

Despite these strong indications that student segregation today, of the non-de jure type, can be acceptable both constitutionally and educationally, I am not ready to bid integration goodbye, as an idea whose

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16. See DERRICK BELL, *SILENT COVENANTS* 165–74 (2004) (discussing private and public schools designed for minority students); Robin D. Barnes, *Black America and School Choice: Charting a New Course*, 106 *YALE L.J.* 2375, 2377–78 (1997) (discussing public schools for African-American boys); Winnie Hu, *To Close Gaps, Schools Focus on Black Boys*, *N.Y. TIMES*, Apr. 9, 2007, at A1 (discussing programs for African-American students in Ossining, New York; Teaneck, New Jersey; Cleveland, Ohio; and Shaker Heights, Ohio). The state of Nebraska has perhaps taken the most extreme approach to this issue, passing legislation (at the request of the state’s sole African-American state legislator) to divide the Omaha school district into three districts—an African-American district, a Latino district, and a white district. See Sam Dillon, *Law to Segregate Omaha Schools Divides Nebraska*, *N.Y. TIMES*, Apr. 15, 2006, at A9. The NAACP and NAACP-LDF have challenged the constitutionality of the legislation in a pending lawsuit. See Complaint, *NAACP v. Heineman*, No. 8:200bcv00371 (D. Neb. May 16, 2006), available at [http://www.naacpldf.org/content/pdf/heineman/NAACP\\_v\\_Heineman.pdf](http://www.naacpldf.org/content/pdf/heineman/NAACP_v_Heineman.pdf).

17. See BELL, *supra* note 16, at 190–91; Harry T. Edwards, *The Journey From Brown v. Board of Education to Grutter v. Bollinger: From Racial Assimilation to Diversity*, 102 *MICH. L. REV.* 944, 958–62 (2004).

18. See Michelle Adams, *Radical Integration*, 94 *CAL. L. REV.* 261, 263–67 (2006) (reviewing the relevant literature by critical race theorists and others criticizing the utility of integration).

19. *Id.* at 264; see also *id.* (“Indeed, there is an increasing belief that integration is no longer a viable social policy, but rather a failed social experiment.”); see also Molly S. McUsic, *The Future of Brown v. Board of Education: Economic Integration of the Public Schools*, 117 *HARV. L. REV.* 1334, 1334 (2004) (concluding that “the influence of *Brown* is thirty years past its peak”); John A. Powell, *The Tensions Between Integration and School Reform*, 28 *HASTINGS CONST. L.Q.* 655, 686 (2001) (“[I]ntegration no longer remains a primary or even secondary goal in education.”); James E. Ryan, *Schools, Race, and Money*, 109 *YALE L.J.* 249, 251 (1999) [hereinafter Ryan, *Schools*] (“It seems unfashionable these days, if not atavistic, to talk seriously about ways to increase racial integration.”); James E. Ryan, *The Supreme Court and Voluntary Integration*, 121 *HARV. L. REV.* 131, 155 (2007) [hereinafter Ryan, *Voluntary Integration*] (“The rest of the country appears to have turned its back on integration.”). Professor Adams herself supports what she describes as “radical integration.” See Adams, *supra* note 18, at 267 (defining radical integration as “a method that tries to integrate the benefits of integration while maintaining the identity of minority groups.”).

importance has come and gone, and accept the segregation in my two local schools. The schools are unequal; the achievement scores, parental financial contributions, and teacher experience level, for example, are higher at the white school than the minority school.<sup>20</sup>

Segregation contributes to that inequality; without it the inequality would be incomprehensible. This Article explores one aspect of the inequality of segregation that is absent from the current literature: the resegregation of teachers. We heard much about the resegregation of students on the fiftieth anniversary of *Brown*.<sup>21</sup> Yet, the status of the desegregation of *teachers*, a longstanding school desegregation duty,<sup>22</sup> was largely ignored.<sup>23</sup> Viewing school segregation through the lens of teacher segregation, I argue that integration of both students and teachers is a necessary first step in achieving equal opportunity; without it, the distribution of resources will be unequal.

In making this argument, I analyze two topics—student segregation and teacher segregation—that are both separate and related. The two are typically found together and are certainly causally interrelated.<sup>24</sup> Yet,

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20. For example, the predominately white school has 85% of its fourth graders at or above grade level in math, while the minority school only has 28%. See Kimberley Park Elementary, High Student Performance NC School Report Cards, 2005–06, <http://www.ncreportcards.org/src/> (follow “Forsyth County, 2005–06” hyperlink; then follow “Kimberley Park Elementary” hyperlink; then follow “High Student Performance” hyperlink); Sherwood Forest Elementary, High Student Performance NC School Report Cards, 2005–06, <http://www.ncreportcards.org/src/> (follow “Forsyth County, 2005–06” hyperlink; then follow “Sherwood Forest Elementary” hyperlink; then follow “High Student Performance” hyperlink). The predominately white school has 94% fully licensed teachers, 45% of teachers with advanced degrees, and only 6% of teachers with less than three years experience. See Sherwood Forest Elementary, Quality Teachers, *supra* (follow “Forsyth county, 2005–06” hyperlink; then follow “Sherwood Forest Elementary” hyperlink; then follow “Quality Teachers” hyperlink). Conversely, the minority school has 84% fully licensed teachers, 8% of teachers with advanced degrees, and 40% of teachers with less than three years experience. See Kimberley Park Elementary, Quality Teachers, *supra* (follow “Forsyth County, 2005–06” hyperlink; then follow “Kimberley Park Elementary” hyperlink; then follow “Quality Teachers” hyperlink).

21. See, e.g., CHARLES T. CLOTFELTER, *AFTER BROWN: THE RISE AND RETREAT OF SCHOOL DESEGREGATION* 67–74 (2004); Gary Orfield & Chungmei Lee, The Civil Rights Project, Harvard University, *Brown at 50: King’s Dream or Plessy’s Nightmare?* (Jan. 2004), available at <http://www.civilrightsproject.ucla.edu/research/reseg04/brown50.pdf>.

22. The Supreme Court ordered that teachers be desegregated along with students in 1968. See *Green v. County Sch. Bd.*, 391 U.S. 430, 435 (1968) (requiring disestablishment of continued segregation in faculty assignment); *infra* note 36 and accompanying text (discussing the judicial imposition of this duty). Further, the federal government at the same time threatened the termination of federal funds if schools did not do so. See *infra* note 37 and accompanying text (describing the executive branch’s involvement in imposing and enforcing this duty).

23. I found only a single chapter, in a single book, on the subject. See Mary Hatwood Futrell, *The Impact of the Brown Decision on African American Educators*, in *THE UNFINISHED AGENDA OF BROWN V. BOARD OF EDUCATION* 79–96 (James Anderson et al. eds., 2004) (discussing the immediate impact of *Brown* on African-American teachers and principals).

24. See *infra* notes 40–42, 84–85, 90 and accompanying text.

teacher segregation raises distinct employment issues not present in student segregation, which also has its own unique remedies such as busing. For the purposes of simplicity, when I talk about segregated schools, I am referencing both student and teacher segregation, the typical pattern of segregation in schools. When I mean to reference only one form of segregation, I specify either student or teacher segregation.

My argument proceeds in four parts. Part I puts the goal of desegregating teachers in historical context. In the aftermath of *Brown*, courts routinely ordered the desegregation of teachers. Significant resistance met their orders, for reasons that sound familiar today. That history is part of our present.

Part II is the Article's empirical study and includes my original analysis of the distribution of teachers and students in 157 school districts throughout the United States. The analysis exposes for the first time in recent history the profound segregation of African-American, Latino, and white teachers in many, but not all, school districts.<sup>25</sup> Teachers today are much more likely to teach students who share their race/ethnicity, continuing the pattern of de jure segregation in education.

Part III exposes the truth about the segregation of teachers. Today's school segregation, as was true in the times of de jure segregation, impedes structural equality. The segregation of teachers today means that white students and students of color have very different access to a key educational resource—experienced teachers.<sup>26</sup> Those who disconnect school integration from quality of education are ignoring the inequality in resources that goes hand in hand with segregation.

The Supreme Court has a very different perception of the meaning of school segregation. In a groundbreaking opinion last term, *Parents Involved*, the Court deemed student integration of no constitutional

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25. I know of only one national analysis of the demographic distribution of teachers, the famous Coleman Report from 1966. JAMES S. COLEMAN ET AL., EQUALITY OF EDUCATIONAL OPPORTUNITY 126–30 (1966). Accounts of individual school districts' attempts to desegregate usually include an analysis of the progress in desegregating teachers. See, e.g., *Tasby v. Gonzalez*, 972 F. Supp. 1065 (N.D. Tex. 1997) (examining faculty assignment in Dallas). Yet, a national analysis of the issue is almost completely absent. The Harvard Civil Rights Project has begun a survey of over 1000 American teachers, which includes an analysis of teacher segregation by region. See Erica Frankenberg, The Civil Rights Project, Harvard University, *The Segregation of American Teachers* 10 tbl.1 (Dec. 2006), available at [http://www.civilrightsproject.ucla.edu/research/deseg/segregation\\_american\\_teachers12-06.pdf](http://www.civilrightsproject.ucla.edu/research/deseg/segregation_american_teachers12-06.pdf).

26. I thus let others demonstrate the value of integration for white students, which is equally important to document. See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2798 n.3 (2007) (Stevens, J., dissenting) (“While the focus of our opinions is often on the benefits that minority schoolchildren receive from an integrated education, children of *all* races benefit from integrated classrooms and playgrounds.”) (citations omitted).

consequence so long as individuals are not treated differently because of their skin color. I argue that this approach is wrong in Part IV. The Equal Protection Clause must, at its core, recognize that segregation is antithetical to structural equality because it guarantees an unequal distribution of resources. Until we as a society recognize the transformative potential of integration, the Court's refusal to do so is, however, of little practical consequence. We need a twenty-first century call for integration from the public itself. Integration may be difficult, but ignoring its transformative power locks us into repeating our pattern of racial hierarchy and subordination.

### I. THE HISTORY OF DESEGREGATING TEACHERS

Because desegregating teachers has received no recent inquiry, this Part examines the legal history of efforts to desegregate teachers. It starts with why courts ordered the desegregation of teachers in the first place<sup>27</sup> and then turns to the resistance to, and practical effects of, desegregating teachers.<sup>28</sup> As we will see, this history is part of our present. Many of the justifications for segregating teachers in the mid-twentieth century continue to be advocated today: minority students need minority teachers as role models; teachers prefer to teach students of their own race/ethnicity; and school districts are responding to teacher preferences in times of teacher shortage.<sup>29</sup> Today's explanation for segregation is rooted, in other words, in our de jure past.

#### A. *The Idea*

[T]he presence of all Negro teachers in a school attended solely by Negro pupils in the past denotes that school a "colored school" just as certainly as if the words were printed across its entrance in six-inch letters.

—Judge Thomas J. Michie  
*Brown v. County School Board of Frederick County,*  
*Virginia* (1965)<sup>30</sup>

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27. See *infra* Part I.A.

28. See *infra* Part I.B–C.

29. See *infra* Parts III.A, III.B.2.

30. 245 F. Supp. 549, 560 (W.D. Va. 1965).

Just as African-American, Latino, and white students were once segregated, so were their teachers.<sup>31</sup> As late as 1966, not one African-American teacher in the states of Alabama, Mississippi, or Louisiana taught in a de jure white school, even though such schools had admitted by then a few African-American students.<sup>32</sup> The practice was not just a Southern one; Northern schools segregated their teachers as well,<sup>33</sup> although not to the degree found in Southern white schools.<sup>34</sup> Similarly, Latino teachers were concentrated in Latino schools in the Southwest.<sup>35</sup>

In the late 1960s, the federal judiciary<sup>36</sup> and Department of Health, Education, and Welfare (HEW)<sup>37</sup> began requiring school districts to

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31. Unlike the segregation of students, however, I found no evidence that the segregation of teachers was mandated by law.

32. Hal R. Lieberman, *Teachers and the Fourteenth Amendment—The Role of the Faculty in the Desegregation Process*, 46 N.C. L. REV. 313, 325 (1968); see also Frank M. Johnson, Jr., *School Desegregation Problems in the South: An Historical Perspective*, 54 MINN. L. REV. 1157, 1159 (1970).

33. See MICHELE FOSTER, *BLACK TEACHERS ON TEACHING*, at xxv–xxviii (1997) (discussing teacher segregation in the North); Peter A. Janssen, *The Next Step: Teacher Integration*, THE REP. 32 (Nov. 3, 1966) (reporting that in the North “Negroes teach almost exclusively in Negro schools and whites in white schools”).

34. In 1963, only 2.5% of the teachers at white Northern schools were African American. Janssen, *supra* note 33, at 33. The corresponding percentage for African-American schools, by contrast, was 65%. *Id.*

35. For example, a ten-month survey of Latino education in Texas in 1972–73 concluded that “Chicano teachers in Texas are segregated even more than are Chicano pupils. Eighty percent of the teachers, compared to two-thirds of the students, are in predominately Chicano schools.” Jorge C. Rangel & Carlos M. Alcalá, Note, *Project Report: De Jure Segregation of Chicanos in Texas Schools*, 7 HARV. C.R.-C.L. L. REV. 307, 323 (1972); see also *Cisneros v. Corpus Christi Indep. Sch. Dist.*, 467 F.2d 142, 151 (5th Cir. 1972) (noting that Latino teachers were more segregated than Latino students). White teachers often, however, taught in the Latino schools. Some school districts with significant Mexican-American populations had no Latino teachers. Rangel & Alcalá, *supra*, at 325, 372. Perhaps most notably, President Lyndon B. Johnson taught at the Mexican school in Cotulla, Texas. See ROBERT A. CARO, *THE YEARS OF LYNDON JOHNSON: THE PATH TO POWER* 164–73 (1982).

36. See *Green v. County Sch. Bd.*, 391 U.S. 430, 435 (1968) (requiring an end to segregation in faculties and staff as part of eliminating the racial identity of schools); see also *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 19 (1971) (reaffirming that courts have the equity power to reassign teachers to achieve “a particular degree of faculty desegregation”); *United States v. Montgomery County Bd. of Educ.*, 395 U.S. 225, 232–33 (1969) (affirming district court order that established numerical requirements for the distribution of teachers).

37. Through Title VI of the 1964 Civil Rights Act, Congress required that school districts desegregate or lose their federal funding. 42 U.S.C. § 2000(d) (2000). As required by statute, HEW issued guidelines for determining Title VI compliance before the disbursement of federal funds. The first guidelines were issued in April 1965 and were modest in faculty desegregation. School districts were to take steps to eliminate segregation, but the required steps were minimal. See 2 NORMAN DORSEN ET AL., *EMERSON, HABER, AND DORSEN’S POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES* 752 (1979) (requiring only “‘biracial faculty meetings and training programs’”) (citations omitted). The March 1966 and 1967 guidelines required “‘significant progress’” toward desegregation of faculties, but set no time requirement. James R. Dunn, *Title VI, the Guidelines and School Desegregation in the South*, 53 VA. L. REV. 42, 60 (1967) (citations omitted). Many school districts ignored the guidelines on faculty desegregation, and still received federal funding. See GARY ORFIELD,

desegregate their teachers as part of their desegregation duty, and desegregating teachers became as standard a remedy as desegregating students. Desegregating teachers requires an even distribution, such that each school generally reflects the school district's teaching staff. That is, if the school district has a teaching staff fairly evenly split between white and African-American teachers, then each school would be roughly evenly divided as well.<sup>38</sup> In other words, no one has to be hired, promoted, or fired to desegregate teachers—or even bussed. The matter is exclusively one of where current teachers will teach.<sup>39</sup>

Courts rarely spoke of integrating teachers as a means of improving education. Instead, the purpose was to transform the educational system by ending the racial identity of schools.<sup>40</sup> The demographics of the teachers

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THE RECONSTRUCTION OF SOUTHERN EDUCATION: THE SCHOOLS AND THE 1964 CIVIL RIGHTS ACT 250 (1969) (finding that in 1966, “[f]ew school divisions had met even the modest Federal standard of one teacher moving across race lines for each school in the system.”). Those that did integrate their faculties did so in ways more palatable to whites, such as assigning African Americans to teach “physical education, home economics, or music.” Note, *School Desegregation and the Office of Education Guidelines*, 55 GEO. L.J. 325, 336 (1966). By 1968, the regulations set specific goals and a time limit by which faculties had to be desegregated for schools to receive federal education money. See ORFIELD, *supra*, at 339.

38. The federal government always allowed a range in the demographic distribution to meet the requirements of desegregation. A common standard was allowing the distribution of teachers to fall within a +/- 15% range of the overall teaching population. See, e.g., *United States v. Unified Sch. Dist. No. 500*, 974 F. Supp. 1367, 1379–80 (D. Kan. 1997) (collecting cases).

39. Although many make a distinction between desegregation and integration, I use the terms interchangeably here. Technically the terms have different meanings. A school district can have a legal duty to desegregate to the extent practicable by eliminating the vestiges of discrimination. See *Freeman v. Pitts*, 503 U.S. 467, 485–86 (1992). This legal duty may not require actual integration if the segregation is caused by nondefendant forces. See *id.* at 496. Integration, on the other hand, is the outcome of not being able to identify a school by race. I use the terms interchangeably here because I am interested in the value of desegregation that results in integration. By neither term do I require an absolutely equal demographic distribution of students or teachers. See *infra* notes 72–76 and accompanying text.

40. See, e.g., *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836, 892 (5th Cir. 1966) (“Yet until school authorities recognize and carry out their affirmative duty to integrate faculties as well as facilities, there is not the slightest possibility of their ever establishing an operative non-discriminatory school system.”), *aff’d per curiam*, 380 F.2d 385 (5th Cir. 1967) (en banc); *Clark v. Bd. of Educ.*, 369 F.2d 661, 669 (8th Cir. 1966) (“[F]aculty segregation encourages pupil segregation and is detrimental to achieving a constitutionally required non-racially operated school system.”); *Wheeler v. Durham City Bd. of Educ.*, 363 F.2d 738, 740 (4th Cir. 1966) (en banc) (“[R]emoval of race considerations from faculty selection and allocation is, as a matter of law, an inseparable and indispensable command with the abolition of pupil segregation in public schools.”).

At least one court reasoned that desegregation of teachers also furthered power sharing. *Dowell v. Sch. Bd.*, 219 F. Supp. 427, 445 (W.D. Okla. 1963) (“[T]he School Board . . . should make a good faith effort to integrate the faculty, in order that both white and Negro students would feel that their color was represented upon an equal level and that their people were sharing the responsibility of high-level teaching.”). School desegregation in general was to promote democratic ideals. See Note, *Grade School Segregation: The Latest Attack on Racial Discrimination*, 61 YALE L.J. 730, 731 n.5 (1952) (“It has often been observed that segregated schools block the Negro child’s opportunity to share in

helped establish a school's racial identity, which in turn indicated to families which students belonged there.<sup>41</sup> Desegregating teachers was thus part of erasing a school's racial identity, so that we had not a "'white' school and 'Negro' school, but just schools."<sup>42</sup> That purpose cannot, however, be divorced from the reality in which the orders were issued—segregated schooling meant stark inequalities.

### *B. Resistance*

The most difficult problem in the desegregation process is the integration of faculties.

—Judge John Minor Wisdom

*United States v. Jefferson County Board of Education* (1966)<sup>43</sup>

Most of the North and South found desegregating teachers exceedingly difficult—more difficult than even student segregation.<sup>44</sup> People resisted

democratic experience.”) (citations omitted); *see id.* at 734 n.23 (“Separateness, by denying full participation, necessarily compromises the goals of self-realization, human relationship, and civil responsibility.”).

41. As early as 1966, reports documented a connection between student desegregation and faculty desegregation. For example, the Coleman Report demonstrated that “the extent of teacher desegregation seems to be directly proportional to the progress of pupil desegregation; where Negro students are less likely to be taught by Negro teachers they are also more likely to be in classes with mostly white classmates.” Lieberman, *supra* note 32, at 325; *see also* DORSEN, *supra* note 37, at 752 (noting the connection between successful freedom-of-choice plans and faculty desegregation); Dunn, *supra* note 37, at 83 (“[R]acial composition of faculties may prove to be the key to school desegregation in the South.”); Johnson, *supra* note 32, at 1171 (reporting that freedom-of-choice plans were allowed in Alabama only if “faculties be integrated on a one to six basis”); Alan Stuart Weitz, *Race and Equal Educational Opportunity in the Allocation of Public School Teachers*, 39 GEO. WASH. L. REV. 341, 352 (1970) (“Where such [freedom-of-choice] plans are utilized, it is both sensible and statistically proven that a segregated teacher staff is a factor influencing student choice of schools along racially imbalanced or segregated lines.”) (footnote omitted).

42. *Green v. County Sch. Bd.*, 391 U.S. 430, 442 (1968). This phrase was used months earlier by HEW’s 1968 Guidelines: “Compliance with the law requires integration of faculties, facilities and activities, as well as students, so that there are no Negro . . . schools and no white schools—just schools.” ORFIELD, *supra* note 37, at 339 (citations omitted). The phrasing was also found in an earlier Fifth Circuit opinion. *See United States v. Jefferson County Bd. of Educ.*, 380 F.2d 385, 389 (5th Cir. 1967) (en banc) (per curiam).

43. *Jefferson County*, 372 F.2d at 892; *see also* Kelley v. Altheimer, 378 F.2d 483, 493 (8th Cir. 1967) (“[T]o eliminate segregation of the faculty . . . may well be the most difficult problem in the desegregation process.”); ORFIELD, *supra* note 37, at 138 (discussing the difficulty of desegregating faculties in the South); J. HARVIE WILKINSON III, FROM *BROWN* TO *BAKKE* 96 (1979) (describing desegregation of teaching staffs as “the least visible and most flammable part of the entire school picture”); Janssen, *supra* note 33, at 32 (“Teachers, the reasoning goes, are employed by their school districts and in most cases can be sent wherever needed. In practice, however, it is not so easy.”); Note, *Race-Based Faculty Hiring and Layoff Remedies in School Desegregation Cases*, 104 HARV. L. REV. 1917, 1919 (1991) (“[E]fforts to place black teachers in formerly all-white schools faced even more intense opposition than did student reassignments.”).

for reasons that sound similar to concerns expressed today. At its core, desegregating teachers meant radical changes to many people's ideas about the racial and ethnic distribution of power and about which teachers belonged where. Teaching is a position of authority, and segregation was all about maintaining power and privilege for whites, including white children. African-American and Latino parents, too, often expressed a preference for entrusting the education of their children to teachers in their own communities.

Specifically, white parents often doubted the competency of minority teachers and generally resisted giving a minority teacher power over a white student.<sup>45</sup> Similarly, minority parents often feared the relinquishment of what direct control minority teachers had over the education of minority children to white teachers.<sup>46</sup> Desegregating teachers meant that minority communities had to place the education of their children in the hands of more whites, who might not have had the best of intentions toward their children. Teachers resisted their desegregation as

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44. See *supra* note 43 and accompanying text.

45. See MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW 182 (1994) (characterizing Chief Justice Vinson's questions during the first oral argument in *Brown* as indicating "his unstated assumption that white parents would not let African-Americans teach their children."); WILKINSON, *supra* note 43, at 96 ("Many white parents found it difficult enough to accept black classmates for their children, let alone a black teacher. Was a black to be permitted to discipline their offspring and teach them 'nigra talk'?"). The State of Alabama found the idea so offensive that it legislated that a school district that desegregated its faculties (against the state's wishes), would be given money to hire additional white teachers "so that students could have a choice of the race of their teacher." Johnson, *supra* note 32, at 1170.

Desegregation also raised the possibility that an African-American male principal would supervise a white female teacher. See William Jefferson, *School Desegregation and the Black Teacher: A Search for Effective Remedies*, 48 TUL. L. REV. 55, 63 (1973) ("Resistance to black principals supervising white teachers has been far stronger than resistance to blacks teaching white students. When desegregation comes, black principals are frequently the first to go.").

46. Starting as early as the Civil War, African Americans preferred African-American teachers, and viewed their replacement of white teachers as a moral and community victory. RICHARD KLUGER, SIMPLE JUSTICE 105, 379, 435 (1975) (describing how some blacks before *Brown* preferred black teachers for their children); Adam Fairclough, *The Costs of Brown: Black Teachers and School Integration*, 91 J. AM. HIST. 43, 47 (2004) [hereinafter Fairclough, *Costs of Brown*] ("From the earliest days of freedom, many blacks asked for black teachers."); Adam Fairclough, "Being in the Field of Education and Also Being a Negro . . . Seems . . . Tragic": *Black Teachers in the Jim Crow South*, 87 J. AM. HIST. 65, 71 (2000) [hereinafter Fairclough, *Jim Crow South*] (noting the economic and pedagogical gains from the change to black teachers for black students). This was not merely a Southern phenomenon either; Professor Davison Douglas' work on Northern segregation documents amply the preferences of Northern African Americans for segregated schools and for African-American teachers. DAVISON M. DOUGLAS, JIM CROW MOVES NORTH 48–50, 109–12, 173–74, 177–80 (2005) (detailing the preferences of some Northern African Americans to separate schools after the Civil War and into the early twentieth century).

well. White teachers<sup>47</sup> and minority teachers<sup>48</sup> often preferred to teach students who shared their race/ethnicity.

School districts also shared these concerns, contending that minority teachers were incompetent to teach white students,<sup>49</sup> and that minority teachers were better teachers for minority students.<sup>50</sup> School districts further argued that in times of teacher shortage, they had no choice but to grant teachers their preferred school.<sup>51</sup> In sum, parents, teachers, and

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47. See *United States v. Bd. of Educ.*, 396 F.2d 44, 47 n.8 (5th Cir. 1968) (describing the results of a survey of both African-American and white teachers in Bessemer, Alabama that demonstrated that few teachers would volunteer to change schools, but that whites would not take the job even if reassigned, while some African Americans would); *Jefferson County*, 372 F.2d at 849 (“Many white teachers prefer not to teach in integrated public schools.”); *WILKINSON*, *supra* note 43, at 96 (“Many white teachers, moreover, had their prejudices about teaching black schoolchildren. Some left teaching altogether at the onset of integration, and others went to private schools.”); *Janssen*, *supra* note 33, at 33 (detailing why white teachers in 1966 Philadelphia preferred to teach white students); *Lieberman*, *supra* note 32, at 361 (“Teachers are simply loathe to teach the underprivileged in ‘dark ghettos.’”); *Weitz*, *supra* note 41, at 355 (describing reasons why white teachers do not want to teach in minority schools).

48. See *KLUGER*, *supra* note 46, at 391–92 (noting the preferences of some black teachers for segregation); *WILKINSON*, *supra* note 43, at 97 (“[B]lack teachers . . . wondered too, after years with all-black charges, how well they would teach in integrated schools and whether white students and parents would accord them proper respect.”); Note, *Desegregation of Public School Faculties*, 51 *IOWA L. REV.* 681, 682 (1966) (“[M]any Negro teachers do not want to teach with white teachers.”); see also *Janssen*, *supra* note 33, at 33 (detailing why African-American teachers in 1966 Philadelphia preferred to teach minority students).

49. See *Cato v. Parham*, 403 F.2d 12, 14–15 (8th Cir. 1968) (noting that the school district claimed that African-American teachers’ “speech dialect and communication” styles made them ineffective teachers of white students); *Smith v. Bd. of Educ.*, 365 F.2d 770, 781 (8th Cir. 1966) (“According to [the Board of Education] negro teachers do not understand many of the problems of white pupils; this relates to the ability of a teacher to communicate or to establish rapport with a pupil; graduates of certain Arkansas negro colleges, ‘generally speaking’, are inferior to graduates of other Arkansas colleges whose student bodies are white; these communication problems are rooted in differing ‘speech patterns.’”).

50. See *Morgan v. Hennigan*, 379 F. Supp. 410, 460 (D. Mass. 1974), *aff’d sub. nom.* *Morgan v. Kerrigan*, 509 F.2d 580 (1st Cir. 1974) (rejecting school district’s role model argument to justify teacher segregation); *Lieberman*, *supra* note 32, at 332 (“Faculty segregation may reflect the difficulty of recruiting teachers, practical accommodation to the wishes of teachers, or someone’s educational notions.”); *Weitz*, *supra* note 41, at 356 (“[W]hen a court requires a specific faculty racial quota in each school, it must recognize the cost entailed in ignoring relevant educational considerations for both white and Negro students.”). Federal courts generally rejected the role model theory for justifying segregation of minority teachers. See, e.g., *Reed v. Rhodes*, 422 F. Supp. 708, 787 (D. Ohio 1976), *remanded without opinion*, 559 F.2d 1220 (6th Cir. 1977); *Arthur v. Nyquist*, 415 F. Supp. 904, 946 (W.D.N.Y. 1976), *reaff’d after reconsideration*, 429 F. Supp. 206 (W.D.N.Y. 1977), *aff’d in part, rev’d in part*, 573 F.2d 134 (2d Cir. 1978). Later, the Supreme Court rejected the idea as well. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 275–76 (1986) (plurality opinion) (“The role model theory allows the Board to engage in discriminatory hiring and layoff practices long past the point required by any legitimate remedial purpose. . . . Moreover, because the role model theory does not necessarily bear a relationship to the harm caused by prior discriminatory hiring practices, it actually could be used to escape the obligation to remedy such practices by justifying the small percentage of black teachers by reference to the small number of black students.”).

51. See *Hobson v. Hansen*, 269 F. Supp. 401, 502 (D.D.C. 1967) (“But if any truth is axiomatic,

school districts strongly resisted the integration of teachers even though it would have furthered the democratic ideal of equality through the sharing of resources.

These rationales for segregating teachers sound remarkably similar to concerns in the twenty-first century. The role model theory for minority learners continues,<sup>52</sup> as do concerns about teacher shortages and teacher qualifications.<sup>53</sup> In other words, the terms of the current debate over desegregating teachers share much with the debate that took place fifty years ago and demonstrate how much our common perceptions are rooted in Jim Crow segregation.

### C. African-American Job Loss

Desegregation had a profound, immediate impact on African-American teachers and principals. Many white schools had excess capacity, and their acceptance of minority students often meant that the minority school, typically physically inferior to the white school, was closed as excess capacity.<sup>54</sup> Too often, those teachers and principals working in the closed

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it is that the Negro *students'* equal protection rights to an integrated faculty cannot be undermined or thwarted by the racially induced preferences of the teachers, who after all are minor public officials whose actions must therefore pass constitutional muster.”); Lieberman, *supra* note 32, at 365 (“Both in the South and in the North, where ‘desegregation’ results in a dual system of integrated schools and Negro schools, racial and unequal allocation of teachers will continue as the only means to prevent even more acute teacher shortages.”); Weitz, *supra* note 41, at 343 (wondering whether “the control which a school board or court can exercise over the employment and placement of teachers is limited primarily by the shortage of well-qualified personnel and their resultant mobility and choice of employment.”) (footnote omitted). For an analysis of the current literature on teacher preferences, see *infra* Part III.B.2.

This occurred not just in the South; Los Angeles, New York City, and Philadelphia ran into serious teacher resistance to desegregation. See Janssen, *supra* note 33, at 32. Northern teachers’ unions went so far as to threaten strikes if forced to integrate faculties. *Id.* Relatedly, school districts reported drops in their applications when integration was attempted. Los Angeles had a thirty-eight percent drop in applications when, in 1966, it attempted to integrate its faculties. *Id.* In Philadelphia, the number of new teachers willing to take assignments to facilitate integration decreased and even among the teachers willing to take the assignment a high percentage quickly quit. *Id.* at 33. See also Jefferson, *supra* note 45, at 59 (recounting how white teachers left the Louisiana public school system in the late 1960s and early 1970s because of desegregation, but were replaced with other white teachers).

52. See, e.g., ROY L. BROOKS, INTEGRATION OR SEPARATION? 227–28 (1996) (describing the value African-American teachers bring to African-American students); see also *infra* note 103 and accompanying text.

53. See, e.g., CARNEGIE FORUM ON EDUC. AND THE ECON., A NATION PREPARED: TEACHERS FOR THE 21ST CENTURY 31 (1986).

54. See Note, *Discrimination in the Hiring and Assignment of Teachers in Public School Systems*, 64 MICH. L. REV. 692, 693 (1966).

schools could not compete against those at the formerly white schools on the standards set by school boards, and were not retained.<sup>55</sup>

Although African-American teachers and principals often appealed successfully to federal courts for protection,<sup>56</sup> the numbers speak for themselves. One survey concluded that almost 40,000 African-American teachers were unemployed by 1972 because of *Brown*.<sup>57</sup>

## II. THE CURRENT SEGREGATION OF TEACHERS

If school administrators were truly colorblind and teacher assignments did not reflect the color of the teacher's skin, the law of averages would eventually dictate an approximate racial balance of teachers in each within a system.

—President Richard Nixon  
Televised Address (1970)<sup>58</sup>

55. Although the NAACP recognized that African-American teachers and principals might lose their jobs under desegregation, "it was uncompromising in its view that the elimination of segregated schools should take priority over the career interests of black educators." Fairclough, *Jim Crow South*, *supra* note 46, at 87; *see also* BELL, *supra* note 16, at 125 ("In all too many cases, black faculty and administrators . . . were secondary to our priority: desegregate the schools."); Fairclough, *Costs of Brown*, *supra* note 46, at 53 ("Looking back, however, the former NAACP attorney Constance Baker Motely believed that the NAACP had simply overestimated the extent to which blacks shared its uncompromising opposition to segregated schools."). The NAACP recognized this possibility early on, and actively campaigned for the hiring of African-American teachers for integrated schools as a way to build support for its quest for student integration. *See* DOUGLAS, *supra* note 46, at 189–90; *see also* FOSTER, *supra* note 33, at xxxv–xxxvii (discussing attempts in the African-American community in the 1950s to address the expected loss of African-American teachers).

56. For a discussion of how the courts could have done a better job of protecting teachers, *see* Jefferson, *supra* note 45, at 71–84 (detailing how the courts and HEW failed to protect black teachers and proposing a standard to redress the problem).

57. JACQUELINE JORDAN IRVINE, *BLACK STUDENTS AND SCHOOL FAILURE* 34 (1990) (in the South between 1954 and 1972, 39,386 black teachers lost their teaching jobs); *see also* KLUGER, *supra* note 46, at 379, 381 (recounting how teachers in Topeka, Kansas lost their jobs after *Brown*); Fairclough, *Costs of Brown*, *supra* note 46, at 54 ("The main casualties of integration were the black schools and the men who had run them. . . . In Alabama, the number of black principals declined from 210 to 57, in Virginia from 170 to 16."); Russell W. Irvine & Jacqueline Jordan Irvine, *The Impact of the Desegregation Process on the Education of Black Students: Key Variables*, 52 J. NEGRO EDUC. 410, 417 (1983) (reporting that "there was a ninety percent reduction in the number of black principals in the South between the years 1964 and 1973, dropping from over 2000 to less than 200"); Jefferson, *supra* note 45, at 58 (concluding for Louisiana that "white teachers thrived as white enrollment declined; contemporaneously, black teachers suffered as black enrollment flourished"); Johnson, *supra* note 32, at 1165 (reporting that 500 North Carolina black teachers lost their jobs in 1965); Sabrina Hope King, *The Limited Presence of African-American Teachers*, 63 REV. EDUC. RES. 115, 135 (1993) ("[B]etween 1954 and 1965, as an immediate consequence of desegregation, 38,000 African-American teachers lost their positions as teachers and administrators in 17 states.").

58. President Richard Nixon, Statement about Desegregation of Elementary and Secondary Schools (Mar. 24, 1970), <http://www.presidency.ucsb.edu/ws/print.php?pid=2923>.

Despite the widespread attention paid to the resegregation of students and the countless court orders to desegregate teachers, we know surprisingly little about the current demographic distribution of teachers.<sup>59</sup> This Part unearths that information through an original, empirical Teacher Distribution Study of 157 school districts. The study exposes the hidden depths of segregation; many school districts face not just segregated student bodies, but segregated teaching staffs as well.

### A. Methodology

Teachers are certainly not as segregated as they were forty years ago. In 1966, not one African-American teacher taught in a white school in Louisiana.<sup>60</sup> Forty years later, only one percent of Louisiana schools had no African-American teacher, and no school had only African-American teachers.<sup>61</sup> Yet, my empirical study exposes how little progress—beyond overcoming the stark segregation posed by de jure segregation—we have achieved in evenly distributing teachers. Matching the teaching staffs to the student body was a hallmark pattern of both de jure and de facto segregated schools, and this study reveals that the matching between students and teachers often remains true today.

#### 1. School Districts Studied

One relatively easy way to reveal this pattern would be to demonstrate that urban, predominately minority school districts have more minority teachers than surrounding suburban, predominately white school districts. For example, Dallas Independent School District (“DISD”), in Texas, last year educated 160,969 children, only 5.3% of whom were white. Its teaching population was also predominately minority, with 57.5% of its teachers identified as minority.<sup>62</sup> Highland Park Independent School District (“HPISD”), carved out almost in the middle of DISD, last year

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59. For example, the Civil Rights Project/Proyecto Derechos Civiles at UCLA’s Graduate School of Education and Information Studies (formerly housed at Harvard University) frequently issues reports on demographic distribution of students. *See, e.g.*, Orfield & Lee, *supra* note 21. Only within the last year has it started to analyze the demographic distribution of teachers. *See* Frankenberg, *supra* note 25.

60. *See supra* note 32 and accompanying text.

61. For the 1279 schools with teacher and student enrollment data, only 146 had no African-American teachers. Technical Appendix, Louisiana Data & Analysis, *supra* note 5. All the schools had at least one white teacher. *See id.*

62. *See* Dallas ISD, 2005–06 Academic Excellence Indicator System § II, 1, 11, <http://www.tea.state.tx.us/perfreport/aeis/2006/district.srch.html> (follow “Dallas ISD in Dallas County” hyperlink).

served 6240 students, only 3.4% of whom were African American or Latino.<sup>63</sup> Similarly, its teaching population was only 1.3% minority.<sup>64</sup> These school districts, of close proximity, were highly segregated by both their teachers and students.

While the matching between students and teachers reflected in these two school districts is likely repeated in many other suburban and urban school districts, this Article puts aside this type of segregation. The failure to achieve integration here is too easy a target. The Supreme Court has largely validated the student segregation in these two school districts, and the segregation in these types of school districts is all too well known.<sup>65</sup>

More interesting, and the focus of this study, are places where integration is possible according to the demographic makeup of the school district.<sup>66</sup> The existence of segregation here is often absent from policy debates about school resegregation, where the focus is on predominately minority school districts. Heterogeneous school districts are, however, more telling as to the prevalence and consequences of segregation. Here, student segregation at the school building level is not a foregone conclusion, and a school district's distribution of resources would be fairly equal by school building. For example, teacher segregation would not be due to any difference in salaries; all would be paid according to the same pay scale. Yet, this Article reveals teacher segregation and inequality even in these types of school districts. In doing so, it reveals how prevalent and harmful school segregation is, even in places where it would not be predicted. My systematic, empirical analysis of these school districts reveals the true magnitude of school segregation.

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63. Highland Park ISD, 2005–06 Academic Excellence Indicator System § II, 1, <http://www.tea.state.tx.us/perfreport/aeis/2006/district.srch.html> (follow “Highland Park ISD in Dallas County” hyperlink). For a map of the school districts in Dallas county, see Texas School District Locator, <http://Deleon.tea.state.tx.us/sdl/forms/mapwin.aspx> (enter “Dallas” in county name box).

64. See Highland Park ISD, *supra* note 63.

65. The Supreme Court has greatly restricted the availability of inter-district remedies for desegregating predominately one-race/ethnicity school districts. See *Milliken v. Bradley*, 418 U.S. 717, 744–45 (1974); Erwin Chemerinsky, *Lost Opportunities: The Burger Court and the Failure to Achieve Equal Educational Opportunity*, 45 MERCER L. REV. 999, 1001–03 (1994). This segregation has affected a high percentage of minority students, and is responsible for much of the current student segregation on a national level. See generally *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2802 (2007) (Breyer, J., dissenting) (“Today, more than one in six black children attend a school that is 99–100% minority.”).

66. This approach obviously excludes parts of the United States that are highly homogeneous. For example, Iowa is 87% white in its student population; Minnesota, 79%; Nebraska, 78%; and Wisconsin, 78%. NAT'L CTR. FOR EDUC. STATISTICS, STATE PROFILES (2004), available at <http://nces.ed.gov/nationsreportcard/states/>.

To analyze school districts where school-building integration is demographically feasible, this Article examines two sets of school districts. One set is the 115 school districts that make up the state of North Carolina, which statewide has relatively diverse student bodies and teaching staffs<sup>67</sup> and is generally recognized as one of the more integrated states.<sup>68</sup> Segregation is anything but a foregone conclusion in North Carolina.

The other set is forty-two school districts in six states: California (six school districts); Louisiana (ten); New Jersey (six); New Mexico (seven); Ohio (four); and Texas (nine).<sup>69</sup> These forty-two districts were selected because of their relatively diverse teaching and student populations, as compared to other districts in their respective states.<sup>70</sup> These districts indicate that the patterns uncovered in North Carolina also hold true elsewhere.

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67. Statewide the student population for the year studied was 31.4% African American, 8.4% Latino, and 56.6% white. Technical Appendix, North Carolina Data & Analysis, *supra* note 5. The statewide teaching body is 13.8% African American, 1.3% Latino, and 80.8% white. *Id.* Further, few school districts are overwhelmingly of one race/ethnicity. Only twenty-two school districts are 85% or more white in student population, and three are 85% or more African American in student population. *Id.*

68. See Orfield & Lee, *supra* note 21, at 28–32.

69. A large factor in whether a state was studied was also the availability of data; some states maintain the data online, while others will make it readily available. By contrast, other states do not maintain such data or will not make it readily available.

70. I sought school districts where integration is statistically most possible, and included school districts that, compared to the others in its state, had a higher diversity in their teaching and student populations. The specific demographics that made up a diverse school district for each state differed according to the overall demographics of that state. I also tried to avoid small school districts, where all middle and high school students almost always attend the same school and integration (rather than segregation) is a foregone conclusion. For example, in California, I randomly chose three school districts from Northern California and three from Southern California that had less than 86% white teaching staffs and at least 42% white student population. In Louisiana, I picked all school districts that had at least 10,000 students, no more than 68% white students, and at least 10% black teaching staffs. In New Mexico, the school districts studied all had at least 6,000 students, at least 34% white students, and at least 10% Latino teachers. I recognize the obvious arbitrariness to some of these selections, yet the arbitrariness should not affect the overall conclusion that teachers are segregated in many school districts. Because the data was readily available, the Technical Appendix also includes analyses of all school districts in the states of Louisiana, New Jersey, and New Mexico. Technical Appendix, Louisiana Data & Analysis, New Jersey Data & Analysis by School District, New Mexico Data & Analysis, *supra* note 5. The statewide data is consistent with the selected school districts presented herein. *Id.*

## 2. *Measuring Teaching Segregation*

Many methods can measure the segregation of teachers.<sup>71</sup> One way, and the approach of my Teacher Distribution Study, is to ask to what degree the pattern of de jure segregation remains true today. That is, using student and teacher assignment data from state boards of education, I ask whether teachers in a given school district are likely to teach in schools with students who share their race/ethnicity. This captures the question of whether teachers are more likely to teach students who share their race/ethnicity, the pattern of de jure segregation.

This question can be answered by odds ratios which compare the probability of a white student having a teacher of a particular race/ethnicity with the probability of an African-American or Latino student having that same teacher at the school-building level.<sup>72</sup> An odds ratio makes this calculation based on the racial/ethnic distribution of teachers and students by school building in a given school district. The resulting odds ratio reveals the extent to which racial/ethnic matching happens in schools between students and teachers. Similarly, odds ratios can measure student segregation by calculating the probability of African-American, Latino, and white students attending school together.

An odds ratio of 1.0 indicates that the probability was equally likely in both groups, and that integration had been achieved. An odds ratio of 1.50 indicates that one student group had a 50% greater chance of having the teacher studied than the other student group. That is, a 1.50 odds ratio comparing the chances of an African-American student having an African-American teacher to that of a white student indicates that an African-American student had a 50% greater chance of having an African-American teacher than a white student. An odds ratio of 2.0 indicates an increased chance of 100%. Correspondingly, if the odds ratio is 0.75 then an African-American student had a 25% less chance of having an African-American teacher than a white student.

To give a specific example, the odds ratios for my local school district, Forsyth County, North Carolina, comparing an African-American student's chances of having an African-American teacher with that of a white student's chances is 1.98.<sup>73</sup> That means "Austin," an African-

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71. See *supra* note 36 and accompanying text (discussing definitions for desegregating teachers used in litigation).

72. Asians and other ethnic groups are excluded because of their relatively small numbers outside of certain geographical areas; a study of these categories is left for another time.

73. See *infra* Table 1.

American student in Forsyth County, was almost twice as likely to have an African-American teacher as “Zoe,” a white student in Forsyth County. To take one extreme example, the comparable odds ratio for Calcasieu, Louisiana is 7.18.<sup>74</sup> This indicates that an Austin in that school district was seven times more likely to have an African-American teacher than a Zoe.

For the purposes of this Article, I defined a school district as “fairly integrated” if the odds ratios range between .51 and 1.49, meaning that a 49% difference in probability is within the acceptable range of segregation. Thus, even if an African-American student had a 49% greater chance of having an African-American teacher than a white student, the school district is still defined as fairly integrated. This is a fairly generous definition of integration. Conversely, a school district is “fairly segregated” if any of the odds ratios is outside the .51 to 1.49 range, meaning that a 50% or greater difference in probability is outside the acceptable range of disparity. This Article, in other words, is examining instances of high segregation. All the odds ratios indicating segregation were statistically significant.<sup>75</sup> Complete access to all the data and analyses can be found on the online technical appendix to the Teacher Distribution Study.<sup>76</sup>

### 3. *Two Limits on the Odds Ratios*

Two fundamental limitations on the odds ratios should be noted. First, the odds ratios analyzed what teachers are in what school building with what students and offer only a rough approximation of a student’s actual classroom experience. They do not indicate who exactly taught which students. The underlying data does not permit an analysis of which student was assigned to which teacher; it instead provides the demographic makeup of the students and teachers in particular school buildings in the school district.

Thus, the analysis does not capture an African-American teacher teaching a Black Studies class with a disproportionately minority

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74. *See infra* Table 3.

75. Some of the odds ratios indicating integration were not statistically significant; all of these insignificant odds ratios reflected a small difference in the probabilities studied, e.g., a 1.02 or .98 odds ratio. The absence of statistical significance does not indicate that the school districts are not integrated on the measures indicated. Instead, it signifies that the difference reflected in the odds ratio—a very small percent difference—could be due to chance. The Technical Appendix specifically notes which odds ratios are not statistically significant. *See* Technical Appendix, *supra* note 5.

76. *See id.* Technical Appendix, *supra* note 5. This Technical Appendix includes all the data and output for this Article in Microsoft Excel format.

enrollment or a white teacher teaching an Advanced Placement course with a disproportionately white enrollment. To the extent this occurs, which is quite likely, the schools would have a *stronger* racial/ethnic matching between students and teachers than the odds ratios reflect. In sum, to the extent students can choose their teachers and are attracted to teachers who share their race/ethnicity, and to the extent teachers are assigned or choose courses with a student population that disproportionately matches their race/ethnicity, the segregation would be stronger than the odds ratios indicate.

Second, school districts defined as fairly integrated according to their odds ratios are not necessarily desegregation success stories. The odds ratios do not measure for the effect of school district boundary lines. To the extent a school district's boundary lines adversely affect the integration efforts of other school districts, the school district—despite odds ratios within the .49 to 1.49 range—may in the aggregate impede integration.<sup>77</sup> In short, the odds ratios indicate an even distribution within a school district, not whether a school district has had a negative or positive impact on the desegregation efforts of surrounding school districts.

### *B. The Continued Segregation of Teachers*

In many school districts, students continue to be in schools with teachers who mirror their race/ethnicity. That is, white students are more likely to have white teachers; African-American students, African-American teachers; and Latino students, Latino teachers. The matching of Latino students and teachers may be due to legitimate educational needs if Latino students are more likely to be English language learners taught disproportionately by Latino teachers. The matching not attributable to similar documented educational justifications, however, is reminiscent of *de jure* segregation.

#### *1. The State of North Carolina*

The state of North Carolina has 115 school districts. The overwhelming majority of these school districts are organized on a county basis, which facilitates integration given that it decreases the chances for suburban,

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77. For example, a demographically diverse school district could produce odds ratios indicating integration. Yet, combining that school district with a neighboring, homogenous school district might enhance the opportunities for integrated education in the aggregate.

white school districts to surround urban, minority school districts.<sup>78</sup> North Carolina is also generally recognized as a state with a relatively high level of school integration.<sup>79</sup>

Yet, even in North Carolina, segregation continues as the dominant pattern. Table 1 details the North Carolina school districts in which African-American students had a 50% or greater chance of getting an African-American teacher, as compared to the chances of white students. To provide some descriptive information of these districts, the table also lists the percentage of African-American students and teachers, along with the overall student population. School district names in bold indicate student segregation. Specifically, bolded names indicate that an African-American student had a 50% or greater chance of being in a school with other African-American students, as compared to the chances of a white student.<sup>80</sup>

TABLE 1  
AFRICAN-AMERICAN TEACHER SEGREGATION IN NORTH CAROLINA  
SCHOOL DISTRICTS

North Carolina School District	Odds Ratio <sup>81</sup>	African-American Students	Student Total Number	African-American Teachers
<b>Charlotte-Mecklenburg</b>	2.09	46%	123,789	24%
<b>Guilford County</b>	2.02	45%	68,797	23%
<b>Forsyth County</b>	1.98	37%	49,599	19%
<b>Gaston County</b>	1.58	22%	32,290	7%
Durham	1.76	58%	31,462	32%
<b>Union County</b>	2.51	17%	31,376	7%
<b>Buncombe County</b>	1.76	9%	25,533	1%
Onslow County	1.53	30%	22,946	7%
<b>Alamance-Burlington</b>	1.81	26%	21,963	9%
<b>Rowan-Salisbury</b>	2.62	23%	20,915	9%
<b>Iredell-Statesville</b>	1.58	17%	20,361	5%

78. Christine H. Rossell, *The Effectiveness of Desegregation Plans*, in *SCHOOL DESEGREGATION IN THE 21ST CENTURY* 67, 92 (Christine H. Rossell et al. eds., 2002).

79. See *supra* note 68 and accompanying text.

80. The precise student segregation odds ratios can be found in the online Technical Appendix. See Technical Appendix, North Carolina Data & Analysis, *supra* note 5.

81. The odds ratios compare an African-American student's chances of having an African-American teacher with those of a white student.

North Carolina School District	Odds Ratio <sup>81</sup>	African-American Students	Student Total Number	African-American Teachers
Davidson County	1.61	4%	20,079	1%
<b>Wayne County</b>	2.51	43%	19,272	21%
Nash-Rocky Mount	1.79	54%	18,235	23%
<b>Rockingham County</b>	1.60	27%	14,604	12%
<b>Caldwell County</b>	1.53	9%	13,015	2%
<b>Henderson County</b>	3.44	8%	12,801	0.5%
Wilson County	1.75	52%	12,640	19%
<b>Wilkes County</b>	3.03	7%	10,086	1%
<b>Lenoir County</b>	2.62	50%	9,928	23%
<b>Stanly County</b>	1.86	16%	9,586	2%
<b>Duplin County</b>	1.82	33%	9,010	15%
<b>Yadkin County</b>	1.91	5%	6,181	1%
<b>Dare County</b>	2.00	5%	4,944	1%
Macon County	1.74	2%	4,266	1%
Cherokee County	2.39	3%	3,706	0.4%

Table 2 shows the same analysis for Latino teachers in North Carolina. As the descriptive figures indicate, the percentage of Latino teachers in North Carolina is very low. Bold indicates school districts in which Latino students have a 50% or greater chance of being in a school with other Latino students, as compared to the chance of white students.<sup>82</sup>

TABLE 2  
LATINO TEACHER SEGREGATION IN NORTH CAROLINA SCHOOL DISTRICTS

North Carolina School District	Odds Ratio <sup>83</sup>	Latino Students	Student Total Number	Latino Teachers
<b>Charlotte-Mecklenburg</b>	1.61	12%	123,789	2%
<b>Guilford County</b>	1.67	7%	68,797	2%
<b>Forsyth County</b>	1.60	14%	49,599	1%

82. The precise student segregation odds ratios can be found in the online Technical Appendix. See Technical Appendix, North Carolina Data & Analysis, *supra* note 5.

83. The odds ratios compare a Latino student's chances of having a Latino teacher with that of a white student.

North Carolina School District	Odds Ratio <sup>83</sup>	Latino Students	Student Total Number	Latino Teachers
Gaston County	1.58	6%	32,290	1%
Union County	3.07	10%	31,376	3%
Robeson County	1.55	7%	24,341	2%
Alamance-Burlington	1.61	15%	21,963	1%
Rowan-Salisbury	1.50	7%	20,915	1%
Randolph County	1.57	9%	18,641	1%
Rockingham County	1.58	5%	14,604	1%
Burke County	2.19	5%	14,446	0.5%
Caldwell County	4.11	5%	13,015	0.1%
Brunswick County	1.84	5%	11,243	0.4%
Duplin County	2.10	25%	9,010	3%
Carteret County	1.86	3%	8,374	1%
Chatham County	6.88	20%	7,521	3%
Pender County	1.57	7%	7,407	1%
McDowell County	1.58	7%	6,504	1%
Alexander County	2.51	5%	5,752	1%
Halifax County	4.34	1%	4,975	1%
Montgomery County	2.12	22%	4,507	1%
Jackson County	3.36	4%	3,678	0.4%

Both tables demonstrate a pattern of teacher segregation existing where there is also student segregation.<sup>84</sup> Only seven of the thirty-eight school districts with teacher segregation did not also have student segregation for that same racial/ethnic group. Those seven school districts were, however, very close to also being classified as segregated by student body.<sup>85</sup>

Not all North Carolina school districts segregated their teachers; in fact, the majority of school districts had not. Seventy-seven of the 115 North Carolina school districts were fairly integrated with regard to

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84. The reverse is also often true, but not always. That is, student segregation often accompanies teacher segregation, but a small percentage of school districts with student segregation did not also have teacher segregation. See Technical Appendix, *supra* note 5.

85. The odds ratios for corresponding student segregation were generally close to the 1.50 standard for being deemed segregated. The seven North Carolina school districts, and their odds ratios for the corresponding student groups, were as follows: Cherokee (1.47); Davidson (1.47); Durham (1.33); Macon (1.16); Nash-Rocky Mount (1.44); Onslow (1.41); and Wilson (1.43). Technical Appendix, North Carolina Data & Analysis, *supra* note 5.

teachers.<sup>86</sup> The overwhelming majority of these school districts were small, where integration is easier to achieve.<sup>87</sup> The median size of the North Carolina school districts with integrated teaching staffs was 4337, while the median size with segregated teaching staffs was 12,908.<sup>88</sup> Although a large number of North Carolina school districts successfully integrated their teachers, the school districts with teacher segregation, which were the larger districts in the state, educated more students overall.<sup>89</sup>

## 2. Other School Districts

These patterns were not unique to North Carolina; the study revealed similar results in forty-two, non-North Carolina school districts. Twenty-five of these school districts concentrated their teachers in schools with

86. The districts, with their total student population, are the following: Alleghany County (1,524); Anson County (4,181); Ashe County (3,266); Asheboro City (4,583); Asheville City (3,847); Avery County (2,276); Beaufort County (7,233); Bertie County (3,240); Bladen County (5,563); Cabarrus County (23,910); Camden County (1,798); Caswell County (3,318); Catawba County (17,113); Chapel Hill-Carrboro (10,936); Clay County (1,323); Cleveland County (17,156); Clinton City (3,023); Columbus County (7,051); Craven County (14,712); Cumberland County (52,439); Currituck County (4,069); Davie County (6,421); Edenton/Chowan (2,470); Edgecombe County (7,644); Elkin City (1,226); Franklin County (8,008); Gates County (2,050); Graham County (1,218); Granville County (8,748); Greene County (3,258); Harnett County (17,561); Haywood County (7,898); Hertford County (3,551); Hickory City (4,532); Hoke County (7,019); Hyde County (634); Johnston County (27,621); Jones County (1,349); Kannapolis City (4,713); Lee County (9,270); Lexington City (3,089); Lincoln County (11,896); Madison County (2,621); Martin County (4,337); Mitchell County (2,293); Moore County (12,087); Mooresville City (4,775); Mount Airy City (1,804); New Hanover County (24,112); Newton Conover City (2,901); Northampton County (3,109); Orange County (6,739); Pamlico County (1,598); Pasquotank County (6,126); Perquimans County (1,780); Person County (5,823); Pitt County (22,115); Polk County (2,481); Richmond County (8,340); Roanoke Rapids City (2,988); Rutherford County (10,012); Sampson County (8,237); Scotland County (6,917); Stokes County (7,412); Surry County (8,810); Swain County (1,842); Thomasville City (2,617); Transylvania County (3,821); Tyrrell County (615); Vance County (8,136); Wake County (120,504); Warren County (2,923); Washington County (2,173); Watauga County (4,496); Weldon City (1,018); Whiteville City (2,634); and Yancey County (2,551). Technical Appendix, North Carolina Summary Data & Analysis, *supra* note 5.

87. See generally Gary Orfield & Erica Frankenberg, The Civil Rights Project, *The Last Have Become First: Rural and Small Town America Lead the Way on Desegregation* 8 (Jan. 2008), available at <http://www.civilrightsproject.ucla.edu/research/deseg/lasthavebecomefirst.pdf> (“Only in rural areas do about half of black and Latino students attend majority white schools.”). With smaller school districts, particularly rural ones, most children attend the same school, and residential segregation is not as acute as in larger metropolitan areas. When students all attend the same public school for their grade level, the students by definition are in an integrated school. Similarly, less residential segregation fosters school integration in schools with attendance zones because the schools are drawing from a more diverse student population.

88. See Technical Appendix, North Carolina Summary Data & Analysis, *supra* note 5.

89. The total number of students in the seventy-seven school districts with teacher integration is 643,484 (which includes one school district with over 120,000 students), while the total number in the thirty-eight school districts with teacher segregation is 734,773. See *id.*

student bodies that mirrored their race/ethnicity. All but four had corresponding student segregation at the school building level, and those four were close to being classified with student segregation.<sup>90</sup> Table 3 details school districts with African-American teacher segregation. Bold indicates student segregation for the racial/ethnic student group studied in the table.

TABLE 3  
AFRICAN-AMERICAN TEACHER SEGREGATION  
IN OTHER SCHOOL DISTRICTS

School District, State	Odds Ratio <sup>91</sup>	African-American Students	Student Total Number	African-American Teachers
<b>Caddo, LA</b>	2.94	63%	44,443	35%
<b>Jefferson, LA</b>	1.59	50%	41,750	18%
<b>Calcasieu, LA</b>	7.18	35%	32,297	15%
<b>Rapides, LA</b>	1.88	44%	24,224	14%
<b>Terrebonne, LA</b>	1.79	29%	19,430	12%
<b>Tangipahou, LA</b>	2.50	46%	19,282	17%
<b>Ascension, LA</b>	1.63	30%	18,045	15%
<b>Iberia, LA</b>	1.96	44%	14,298	22%
<b>St. Mary, LA</b>	2.23	47%	10,309	22%
<b>Middlesex County, NJ</b>	2.64	12%	116,917	4%
<b>Camden County, NJ</b>	6.85	26%	89,242	17%
<b>Union County, NJ</b>	5.23	27%	86,852	11%
<b>Passaic County, NJ</b>	18.20	16%	80,312	11%
<b>Mercer County, NJ</b>	5.73	27%	60,487	14%
<b>Atlantic County, NJ</b>	7.87	23%	47,852	12%
<b>Cumberland County, NJ</b>	1.74	27%	26,388	7%
<b>Franklin Township, NJ</b>	1.99	35%	8,937	15%
<b>Albuquerque, NM</b>	1.68	4%	93,942	2%
Roswell, NM	1.81	3%	9,271	1%

90. The odds ratios for corresponding student segregation were generally close to the 1.50 standard for being deemed segregated. The four school districts, and their odds ratios for the corresponding student groups, were as follows: Clovis (1.45); Galveston (1.21); Roswell (1.49); and Turlock-Stanislaus (1.23). Technical Appendix, California Data & Analysis, New Mexico Data & Analysis, Texas Data & Analysis, *supra* note 5.

91. The odds ratios compare an African-American student's chances of having an African-American teacher with that of a white student.

School District, State	Odds Ratio <sup>91</sup>	African-American Students	Student Total Number	African-American Teachers
<b>Columbus City, OH</b>	1.75	62%	58,766	22%
<b>Toledo City, OH</b>	2.22	46%	30,428	11%
<b>Akron City, OH</b>	2.56	49%	27,411	10%
<b>Canton City, OH</b>	1.66	37%	10,929	8%
<b>Richardson, TX</b>	2.12	25%	34,066	7%
<b>Spring Branch, TX</b>	2.14	6%	32,250	5%
<b>Tyler, TX</b>	1.62	34%	17,480	18%
<b>Wichita Falls, TX</b>	1.97	17%	14,872	4%
<b>Galveston, TX</b>	1.54	32%	9,147	27%

The incidents of Latino teacher segregation are detailed in Table 4. The odds ratios for Latino teacher segregation for school districts outside of North Carolina are more telling simply because the percentage of Latino teachers is much higher. Again, the school district names in bold indicate Latino student segregation.

TABLE 4  
LATINO TEACHER SEGREGATION  
IN OTHER SCHOOL DISTRICTS

School District, State	Odds Ratio <sup>92</sup>	Latino Students	Student Total Number	Latino Teachers
Turlock-Stanislaus, CA	1.87	47%	13,982	12%
<b>Middlesex County, NJ</b>	4.76	21%	116,917	5%
<b>Camden County, NJ</b>	6.39	15%	89,242	3%
<b>Union County, NJ</b>	4.34	27%	86,852	7%
<b>Passaic County, NJ</b>	7.53	42%	80,312	12%
<b>Mercer County, NJ</b>	3.53	13%	60,487	3%
<b>Atlantic County, NJ</b>	2.44	18%	47,852	3%
<b>Cumberland County, NJ</b>	1.67	28%	26,388	5%
<b>Franklin Township, NJ</b>	1.94	11%	8,937	2%
<b>Albuquerque, NM</b>	1.68	55%	93,942	27%
Clovis, NM	1.84	46%	8,313	15%

92. The odds ratios compare a Latino student's chances of having a Latino teacher with that of a white student.

School District, State	Odds Ratio <sup>92</sup>	Latino Students	Student Total Number	Latino Teachers
Columbus City, OH	4.06	5%	58,766	1%
Austin, TX	1.91	55%	79,692	24%
Arlington, TX	2.64	32%	62,130	7%
Richardson, TX	2.79	28%	34,066	6%
Spring Branch, TX	3.04	54%	32,250	19%
Tyler, TX	5.33	32%	17,480	8%
Wichita Falls, TX	1.62	23%	14,872	4%
Galveston, TX	1.61	38%	9,147	13%

As in North Carolina, not all school districts studied segregated their teachers. Seventeen of the forty-two school districts had teacher integration by the study's standards. One was from Louisiana, four from New Mexico, and two from Texas.<sup>93</sup> The other ten school districts were evenly divided between California<sup>94</sup> and New Jersey.<sup>95</sup>

New Jersey should not, however, be taken as similarly integrated as California, where school districts closely monitor their integration levels.<sup>96</sup> In New Jersey, I encountered the most difficulty in identifying school districts that were diverse in both their student and teaching population. Almost all New Jersey school districts had overwhelming white or minority student bodies.<sup>97</sup> Thus, for New Jersey I also figured the odds

93. The one Louisiana school district was St. Landry (student population 15,802). Technical Appendix, Louisiana Data & Analysis, *supra* note 5. The four New Mexico school districts were Alamogordo (student population 6,492); Carlsbad (6,076); Hobbs (7,661); and Rio Rancho (13,655). Technical Appendix, New Mexico Data & Analysis, *supra* note 5. The two Texas school districts were Mesquite (student population 34,628) and Midland (20,621). Technical Appendix, Texas Data & Analysis, *supra* note 5.

94. The five integrated California school districts included Adelanto Elementary (San Bernardino County) (student total population 7,782); Berkeley (Alameda County) (9,076); Carlsbad (San Diego County) (10,412); Fairfield-Suisun (Solano County) (23,377); and Lake Elsinore (Riverside County) (20,652). Technical Appendix, California Data & Analysis, *supra* note 5.

95. The five integrated New Jersey school districts included Vineland City (student total population 9,680); Montclair Township (6,579); Millville City (6,042); Pemberton Township (5,562); and Morris (4,727). Technical Appendix, New Jersey Data & Analysis by School District, *supra* note 5.

96. For each school and school district, the State of California calculates an "Ethnic Diversity Index." For an explanation of that index, see Ed-Data Website, <http://www.ed-data.k12.ca.us> (follow "Reports-District" hyperlink; then follow "students" hyperlink; then follow "Ethnic Diversity Index" hyperlink) (last visited Aug. 30, 2008). Interestingly, New Jersey state law also requires integration in its schools, but with little apparent affect. See generally Bernard K. Freamon, *The Origins of the Anti-Segregation Clause in the New Jersey Constitution*, 35 RUTGERS L.J. 1267, 1301 (2004) (discussing 1947 amendment to New Jersey's constitution that prohibits both de jure and de facto segregation).

97. Northern districts are typically not organized by county as they are in the South, and school

ratios for seven counties (as most Southern school districts are organized) that are diverse in both their students and teachers. For these counties, I combined every school district into its county and calculated the odds ratios based on county data. The odds ratios for all seven counties studied reflected strong segregation of teachers. This segregation is noted by naming the New Jersey counties in the two preceding tables.

### C. Does Anyone Care?

It is easy to fault integration. Desegregation orders subjected children of color to long bus rides to schools that were hostile or indifferent to their learning and asked them to assimilate to succeed;<sup>98</sup> desegregation destroyed segregated schools that were points of community pride;<sup>99</sup> and integration assumed that sitting next to white children would guarantee children of color educational attainment.<sup>100</sup> I largely agree with these complaints.

What I disagree with, however, is the push for segregated schooling as a better opportunity for children of color and for deeming integration irrelevant to quality of education. The idea of quality, segregated education for children of color presents many wonderful aspirations. Yet, the reality is that segregation today impedes equality just as it did in days of de jure segregation. Segregation ensures advantages to whites and perpetuates structural inequality through its unequal distribution of resources. The consequences of segregating teachers, the subject of the next Part, amply demonstrate the cruelty of school segregation.

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districts can be quite small. The larger school districts are often incredibly segregated by their student body. New Jersey had almost two hundred school districts with only one school. Technical Appendix, New Jersey Data & Analysis by School District, *supra* note 5. Only eighteen school districts in New Jersey had at least seventeen school buildings, and these school districts, with one exception, were highly segregated in either their student body or teacher staff, or both. *Id.* I studied the one school district that was not segregated by definition and then also five other smaller school districts that had at least ten school buildings and were relatively diverse in their student and teaching populations.

98. Edwards, *supra* note 17, at 959 (“What we may be witnessing at the start of the twenty-first century is an acceptance by many African Americans of what I view as ‘valuing-our-identities’ approach that is radically different from the ‘blending in,’ assimilationist ideal with which I grew up.”); Juan F. Perea, *Buscando America: Why Integration and Equal Protection Fail to Protect Latinos*, 117 HARV. L. REV. 1420, 1451 (2004) (“School integration, then, demanded one-way assimilation of Black and Latino students into formerly all-White educational environments. . . . Whiteness was privileged in education by making White standards the only relevant standards for success.”).

99. See generally Futrell, *supra* note 23 (discussing the impact of school closings on the African-American community).

100. See generally Adams, *supra* note 18, at 302.

### III. THE IMPACT OF TEACHER SEGREGATION

[I]t is completely unrealistic to assume that individuals of each race will gravitate with mathematical exactitude to each employer or union absent unlawful discrimination.

—Justice Sandra Day O’Connor  
*Sheet Metal Workers v. EEOC* (1986)<sup>101</sup>

Many find great potential for children of color in segregated schools. The idea of communities of color controlling the education of their children is appealing.<sup>102</sup> Yet, for most children of color that potential is not fulfilled. While I agree with many of the problems with integration,<sup>103</sup> I cannot escape the more troubling truth of segregation—it perpetuates racial hierarchy through its unequal distribution of resources. This Part begins by describing the existing social science literature that puts great faith in segregated schooling for children of color. It then turns to the tough reality that segregated schooling for most children of color remains unequal. As was true in 1954, the year of *Brown*, segregated education (and here I’m talking about both student and teacher segregation) establishes structural barriers to equality. Today’s segregation of teachers means unequal access to resources for the typical student of color.

#### A. *The Hopeful Version of Segregation*

The strongest argument today for segregating students and teachers of color is that it would facilitate successful educational outcomes.<sup>104</sup> In these schools, the idea is that teachers of color would be positive role models<sup>105</sup>

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101. *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 494 (1986) (O’Connor, J., concurring in part and dissenting in part); see also *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989) (concluding that a thirty percent hiring goal “rests upon the ‘completely unrealistic’ assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population.”) (quoting *Sheet Metal Workers*, 478 U.S. at 494). For a thorough discussion of how the Supreme Court has defined what a race-neutral world looks like, see Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279 (1997).

102. See Adams, *supra* note 18, at 266 (“[T]he black community, with appropriate support and no longer encumbered by *de jure* segregation, is perfectly capable of nurturing, educating, and developing successful black individuals.”).

103. See *supra* notes 98–100 and accompanying text.

104. The successful educational outcomes include both academic achievement and non-academic factors. See generally Adams, *supra* note 18, at 281–82 (discussing the research on the non-academic benefits of schools).

105. See, e.g., King, *supra* note 57, at 120 (“This perspective supports an assumption that students of color need teachers of color in their learning environment to ensure that their aspiration levels, achievement levels, and a sense of self-worth will be advanced rather than diminished.”) (citations

and able to meet the learning needs of children of color.<sup>106</sup> The stereotype threat theory—that people underperform when they perceive a stereotype that foresees their poor performance—would also predict a positive relationship in achievement when students of color are evaluated by teachers of color.<sup>107</sup>

The evidence is developing on the relationship between achievement outcomes and pupil-teacher matching. It leans slightly toward demonstrating a positive impact on achievement when children of color are taught by teachers of color.<sup>108</sup> Social science literature has

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omitted) (collecting studies); Sheila Nataraj Kirby, Mart Berends & Scott Naftel, *Supply and Demand of Minority Teachers in Texas: Problems and Prospects*, 21 EDUC. EVALUATION & POL'Y ANALYSIS 47, 48 (1999) (reviewing the literature on the role model value of minority teachers for minority students). Of course, the Supreme Court has held that the role model theory cannot justify the different treatment of teachers. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986) (plurality opinion).

106. See, e.g., Karen M. Gentemann & Tony L. Whitehead, *The Cultural Broker Concept in Bicultural Education*, 52 J. NEGRO EDUC. 118, 119 (1983) (describing the African-American teacher as a “cultural broker” [who is] able to straddle both cultures, to take mainstream values and communicate them to the ethnic cultures, and communicate the ethnic culture to the mainstream”); Jacqueline Jordan Irvine, *Beyond Role Models: An Examination of Cultural Influences on the Pedagogical Perspectives of Black Teachers*, 66 PEABODY J. EDUC. 51, 51 (1989) (arguing that African-American teachers “are more than mere role models. They are cultural translators and intercessors for black students.”); King, *supra* note 57, at 123 (detailing studies finding that “distinctive cognitive and interactive styles [are] often present in African-American students”); Marvin Lynn, Charletta Johnson & Kamal Hassan, *Raising the Critical Consciousness of African American Students in Baldwin Hills: A Portrait of an Exemplary African American Male Teacher*, 68 J. NEGRO EDUC. 42, 44–45 (1999) (collecting studies on pedagogical value of African-American teachers for African-American students); see also Lynn, *supra*, at 45 (collecting studies that “emphasize the ways in which African American teachers incorporate and make use of the language of African-American and West Indian students to construct relevant curriculum”); Perea, *supra* note 98, at 1462 & n.223 (collecting studies for Latino students).

107. See Thomas S. Dee, *Teachers, Race, and Student Achievement in a Randomized Experiment*, 86 REV. ECON. & STAT. 195, 197 (2004) (explaining stereotype threat theory as “refer[ing] to the possibility that, in situations where students perceive stereotypes might attach (for example, black students with white teachers), they experience an apprehension that retards their academic identification and subsequent achievement”). Although the theory has been documented in the education context, no one has examined it specifically in the K-12 setting. See *id.* (concluding that “it is not yet clear whether this intriguing phenomenon exists among students in elementary and secondary settings”).

108. One study found a positive impact of African-American teachers on the achievement of African-American students, particularly for students whose mothers did not have a college education. Mark O. Evans, *An Estimate of Race and General Role-Model Effects in Teaching High School*, 23 J. ECON. EDUC. 209, 214 (1992) (finding, after controlling for teacher and student ability, “a significant role-model effect for African-Americans” on achievement on a standardized economics test). The effect was highest for African-American students whose mothers did not graduate from college. *Id.* at 215; see also Dee, *supra* note 107, at 209 (finding “consistent evidence that there [were] rather large educational benefits for both black and white students from assignment to an own-race teacher in these early grades”); Frederick M. Hess & David L. Leal, *Minority Teachers, Minority Students, and College Matriculation: A New Look at the Role-Modeling Hypothesis*, 25 POL'Y STUD. J. 235, 244 (1997) (finding a positive relationship between the total number of students attending college and the

demonstrated fairly persuasively that African-American teachers generally rate African-American students higher on subjective measures than the same students are rated by white teachers.<sup>109</sup> Professors Derrick Bell and Roy Brooks, in particular, have documented the success of predominately African-American schools, both private and public.<sup>110</sup> For these reasons, the idea of children of color taught by teachers of color should be something to praise.

### *B. The Reality of Segregation*

This hopeful story of segregated education is not universally accepted. For example, some researchers find that racial matching between students and teachers does not increase academic achievement.<sup>111</sup> Yet, for the purposes of argument, I take the above social science literature as largely

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percentage of minority teachers at the school district level, but questioning whether the relationship may be explained by “overall district improvements” that are associated with the percentage of minority teachers at the school district level); Kristin Klopfenstein, *Beyond Test Scores: The Impact of Black Teacher Role Models on Rigorous Math Taking*, 23 CONTEMP. ECON. POL’Y, 416, 416 (2005) (finding that “increasing the percentage of math teachers who are black has a nontrivial, positive impact on the likelihood that a black geometry student will enroll in a subsequent rigorous math course”); Sabrina Zirkel, *Is There a Place for Me? Role Models and Academic Identity Among White Students and Students of Color*, 104 TCHRS. C. REC. 357, 374 (2002) (concluding that both students of color and white students taught by a teacher of their race (and gender) “showed significantly greater academic performance,” and that this was particularly true for students of color). Researchers have also documented an achievement boost for white students taught by white teachers. See Dee, *supra* note 107, at 209; Zirkel, *supra*, at 374.

109. See, e.g., Douglas B. Downey & Shana Pribesh, *When Race Matters: Teachers’ Evaluations of Students’ Classroom Behavior*, 77 SOC. EDUC. 267, 267, 269–70 (2004) (describing studies “suggest[ing] that teachers rate black students as exhibiting poorer classroom behavior and as being less academically engaged than they do white students”) (citations omitted). For a description of earlier studies reaching similar results, see Irvine & Irvine, *supra* note 57, at 414–15; King, *supra* note 57, at 122. One study concluded that the lower ratings were not explained on the theory that African-American students acted more inappropriately in classes with white teachers than in classes with African-American teachers. See Downey & Pribesh, *supra*, at 269.

110. BELL, *supra* note 16, at 165–77; BROOKS, *supra* note 52, at 221–25.

111. See Ronald G. Ehrenberg, Daniel D. Goldhaber & Dominic J. Brewer, *Do Teachers’ Race, Gender, and Ethnicity Matter? Evidence from the National Educational Longitudinal Study of 1988*, 48 INDUS. & LAB. REL. REV. 547, 557, 559 (1995) (finding no gain in a two-year period in achievement tests attributable to a gender and racial/ethnic match between African-American, Latino, and white students and teachers); Roland G. Fryer, Jr. & Steven D. Levitt, *Understanding the Black-White Test Score Gap in the First Two Years of School*, 86 REV. ECON. & STAT. 447, 459 (2004) (“By the end of first grade, however, the black-white test score gap is greater across the board for students who have at least one black teacher.”). In many respects, a positive relationship has been difficult to prove with much certainty because students have many teachers at the middle and high school levels, and the overwhelming majority of teachers are white. It is hard to identify the impact a limited number of racial/ethnic matches has on achievement. Further, it is not clear whether the assignment of minority children to minority teachers is a random event; it is possible that “minority faculty sought out or were more likely to be assigned to at-risk minority students, [and then] naive estimates of their impact on student outcomes would understate the true effects.” Dee, *supra* note 107, at 197.

true. My point then is not to quibble with the research demonstrating the value children of color gain from having a teacher of color. What I do question, however, is how realistic that promise is for most children of color. The ultimate lesson of the research on the academic value of racial/ethnic matching between students and teachers is not the value of segregated schools, but the need for better integration.

### *1. Need for Quality White Teachers for Minority Students*

Two practical complications arise from deeming minority teachers, on average, as the best teachers for minority students.<sup>112</sup> First, white students benefit from teachers of color as well.<sup>113</sup> Concentrating teachers of color in minority schools deprives white students of the benefits they also receive from teachers of color.

Second, students of color need quality white teachers in addition to quality minority teachers. Even if all minority teachers only taught minority students—a prospect that raises serious constitutional and educational questions<sup>114</sup>—minority students would still depend upon white teachers. Teachers today are overwhelmingly white: in 2005 83% of teachers were white, while only 8% were African American and 6% were Latino.<sup>115</sup> The student population, on the other hand, in 2005 was 58% white, 19% Latino, and 17% African American.<sup>116</sup> Thus, while the student body was 36% African American and Latino, the corresponding teaching population was only 14%. The disparity will likely increase with time. The

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112. An obvious legal issue arises as well. The Supreme Court has held that teachers cannot be treated differently on the basis of their race for the goal of providing students good role models. *See Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986) (plurality opinion).

113. Studies on the value of minority teachers often include a tag line that generally states a benefit for white students from having a minority teacher. *See, e.g., Wynetta Y. Lee, Striving Toward Effective Retention: The Effect of Race on Mentoring African American Students*, 74 PEABODY J. EDUC. 27, 38 (1999) (“Furthermore, majority students can benefit from being exposed to African-American faculty because U.S. society, external to the university, is growing more diverse.”). Specifically, white students are said to benefit from minority teachers because society is diverse. Peter Loehr, *The Urgent Need for Minority Teachers*, EDUC. WK., Oct. 5, 1988, at 32 (“Without sufficient exposure to minority teachers throughout their education, both minority and majority students come to characterize the teaching profession—and the academic enterprise in general—as better suited to whites.”). Further, minority teaching demonstrates to white students that education is open to all students, helps them develop appropriate racial and ethnic ideas, and sends a message about equality in power. *See* CARNEGIE FORUM, *supra* note 53, at 79; King, *supra* note 57, at 120.

114. *See supra* note 50.

115. Frankenberg, *supra* note 25, at 10 tbl.1. The South has a strong percentage of teachers who are African American, while the West has the highest percentage of Latino teachers. *See id.* at 3. Specifically, 19% of Southern teachers are African American; 11% of Western teachers are Latino. *Id.*; *see also id.* at 17–18 (providing more detailed numbers for both teachers and students by region).

116. *Id.* at 11 tbl.2.

percentage of minority teachers is expected to decline while the percentage of students of color is predicted to increase.<sup>117</sup> Teaching is increasingly a white woman's job, while student bodies are increasingly heterogeneous.

Given the benefit both children of color and white children receive from having a teacher of color, we obviously need more minority teachers. The focus of this Article, however, concerns how best to distribute the existing teachers of color, rather than on how to increase the number of minority teachers. In answering that question, we must, as a first step, recognize that schools with predominately minority students will necessarily include white teachers. Not enough minority teachers exist to provide adequate staffing for minority schools, even if they were exclusively confined to such schools. This dependence on white teachers places schools with predominately minority student bodies in a weak bargaining position because experienced white teachers tend to leave these schools as soon as they can, as revealed in the next section.<sup>118</sup>

## 2. *White Flight, Brown Flight, Black Flight: Teacher Preferences*

A desire to teach in a particular school can be based on many factors—its distance from the teacher's home, its proximity to the teacher's high school, its facilities, its leadership, its curricular or pedagogical approach, the presence of the teacher's friends or mentors, or any number of other reasons that influence teachers' choices.<sup>119</sup> This section discusses the teacher preference that is most relevant here: a teacher's preference to teach, or not to teach, at a school with a certain student population.

Teacher mobility studies strongly indicate that teachers of different races/ethnicities react differently to schools with predominately minority

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117. This phenomenon has its roots in the expansion in career opportunities for minorities in a post-Jim Crow America. See King, *supra* note 57, at 138–39; see also Kirby, Berends & Naftel, *supra* note 105, at 48 (“The underrepresentation of minorities in teaching is likely to become worse over time because the proportion of minorities in teaching is declining.”) (citing studies to that effect).

118. See *infra* Part III.B.2.

119. See Donald Boyd et al., *Explaining the Short Careers of High-Achieving Teachers in Schools with Low-Performing Students*, 95 AM. ECON. REV. 166, 166 (2005) (“Non-pecuniary job characteristics such as class size, preparation time, facilities, student characteristics, and school leadership also can affect teacher decisions.”); *id.* at 170 (finding that geographical proximity between a teacher's home and teaching position in New York City is “as large as any of the other factors considered,” including the demographics of the student body); Eric A. Hanushek, John F. Kain & Steven G. Rivkin, *Why Public Schools Lose Teachers*, 39 J. HUM. RES. 326, 328 n.2 (2004) (citing study that found “that teachers tend to enter teaching careers at schools that are geographically very close to the high school they attended”); *id.* at 340 (posing the question of whether teachers prefer to work at schools close to their home, which could increase teacher segregation in schools to the extent neighborhoods are segregated).

students. A study of Texas public elementary school teachers from 1993 to 1996 concluded that as the African-American and Latino student populations increased, so too did the likelihood that white teachers would leave those schools.<sup>120</sup> Yet, the experience of African-American and Latino teachers was fundamentally different; they were *less likely* to leave in this situation.<sup>121</sup> Similarly, a study of Georgia public elementary school teachers from 1994 to 2001 concluded that African-American teachers “are significantly less likely to leave minority schools than are white teachers.”<sup>122</sup>

Other studies reached similar conclusions for African Americans, but not for Latinos. A study of New York City elementary school teachers concluded that Latino and white teachers were more likely to leave schools as the white student population declined and the African-American population increased.<sup>123</sup> This was not true, however, for African-American teachers.<sup>124</sup> Another study documented similar results in North Carolina as in New York. White teachers of schools with higher nonwhite student populations were more likely to leave the schools.<sup>125</sup> African-American teachers, on the other hand, were less likely to leave schools with higher nonwhite percentages.<sup>126</sup>

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120. See Hanushek, Kain & Rivkin, *supra* note 119, at 343. The moves by white teachers do not appear to be driven by salary: “The annual salary gain averaged across all movers with less than ten years of experience is slightly more than 0.4 percent of annual salary or roughly \$100.” *Id.* at 337.

121. *Id.* at 337.

122. Benjamin Scafidi, David L. Sjoquist & Todd R. Stinebrickner, *Race Poverty, and Teacher Mobility* 14 (Aug. 2005), available at <http://ssrn.com/abstract=902032>; see also *id.* at 19–20. Cf. Frankenberg, *supra* note 25, at 25–26 (study by Harvard Civil Rights project concluding that “[b]oth white and nonwhite teachers report more satisfaction with their teaching career at the schools with the highest percentage of white students. Conversely the highest percentage of both white and nonwhite teachers reporting that they were ‘not at all [satisfied]’ were in schools with less than a quarter white students—and, in fact, a higher percentage of nonwhite teachers expressed this dissatisfaction.”) (citation omitted). Yet, the study also found that nonwhite teachers expressed a high likelihood of leaving predominately white schools. See *id.* at 30 (“[A]mong teachers in 0–25% white schools, a higher percentage of nonwhite teachers report that they are very likely to leave than do white teachers.”).

123. Boyd et al., *supra* note 119, at 169 (examining New York City elementary school teachers who started teaching between 1995 and 2002).

124. For African-American teachers, the study concluded “there is little relationship between student-body racial composition and retention.” *Id.*

125. Clotfelter, Ladd & Vigdor, *Teacher Mobility*, *supra* note 11, at 24–25 (studying North Carolina teachers between 1994 and 2004 and finding that “white teachers whose schools have higher nonwhite percentages are more likely than others to leave the public schools, move from their current district, or switch schools within the same district.”).

126. *Id.* Yet, African-American teachers were more likely to leave teaching as a profession when teaching higher nonwhite student populations, although their rate was smaller when compared to white teachers. *Id.*

Researchers have estimated what salary it would take for white teachers to teach in predominately minority schools. One study estimated that a ten percent salary increase would be needed for a ten percent increase in the number of African-American students.<sup>127</sup> Small salary increases in general have little influence on attracting teachers to “hard-to-staff” schools.<sup>128</sup>

One issue underlying this is whether white teachers are reacting not to race, but instead to another factor such as poverty or achievement.<sup>129</sup> Here, the evidence has strongly indicated that this is not occurring. For example, researchers found in Texas that the number of students eligible for free or reduced lunch did not affect teacher exit rates.<sup>130</sup> The North Carolina study likewise found “little support . . . that the level of student achievement [had] an independent influence” on teachers’ leaving schools.<sup>131</sup> The same was true for North Carolina students eligible for free or reduced lunch.<sup>132</sup> A study of Georgia similarly concluded that

teachers are much more likely to exit schools with large proportions of minority students, and that the relationships found for student test scores and poverty rates . . . are being driven to a large extent by the fact that these variables are highly correlated with the proportion of minority students in a school.<sup>133</sup>

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127. See Hanushek, Kain & Rivkin, *supra* note 119, at 350. The salary increases needed for teaching in a large urban district instead of a suburban district were even larger, 25% to 43% for female teachers with less than five years of experience, depending on the teacher’s number of years teaching. That is, female teachers with none to two years of experience would need a salary differential of 25.2%, while teachers with two to five years of experience would need a 42.6% increase. *Id.* at 350–51. The percentages for men were substantially lower, at 12.3% and 8.8%, respectively. *Id.*

128. Clotfelter, Ladd & Vigdor, *Teacher Mobility*, *supra* note 11, at 12 (referencing forthcoming study that concluded that “a modest \$1,800 salary add-on in North Carolina targeted at math, science, and special education teachers in low-achieving and low-income schools . . . [had] a 17% decline in the rate of turnover in those schools”); Hanushek, Kain & Rivkin, *supra* note 119, at 351 (concluding that “the overall cost of providing such bonuses almost surely exceeds the amounts typically considered in most policy discussions.”).

129. Another possibility would be changing other factors associated with predominately minority schools, such as larger class sizes and inferior facilities, along with the “testing and sanctions pressure from [No Child Left Behind].” Frankenberg, *supra* note 25, at 26.

130. *Id.*; see also Brief of 553 Social Scientists as Amici Curiae Supporting Respondents, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007) (No. 05-908), 2006 WL 2927079, at \*10 (“According to studies that investigate teacher turnover in segregated minority schools, race is the driving factor in predicting teacher mobility, more so than working conditions or student poverty.”) (footnote omitted).

131. Clotfelter, Ladd & Vigdor, *Teacher Mobility*, *supra* note 11, at 11.

132. *Id.* at 12 (citing studies that concluded that “the independent effect of income cannot be confirmed statistically in equations containing racial variables as well”).

133. Scafidi, Sjoquist & Stinebrickner, *supra* note 122, at 5; see also *id.* at 16 (“Our results

In short, the teacher mobility studies reveal that race itself influences where teachers teach, not poverty or achievement rates.

### 3. *The Inequality in Segregation*

This result, that white teachers are likely to leave predominately minority schools, is not good for children of color. Predominately minority schools need white teachers, but are generally able to attract only ones who are inexperienced, otherwise unemployable at majority-white schools, or interested in minority schools.<sup>134</sup> This narrows considerably their pool of potential teachers. Overall, this situation harms minority school children.<sup>135</sup> While educational literature is often ambiguous in its findings, and even contradictory, the literature is very firm on one point: experience matters.<sup>136</sup> The experience of teachers is unequivocally correlated with higher achievement scores.<sup>137</sup>

Despite the value of experienced teachers, African-American and Latino students are consistently associated with novice teachers.<sup>138</sup> Racial

indicate that . . . teachers are more likely to leave a particular type of poor school—one that has a large proportion of minority students.”); *see also* Hanushek, Kain & Rivkin, *supra* note 119, at 343 (making similar findings in Texas).

134. The research on teacher mobility could reflect that teachers are responding to the preferences of the school district or principal rather than indicating their personal preferences. One group of researchers posed this question, but found that their study proved otherwise. *See* Hanushek, Kain & Rivkin, *supra* note 119, at 340–41, 347.

135. *See* Frankenberg, *supra* note 25, at 38 (“Given the relationship between teacher experience and student achievement, these findings suggest that black and Latino students in this sample are systematically disadvantaged by the overrepresentation of inexperienced teachers in their schools. Further, since novice teachers are the most likely to leave their schools, these trends could also contribute to higher teacher turnover in predominately minority schools.”).

136. *See* Clotfelter, Ladd & Vigdor, *Teacher Mobility*, *supra* note 11, at 18 (“One of the most consistent findings that emerge from research on student achievement is that teacher effectiveness increases over the first several years of a teacher’s career.”); Jennifer Imazeki, *Teacher Salaries and Teacher Attrition*, 24 *ECON. EDUC. REV.* 431, 433 (2005) (“[T]eacher experience [is] one of the few characteristics that is fairly consistent in holding a positive correlation with student performance.”). *See generally* Charles T. Clotfelter, Helen F. Ladd & Jacob L. Vigdor, *Who Teaches Whom? Race and the Distribution of Novice Teachers*, 24 *ECON. EDUC. REV.* 377, 378–79 (2005) [hereinafter Clotfelter, Ladd & Vigdor, *Novice Teachers*] (reviewing the literature).

137. *See, e.g.*, Charles T. Clotfelter, Helen F. Ladd & Jacob L. Vigdor, *Teacher-Student Matching and the Assessment of Teacher Effectiveness*, 41 *J. HUM. RES.* 778, 807 (2006) (“For the typical student, the benefit from having a highly experienced teacher is approximately one-tenth of a standard deviation on reading and math test scores, and roughly half of this return occurs for the first one or two years of teaching experience.”). One possible exception to the strong relationship between experience and efficacy are participants in the Teach for America program. Although the results are conflicting, many studies indicate the success of these beginning teachers. *See, e.g.*, Margaret Raymond & Stephen Fletcher, *The Teach for America Evaluation*, *EDUC. NEXT*, Spring 2002, at 62, 65–68, available at <http://www.hoover.org/publications/ednext/3368241.html>.

138. *See, e.g.*, Clotfelter, Ladd & Vigdor, *Novice Teachers*, *supra* note 136, at 391 (“Within

segregation—not economic segregation or poor achievement scores—causes the distribution of this key educational resource to be unequal.<sup>139</sup> In short, even when teachers teach in the same school district, pursuant to the same salary structure, segregation creates inequality. The inequality in teacher experience is of serious consequence, given the strong connection between achievement and teacher experience.<sup>140</sup>

The inequality caused by teacher segregation also reveals the transformative power of integration. With integrated student bodies, teachers would lack the opportunity to flee, and students of color would get the tangible benefit of experienced teachers. Increasing integration of students, in other words, would help dissipate the strong relationship between inexperienced teachers and minority students. To the extent student bodies are fairly integrated, experienced white teachers will have fewer opportunities to avoid teaching minority students, and one less reason to exit a school.

It is improbable that teacher segregation creates inequality in only one resource, teacher experience levels, but nowhere else. Other teacher qualifications are likely to be distributed more evenly with integration.<sup>141</sup> Nor are the benefits of teacher desegregation only about academic achievement. For example, our current system teaches children of color that whites can be in positions of authority, but fails to teach white children, who are rarely exposed to minority teachers, the corresponding lesson that people of color can be in authority. Similarly, our current system teaches children of color that they can only be in positions of power over people of color, but not whites. Desegregating teachers would teach all children that people of all races can be in positions of authority and would break us from a Jim Crow idea about power.

Integrated education is thus a first, crucial step for quality of education for all children. Efforts to equalize that quality through school finance litigation have amply demonstrated that it is exceedingly difficult to equalize schools by simply arguing over monetary resources.<sup>142</sup> Only by

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districts, novice teachers are disproportionately assigned to the schools and to the classrooms within schools that disproportionately serve black students.”); Frankenberg, *supra* note 25, at 24 (finding that “high minority schools are more likely to have novice teachers”).

139. See *supra* notes 129–33 and accompanying text.

140. See *supra* notes 136–37 and accompanying text.

141. For example, other teacher qualifications such as national certification, graduate degrees, and subject-matter degrees will likely be more equitably distributed with desegregation of students and teachers.

142. See, e.g., Ryan, *Schools*, *supra* note 19, at 256 (“[S]chool finance reform has done little to improve the academic performance of students in predominantly minority districts.”). Ryan has explained that the effects of socioeconomic and racial segregation “cannot be adequately addressed by

coming together will all resources begin to be equally distributed. In addition, school segregation places no personal responsibility on whites to improve the education of children of color, even though they have access to many resources.<sup>143</sup> Even more troubling, whites can excuse themselves from accountability without guilt when people of color seek school segregation.

Integration should not, however, be the last step. This is where the social science literature studying the value of teachers of color to minority children becomes relevant. Successful school integration will depend on translating the benefits teachers of color provide to children of color to all teachers, for all students. None of the social science literature documenting the value of teachers of color teaching students of color argued that white teachers could not be effective teachers for students of color as well. That research, in fact, at times has documented the failures of some teachers of color<sup>144</sup> and successes of white teachers.<sup>145</sup> Instead of using that literature to validate student and teacher segregation, given the inequality in

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school finance reform, because students in schools with high concentrations of poverty need more than increased funding to improve their achievement.” *Id.* To prove this point, Ryan cites research on the effects of peer influence, stating that “research confirms that peers generally exert a strong influence on student performance and that students from lower socioeconomic backgrounds in particular suffer from being surrounded solely or primarily by students from similarly impoverished backgrounds.” *Id.* at 257. He states that school finance litigation does not challenge segregation because it is “primarily concerned with securing ‘adequate’ resources for such [segregated] schools.” *Id.* at 256. Thus, to Ryan, the problem cannot be reduced to school improvement via increased funds. He explains that “[i]ncreasing expenditures in racially isolated schools . . . cannot replicate the social benefits of racially integrated schools.” *Id.* Others disagree, and argue that school finance reform litigation does improve the academic performance of students in predominately minority districts. *See, e.g.*, William J. Glenn, *Separate But Not Yet Equal: The Relation Between School Finance Adequacy Litigation and African American Student Achievement*, 81 PEABODY J. EDUC. 63, 74–75 (2006) (finding that school finance litigation has had a positive impact on African-American student achievement, but also emphasizing that racial segregation should be considered as well).

143. *See* Charles R. Lawrence, III, *Forbidden Conversations: On Race, Privacy, and Community (A Continuing Conversation with John Ely on Racism and Democracy)*, 114 YALE L.J. 1353, 1377 (2005) (“The genius of segregation as a tool of oppression is the signal it sends to the oppressors—that their monopoly on resources is legitimate, that there is no need for sharing, no moral requirement of empathy and care.”).

144. *See, e.g.*, Carolyn Tyson, *Notes from the Back of the Room: Problems and Paradoxes in the Schooling of Young Black Students*, 76 SOC. EDUC. 326, 332 (2003) (reporting that at one public all African-American school and one private all African-American school, “[t]he teachers’ demands for conformity to particular cultural norms usually won out over the goals of building students’ self-esteem and affirming racial identity.”); *id.* at 336 (finding at both schools African-American teachers “compared blacks to whites and inadvertently conveyed negative messages about blacks”); *see generally id.* at 338–39 (discussing literature making similar conclusions).

145. *See, e.g.*, GLORIA LADSON-BILLINGS, *THE DREAMKEEPERS: SUCCESSFUL TEACHERS OF AFRICAN AMERICAN CHILDREN* 28 (1994) (identifying some white teachers as successful teachers of African-American students); Gentemann & Whitehead, *supra* note 106, at 127–29 (reviewing the literature and concluding that whites can be cultural brokers for minority students).

resources that attends such segregation, I would use that literature as a road map for improving all teaching. That is a more promising goal than segregation.

One final, obvious point: integration cannot be a first step toward equality in homogenous school districts; other approaches are needed here. Where it is possible, however, integration should be returned to the bargaining table. It should again be included in our list of “wants” for our public schools.

#### IV. INTEGRATION’S CONSTITUTIONAL AND SOCIETAL INSIGNIFICANCE

What makes one uneasy, of course, is the truly awesome magnitude of what has yet to be done.

—Judge Thurgood Marshall (1964)<sup>146</sup>

Using words that fill history books, Chief Justice Earl Warren declared that “[s]eparate educational facilities are inherently unequal.”<sup>147</sup> So far, I have argued that this remains true from a pragmatic standpoint. Today, schools segregated by their students and teachers—an all too frequent pattern<sup>148</sup>—are unequal in an important educational resource, teacher experience levels, and are very likely unequal in other resources as well.<sup>149</sup> Because this pattern has a racial/ethnic component, the only way to break it is to desegregate students and teachers alike. In this Part, I take as a given the practical effects of segregation and turn to a different issue—what constitutional and societal significance should be attached to segregated education and its consequences.

I begin with the Supreme Court. I argue that the Roberts Court has refused to attach any constitutional meaning to school segregation and its effects, as demonstrated in its landmark plurality decision issued last term, *Parents Involved*.<sup>150</sup> In doing so, the Court has created significant, and new, barriers to achieving the student integration I believe is necessary for equality. I then turn to society at large and contend that while the value of student integration deserves far better treatment by the Roberts Court in

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146. *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836, 853 n.33 (5th Cir. 1966) (quoting Thurgood Marshall, *The Courts*, in CENTER FOR THE STUDY OF DEMOCRATIC INSTITUTIONS, *THE MAZES OF MODERN GOVERNMENT* 36 (1964)).

147. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

148. *See supra* Part II.B.

149. *See supra* Part III.B.

150. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007); *infra* Part IV.A.

*Parents Involved*, a more fundamental barrier to eradicating segregation exists today than the Supreme Court.<sup>151</sup> Our societal comfort with segregation and disinterest in racial integration is a greater limit on achieving integration than the Supreme Court's refusal to attach constitutional value to integration.

#### A. *The Roberts Court and Integration*

Judicial roadblocks to school integration date to at least 1974,<sup>152</sup> when the Supreme Court declared the segregation in many urban and suburban school districts constitutional.<sup>153</sup> What is new, however, is that a plurality of the Supreme Court has indicated an *affirmative* constitutional disinterest in student segregation.<sup>154</sup> By this, I mean that the plurality is more than ignoring the consequences of student segregation, but is telling us that paying attention to today's student segregation is wrong and contrary to the meaning of the Fourteenth Amendment and the spirit of *Brown*. Any inequality due to segregation, including the inequality demonstrated by teacher segregation, is thus of no constitutional importance for the plurality. This disinterest in integration is fundamentally different than anything ever before seen in a Supreme Court opinion.

A majority of the Court in *Parents Involved* reached a relatively narrow holding. Five Justices held that the voluntary race conscious admissions policy in two school districts was not narrowly tailored to any compelling governmental interest.<sup>155</sup> The school districts, according to the majority, failed to treat the students as individuals<sup>156</sup> and to demonstrate a need for their racial classifications.<sup>157</sup> The majority opinion largely avoided the

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151. See *infra* Part IV.B.

152. Even in 1955, the Supreme Court minimized judicial involvement in achieving school desegregation when it placed primary responsibility for desegregation with school boards and when it ruled that desegregation need not come immediately, but "with all deliberate speed." *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 301 (1955); see also Wendy Parker, *Connecting the Dots: Grutter, School Desegregation, and Federalism*, 45 WM. & MARY L. REV. 1691, 1706–16 (2004).

153. *Milliken v. Bradley (Milliken I)*, 418 U.S. 717, 734–44 (1974). See Robert D. Goldstein, *A Swann Song for Remedies: Equitable Relief in the Burger Court*, 13 HARV. C.R.-C.L. L. REV. 1, 26–32 (1978); Mark G. Yudof, *School Desegregation: Legal Realism, Reasoned Elaboration, and Social Science Research in the Supreme Court*, 42 LAW & CONTEMP. PROBS. 57, 93–99 (1978).

154. See Ryan, *Voluntary Integration*, *supra* note 19, at 154 ("But the Court has never actively opposed voluntary school integration or sought to interfere with school officials—as opposed to courts—trying to reach that end. It does so [in *Parents Involved*], and that matters.")

155. See *Parents Involved*, 127 S. Ct. at 2759–60.

156. *Id.*

157. *Id.* at 2760.

question of whether the school districts' integration goals were constitutionally worthy.

Chief Justice Roberts, joined by Justices Alito, Scalia, and Thomas, took the case as an opportunity to do much more, however, than outlaw what school boards were doing in Jefferson County, Kentucky, and Seattle, Washington.<sup>158</sup> The plurality used *Parents Involved* as a chance to redefine, by seismic proportions, both the Equal Protection Clause and *Brown*. In doing so, they turned *Parents Involved* into a landmark case that must be answered by those of us who seek school integration and define segregation as harmful.

### 1. *The Equal Protection Clause*

The plurality unabashedly committed itself to a colorblind interpretation of the Equal Protection Clause, in all situations, with no consideration of other constitutional values.<sup>159</sup> The matter was put simply by Chief Justice Roberts: “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”<sup>160</sup> The importance of colorblind government action is fairly similar to earlier opinions in which the Court stressed the importance of treating individuals alike, regardless of their race/ethnicity.<sup>161</sup> New, however, was the plurality's failure in *Parents Involved* to mention additional values as relevant to its Equal Protection analysis.<sup>162</sup>

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158. *Id.* at 2761 (plurality opinion). For a discussion of why Justice Kennedy broke ranks with the other members of the majority, see *infra* notes 191–93 and accompanying text.

159. *See id.* at 2762–66 (detailing past case law on the importance of how individuals are treated).

160. *Id.* at 2768; *see also id.* at 2792 (Kennedy, J., concurring in part and concurring in judgment) (“In the real world, it is regrettable to say, [Justice Harlan’s colorblind axiom] cannot be a universal constitutional principle.”).

161. *See, e.g., Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224–25 (1995) (“When they touch upon an individual’s race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest.”) (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978)); *Miller v. Johnson*, 515 U.S. 900, 911 (1995) (“At the heart of the Constitution’s guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class.”) (internal quotation marks and citation omitted); *Shaw v. Reno*, 509 U.S. 630, 642 (1993) (“Laws that explicitly distinguish between individuals on racial grounds fall within the core of that prohibition.”).

162. *See Parents Involved*, 127 S. Ct. at 2791 (Kennedy, J., concurring in part and concurring in judgment) (“The plurality opinion is too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race.”); *id.* (“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.”).

For example, the Supreme Court has often stressed the value of local control over public schools.<sup>163</sup> When the Rehnquist Court limited the reach of school desegregation remedies, it explicitly emphasized the limited nature of judicial power because of the importance of local control over K-12 education.<sup>164</sup> Similarly, the Rehnquist Court relied heavily on deference to justify its approval of the University of Michigan Law School affirmative action policies.<sup>165</sup> Yet, the plurality in *Parents Involved* specifically rejected any constitutional significance for local control or deference.<sup>166</sup> In addition, the Rehnquist Court accepted that race continues to impact individuals and society.<sup>167</sup> The *Parents Involved* plurality had, however, nothing to say about the impact of race today, other than that race should not matter.<sup>168</sup>

Even more troubling was the plurality's refusal to recognize very recent opinions that incorporated the harms of segregation into Equal Protection Clause jurisprudence. For example, the Rehnquist Court often considered the meaning of the Equal Protection Clause in cases of whites claiming racial discrimination, particularly in the context of race-conscious public contracting and legislative districting. In evaluating these situations of separation designed to benefit minorities, the Court stressed the need to eliminate different treatment to forestall the resulting harms of

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163. See Wendy Parker, *The Supreme Court and Public Law Remedies: A Tale of Two Kansas Cities*, 50 HASTINGS L.J. 475, 540–42 (1999) (discussing the importance of local control in school desegregation opinions).

164. See Parker, *supra* note 152, at 1705–39 (analyzing the federalism implications of school desegregation jurisprudence). Justice Breyer's dissenting opinion argued for the importance of allowing local choice over voluntary race-conscious integration plans. See *Parents Involved*, 127 S. Ct. at 2826 (Breyer, J., dissenting) (“[G]iving some degree of weight to a local school board’s knowledge, expertise, and concerns . . . simply recognizes that judges are not well suited to act as school administrators.”).

165. See *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003) (“The Law School’s educational judgment that such diversity is essential to its educational mission is one to which we defer.”); Wendy Parker, *The Story of Grutter v. Bollinger: Affirmative Action Wins*, in EDUCATION LAW STORIES 83, 98–99 (Michael Olivas & Ronna Schneider eds., 2008).

166. The plurality rejected deference to local school districts as “fundamentally at odds with our equal protection jurisprudence.” *Parents Involved*, 127 S. Ct. at 2766 (internal quotation marks and citation omitted) (plurality opinion).

167. See *Grutter*, 539 U.S. at 333 (“Just as growing up in a particular region or having particular professional experiences is likely to affect an individual’s views, so too is one’s own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters.”); *id.* at 338 (“By virtue of our Nation’s struggle with racial inequality, such students are both likely to have experiences of particular importance to the Law School’s mission, and less likely to be admitted in meaningful numbers on criteria that ignore those experiences.”); *Easley v. Cromartie*, 532 U.S. 234, 257 (2001) (plurality opinion) (“[R]ace in this case correlates closely with political behavior.”); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 503 (1989) (“Blacks may be disproportionately attracted to industries other than construction.”).

168. See *supra* note 160 and accompanying text.

segregation. For example, in the voting rights arena, the Court expressed grave concern with the “balkanization” inherent in majority-minority voting districts and other forms of segregation.<sup>169</sup> Similar concerns were expressed in public contracting cases.<sup>170</sup> Likewise, in *Grutter*, the Court voiced opposition to separatism in education as harming democratic values and educational success.<sup>171</sup>

At its core, these prior approaches prized not just equal treatment before the law, but a sense that we are all better off when we are together, and that separation runs counter to the spirit of the Equal Protection Clause. The Rehnquist Court could have decided all of its Equal Protection Clause opinions, except for *Grutter*,<sup>172</sup> solely on the importance of equal individual treatment under a colorblind Equal Protection Clause. Yet, the Rehnquist Court chose not to, instead articulating additional constitutional values.

The plurality in *Parents Involved*, however, made only brief, passing mention of the harms of different treatment, and they were all described in terms of effects on individuals.<sup>173</sup> In a closely watched case about resegregation, the plurality refused to utter one word in favor of school districts’ desegregation goals.<sup>174</sup> The plurality snubbed even race-neutral

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169. See *Miller v. Johnson*, 515 U.S. 900, 911 (1995) (“Just as the State may not, absent extraordinary justification, segregate citizens on the basis of race in its public parks . . . so did we recognize in *Shaw* that it may not separate its citizens into different voting districts on the basis of race.”) (citations omitted); *Shaw v. Reno*, 509 U.S. 630, 657 (1993) (“Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters . . .”).

170. See *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 603 (1990) (O’Connor, J., dissenting), (“[Racial classifications] endorse race-based reasoning and the conception of a Nation divided into racial blocs, thus contributing to an escalation of racial hostility and conflict.”), *overruled by Adarand Constructors, Inc. v. Peña* 515 U.S. 200 (1995); *id.* at 610 (“We are a Nation not of black and white alone, but one teeming with divergent communities knitted together by various traditions and carried forth, above all, by individuals.”).

171. See *Grutter*, 539 U.S. at 332 (“Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.”); *id.* at 331 (“[T]he diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity.”); *id.* at 332 (“In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.”).

172. That is, it seems very likely that the plaintiff in *Grutter*, Barbara Grutter, would have been admitted to Michigan Law School if she had been African American or Latino. See Parker, *supra* note 165, at 92 (noting the testimony of the plaintiff’s expert that indicated “that for those with Grutter’s scores—undergraduate GPAs of 3.75 and above, and LSATs of 161 to 163—the 1995 admission rate for minority applicants was 100%: three out of three, while the rate for other applicants was 9%: 13 out of 138.”).

173. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2767 (2007) (plurality opinion).

174. At best, the plurality stated that “the school districts may seek a worthy goal . . .” *Id.* at

measures to achieve integration, calling the issue beyond the scope of the case presented to the Court.<sup>175</sup>

By defining equal individual treatment as the sole goal of the Equal Protection Clause, the plurality would have also necessarily found no constitutional significance in the inequality of teacher segregation demonstrated by this Article, or any other inequities caused by segregation. According to the *Parents Involved* plurality, so long as the school districts at issue treated individuals alike, they should have had no concern with any inequities arising from that similar treatment. The four Justices were solely concerned with equal treatment, refusing even lip service to the quest for integration, and they turned a blind eye to the practical effects of segregation.

My argument here is not, however, to suggest that the Court has ever required an end to segregation not due to state action, so-called de facto segregation. Nothing could be further from the truth.<sup>176</sup> Instead, I am contending that the Supreme Court in the very recent past has interpreted the Constitution as promoting values in addition to colorblind treatment, and the plurality undertook a significant shift in ignoring those values in *Parents Involved*. In sum, the plurality makes the Equal Protection Clause one-dimensional, when before it was not.

## 2. Brown

Nor did the plurality stop with confining the Equal Protection Clause to only colorblind treatment. It also sought validation for an exclusively colorblind Equal Protection Clause from the “Holy Grail of racial justice,” *Brown v. Board of Education*.<sup>177</sup> Chief Justice Roberts claimed a colorblind reading of the Equal Protection Clause was “faithful to the heritage of *Brown*.”<sup>178</sup> To do so, Chief Justice Roberts recast *Brown* as a case *only* about race-neutral admission standards.<sup>179</sup> He defined the quest of the *Brown* plaintiffs for one and only one purpose: “that no State has any authority under the equal-protection clause of the Fourteenth

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2765.

175. *Id.* at 2766 (on the issue of race-neutral attempts to achieve integration, “express[ing] no opinion on their validity—not even in dicta”). Such a minimalist approach is at odds with the rest of the plurality opinion, where the Court reached many topics not necessary for a decision in the case.

176. Justice Breyer, however, made such an argument in his *Parents Involved* dissent. See *Parents Involved*, 127 S. Ct. at 2810–13 (Breyer, J., dissenting).

177. BELL, *supra* note 16, at 3.

178. *Parents Involved*, 127 S. Ct. at 2767 (plurality opinion).

179. *Id.* at 2767–68 (limiting *Brown* to a concern with individual treatment).

Amendment to use race as a factor in affording educational opportunities among its citizens.”<sup>180</sup> In support of his argument, the Chief Justice was bold enough to quote counsel for the *Brown* plaintiffs, who were far from pleased.<sup>181</sup>

As a matter of legal history, the Chief Justice could not be more wrong. In the aftermath of *Brown*, Southern schools tried to limit the remedy in *Brown* to race-neutral, colorblind admissions.<sup>182</sup> The Supreme Court firmly put that argument to rest in *Green*, when it held inadequate a race-neutral, colorblind student assignment plan.<sup>183</sup> Instead of neutrality, the Court required actual desegregation not only in student assignments, but also “to every facet of school operations—faculty, staff, transportation, extracurricular activities and facilities.”<sup>184</sup> Courts routinely ordered race-conscious remedies to desegregate the factors identified in *Green* to the extent practicable. In its three school desegregation opinions, for example, the Rehnquist Court reaffirmed that *Brown* required more than racial neutrality, but also desegregation according to the *Green* factors.<sup>185</sup> Since *Green*, *Brown* has been all about using “race as a factor”<sup>186</sup> to achieve integration throughout the entire school system—until the *Parents Involved* plurality.

The bravery of those facing hostile and violent crowds in crossing the color line—largely done pursuant to race-conscious court orders—was simply wasted effort if Chief Justice Roberts is right. The plurality apparently believed that such brave individuals should have been satisfied with the race-neutral admissions offered by the South and kept themselves in the segregated schools that neutrality perpetuated.

The plurality’s misuse of *Brown* is more than false history, but also affects the future. Boldly, without precedent, the *Parents Involved* plurality deemed a concern with integration contrary to the spirit of

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180. *Id.* (quoting the oral argument of plaintiffs’ counsel in *Brown*, Robert L. Carter).

181. *Id.*; see also Adam Liptak, *The Same Words, But Differing Views*, N.Y. TIMES, June 29, 2007, at A24 (quoting Judge Robert L. Carter, Professor Jack Greenberg, and William T. Coleman, Jr. as disputing Chief Justice Roberts’ use of the plaintiffs’ arguments in *Brown*).

182. See Parker, *supra* note 152, at 1709–13 (detailing race-neutral pupil placement laws enacted in Southern states in response to *Brown*).

183. *Green v. County Sch. Bd.*, 391 U.S. 430, 435 (1968).

184. *Id.*

185. See *Missouri v. Jenkins (Jenkins III)*, 515 U.S. 70, 88 (1995) (deeming the *Green* factors as “the most important indicia of a racially segregated school system”); *Freeman v. Pitts*, 503 U.S. 467, 493 (1992) (requiring, along with desegregation of the *Green* factors, “real and tangible relief to minority students”); *Bd. of Educ. v. Dowell*, 498 U.S. 237, 250 (1991) (“In considering whether the vestiges of *de jure* segregation had been eliminated as far as practicable, the District Court should look [at the *Green* factors]”).

186. *Parents Involved*, 127 S. Ct. at 2767 (plurality opinion).

*Brown*. If colorblind treatment is the goal, and segregation is not constitutionally significant, then integration is necessarily immaterial to fulfilling the promise of *Brown* even today.

The *Parents Involved* plurality was mistaken in refusing to recognize the other basic message of *Brown*: segregation ensures an inequality in resources that has constitutional significance.<sup>187</sup> While *Brown* only required judicial remedies to cure de jure segregation, and not de facto segregation, *Brown* arguably still stands for the proposition that segregation itself is contrary to the spirit of equality. Justice Roberts, however, ignored this aspect of *Brown*—along with the very practical reality of the harms of school segregation—and recast *Brown*. Segregation today is not a neutral state of being; it perpetuates inequality just as it did in Jim Crow America and should have constitutional consequences.

So far this Article has made but one current-day connection between racial/ethnic segregation and inequality of education. Segregation deprives minority schools of experienced teachers, a critical educational resource.<sup>188</sup> Correcting this imbalance is quite unlikely without integration given the preference of white teachers to teach in white schools.<sup>189</sup> Yet, segregation by race affects the distribution of a key educational resource.<sup>190</sup> Equalizing without togetherness has proven impossible. The *Parents Involved* plurality turned the Constitution deaf to the practical consequences of segregation.

### B. Society and Integration

While the plurality refused to approve any efforts to integrate, Justice Kennedy and the four dissenting Justices did. Justice Kennedy, who provided the fifth vote on the outcome, broke ranks with the other members of the majority and specifically deemed diversity a compelling governmental interest for K-12 schools, as did the four dissenting Justices.<sup>191</sup> In other words, Justice Kennedy faulted the defendants' plans for their lack of narrow tailoring, not for their purpose.<sup>192</sup>

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187. *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483, 495 (1954) (“Separate educational facilities are inherently unequal.”).

188. See *supra* notes 136–37 and accompanying text.

189. See *supra* Part III.B.2.

190. Another example of the inherent inequality of separation is demonstrated by school finance litigation, which directly sought to equalize resources without integration. Even without the complicating nature of race and ethnicity at issue, equalizing resources without integration was largely fruitless. See *supra* note 142 and accompanying text.

191. *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 judgment) (“Diversity, depending on its meaning

Specifically, Justice Kennedy left open the possibility of other race-conscious student assignment plans garnering his vote and approved race-neutral measures designed to increase integration.<sup>193</sup> The door to constitutional, voluntary efforts to desegregate in the K-12 level remains open and schools can seek integration of both their students and teachers. Implicit in Justice Kennedy's and the dissent's arguments is that segregation has real world consequences that merit constitutional significance.

The trick then, for any school district wishing to integrate, is to use the race-neutral measures specifically approved by Justice Kennedy and presumably by the dissenting Justices, or to do a better job at using race-conscious measures to capture Justice Kennedy's vote on narrow tailoring. While the efficacy of either approach is debatable, one should not underestimate the opening left to school districts to pursue integration. The plurality's affirmative disinterest in segregation is not the final word. Five Justices tell us clearly that the plurality got it wrong on what a school district may pursue.

This path may, however, offer only false hope. We simply do not know whether Justice Kennedy—who vigorously dissented in *Grutter*—will actually vote to uphold a race-conscious plan. I also strongly question how relevant that option is to current educational debates. To the extent that school districts are now more hesitant to integrate, the cost of the plurality opinion is high. A school district may decide not to pursue integration out of a fear of lawsuit, or it may decide not to integrate out of a perception that all integration efforts are constitutionally suspect. Either way, the plurality opinion may adversely affect how school boards treat the segregation in their school districts.

For most school districts, however, I think the plurality opinion mainly validates what the school districts already practice—an unwillingness to look at inequality through the lens of race/ethnicity. Ultimately, what I

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and definition, is a compelling educational goal a school district may pursue.”); *id.* at 2791 (“The plurality opinion is too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race.”); *id.* at 2822 (Breyer, J., dissenting) (“In light of this Court’s conclusions in *Grutter*, the ‘compelling’ nature of these interests in the context of primary and secondary public education follows here *a fortiori*.”).

192. See *id.* at 2790–91 (Kennedy, J., concurring in part and concurring in judgment) (concluding that the plans lacked the necessary narrow tailoring). The opinion leaves Justice Kennedy in a similar situation faced by Justice Powell in *Bakke*—agreeing with the majority that the plans should fail, but also agreeing with the dissent that race can be a factor. See *Regents of Univ. of Ca. v. Bakke*, 438 U.S. 265, 311–18 (1978) (opinion of Powell, J.).

193. *Parents Involved*, 127 S. Ct. at 2791–92 (Kennedy, J., concurring in part and concurring in judgment).

find so troubling is *not* that four Justices of the Supreme Court commit themselves, in the name of *Brown*, to colorblindness as the only Equal Protection Clause value. What is more troubling is that today most educators, parents, and advocates approach educational equity from a race-neutral stance. Integration is absent from most agendas for educational excellence or equality. As a result, very little public outcry met the outcome in *Parents Involved*.<sup>194</sup> Nor do many complain about the current segregation in our schools; instead the public reaction largely validates it.<sup>195</sup>

Professor Jim Ryan has counted the number of school districts with plans similar to those challenged in *Parents Involved*—voluntary, race-conscious choice plans—as between ten and thirty.<sup>196</sup> The number of school districts desegregating their few magnet schools with race-conscious admission policies is likely higher, but still far from prevalent. Only one school filed a brief in *Parents Involved* and admitted to any kind of race-conscious admissions in its magnet programs: Los Angeles Unified, the nation's second largest school district, with nine percent white enrollment.<sup>197</sup> Even those opposed to race-conscious K-12 practices have found few school districts to sue.<sup>198</sup>

One would not expect many school districts to have the resources to file amicus briefs with the Supreme Court declaring a need for their race-conscious admission policies. Major national educational organizations and states, on the other hand, have such resources and filed amicus briefs in *Parents Involved*. With the exception of Florida, the states filing briefs supported race-conscious K-12 admissions, as did the major national

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194. See Patricia Williams, *Mourning in America*, THE NATION, July 30, 2007, at 10, 10, available at <http://www.thenation.com/doc/20070730/williams> (“What concerns me at the moment is the general lack of outcry that has met the decision that public school districts cannot take voluntary action to overcome racial inequality.”).

195. See *supra* notes 16–19 and accompanying text.

196. See Ryan, *Voluntary Integration*, *supra* note 19, at 146–47.

197. See Brief of Los Angeles Unified School District as Amicus Curiae Supporting Respondents, *Parents Involved*, 127 S. Ct. 2738 (No. 05-908), 2006 WL 2927064, at \*1–\*3.

198. For example, the Center for Individual Rights, which litigated the Michigan affirmative action cases, only has two cases pending on this topic. See Center for Individual Rights, Civil Rights Cases, [http://www.cir-usa.org/case\\_results.php?type=1](http://www.cir-usa.org/case_results.php?type=1) (last visited Feb. 15, 2008). Both are against New York City's public schools, and one concerns race-conscious magnet school admission and the other challenges race-conscious test preparation courses. See *id.* The Pacific Legal Foundation has no pending cases, but has written a letter to a Texas school district about its race-conscious student assignment. See Pacific Legal Foundation, Public Schools May Not Assign Students Based on Skin Color, <http://community.pacificlegal.org/NETCOMMUNITY/Page.aspx?pid=497&srcid=272> (last visited Feb. 15, 2008).

educational organizations. All wrote at length on the value of integrated education.<sup>199</sup>

Interesting, however, is the lack of commitment of these national groups to promoting integration elsewhere. Their websites, for example, have almost nothing to say about the value of integration. The National Education Association does not list desegregation, integration, or diversity as one of its thirty “education issues in the spotlight.”<sup>200</sup> The National Parent Teacher Association has passed many resolutions, but I could not find one on the importance of desegregation, integration, or diversity since the 1950s.<sup>201</sup> Similarly, the National School Boards Association is asking Congressional members to make a “pledge to America’s schoolchildren,” but the pledge has nothing to do with desegregation, integration, or diversity.<sup>202</sup> While a number of state laws mandate some type of integration efforts by their school districts in laws dating back decades,<sup>203</sup> I know of no state with a meaningful, statewide effort to desegregate its schools, other than California.<sup>204</sup> Similarly, the educational K-12 issues of the day—choice, No Child Left Behind (“NCLB”)<sup>205</sup>—have nothing to do with integration.<sup>206</sup> Even attempts to eradicate the racial/ethnic achievement gap are either race-neutral or segregative, but never based on integration.<sup>207</sup>

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199. See Brief of the Council of Great City Schools et al. as Amici Curiae Supporting Respondents, *Parents Involved*, 127 S. Ct. 2738 (No. 05-908), 2006 WL 2882698, at \*8-\*11, \*14-\*17; Brief of the National Parent Teacher Association as Amicus Curiae supporting Respondents, *Parents Involved*, 127 S. Ct. 2738 (No. 05-908), 2006 WL 2882699, at \*7-\*17; Brief of National School Boards Association as Amicus Curiae supporting Respondents, *Parents Involved*, 127 S. Ct. 2738 (No. 05-908), 2006 WL 2925968, at \*14-\*15; Brief of National Education Association et al. as Amici Curiae supporting Respondents, *Parents Involved*, 127 S. Ct. 2738 (No. 05-908), 2006 WL 2927085, at \*15-\*30; Brief of States of New York et al. as Amici Curiae Supporting Respondents, *Parents Involved*, 127 S. Ct. 2738 (No. 05-908), 2006 WL 2944679, at \*4-\*7.

200. See National Education Association, Issues in Education, <http://www.nea.org> (follow “Issues in Education” hyperlink) (last visited Feb. 13, 2008).

201. See National Parent Teacher Association, Resolutions, <http://www.pta.org> (follow “Issues & Action” hyperlink; then follow “Resolutions” hyperlink) (last visited Feb. 13, 2008).

202. See National School Boards Association, Pledge to America’s Schoolchildren, <http://www.pledgetoamericasschoolchildren.org/pledge.php> (last visited Feb. 13, 2008).

203. Brief of States of New York et al., *supra* note 199, at \*4-\*7 (discussing such state laws).

204. See *supra* note 96 and accompanying text.

205. 20 U.S.C. §§ 6301–6578 (Supp. IV 2004). Yet, some civil rights lawyers argue that aspects of NCLB, particularly the interdistrict transfer provisions, “can and should be used to promote desegregation.” Goodwin Liu & William L. Taylor, *School Choice to Achieve Desegregation*, 74 *FORDHAM L. REV.* 791, 795 (2005).

206. Lawrence, *supra* note 143, at 1377 (“Vouchers, charter schools, Edison schools, and the No Child Left Behind Act all offer educational reform for poor minority children with no direct attention to race or class integration.”).

207. See Hu, *supra* note 16.

In many ways, the outcome and the plurality opinion in *Parents Involved* change very little at the K-12 level. Contrast this with *Grutter*, where many colleges and universities quite truthfully argued that a strict prohibition against affirmative action would dramatically change the demographic makeup of elite higher education.<sup>208</sup> The Supreme Court has a well-deserved reputation for “maximiz[ing] its power by paying attention to the social and political forces that surround it.”<sup>209</sup> Given the widespread support for diversity—even the Bush administration endorsed diversity in theory in its *Grutter* amicus brief<sup>210</sup>—and the lukewarm reception to K-12 integration, the outcome in *Parents Involved* was all too predictable. We have never been that committed as a society to integrated public elementary and secondary schools. We continue today to accept the inequities that attend student and teacher segregation, or at least attach no racial label to the consequences of school segregation.

Achieving integration has never been easy. We continue to find comfort in self-segregation in our neighborhoods, places of worship, and schools. A more fundamental problem than the plurality’s disinterest in integration is the disinterest found in the overwhelming majority of school districts. We have completely disconnected integration from quality of education. Until we are willing to take this step—a difficult step to be sure, for it requires us all to trust each other with the education of our youth—efforts to improve our schools will come up short and racial inequality will continue. As Professor Charles Lawrence so eloquently reminds us, “education should be a community enterprise engaged in for the good of the collective, for other people’s children as well as our own.”<sup>211</sup> Until we embrace integration as a society, it is impossible to imagine the Supreme Court taking that step for us. What is imaginable, however, is an outcome like *Grutter* if we come to support integration as much as we have diversity.<sup>212</sup> After all, just one more vote is needed to turn the *Parents Involved* plurality into dissenters.

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208. See Neal Devins, *Explaining Grutter v. Bollinger*, 152 U. PA. L. REV. 347, 373 (2003) (“[A]ffirmative action has become so entrenched that the costs of taking a stand against it are greater now than ever before.”).

209. *Id.* at 348.

210. See Parker, *supra* note 165, at 97.

211. Lawrence, *supra* note 143, at 1396.

212. Because diversity and integration are sometimes used interchangeably, I want to make clear their differences. Diversity adds color to predominantly white institutions. See Deborah Jones Merritt, *Brown’s Legacy: The Promises and Pitfalls of Judicial Relief*, 56 NEGRO EDUC. REV. 51, 53 (2005) (“Selective colleges have just the ‘right’ mix of white and minority students, enough African-American and Latino students to give the campus an urbane, cosmopolitan air without threatening the white campus majority.”). The schools can and usually do, however, retain their white identity.

## CONCLUSION

My aim in this Article was two-fold. First, my empirical work revealed that our schools are more resegregated than is commonly recognized; not only are students increasingly segregated, their teachers are as well. Second, I demonstrated that the segregation of teachers, which goes hand and hand with student segregation, ensures that the critical resource of experienced teachers is distributed unequally. Thus, I sought to reconnect integration with quality of education by demonstrating one of many links between segregation and unequal resources. I direct this message primarily not to the Supreme Court, whose current composition seems entirely comfortable with school segregation, but instead to parents, advocates, and educators. Until our society embraces integration, the Supreme Court is unlikely to do so. As a society, we too often ignore the consequences of school segregation, and pretend any inequities are entirely nonracial in cause and effect.

None of this is to suggest that integration is an easy road. The most obvious lesson of *Brown* is the difficulty of integration. When my son moved from our white neighborhood school to an integrated downtown school, I hesitated much more than I would have thought possible in how to explain the racial aspects of that decision to other white parents. I often found myself frozen in talking in personal terms about an issue I have litigated and thought about for fifteen years. Thus, I do not mean to underestimate the difficulty of pursuing integration. Yet, I hope this Article has helped people of all colors see that ignoring the consequences of segregation dooms us to repeating the errors of the Jim Crow racial hierarchy. Our children deserve a better world, not a repeat of the past.

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Diversity has had little impact on historically minority institutions. Integration, on the other hand, erases racial/ethnic identifiability in all schools. For these reasons, diversity lacks the transformative potential of integration.