

2006

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Myron Orfield

University of Minnesota Law School

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Choice, Equal Protection, and Metropolitan Integration: The Hope of the Minneapolis Desegregation Settlement

Myron Orfield¹

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Introduction

The Minneapolis-St.Paul metropolitan area is one of the whitest and most affluent regions in the country.² In the state of Hubert Humphrey, and many other national civil rights leaders, central city school districts contain many public schools that are overwhelmingly poor and enroll virtually no White students.³ These schools are segregated both racially and economically from their city and suburban counterparts—some are “hypersegregated,”⁴ with nearly 90% Black students and similarly large concentrations of poverty.⁵

The effects of neighborhood segregation and poverty are greatly magnified in schools, which are much more segregated

1. Associate Professor of Law, Fesler-Lampert Chair in Urban and Regional Planning, University of Minnesota and Non-resident Senior Fellow, the Brookings Institution. This paper was presented at the Public Law Workshop at the University of Minnesota Law School. The author would like to acknowledge Daria Roithmayr, Brad Karkkainen, James Ryan, John Powell, Gary Orfield, Guy Charles, Jill Hasday, Ruth Okediji, and Jim Chen for their assistance. I would like to thank Scott Crain, C. Ann Olson and Nick Wallace for their spectacular research assistance.

² See U.S. Census Bureau, Summary File 3, http://factfinder.census.gov/servlet/CTTable?_caller=geoselect&_ts=144858684577 (last visited _____, 2005). The Minneapolis-St. Paul area is about 86% White, and slightly more than 5% Black. The median income by household is more than \$54,000—fourth in the nation. *Id.*

3. INSTITUTE ON RACE AND POVERTY: RESEARCH, EDUCATION AND ADVOCACY, SELECTED DEMOGRAPHICS, MINNEAPOLIS PUBLIC ELEMENTARY SCHOOLS, 2003-2004 (2004);

4. DOUGLAS MASSEY & NANCY DENTON, AMERICAN APARTHEID 10 (1993) (coining the term “hypersegregation” to describe intense, multidimensional segregation).

5. See INSTITUTE ON RACE AND POVERTY, *supra* note 2.

than their neighborhoods. Moreover, while more than two-thirds of poor white children lived in low-poverty neighborhoods, only about 25 percent of poor black children and less than 33 percent of poor Hispanic children lived in low-poverty neighborhoods.⁶ In significant part because of this racial and social segregation, only 52 percent of black children and 20 percent of Hispanic children in Minneapolis will graduate.⁷ Those that do graduate or obtain an equivalency degree will likely have tremendous difficulty finding a path to college or a well-paying job with benefits in the overwhelmingly white-dominated higher education system and economy. If this kind of racial and socioeconomic segregation can happen in the Twin Cities, it can conceivably happen anywhere.

Fifty years after the U.S. Supreme Court decreed segregated schools to be intrinsically wrong and later ordered that desegregation proceed by “meaningful and immediate progress,”⁸ separate schooling still exists for Whites and minorities.⁹ While county-wide educational systems throughout the south effectively and stably desegregated de jure school districts,¹⁰ Northern districts—contained within fragmented areas with many districts—were less amenable to stable integration. Minneapolis, for example,¹¹ engaged in city-only desegregation. Hemmed in by many independent suburban districts and the Supreme Court’s decision in *Milliken*,¹² these Northern cities were ordered to

⁶ Paul Jargowsky, *Poverty and Place* 75 (1997).

⁷ Minnesota Department of Education, “School Report Card: Minneapolis,” (2005), *at* http://education.state.mn.us/ReportCard2005/ayspGraduation.do?SCHOOL_NUM=000&DISTRICT_NUM=0001&DISTRICT_TYPE=03

⁸ *Green v. County Sch. Bd. of New Kent County, Va.*, 391 U.S. 430, 439 (1968).

⁹ See e.g., Richard Thompson Ford, *Brown’s Ghost*, 117 HARV. L. REV. 1305, 1309 (2004) (noting that “green follows White,” meaning integrated schools will ensure that minorities from low-income communities will not be ignored by the state if they attend the same middle-class schools as do Whites).

¹⁰ GARY ORFIELD AND SUSAN EATON, *DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION* 14-16 (1996).

¹¹ Booker, See also Myron Orfield, *Metropolitcs*, ch.2 (1997); John Powell, *Segregation and Educational Inadequacy in Twin Cities Public Schools*, 17 Hamline J.L.P.P. 337 (1996); Myron Orfield, *Economic and Racial Polarization in Twin Cities Schools*, 17 Hamline J.L.P.P. 271 (1996).

¹² *Milliken v. Bradley*, 418 U.S. 717 (1974).

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desegregate their schools without suburban assistance.¹³ While the county-wide systems in the south remained stably integrated for decades, the results in the Twin Cities were consistent with city-only desegregation plans throughout the country – temporary integration overwhelmed eventually by white flight.¹⁴

In Minnesota, “separate and much more than equal funding” of inner-city schools has been the response to the problem of regional segregation.¹⁵ Minnesota increased funding to segregated schools when it was under the threat of a metropolitan desegregation suit both in the 1970s under the federal equal protection clause and in the 1990s under the state’s.¹⁶ Since 1995, state funding formulas have guaranteed that twice as much money is spent per pupil the most segregated city schools, as compared to that spent in the wealthiest suburban districts.¹⁷

In both cases, like so many other places in the country, the state made an implicit bargain with the city schools: “you keep black and Latino out of our white suburban neighborhoods in segregated schools in the city and we will pay you to do it.” At the time, it seemed like a good bargain for whites who were afraid of black students and central-city education systems which liked the idea of new resources. But it wasn’t a good deal. It was a deal that likely destroyed countless lives, deeply hurt city and suburban neighborhoods where the schools became racially identifiable, and ultimately the quality of life and, very likely, the economy of the Twin Cities.

This new funding, which has not changed the tragedy and harm caused by the segregation of the inner-city schools, is unlikely to increase further. It is unlikely that the legislature will grant more money to inner-city schools when they are increasingly failing and when property taxes and enrollment are growing rapidly in the developing, low-property tax, and politically pivotal suburbs.¹⁸

¹³ GARY ORFIELD AND SUSAN EATON, *DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION* 29-30 (1996).

¹⁴ Myron Orfield, *Metropolitics*, 44-45 (1997).

¹⁵ MYRON ORFIELD, *METROPOLITICS: A REGIONAL AGENDA FOR COMMUNITY AND STABILITY* 91 (1997).

¹⁶ *Id.* at 45.

¹⁷ MYRON ORFIELD, *METROPOLITICS: A REGIONAL AGENDA FOR COMMUNITY AND STABILITY* (1997).

¹⁸ *See id.*

Racially and economically isolated schools are often attacked by opportunistic politicians who use the pathologies created by segregation to fuel white resentment against the segregated schools.¹⁹ Segregated schools with high spending and poor test scores are often used as an affirmation of conservative views of government and a powerful wedge issue to divide suburban voters, many of whom live in low wealth school districts which directly compete with the central cities for aid.²⁰ There has been little or no politically or practically effective liberal response to these attacks. But the failure of segregated schools is not necessarily due to corruption or mismanagement—although both are more likely to occur in central cities without politically powerful middle-class families to monitor school quality and performance. It is because, as decades of national experience have shown, students are overwhelmingly disadvantaged by the learning environments of majority poor and segregated schools.²¹ While racially and economically isolated schools fail, the few examples socially integrated schools are meeting expectations and effectively educating children from diverse racial and social backgrounds.²²

Urban school advocates and political leaders across the spectrum throughout the nation have also hailed charter schools as an answer to failing urban schools.²³ Charter schools, started in

19. *See, e.g.*, Doug Grow, *Was Day Crude? Or Just Stupid?*, STAR TRIB. (Minneapolis), May 22, 2004, at 1B (quoting the Minnesota Senate Minority Leader who was recently forced to apologize for “repeatedly and angrily sa[ying] that Minneapolis and St. Paul schools ‘suck’”).

20. *See id.* Suburban and rural leaders often object to the increasing amounts of aid that go to large, inner-city school districts while test scores and completion rates fail to improve. *See id.* These leaders generally fail to mention the manifold difference between educating students in schools with 90% or more children coming from poor homes and educating students in affluent or middle class suburbs.

21. *See, e.g.*, RICHARD D. KAHLBERG, ALL TOGETHER NOW 47-76 (2001) (discussing effects of concentrated poverty, parent educational achievement, “oppositional culture,” and influence of peers on educational attainment among students).

22. *See* Minn. Dep’t of Educ., School Report Card: Lake Harriet Upper (121), http://education.state.mn.us/ReportCard2005/schoolDistrictInfo.do?SCHOOL_NUM=121&DISTRICT_NUM=0001&DISTRICT_TYPE=03 (last visited Sept. 11, 2005) (showing demographics and links to AYP and Basic Skills Testing results). As an example, Lake Harriet Upper Campus in Southwest Minneapolis has 18% minorities, 11% free and reduced lunch enrollment, and the school is making adequate yearly progress and exceeding testing goals for children of all races. *See id.*

²³ Much of the rhetoric surrounding charter schools is based on upsetting the notion of what a “public” school is. *See, e.g.*, U.S. Charter Schools, *at*

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Minnesota as a national model, have failed to yield any better results, have deepened racial segregation, and appear to be frequently mismanaged and financially unstable.²⁴

Schools are more than textbooks, facilities, and dedicated teachers. Schools are also social networks which establish connections and relationships that are important in college, careers, and general access to opportunity. Poor, segregated schools cannot expose children to these networks, and the larger institutions associated with opportunity in society are harder for students from racially and socially segregated high schools to access, which hinders the ability of Black and Latino children to lift themselves out of poverty.²⁵ In addition, even Whites who are the racial group most segregated in their schooling—segregated from both low-income students and students of color—are injured by decreased opportunities to interact with diverse groups in an increasingly diverse country.²⁶ The trend across the nation is for increased diversity at all grades, and whites will soon be in the minority.²⁷

Like Minneapolis in the 1960s and 1970s, older suburban school districts are experiencing rapid racial change, increased segregation, and its attendant harms.²⁸ In several of these school districts, recent attendance boundary changes have concentrated minorities in racially identifiable schools in a pattern of conduct

http://www.uscharterschools.org/pub/uscs_docs/o/movement.htm

24. See ERICA FRANKENBERG & CHUNGMEI LEE, HARVARD CIVIL RIGHTS PROJECT, CHARTER SCHOOLS AND RACE: A LOST OPPORTUNITY FOR INTEGRATED EDUCATION 4, 7 (2003), <http://www.civilrightsproject.harvard.edu/research/deseg/CharterSchools.php> (noting that 70% of Black students in charter schools are likely to be in intensely segregated schools as opposed to 34% in standard public schools; also noting that the uniqueness of charter schools makes it difficult or impossible to evaluate the quality of education); see also Scott Abernathy, *Charter Schools, Parents, and Public Schools in Minnesota*, 34 CURA REP. 1, 6-7 (2004) (discussing positive and negative consequences associated with charter schools).

25. See Joleen Kirschenman & Kathryn Neckerman, *We'd Like to Hire them but, . . . the Meaning of Race for Employers*, in THE URBAN UNDERCLASS, *supra* note 15, at 203, 231 (documenting discrimination by employers in Chicago who turned down applicants from low-income neighborhoods and high schools more frequently).

26. See Ford, *supra* note 7 at 1311 (quoting the reasoning of Justice O'Connor in *Grutter v. Bollinger*, 539 U.S. 306 (2003)).

27. Eric Schmitt, *The New Urban Minority*, N.Y. Times, May 6, 2001, (Westlaw) (noting Whites constitute a minority in the largest 100 cities in the country).

28. See *infra* notes 28. See *infra* notes 235--247 and accompanying text. and accompanying text.

which may violate the federal and state constitutions.²⁹ Suburban racial change and policies that contribute to White flight and segregation are hurting these communities by creating identifiably “White” schools and “Nonwhite” schools, thereby encouraging the spatial separation of Whites and minorities not only in schools but also in suburban neighborhoods.³⁰

More segregation is not inevitable though. The legal response has been largely halted in the federal courts, as they have essentially “dismantled” desegregation remedies and allowed school districts to return to segregated schooling.³¹ Yet important federal remedies remain relevant to the setting of attendance boundaries in newly diverse, older suburbs.

Perhaps more importantly, civil rights plaintiffs’ lawyers have shifted their tactics to state courts. *Sheff v. O’Neill*, a state case filed in Connecticut in 1989, is the leading case advocating desegregation through state constitutional law.³² Local attorneys and the Minneapolis NAACP filed a similar suit in 1995 to require the state of Minnesota to desegregate Minneapolis’s troubled schools with neighboring suburban districts.³³ A settlement arose in 1999 that pushed the state towards creating a solution and provide opportunity for poor children and children of color to attend middle-income schools.³⁴ The Choice is Yours Program (“CIY”), created by the settlement, made space for 2,000 low-income Minneapolis children from poor neighborhoods to attend suburban schools over four years.³⁵

Early experiences in the program are positive and the

29. *See, e.g.*, The Bloomington Public Schools: Middle School Boundaries, <http://www.bloomington.k12.mn.us/distinfo/reports/Middleschoolboundaries.html> and http://www.bloomington.k12.mn.us/distinfo/reports/MiddleschoolPro_Con.html (last visited Sept. 11, 2005).

30. Recent evidence shows that real estate agents, in violation of federal law, systematically steer Whites toward White areas in the suburbs and Blacks toward Black areas of the suburbs. *See* LAWRENCE A. WINANS & CHRISTY L. SNOW, FAIR HOUSING AUDIT: A COMMUNITY AUDIT TESTING FOR RACIAL BIAS IN RENTAL HOUSING IN THE CITIES OF BLOOMINGTON, BURNSVILLE, AND ST. CLOUD 12-21 (1997).

31. *See infra* notes 31. *See infra* notes 386---390 and accompanying text. and accompanying text.

32. *Sheff v. O’Neill*, 678 A.2d 1267 (Conn. 1996).

33. *See infra* note 151 and accompanying text.

34. *See infra* notes 183-189 and accompanying text.

35. *See* West Metro Education Program, The Choice is Yours, <http://www.wmep.net/choice.html> (last visited Aug. 10, 2005) (explaining CIY in detail for parents and children).

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legislature, on a bipartisan basis, recently continued CIY after the settlement expired.³⁶ The parents of the CIY children say the schools are safer and stronger educationally, all this despite long bus rides and the ever-present problem of racism by whites unaccustomed to black and Latino students. Moreover, fewer than 20% of students enrolling in a suburban school through the program elected to return to the Minneapolis School District (MSD).³⁷ This article argues that, in order to combat desegregation in Minneapolis, this program should be extended and expanded to operate in conjunction with a stronger regional approach to affordable housing.

This article will discuss the barriers to integration that have been created since *Brown v. Board of Education*³⁸ and the relevance that struggles from the 1970s and 1980s have for the increased segregation in the Twin Cities and around the country today.³⁹ The article details the legal structure that has been created in Minnesota to address segregation,⁴⁰ state equal protection lawsuits,⁴¹ and desirable outcomes and needed reforms.⁴² I support a slightly different position than some recent commentators by noting that racial integration is a required element to improving our schools and cities—economic class cannot effectively serve as a proxy for the benefit of increased cross-cultural interaction.

The article concludes by showing that comprehensive state regional integration can be achieved if sound, regional strategies are used to discourage White flight by creating low-poverty, high-achieving schools throughout the region.⁴³ New research from the Institute on Race and Poverty (“IRP”) shows that, far from encouraging White flight, as city-only desegregation does, metropolitan-wide school desegregation helps to create stably integrated schools and residential neighborhoods.⁴⁴ These findings have ramifications for the future administration of CIY

36. Allie Shah, *School-choice Plan Extended*, STAR TRIB. (Minneapolis), Jan. 8, 2004, at 1B (summarizing the achievements of the first two years of the program).

37. ELISABETH A. PALMER, *THE CHOICE IS YOURS AFTER TWO YEARS: AN EVALUATION* 18 (2003).

38. 347 U.S. 483, 495 (1954) (finding segregated schooling unconstitutional).

39. *See infra* Part B.1.

40. *See infra* Part D.

41. *See infra* Part B.2.

42. *See infra* Part II.D.

43. *See infra* Part III.D., E.

44. *See infra* part III.E.

and future discussions on the crisis in U.S. public schools. With a strong choice program permitting low-income minority families to enter middle-class suburban schools and a much more targeted low-income housing program reinforcing integration of those schools, there is no reason why an area as White and affluent as the Twin Cities cannot become a fully and stably integrated region.

Parents and students, understanding all the options, don't choose segregated schooling and its attendant disadvantages—the overwhelming interest in CIY demonstrates as much. Moreover, it is ultimately politically if not practically untenable to spend twice the suburban average in funding on schools of concentrated poverty without achievement results. In theory and in practice, a transportation voucher and a seat in a middle-class suburban school costs less and provides more opportunity, while contributing to residential stability. Furthermore, creating and maintaining cross-cultural relationships is as important as ever in a society that is increasingly diverse and is only served well through desegregated schools.

All of these considerations give rise to a moral as well as a legal obligation for overwhelmingly White and middle-class schools to allow space for children of all backgrounds in their schools and to share their resources and experience to help educate the state's poorest children. More funding is not enough to meet that obligation: fifty years after the initial decree in *Brown*, civil rights leaders have proved themselves prophetic in arguing that segregated schools are not equal schools, even if you spend twice as much as affluent white schools.

I. History and Demographic Change of Minnesota School Segregation: From Minneapolis to the Inner Suburbs

A. How Segregation Happens

Segregation and its socioeconomic consequences were carved into the nation's landscapes and psyches by the century of discrimination that followed slavery. A century after the Civil War, the Kerner Commission reported to the nation in 1968 of the conditions igniting hundreds of urban riots. It said of the racial

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ghetto: “White institutions created it, white institutions maintain it, and white society condones it.”⁴⁵ School segregation arises out of institutions that affect both schools and housing because quality education is a significant factor influencing parents’ choice of neighborhood.

Even after overt racial discrimination became illegal during the second half of the 1900s, housing, zoning, and school policies persist in protecting segregation. Public officials recognize that these policies, abetted by local government fragmentation, can be used to shield private decisions that sometimes include race-based motivations. Thus, to accept as “natural” the policies and practices that maintain segregation, and the ongoing dynamics they perpetuate, overlooks both discrimination’s history and the chance still to “walk the talk” of equal access to opportunity for all races and ethnicities.

Pervasive housing discrimination by private actors helped to create and currently maintains poor, minority neighborhoods.⁴⁶ Until at least the end of World War II, physical violence, racial zoning, and discriminatory real estate practices kept blacks tightly confined in ghetto areas and out of white areas.⁴⁷ In many cities, white property owners attached restrictive covenants to deeds that forbade blacks from buying homes in their neighborhoods.⁴⁸ Real estate agencies engaged in a variety of discriminatory practices, including racial steering of blacks and whites away from each other and blockbusting, which involves selling a few homes in a white neighborhood to black tenants, buying neighboring homes at lower prices from panicked white homeowners, and then selling the homes to middle-income blacks at a premium.⁴⁹

⁴⁵ United States Kerner Comm’n, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 2 (1968), quoted in Meredith Lee Bryant, *Combating School Resegregation through Housing: A Need for a Reconceptualization of American Democracy and the Rights it Protects*, in IN PURSUIT OF A DREAM DEFERRED: LINKING HOUSING AND EDUCATION POLICY 49, 51 (John Powell, Gavin Kearney, & Vina Kay, eds., 2001).

⁴⁶ DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID 12-14 (1993).

⁴⁷ *Id.* at 36-37.

⁴⁸ *Id.* Racially restrictive covenants were declared unconstitutional in the 1940s. *Shelley v. Kramer*, 334 U.S. 1, 13 (1948).

⁴⁹ See MASSEY & DENTON, *supra* note 46, at 38.

To this day, blacks and Latinos at all income levels are discriminated against by real estate agents, who show them only a small subset of the market and steer whites away from communities with people of color.⁵⁰ Mortgage lenders also systematically lend less mortgage money to blacks and Latinos compared to whites of comparable income and background.⁵¹ These patterns of housing discrimination and resegregation do not stop at central city borders but also affect large parts of suburbia. A recent study of metropolitan Boston showed that nearly half of black homebuyers were concentrated in only 7 of 126 communities.⁵²

The resegregation of urban neighborhoods is a complex process that contributes substantially to the isolation of poor minorities. When Black or Latino residents move to a new neighborhood that is integrated or very white, white demand for housing declines.⁵³ This occurs first in households with children and later for the broader middle-class.⁵⁴ In a housing market where American households change housing locations on average every six years, black and Latino members of the middle class are not, by

50. See MARGERY AUSTIN TURNER ET AL., URBAN INST., DISCRIMINATION IN METROPOLITAN HOUSING MARKETS 3-1 to 3-19, 6-1 to 6-13 (2002), available at http://www.huduser.org/Publications/pdf/Phase1_Report.pdf (summarizing discrimination data from 2000); JOHN YINGER, CLOSED DOORS, OPPORTUNITIES LOST 51-61 (1995) (examining racial and ethnic steering phenomena); see generally George C. Galster, *Racial Steering in Urban Housing Markets: A Review of Audit Evidence*, 18 REV. BLACK POL. ECON 105 (1990) (same).

51. See John Yinger, *Cash in Your Face: The Cost of Racial and Ethnic Discrimination in Housing*, 42 J. URB. ECON. 339, 340 (1997) (providing research based on Home Mortgage Disclosure Act data finding that discrimination in housing and financing markets costs blacks and Hispanics, on average, more than \$3,000 whether or not they actually encounter discrimination); YINGER, *supra* note 50, at 69-70 (1995) (analyzing HMDA data and finding stark racial differences in lending policy, even when controlling for differences in lenders and individual economic characteristics of the borrower).

52. GUY STUART, THE CIVIL RIGHTS PROJECT, HARVARD UNIV., SEGREGATION IN THE BOSTON METROPOLITAN AREA AT THE END OF THE 20TH CENTURY (2000), available at http://www.civilrightsproject.harvard.edu/research/metro/housing_boston.php (referring to evidence presented in the report's unpaginated executive summary). Additionally, white suburbanites are not shown integrated markets. TURNER ET AL., *supra* note 50, at 6-1.

⁵³ See MASSEY & DENTON, *supra* note __, at 96.

⁵⁴ MYRON ORFIELD, AMERICAN METROPOLITICS: THE NEW SUBURBAN REALITY 11 (2002).

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themselves, capable of sustaining a middle-class housing market.⁵⁵ When white middle-class families withdraw, the reality of supply and demand will lower prices.⁵⁶ When the price of housing falls, low-income minorities move into the housing left behind.⁵⁷ Businesses and jobs, seeing this disinvestment by the broader middle class, soon follow, taking with them a portion of the tax base.⁵⁸

Racial change in schools is often a precursor to change in the housing market. In most cases when schools become more black and Latino they become poorer and within a short span the neighborhood follows suit.⁵⁹ Once the minority share in a community school increases to a threshold level (perhaps 10 to 20 percent), racial transition accelerates until minority percentages reach very high levels (greater than 80 percent).⁶⁰

A study by the Institute of Race and Poverty (IRP) found striking evidence of resegregation in some of the largest metropolitan areas in the United States.⁶¹ An analysis of 15 large metro regions between 1980 and 2000 found that a majority of

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ The pattern of resegregation, flight and tipping is complex. See George Galster et al., *Identifying Neighborhood Thresholds: An Empirical Exploration*, 11 HOUSING POLY DEBATE 701 (2000); Roberto Quericia & George Galster, *Threshold Effects and Neighborhood Change*, 20 J. PLAN. EDUC. & RES. 146 (2000); George Galster et al., *The Fortune of Poor Neighborhoods*, 39 URB. AFF. REV. 205 (2003). Some have argued that the "invasion-succession" model may be less applicable in contexts involving Hispanic and Asian residents. See David Fasenfest et al., *Living Together: A New Look At Racial And Ethnic Integration In Metropolitan Neighborhoods*, LIVING CENSUS SERIES (Brookings Inst. Ctr. on Urban & Metro. Policy, Washington, D.C.)(2004), Apr. 2004, at 15, at http://www.brookings.edu/metro/publications/20040428_fasenfest.htm.

⁵⁹ *Id.* at 9-15.

⁶⁰ MYRON ORFIELD, METROPOLITICS: A REGIONAL AGENDA FOR COMMUNITY AND STABILITY 43-54 (1997). Change occurs fastest at levels of 20 percent to 50 percent and proceeds in most cases until schools are highly segregated. ORFIELD, *supra* note 54 at 10.

⁶¹ Myron Orfield and Tom Luce, Inst. on Race & Poverty, *Minority Suburbanization and Racial Change: Stable Integration, Neighborhood Transition and the Need for Regional Approaches*, (May 5, 2005).

blacks and Latinos now live in suburban cities.⁶² IRP found that many neighborhoods which at one point in time appeared to be integrated were actually in a period of racial transition.⁶³ Many of these neighborhoods experienced racial transition only if the nonwhite population exceeded 20 to 30 percent.⁶⁴

Census data also shows that integrated census tracts which had a black population percentage in the mid-thirties in 1980 were more likely to make the transition to predominantly black during the next twenty years than they were to remain integrated.⁶⁵ Resegregation is not inevitable, but integrated areas with a majority of black residents tend to become more black over time.⁶⁶ Communities that have practiced “managed integration” with a series of pro-integrative financial incentives, careful oversight of real estate practices, and using marketing strategies geared to maintaining the housing demand of whites when evidence of resegregation appeared, have shown frequent success in maintaining social and economic integration for generations.⁶⁷

Despite evidence that discrimination plays a large role in residential segregation,⁶⁸ conventional wisdom holds that patterns

⁶² *Id.* at 1.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Lynette Rawlings et. al, *Race and Residence: Prospects for Stable Neighborhood Integration*, 3 NEIGHBORHOOD CHANGE IN URB. AM. (Urban Inst., Washington, D.C.), March 2004, at 4-5, 8, at <http://www.urban.org/template.cfm?Template=/TaggedContent/ViewPublication.cfm&PublicationID=8817&NavMenuID=95>.

⁶⁷ ORFIELD, *supra* note 54, at 125-26.

⁶⁸ See, e.g., MARGERY AUSTIN TURNER ET AL., URBAN INST., DISCRIMINATION IN METROPOLITAN HOUSING MARKETS 3-1 to 3-19, 6-1 to 6-13 (2002), available at http://www.urban.org/UploadedPDF/410821_Phase1_Report.pdf (“In 2000, African American renters were significantly more likely to be denied information about available housing units than comparable white renters.”); see also John Yinger, *Cash in Your Face: The Cost of Racial and Ethnic Discrimination in Housing*, 42 J. URB. ECON. 339 (1997) (research based on Home Mortgage Disclosure Act data finding that discrimination in housing and financing markets costs blacks and Hispanics, on average, more than \$3,000 whether or not they actually encounter discrimination); JOHN YINGER, CLOSED DOORS, OPPORTUNITIES LOST 69 (1995) (analysis of HMDA data resulting from the finding stark racial differences in lending policy, even controlling for differences in lender policy and individual economic characteristics of the borrower);

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of segregation are simply the result of individual preferences. The Supreme Court in *Freeman v. Pitts*⁶⁹ exemplified this view by finding that a pattern of segregation was the result of private choices, approvingly citing a lower court's reliance on a study which it implied showed that the preferences of black and Latinos for 50/50 integrated neighborhoods and whites' being uncomfortable with more than a 10 percent black and Latino population make segregation inevitable.⁷⁰ Courts and legal commentators have cited this finding as fact, and it has cast a huge shadow over the law and, hence, the landscape of reform. However, the study's authors have recently written that the court's analysis was inadequate and that significant and increasing evidence shows the ability of blacks and whites to live together on a long-term stable basis, particularly when a conscious integration plan is in place.⁷¹

The forces that work to create resegregation, as described above, are certainly complex, but there is little question that discrimination plays at least some role in maintaining residential segregation. Because of the wide-spread use of neighborhood schooling, residential segregation is then translated into school segregation.⁷² The next section describes how the segregation of minorities by race and income has such a devastating effect on their life prospects.

B.The Consequences of Segregation

Segregated schools harm children. They harm schools, communities, and entire metropolitan regions. Segregated schools mirror a region's severely segregated residential patterns, concentrating poverty, magnifying its harms, and isolating those most needing opportunity from the social structures, jobs, and education that offer it.

⁶⁹ 503 U.S. 467 (1992).

⁷⁰ *Id.* at 495.

⁷¹ Reynolds Farley et al., *The Residential Preferences of Blacks and Whites: A Four-Metropolis Analysis*, 8 HOUS. POLICY DEBATE 763, 794 (1997). The district court relied on an earlier study of Detroit by Reynolds Farley. *Id.* at 771-73. (citing Reynolds Farley, et al. *Chocolate City, Vanilla Suburbs: Will the Trend Towards Racially Separate Communities Continue?*, 7 SOC. SCI. RESEARCH 319 (1978))

⁷² Richard Kahlenberg, *All Together Now* 147-50 (2004).

1. Segregated Schools Hurt Kids

More than three-quarters of the difference in academic achievement among students is explained by the socioeconomic status of their peers, as a recent comprehensive study of hundreds of the nation's secondary schools confirmed.⁷³ Not only do racially and economically segregated schools hurt children, they harm disproportionate proportions of minority children simply because they are minorities.

a. Concentrated Poverty Hurts Kids

"The percentage of poor children in a school is an extremely strong predictor of inequality in educational outcomes...."⁷⁴ As "fifty years of sociological data have made clear: being born into a poor family places students at risk, but to be assigned then to a school with a high concentration of poverty poses a second, independent disadvantage that poor children attending middle-class schools do not face."⁷⁵ The harms of economically segregated schools disproportionately fall on nonwhite children because of their skin color, for the reason that residential segregation permits most poor white children nevertheless to live and be educated in middle-class settings.

Because of segregation by race and poverty, poor Latino and black children are 2.3 times⁷⁶ more likely than poor white students

⁷³ Russell W. Rumberger & Gregory J. Palardy, *Does Resegregation Matter? The Impact of Social Composition on Academic Achievement in Southern High Schools*, in *SCHOOL RESEGREGATION: MUST THE SOUTH TURN BACK?* 127, 135, 137 (John Charles Boger & Gary Orfield, eds. 2005) (national, longitudinal study of eighth through twelfth graders).

⁷⁴ Gary Orfield, *Metropolitan School Desegregation: Impacts on Metropolitan Society* in *IN PURSUIT OF A DREAM DEFERRED: LINKING HOUSING AND EDUCATION POLICY* 121, 141 (John Powell, Gavin Kearney, & Vina Kay, eds., 2001), citing Gary Orfield & ___ Reardon ___ (1993).

(O:141, citing Orfield and Reardon 1993)

⁷⁵ Richard Kahlenberg, *ALL TOGETHER NOW: CREATING MIDDLE-CLASS SCHOOLS THROUGH PUBLIC SCHOOL CHOICE* 25 (2001).

⁷⁶ Russell W. Rumberger & Gregory J. Palardy, *Does Resegregation Matter? The Impact of Social Composition on Academic Achievement in Southern High Schools*, in *SCHOOL RESEGREGATION: MUST THE SOUTH TURN BACK?* 127,

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to attend schools of concentrated poverty, cut off from meaningful exposure to middle-class culture.⁷⁷ In contrast, because they are white, 4 out of 5 poor white children attend schools with meaningful middle-class enrollments.⁷⁸

Although poor students have, on average, lower math test scores than do non-poor students, all children do better in middle class schools, and all children do worse in schools of concentrated poverty.⁷⁹

Among the harms of attending poor schools is the risk of being poor as an adult. When studies control for individual achievement and family background, they still find that “attending a school with high concentrations of poverty increases the chances of adult poverty by a factor of between three and four compared with attending a low-poverty school.”⁸⁰ Other harms of economically segregated schools (and neighborhoods) include the harms associated with racially segregated schools, below, and with dropping out of school.⁸¹ On average, high school “dropouts are far more likely to be unemployed, in prison, and living in poverty.”⁸²

127-128 (John Charles Boger & Gary Orfield, eds. 2005) (19 percent for white children; 44 percent for black and Latino children).

⁷⁷ Russell W. Rumberger & Gregory J. Palardy, *Does Resegregation Matter? The Impact of Social Composition on Academic Achievement in Southern High Schools*, in *SCHOOL RESEGREGATION: MUST THE SOUTH TURN BACK?* 127, 127-128 (John Charles Boger & Gary Orfield, eds. 2005). In addition to the racially disproportionate burden on nonwhite children of attending poor schools, the rate of individual poverty is 2.5 times higher among nonwhite children. *Id.* at 127.

⁷⁸ Russell W. Rumberger & Gregory J. Palardy, *Does Resegregation Matter? The Impact of Social Composition on Academic Achievement in Southern High Schools*, in *SCHOOL RESEGREGATION: MUST THE SOUTH TURN BACK?* 127, 127-128 (John Charles Boger & Gary Orfield, eds. 2005) (81 percent of white children attend middle-class schools). In addition to the racially disproportionate burden on nonwhite children of attending poor schools, the rate of individual poverty is 2.5 times higher among nonwhite children. *Id.* at 127.

⁷⁹ Russell W. Rumberger & Gregory J. Palardy, *Does Resegregation Matter? The Impact of Social Composition on Academic Achievement in Southern High Schools*, in *SCHOOL RESEGREGATION: MUST THE SOUTH TURN BACK?* 128 (John Charles Boger & Gary Orfield, eds. 2005).

⁸⁰ Richard Kahlenberg, *ALL TOGETHER NOW: CREATING MIDDLE-CLASS SCHOOLS THROUGH PUBLIC SCHOOL CHOICE* 31 (2001).

⁸¹ Gary Orfield et al, *Losing Our Future: How Minority Youth are Being Left Behind by the Graduation Rate Crisis*, 3 (Executive Summary, 2004), at www.civilrightsproject.harvard.edu/research/dropouts/LosingFuture_Executive.pdf

Schools of concentrated poverty offer fewer resources, weaker educational preparation, and “substantially lower achievement levels.”⁸³ Compounded by racial isolation, segregated schools prevent access to the social contacts and cultural familiarity “necessary for career and educational advancement,” especially for black children.⁸⁴ In short, students in segregated schools “are ‘deprived of the most effective educational resources contained in the schools: those brought by other children as the result of their home environment.’”⁸⁵

b. Racial Segregation Hurts Kids

While the harms of segregated schools stem largely from the challenges associated with concentrated poverty, racially segregated schools additionally isolate children who must function in a multi-cultural society from ongoing interactions that teach those competencies. Segregation deprives children of middle class cultures that model and support hopeful futures, and that offer social networks to information and opportunity.

Racially segregated schools tend to be overcrowded, staffed by larger shares of uncertified teachers, have low expectations, and limited facilities.⁸⁶ In addition, nonwhite segregated schools “often

(visited Nov. 2005).

⁸² Gary Orfield et al, *Losing Our Future: How Minority Youth are Being Left Behind by the Graduation Rate Crisis*, 1 (Executive Summary, 2004), at www.civilrightsproject.harvard.edu/research/dropouts/LosingFuture_Executive.pdf (visited Nov. 2005).

⁸³ Jacinta Ma & Michael Kurlander, The Future of Race-Conscious Policies in K-12 Public Schools, in , *in SCHOOL RESEGREGATION: MUST THE SOUTH TURN BACK?* 240, 248-49 (John Charles Boger & Gary Orfield, eds. 2005).

⁸⁴ Jacinta Ma & Michael Kurlander, The Future of Race-Conscious Policies in K-12 Public Schools, in , *in SCHOOL RESEGREGATION: MUST THE SOUTH TURN BACK?* 240, 248-49 (John Charles Boger & Gary Orfield, eds. 2005).

⁸⁵ Richard Kahlenberg, *ALL TOGETHER NOW: CREATING MIDDLE-CLASS SCHOOLS THROUGH PUBLIC SCHOOL CHOICE* 24 (2001), quoting James Coleman’s testimony before the Senate Select Committee on Equal Educational Opportunity, *Report: Toward Equal Educational Opportunity*, 92 Cong., 2d Sess. (Government Printing Office, 1972).

⁸⁶ U.S. Department of Education, *GREAT EXPECTATIONS: REFORMING URBAN HIGH SCHOOLS—AN EDUCATION FORUM WITH URBAN EDUCATORS AND LEADERS* (2000).

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transmit lower expectations to minority students and offer a narrower range of educational and job-related options.”⁸⁷ Thus, studies have found, for example, that the jobs that black students from racially segregated schools obtained were lower paying and more racially isolated than the jobs obtained by whites.⁸⁸ Ghetto schools too often do not encourage students “to develop the levels of self-esteem or the styles of presentation which employers perceive as evidence of capacity or ability.”⁸⁹

Segregated schools also deprive nonwhite students of exposure to a sufficiently strong success culture to support them in breaking free from the oppositional culture of many peers. Children coming from deeply disadvantaged families, particularly impoverished black students, too often are surrounded by “oppositional” cultures at home, in their segregated neighborhoods—and, tragically, at school, if they attend segregated schools. These cultures deride and punish individuals seeking to succeed in the dominant culture.⁹⁰ The intense pressure not to give in to what is seen as a “white” educational and social system can weigh heavily on black students who wish to succeed at school.⁹¹

This oppositional culture perpetuates segregation and its harms. It stems from sets of beliefs involving a victimhood from discrimination that is believed to be permanent and

⁸⁷ Michael A Boozer, et al., *Race and School Quality Since Brown v. Board of Education*, 1992 Brookings Papers Econ. Activity (Microeconomics), citing Marvin Dawkins & Jomills Braddock, *The Continuing Significance of Desegregation: School Racial Composition and African American Inclusion in American Society*, 63 J. NEGRO EDUC. 394 (1994); Janet Ward Schofield, *Review of Research on School Desegregation's Impact on Elementary and Secondary School Students*, in HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION 597 (James Banks & Cherry McGee Banks, eds. 1995).

⁸⁸ Michael Boozer, et al., *Race and School Quality Since Brown v. Board of Education*, 1992 Brookings Papers Econ. Activity (Microeconomics), Brief as Amicus Curiae in Support of Defendants-Appellees, 14, *Comfort v. Lynn Sch. Committee*, No. 03-2415 (U.S. Ct. App., 1st Cir. 2004), at www.civilrightsproject.harvard.edu/policy/legal_docs/ComfortVLynn_brief.pdf (visited Oct. 2005).

⁸⁹ William Julius Wilson, THE TRULY DISADVANTAGED 103 (1987).

⁹⁰ Case studies vividly relate this intense peer pressure, and its effects. See, e.g., Ron Suskind, A HOPE IN THE UNSEEN (1999); Alex Kotlowitz, THERE ARE NO CHILDREN HERE (1991).

⁹¹ See, e.g., Signithia Fordham & John Ogbu, *Black Students' School Success: Coping with the Burden of "Acting White,"* 18 URB. REV. 176 (1986).

institutionalized.⁹² Tragically, oppositional culture among black students discourages academic accomplishment “regardless of income level or class.”⁹³ This can perpetuate negative social networks;⁹⁴ therefore integration is valuable in offering “social networks and interpersonal skills that in turn may provide access, information, contact, and sponsorship.”⁹⁵

Indeed, even disadvantaged students who are committed to succeeding found they “lacked the knowledge or access necessary to implement a plan of action.”⁹⁶ The racially integrated school environment offers these ingredients for success, and provides “alternative role models and opportunities as well as affection and validation.”⁹⁷

2. Segregation Hurts Twin Cities Kids and Schools

The Twin Cities region is severely segregated by class and race, and districts such as Minneapolis are dangerously segregated as a result. The acutely segregated schools in Minneapolis are

⁹² Terea Wasonga & Dana Christman, *Perceptions and Construction of Meanings of Urban High School Experiences Among African American University Students: A Focus Group Approach*, 35 EDUC. & URB. SOC. 181, 181 (2003), **citing**

⁹³ Terea Wasonga & Dana Christman, *Perceptions and Construction of Meanings of Urban High School Experiences Among African American University Students: A Focus Group Approach*, 35 EDUC. & URB. SOC. 181, 182 (2003), **citing**

⁹⁴ Terea Wasonga & Dana Christman, *Perceptions and Construction of Meanings of Urban High School Experiences Among African American University Students: A Focus Group Approach*, 35 EDUC. & URB. SOC. 181, 182 (2003), **citing**

⁹⁵ Terea Wasonga & Dana Christman, *Perceptions and Construction of Meanings of Urban High School Experiences Among African American University Students: A Focus Group Approach*, 35 EDUC. & URB. SOC. 181, 183 (2003), **citing**

⁹⁶ Terea Wasonga & Dana Christman, *Perceptions and Construction of Meanings of Urban High School Experiences Among African American University Students: A Focus Group Approach*, 35 EDUC. & URB. SOC. 181, 198 (2003).

⁹⁷ Terea Wasonga & Dana Christman, *Perceptions and Construction of Meanings of Urban High School Experiences Among African American University Students: A Focus Group Approach*, 35 EDUC. & URB. SOC. 181, 198 (2003).

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crushed by poverty enrollments of 80 to nearly 100 percent. That gives students not opportunity, but a culture of intergenerational poverty and its attendant challenges.

a. Twin Cities Schools are Severely Segregated

The Twin Cities metro region has one of the nation's lowest poverty rates, 6.7 percent in 2000. While poverty is borne disproportionately by the central cities, at 16.4 percent versus the suburbs' 4.0 percent,⁹⁸ school segregation is entirely out of proportion even to that disparity: two-thirds of students in Minneapolis Public Schools receive free and reduced-price lunches,⁹⁹ and many Minneapolis schools enroll essentially no middle-class students.¹⁰⁰

By 2003, 46 percent of reporting Minneapolis schools were terribly segregated, with enrollments 81-100 percent nonwhite.¹⁰¹ Sixty-eight percent of Minneapolis students presently are on free/reduced price lunch.¹⁰² This concentration of poverty is extreme in the national context and is especially so within the Twin Cities regional context. Minneapolis makes the list (although barely) of the largest one hundred school districts in the

⁹⁸ Institute on Race and Poverty [IRP], *Minority Suburbanization, Stable Integration, and Economic Opportunity in Fifteen Metropolitan Regions*, draft report to the Detroit Branch, NAACP, (June 2005), Table A3. For a preliminary summary and links to the project's 250 maps, see *Minority Suburbanization and Racial Change: Stable Integration, Neighborhood Transition, and the Need for Regional Approaches* [*Minority Suburbanization* "] (May 2005), www.irpumn.org/website/projects/index.php?strWebAction=project_detail&intProjectID=15 (visited Oct. 2005).

⁹⁹ A student is eligible for free lunch if her household has an income at or below 130 percent of federal poverty guidelines. During the 2001-2002 school year, a student from a four-person household would be eligible if household income did not exceed \$22,945. Food and Nutrition Service Child Nutrition Programs—Income Eligibility Guidelines, 66 Fed. Reg. 15827-29 (Mar. 21, 2001), www.fns.usda.gov/cnd/governance/notices/iegs/IEGs01-02.pdf.

¹⁰⁰ See Institute on Race & Poverty, Twin Cities Demographics.

¹⁰¹ **NCES 2002-03 full cite.**

¹⁰² Minnesota Department of Education, "School Report Card: Minneapolis" (2005), http://education.state.mn.us/ReportCard2005/schoolDistrictInfo.do?SCHOOL_NUM=000&DISTRICT_NUM=0001&DISTRICT_TYPE=03 (visited Oct. 2005).

nation, which includes districts in the nation's most troubled cities.

Economic segregation in Minneapolis schools exceeds that of districts like Detroit, Miami, and Mobile, Alabama, and matches that of districts like Baltimore.¹⁰³ Looking within the Twin Cities metro region reveals more vividly not only the extent of economic segregation, but the opportunities for reversing it.¹⁰⁴ Minneapolis's poverty average is 40 percentage points higher than Bloomington and 61 points higher than Edina.¹⁰⁵

When poverty burdens become too large in a school, enrollments can change rapidly until concentrated poverty is extreme. In schools puts neighborhoods at risk of changing quickly as the middle class goes elsewhere in search of "good" schools.¹⁰⁶ School segregation and residential segregation thus are inexorably linked.

Thus, if concentrated race and poverty create a poor learning environment, one solution is the deconcentration of race and poverty. Over the years, integration of classrooms by race and class has shown to be one of the most effective methods for raising student achievement. The next section illustrates some of the gains students have made by attending integrated schools.

C. What are the benefits of integration

Students benefit from economically and racially integrated schools. And so do neighborhoods and metro regions. Anything short of integration does not compensate for what's missing in segregated schools: a large share of students who bring to school the high expectations and aspirations and access to opportunity networks associated with living in middle-class families.

¹⁰³ NCES 2003, Table 9.

¹⁰⁴ Data for each district can be accessed through the index at Minnesota Department of Education, *School Report Card* (2005), <http://education.state.mn.us/ReportCard2005/index.do> (visited Oct. 2005).

¹⁰⁵ Data for each district can be accessed through the index at Minnesota Department of Education, *School Report Card* (2005), <http://education.state.mn.us/ReportCard2005/index.do> (visited Oct. 2005).

¹⁰⁶ Myron Orfield, METROPOLITICS: A REGIONAL AGENDA FOR COMMUNITY AND STABILITY 39 (1997).

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1. Integrated Schools Help Students

Since James Coleman's seminal 1966 report, empirical research has continued to show "that a student's achievement is highly related to characteristics of other students in the school."¹⁰⁷ As the Supreme Court confirmed in 2003, "numerous studies show that student body diversity promotes learning outcomes, and better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals."¹⁰⁸ The reasons for this range from the effects of a student's peers on aspirations and attitudes toward education, to the attention policy makers give to middle- and upper-class parents and schools.

a. Social and Opportunity Benefits

For both white and black students, interracial contact in primary and secondary school makes it more likely that they will live, work, and attend college in more integrated settings.¹⁰⁹ For black students, the interracial contact helps reverse perpetual segregation, in part because desegregated schools permit "access to high-status institutions and the powerful social networks within them."¹¹⁰

¹⁰⁷ Russell W. Rumberger & Gregory J. Palardy, *Does Resegregation Matter? The Impact of Social Composition on Academic Achievement in Southern High Schools*, in *SCHOOL RESEGREGATION: MUST THE SOUTH TURN BACK?* 128 (John Charles Boger & Gary Orfield, eds. 2005).

¹⁰⁸ *Grutter v. Bollinger*, __ U.S. __, __, 123 S.Ct. 2325, 2340 (2003).

¹⁰⁹ Amy Stuart Wells & Robert L. Crain, *Perpetuation Theory and the Long-Term Effects of School Desegregation*, 64 REV. ED. RES. 531 (1994) (reviewing 21 research studies), cited in Brief as Amicus Curiae in Support of Defendants-Appellees, 15, *Comfort v. Lynn Sch. Committee*, No. 03-2415 (U.S. Ct. App., 1st Cir. 2004), at

www.civilrightsproject.harvard.edu/policy/legal_docs/ComfortVLynn_brief.pdf (visited Oct. 2005).

¹¹⁰ Amy Stuart Wells & Robert L. Crain, *Perpetuation Theory and the Long-Term Effects of School Desegregation*, 64 REV. ED. RES. 531, 552, 531 (1994) (reviewing 21 research studies), cited in Brief as Amicus Curiae in Support of Defendants-Appellees, 15, *Comfort v. Lynn Sch. Committee*, No. 03-2415 (U.S. Ct. App., 1st Cir. 2004), at

www.civilrightsproject.harvard.edu/policy/legal_docs/ComfortVLynn_brief.pdf (visited Oct. 2005).

For both black and, especially, white students, integrated classrooms improve the stability of interracial friendships,¹¹¹ and make adult interracial friendships more likely.¹¹² Desegregated schools decrease racial prejudice among students and increase comfort around people with different backgrounds.¹¹³ These outcomes flow from the interactions between the races that, consistent with the widely accepted¹¹⁴ intergroup contact theory, enhance understanding and empathy, and reduce stereotyping.

Integrated schools are important settings for intergroup contact because students in that setting are to be accorded equal status; there are authorities to facilitate the contact; students are engaged in common activities and goals; and personal contacts displace stereotyping.¹¹⁵ A similar process can occur when parents from diverse backgrounds work together on behalf of their children's schools. These are important aspects of promoting democratic values and bringing member of our society together.

The most recent research confirms that both white and black children who attend desegregated schools are "less likely to

¹¹¹ Maureen Hallinan & Richard Williams, *The Stability of Students' Interracial Friendships*, 52 AM. SOC. REV. 653 (1987), in Brief as Amicus Curiae in Support of Defendants-Appellees, 19, *Comfort v. Lynn Sch. Committee*, No. 03-2415 (U.S. Ct. App., 1st Cir. 2004), at www.civilrightsproject.harvard.edu/policy/legal_docs/ComfortVLynn_brief.pdf (visited Oct. 2005).

¹¹² Richard Kahlenberg, ALL TOGETHER NOW: CREATING MIDDLE-CLASS SCHOOLS THROUGH PUBLIC SCHOOL CHOICE 44 (2001), **citing**.

¹¹³ Amy Stuart Wells, et al., *How Desegregation changed Us: The Effects of Racially Mixed Schools on Students and Society* (Mar. 2004), <http://www.tc.columbia.edu/news/article.htm?id=4774&tid=118>, part of IN SEARCH OF BROWN (forthcoming 2005); Brief as Amicus Curiae in Support of Defendants-Appellees, 17-19, *Comfort v. Lynn Sch. Committee*, No. 03-2415 (U.S. Ct. App., 1st Cir. 2004), at www.civilrightsproject.harvard.edu/policy/legal_docs/ComfortVLynn_brief.pdf (visited Oct. 2005).

¹¹⁴ Brief as Amicus Curiae in Support of Defendants-Appellees, 8, *Comfort v. Lynn Sch. Committee*, No. 03-2415 (U.S. Ct. App., 1st Cir. 2004), at www.civilrightsproject.harvard.edu/policy/legal_docs/ComfortVLynn_brief.pdf (visited Oct. 2005). See Christopher Ellison & Daniel A Powers, The Contact Hypothesis and Racial Attitudes Among Black Americans, 75 Soc. Sci. Q. 385 (1994); Lee Sigelman & Susan Welch, The Contact Hypothesis Revisited: Black-White Interaction and Positive Racial Attitudes, 71 Soc. Forces 781 (1993).

¹¹⁵ Brief as Amicus Curiae in Support of Defendants-Appellees, 8-9, *Comfort v. Lynn Sch. Committee*, No. 03-2415 (U.S. Ct. App., 1st Cir. 2004), at www.civilrightsproject.harvard.edu/policy/legal_docs/ComfortVLynn_brief.pdf (visited Oct. 2005).

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express negative views about members of the other race,” and black graduates “are less likely than graduates of segregated schools to believe that anti-Black discrimination is widespread.”¹¹⁶ In addition, many studies already had confirmed that these students were “more likely to attend integrated colleges, live in integrated neighborhoods as adults, and send their children to integrated schools.”¹¹⁷

b. Academic Attainment and Achievement

Without reducing the academic results for middle class and white children,¹¹⁸ integrated schools improve outcomes for poor children and nonwhite children. Among the important reasons are that “ambition is contagious”: the drive to achieve is greatly fueled when disadvantaged children attend school with middle-class students.¹¹⁹

Attainment. Black students who attend racially¹²⁰ integrated and economically¹²¹ integrated schools complete more years of schooling than those who attend segregated schools. This is true for post-secondary education attainment, too. College attendance rates are higher among black students attending racially integrated schools, and especially for blacks in northern states, than for students attending segregated schools.¹²² For example,

¹¹⁶ Richard Kahlenberg, ALL TOGETHER NOW: CREATING MIDDLE-CLASS SCHOOLS THROUGH PUBLIC SCHOOL CHOICE 45 (2001).

¹¹⁷ Richard Kahlenberg, ALL TOGETHER NOW: CREATING MIDDLE-CLASS SCHOOLS THROUGH PUBLIC SCHOOL CHOICE 44 (2001), *citing*.

¹¹⁸ See studies cited in Richard Kahlenberg, ALL TOGETHER NOW: CREATING MIDDLE-CLASS SCHOOLS THROUGH PUBLIC SCHOOL CHOICE **pages**(2001).

¹¹⁹ See, e.g., Richard Rothstein, WHAT DO WE KNOW ABOUT DECLINING (OR RISING) STUDENT ACHIEVEMENT? 129-30 (1997).

¹²⁰ Michael A Boozer, et al., *Race and School Quality Since Brown v. Board of Education*, 1992 Brookings Papers Econ. Activity (Microeconomics) 269, cited in Brief as Amicus Curiae in Support of Defendants-Appellees, *Comfort v. Lynn Sch. Committee*, 12-13, No. 03-2415 (U.S. Ct. App., 1st Cir. 2004), at www.civilrightsproject.harvard.edu/policy/legal_docs/ComfortVLynn_brief.pdf (visited Oct. 2005).

¹²¹ See studies cited in Richard Kahlenberg, ALL TOGETHER NOW: CREATING MIDDLE-CLASS SCHOOLS THROUGH PUBLIC SCHOOL CHOICE 28-30 (2001).

¹²² Robert Crain & Rita Mahard, *School Racial Composition and Black*

research on desegregation achieved by school choice in St. Louis found that attending a racially integrated school correlated with twice the rate of college enrollment compared with those among the 12,000 students studied who attended segregated schools.¹²³

Achievement. “[M]inority students who attend more racially integrated schools show increased academic achievement and progress, which are typically measured by scores on achievement tests.”¹²⁴ For black students, the achievement gains are especially consistent when their desegregated school experience began in the primary grades.¹²⁵ Test scores for Latino students also are higher on average when they attend desegregated schools.¹²⁶ In addition, studies consistently find achievement gains for students attending

College Attendance and Achievement Test Performance, 51 SOC. EDUC. 81 (1978); see also Michael A. Boozer, et al., *Race and School Quality Since Brown v. Board of Education*, 1992 Brookings Papers Econ. Activity (Microeconomics) 269.

¹²³ Goodwin Liu & William Taylor, “School Choice to Achieve Desegregation,” (unpublished paper) (on file with author).

¹²⁴ Based on social science research surveys reviewing four decades of research: Janet Ward Schofield, *Maximizing the Benefits of Student Diversity: Lessons from School Desegregation Research*, in DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION 99 (Gary Orfield & Michael Kurlaender, eds. 2001); Janet Ward Schofield, *Review of Research on School Desegregation’s Impact on Elementary and Secondary School Students*, in HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION 597 (James Banks & Cherry McGee Banks, eds. 1995); Robert Crain & Rita Mahard, *The Effect of Research Methodology on Desegregation Achievement Studies: A Meta-Analysis*, 88 AM. J. SOC. 839 (1983); Robert Crain, *School Integration and the Academic Achievement of Negroes*, 44 SOC. EDUC. 1 (1971). Cited in Brief as Amicus Curiae in Support of Defendants-Appellees, 9-10, *Comfort v. Lynn Sch. Committee*, No. 03-2415 (U.S. Ct. App., 1st Cir. 2004), at www.civilrightsproject.harvard.edu/policy/legal_docs/ComfortVLynn_brief.pdf (visited Oct. 2005).

¹²⁵ Robert Crain & Rita Mahard, *The Effect of Research Methodology on Desegregation Achievement Studies: A Meta-Analysis*, 88 AM. J. SOC. 839 (1983), cited in Brief as Amicus Curiae in Support of Defendants-Appellees, 11, *Comfort v. Lynn Sch. Committee*, No. 03-2415 (U.S. Ct. App., 1st Cir. 2004), at www.civilrightsproject.harvard.edu/policy/legal_docs/ComfortVLynn_brief.pdf (visited Oct. 2005).

¹²⁶ Janet Ward Schofield, *Review of Research on School Desegregation’s Impact on Elementary and Secondary School Students*, in HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION 597 (James Banks & Cherry McGee Banks, eds. 1995), cited in Brief as Amicus Curiae in Support of Defendants-Appellees, 11, *Comfort v. Lynn Sch. Committee*, No. 03-2415 (U.S. Ct. App., 1st Cir. 2004), at www.civilrightsproject.harvard.edu/policy/legal_docs/ComfortVLynn_brief.pdf (visited Oct. 2005).

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economically diverse schools, as contrasted with those attending schools of concentrated poverty.¹²⁷

c. Aspirations and Occupational Attainment

By attending desegregated middle-class schools, poor and nonwhite students obtain equal access to cultures of high educational and occupational expectations often taken for granted by the middle and upper classes. Desegregated middle-class schools also permit access to the social networks associated with opportunity. The schools with the ingredients for pursuing “the American dream” are those where most students come from homes providing these experiences and connections—homes that are middle class.¹²⁸

As the Supreme Court has found, the benefits of diversity “are not theoretical but real, as major American businesses have made clear that the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.”¹²⁹ For black students, examples of the occupational benefits of attending nonsegregated school include higher occupational aspirations and access to professions from which minorities have historically been excluded.¹³⁰

¹²⁷ See studies cited in Richard Kahlenberg, *ALL TOGETHER NOW: CREATING MIDDLE-CLASS SCHOOLS THROUGH PUBLIC SCHOOL CHOICE* 26-28 (2001).

¹²⁸ Brief as Amicus Curiae in Support of Defendants-Appellees, 12, *Comfort v. Lynn Sch. Committee*, No. 03-2415 (U.S. Ct. App., 1st Cir. 2004), at www.civilrightsproject.harvard.edu/policy/legal_docs/ComfortVLynn_brief.pdf (visited Oct. 2005).

2, citing Marvin Dawkins & Jomills Braddock, *The Continuing Significance of Desegregation: School Racial Composition and African American Inclusion in American Society*, 63 *J. NEGRO EDUC.* 394 (1994); Janet Ward Schofield, *Review of Research on School Desegregation’s Impact on Elementary and Secondary School Students*, in *HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION* 597 (James Banks & Cherry McGee Banks, eds. 1995).

¹²⁹ *Grutter v. Bollinger*, __ U.S. __, __, 123 S.Ct. 2325, 2340 (2003).

¹³⁰ Janet Ward Schofield, *Maximizing the Benefits of Student Diversity: Lessons from School Desegregation Research*, in *DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION* 100 (Gary Orfield & Michal Kurlaender, eds. 2001), cited in *Lynn Brief* at 13.

In addition, *both* white and black students tend to have higher educational aspirations if they have cross-race friendships, as contrasted with students who had only same-race friendships.¹³¹ Finally, as to the overall benefits of middle-class schools, they “will raise the achievement and improve the life chances of the poor without reducing the achievement of the middle class . . . further[ing] the secondary goal of promoting a vibrant democracy and unity amid diversity.”¹³²

D. The Failure of City-only Integration Plans Compared to the Success of Metropolitan Plans

Analysis of neighborhood demographic data show that during the period from 1980 to 2000 metropolitan areas that employed busing on large geographic scales (county or region-level programs) showed *better or more stably integrated* housing market outcomes than areas *that did not have busing*.¹³³ Metropolitan areas with large-scale busing showed larger increases in the number of residents living in integrated settings than non-busing metros, and integrated neighborhoods were less likely to become segregated in busing metros. Both metropolitan areas with metro busing and those without showed similar patterns during the 20-year period—the percentages of Whites and Blacks living in integrated settings¹³⁴ increased while the percentages of Hispanics

¹³¹ Maureen Hallinan & Richard Williams, *Students' Characteristics and the Peer Influence Process*, 63 SOC. EDUC. 122 (1990), in **Lynn Brief** at 19.

¹³² Richard Kahlenberg, ALL TOGETHER NOW: CREATING MIDDLE-CLASS SCHOOLS THROUGH PUBLIC SCHOOL CHOICE 25 (2001).

¹³³ See Myron Orfield & Tom Luce, *Minority Suburbanization and Racial Change*, May 5, 2005 (unpublished paper), http://www.irpumn.org/uls/resources/projects/MinoritySubn_050605wMAPS.pdf. The following information in this section is derived from the statistics reported in this paper. See *id.*

¹³⁴ The definitions for the neighborhood types are: Predominately White – tracts where both the Black and Hispanic shares of the population are less than 10%; Predominately Black – Black share greater than 50% and Hispanic share less than 10%; Predominately Hispanic – Hispanic share greater than 50% and Black share less than 10%; Black and Hispanic – Black share greater than 10%, Hispanic share greater than 10% and White share less than 40%; White/Black Integrated – Black share greater than 10% and less than 50%, Hispanic share less than 10%; White/Hispanic Integrated – Hispanic share greater than 10% and less than 50%, Black share less than 10%; W/B/H Integrated – Black share greater than 10%, Hispanic share greater than 10% and White share greater than 40%. Black and White shares are for non-Hispanic Black and non-Hispanic White population.

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in integrated settings declined. However, the integrative trends were significantly stronger in the metropolitan areas with busing. In these places, the percentage of the total population living in integrated settings increased by 17 points, from 25% to 42%. In the other 85 metropolitan areas, the total percentage increased only 9 points, from 26% to 35%.

IRP's finding with respect to the success of metropolitan desegregation in stemming White flight affirms research from the 1980s about the power of metro-wide integration. Diana Pearce noted that school desegregation—if it is metropolitan in nature—can have an unexpected effect: integration of living patterns and the prevention of White flight or “disenrollment.”¹³⁵ These findings were based on the wave of integration that came subsequent to *Brown* and continued court oversight of school integration. Other researchers, as a corollary, have studied a similar timeframe to note that metro-wide school desegregation is also the most effective method for increasing Black achievement.¹³⁶ While their findings indicated that all desegregation plans increased achievement, metropolitan desegregation had the greatest effect on the achievement of Black students.¹³⁷ Moreover, for children who desegregated at earlier ages—starting with kindergarten—the effect on their achievement increased dramatically.¹³⁸

These studies prove that desegregation and an integrated learning environment can be powerful forces in raising achievement at all levels. The value of these studies is to prove that desegregation that occurs across the metropolitan region is effective in stabilizing neighborhoods and in reducing the education gap. An expanded CIY program, combined with targeted low-income housing programs, can conceivably reduce and eliminate segregation in an area as White as the Twin Cities.

E. On the Ground in Minneapolis

135. DIANA PEARCE, *BREAKING DOWN BARRIERS: NEW EVIDENCE ON THE IMPACT OF METROPOLITAN SCHOOL DESEGREGATION OF HOUSING PATTERNS* 3 (1980).

136. ROBERT CRAIN AND RITA MAHARD, *DESEGREGATION PLANS THAT RAISE BLACK ACHIEVEMENT: A REVIEW OF THE RESEARCH* (1982).

137. *Id.*

138. *Id.*

Trends in Minneapolis schools duplicate the trends in national segregation statistics, showing that schools segregated by race are invariably poor schools as well. Before the litigation in *Booker v. Special School District No. 1*—Minneapolis's first desegregation lawsuit—the Minneapolis School District (MSD) was 85 percent White.¹³⁹ Now, after the subsequent shift of the White middle-class to suburban enclaves, the MSD is 73 percent non-White and has 68 percent of its students receiving free or reduced lunch.¹⁴⁰

The severely segregated Minneapolis School District graduates only 55 percent of its students.¹⁴¹ Yet more than 91 percent of adults in the Twin Cities region have at least a high school diploma, and more than 33 percent have at least a college degree.¹⁴² In contrast to the 55-percent graduation rate in Minneapolis, adjacent school districts graduate 88 to 100 percent of their students.¹⁴³

Academic attainment and achievement declined as economic and racial segregation become more severe, as illustrated by the Minneapolis Schools. As the poverty concentration in the district

139. 351 F. Supp. 799, 802 (D. Minn. 1972).

140. Minn. Dept. of Educ., School Report Card: Minneapolis, http://education.state.mn.us/ReportCard2005/schoolDistrictInfo.do?SCHOOL_NUM=000&DISTRICT_NUM=0001&DISTRICT_TYPE=03 (last visited Nov. 1, 2005).

141. Minnesota Department of Education, "School Report Card: Minneapolis" (2005), http://education.state.mn.us/ReportCard2005/schoolDistrictInfo.do?SCHOOL_NUM=000&DISTRICT_NUM=0001&DISTRICT_TYPE=03 (visited Oct. 2005). "According to the most recent [Minneapolis] district data, the city's seven high schools had a 78 percent graduation rate. However, add in the contract alternatives, such as the Center School, 2421 Bloomington Ave. S.; The City, Inc., 1315 12th Ave. N.; and others, and the graduation rate drops to 54.5 percent." Scott Russell, "Schools Become a Big Issue in Mayor's Race," DOWNTOWN JOURNAL (Mpls., Oct. 3, 2005), <http://www.skywaynews.net/articles/2005/09/26/news/news02.txt> (visited Oct. 2005).

142. In 2000, the 13-county Twin Cities region's percentage was 90.6; nationwide, it was 80.4 percent. U.S. Census Bureaus data for 2000.

143. Minnesota's state-wide graduation rate in 2005 was 89 percent. Minnesota Department of Education, *School Report Card: Statewide* (2005), <http://education.state.mn.us/ReportCard2005/>

[schoolDistrictInfo.do?SCHOOL_NUM=000&DISTRICT_NUM=9999&DISTRICT_TYPE=99](http://education.state.mn.us/ReportCard2005/schoolDistrictInfo.do?SCHOOL_NUM=000&DISTRICT_NUM=9999&DISTRICT_TYPE=99) (visited Oct. 2005). Data for individual districts and schools are accessible from the index at Minnesota Department of Education, *School Report Card* (2005), <http://education.state.mn.us/ReportCard2005/index.do> (visited Oct. 2005).

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increased from 46 to 68 percent, graduation rates dropped from 67 to 55 percent (Table 1-#).¹⁴⁴

With the exception of schools in the southwest lakes area of the city, families are not choosing most Minneapolis schools. Minneapolis enrollments have dropped sharply, declining 18 percent in the new millennium, from 48,000 to 39,913 students.¹⁴⁵ (In contrast, during the four years from 2000 to 2004, public school enrollments declined only 2.1 percent statewide.¹⁴⁶) In addition, for every student who transfers into the Minneapolis School District, six transfer out, by far the largest negative ratio in the state.¹⁴⁷

These disparities are also becoming apparent in suburban districts surrounding Minneapolis. Robbinsdale, a nearby inner-ring suburb and the largest recipient of CIY suburban transfer students, is 64% White and has a free and reduced lunch population of 32 percent.¹⁴⁸ Several other suburban districts, such as Richfield and Bloomington have also had substantial racial change. It is important to note that these districts have also had white flight, but were never under a court order to desegregate.

Adjacent to Minneapolis is the Edina School District, which enrolls 88% White students, with a 6% free or reduced lunch enrollment.¹⁴⁹ Parents take notice of these demographics and the

¹⁴⁴ Data for each district can be accessed through the index at Minnesota Department of Education, *School Report Card* (2005), <http://education.state.mn.us/ReportCard2005/index.do> (visited Oct. 2005).

¹⁴⁵ HAZEL REINHARDT, A REPORT TO THE MINNEAPOLIS SCHOOL DISTRICT AS PART OF THE FACILITIES UTILIZATION PLAN: AN ANALYSIS OF ENROLLMENT AND ENROLLMENT PROJECTIONS 26 (2004), *available at* http://www.mpls.k12.mn.us/sites/78254f07-8bd2-4334-a7cb-fca95ff9dcb9/uploads/demography_report.pdf.

¹⁴⁶ Declines were especially large in Ramsey and Hennepin counties. McMurry, *Enrollment Declines*, at 3. During those four years, sixteen of 87 counties experienced enrollment growth, and they were mostly in Twin Cities suburban counties, especially Scott, Sherburne, Wright, Dakota, and Carver. McMurry, *Enrollment Declines*, at 3.

¹⁴⁷ Martha McMurry, Minnesota State Demographic Center, *Enrollment Declines are Widespread Since 2000*, **page** (Population Notes, OSD-05-118)(Apr. 2005), www.demography.state.mn.us/PopNotes/Enrollment%20Declines.pdf (visited Oct. 2005).

¹⁴⁸ Minn. Dept. of Educ., *School Report Card: Robbinsdale*, http://education.state.mn.us/ReportCard2005/schoolDistrictInfo.do?SCHOOL_NUM=000&DISTRICT_NUM=0281&DISTRICT_TYPE=01 (last visited Nov. 1, 2005).

¹⁴⁹ *Id.*

quality of a school district as evidenced by its test scores. Transfer statistics are one indication of this: Edina has a 4 to 1 ratio of students transferring in to their district versus students leaving the district, compared to 6 to 1 outflow in Minneapolis.¹⁵⁰

II. Legal Responses to Segregation in Minnesota

School segregation of this magnitude matters because the racially discriminatory effects are unfair to children. The mechanisms that brought about this state of affairs can be explained to some degree, but there are no easy solutions as to how to achieve integration and share the opportunity of middle-class schools with children of all races. The following sections attempt to describe the history of school desegregation in Minneapolis and the demographic change in both Minneapolis and its neighboring suburbs.

A. *Booker v. Special School District No. 1*: Desegregation in Minneapolis and Re-segregation in the Suburbs

The story of segregation in Minneapolis schools and the resultant White-flight from the city-only desegregation plan begins with *Booker v. Special School District No. 1*. Because the court's desegregation remedies were only contained within the Minneapolis city boundaries, middle-class Whites could easily flee the city and those remedies to suburban jurisdictions with their neighborhood schools.¹⁵¹ Lifting of the desegregation order in the 1980s, coupled with a return to neighborhood schools, had the predictable effect of re-segregating Minneapolis's schools.¹⁵² Nevertheless, the lessons of *Booker* remain important because many of the methods of segregative school policies remain the same.

1. *Booker's Impact on School Enrollment in Minneapolis*

Racial discrimination was a fact of life in Minneapolis's

150. Minn. Dept. of Educ., School Report Card: Edina, http://education.state.mn.us/ReportCard2005/schoolDistrictInfo.do?SCHOOL_NUM=000&DISTRICT_NUM=0273&DISTRICT_TYPE=01 (last visited Nov. 1, 2005). See also *supra* note 37.

151. See *infra* Part II.B.1.

152. See *infra* Part II.B.1.

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public schools throughout the 1950s and 1960s.¹⁵³ Like many Northern cities, Minneapolis had segregated neighborhoods that undoubtedly contributed—and continue to contribute—to creating segregated schools.¹⁵⁴ Desegregation played out in Minneapolis as it played out across the rest of the nation—against the backdrop of President Nixon’s anti-busing Southern strategy and the resultant decimation of federal desegregation remedies by the United States Supreme Court.¹⁵⁵

The first Supreme Court case to test Northern desegregation was *Keyes v. School District No. 1*.¹⁵⁶ The *Keyes* Court held that *de jure* racial segregation could be found in a district that had no history of state-mandated school segregation, as long as the prerequisite “segregative intent” could be found.¹⁵⁷

Moreover, segregative intent in a substantial part of the district could be imputed to the district as a whole, providing a supervising court with the authority to order district-wide relief.¹⁵⁸ Denver’s public schools had acted with segregative intent by making teacher and student assignments based on race, aligning school attendance boundaries so as to segregate on the basis of race, and by increasing density in segregated schools, as opposed to Southern-style desegregation where assignments were explicitly

153. Cheryl W. Heilman, *Booker v. Special School District No. 1: A History of School Desegregation in Minneapolis, Minnesota*, 12 LAW & INEQ. 127, 129 (1993).

154. *See id.* at 130 (describing all-white and all-black neighborhoods as contributing to segregation).

155. *See, e.g.*, Nathaniel Jones, *The Judicial Betrayal of Blacks Again: The Supreme Court’s Destruction of the Hopes Raised by Brown v. Board of Education*, 32 FORDHAM URB. L.J. 109, 114-15 (2004) (observing the difficulty of implementing truly equal education in wake of Supreme Court education jurisprudence); *see also* JOHN W. DEAN, *THE REHNQUIST CHOICE* 47 (2001) (quoting Richard Nixon as follows: “I don’t care if he’s a Democrat or a Republican . . . he must be against busing”).

156. 413 U.S. 189 (1973).

157. *See id.* at 211. In *Keyes*, the plaintiffs had conceded that segregative intent was a necessary component of finding segregation in a school where *de jure* legal separation of the races had not been explicitly enforced by law in the past. *See id.* at 198. For this reason, *Keyes* should not be viewed as being overturned by *Washington v. Davis*, as the plaintiffs in *Washington* conceded that no discriminatory intent existed; rather, *Keyes* was modified to the extent that proof of disparate impact is now insufficient to show a constitutional violation. *See Washington v. Davis*, 426 U.S. 229 (1976).

158. *See Keyes*, 413 U.S. at 208 (“[W]e hold that a finding of intentionally segregative school board actions in a meaningful portion of a school system, as in this case, creates a presumption that other segregated schooling within the system is not adventitious.”).

based on race.¹⁵⁹ *Keyes* begins with the analysis that what is or is not a segregated school depends on the facts of each case, but also outlines a number of factors that could establish segregative intent.¹⁶⁰

Back in Minneapolis, racial separation was encouraged and intensified by changing attendance boundaries, giving “special transfers” to White students at their parent’s request, and permitting White students to opt out of attending minority schools.¹⁶¹ Two suits by the NAACP forced the District to remedy segregation, one in the 1970s which led to busing within the city of Minneapolis and one in the 1990s which led to the creation of CIY. The 1970s suit relied on federal court oversight, while the 1990s lawsuits turned to state court remedies after the demise of desegregative case law in the federal courts. The 1990s cases are discussed in greater detail later in the article.

The court in *Booker* detailed findings of segregation extensively in its opinion.¹⁶² It noted that segregation was probably starkest in the elementary schools, which tend to be much smaller than secondary schools.¹⁶³ Nearly three-quarters of Whites attended elementary schools with virtually no minorities, while 55% of Black children attended schools that were more than 30% minority.¹⁶⁴ At least three elementary schools had minority enrollments over 70% while several schools had fewer than six minority students total.¹⁶⁵ Noting that the size and location of Bethune Elementary “were intended to have the effect of continuing the pattern of [racial segregation,]” Judge Larson found that Bethune could only have more obviously been a school for minorities if the District had written the words “Black school . . . over the door.”¹⁶⁶ Enrollments of minority students in

159. *Keyes*, 413 U.S. at 201-02 (listing acts which, when aggregated, convinced the Court of segregative intent).

160. *Id.* at 196 (listing the factors the Court looks for in deciding if a school is segregated).

161. *Booker v. Special Sch. Dist. No. 1*, 351 F. Supp. 799, 804 (D. Minn. 1972); see also Heilman, *supra* note 153, at 130. Heilman served as a law clerk to Judge Larson, who oversaw the *Booker*-led desegregation, just as the court supervision was ending. See *id.* at 127. Her article supplements much of the background for this narrative where the reported case is silent. See *id.* at 127.

162. *Booker*, 351 F. Supp at 802.

163. See *id.*

164. *Id.*

165. *Id.*

166. *Id.* at 803.

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Minneapolis's junior and senior high schools followed similar but less extreme patterns, due in part because they are generally fewer in number and have larger enrollments.¹⁶⁷

The *Booker* court found that the District promoted segregation by maintaining over-capacity minority schools when nearly adjacent White schools could easily handle the overflow.¹⁶⁸ For example, Washburn High School received additions in 1967 to deal with being around 600 students over-capacity.¹⁶⁹ Nearby Central High School ran about 600 students under-capacity.¹⁷⁰ Washburn's minority enrollment was less than 3% Black, while Central enrolled about 23% Black students.¹⁷¹ The District offered no reasoning for this decision during the trial.¹⁷²

Similarly, the District encouraged segregation through the construction of new buildings.¹⁷³ Judge Larson found that the District built smaller-than-average White schools in White neighborhoods that were adjacent to Black neighborhoods.¹⁷⁴ The nearby minority communities received larger-than-average elementary schools.¹⁷⁵ As an example, Page Elementary—an all white school—built in 1958, could hold 300 students and was the fifth smallest elementary in the district; nearby Field—a largely Black school—could handle nearly 600 students.¹⁷⁶ To Judge Larson, the implications were obvious: Minneapolis intended to concentrate as many minority students as possible in each “black school,” while permitting Whites to remain in segregated-White schools.¹⁷⁷

Boundary changes also permitted the MSD to perpetuate segregation. Changing attendance boundaries permitted the District to shift minority students from overwhelmingly

167. *Id.* (stating similar statistics as those of the secondary schools).

168. *Id.* at 803-04.

169. *Id.* at 803.

170. *Id.*

171. *Id.* at 803.

172. *Id.*

173. *Id.* at 803-04 (concluding this from statistics expounded upon later).

174. *Id.* at 803.

175. *Id.* (noting that schools in Black neighborhoods were built bigger than schools built in White neighborhoods, which were smaller).

176. *Id.* at 804. In an attempt to ward off the looming desegregation lawsuit, the District combined Field with Hale Elementary School, which was 98% White. Judge Larson noted that the community resistance to this plan was “vehement.” *Id.* at 806.

177. *Id.* at 806 (coming to this conclusion after seeing statistics dealing with different schools' capacity issues).

overcrowded schools to only slightly overcrowded schools.¹⁷⁸ For example, the District instituted boundary changes in 1968 to maintain Washburn and Southwest high schools as segregated Black environments.¹⁷⁹ In addition, the District permitted one-way flight out of its attendance boundaries by granting special transfers from largely high-minority schools.¹⁸⁰ Finally, the creation of “optional” attendance zones on the boundaries of minority neighborhoods permitted Whites to opt out of attending increasingly minority schools.¹⁸¹

Judge Larson eventually ceded control of the district after several years of progress on a desegregation plan. He did so in reliance that the State would assume responsibility for monitoring and enforcing a rule to maintain integrated schools.¹⁸² The supervision was based on the 15 percent rule, which stated that each school in a district could have no more than 15 percent minority students than the minority average of the district.¹⁸³ Each district was viewed on its own terms there was no inter-district operation of the rule. As might be expected, it produced integration for a time, but also stimulated white flight.¹⁸⁴

Desegregation was for a time successful, such that ten years after the desegregation process began in earnest, racially identifiable schools arguably did not exist in Minneapolis. Reporter Gregor Pinney noted: “[n]o longer does the city have minority schools in the center and ‘white schools’ everywhere else.”¹⁸⁵ Dissolution of the federal decree relied primarily on the oversight of the District, with the State monitoring compliance, for continuing desegregation. Despite his decision to give up jurisdiction over the District, Judge Larson continued to have doubts about the willingness of a school district to desegregate without the continued oversight and pressure of a federal judge.¹⁸⁶ With the increasingly evident segregation in the metro-area

178. *See id.* at 804.

179. *See id.*

180. *See id.* (finding that race played a role in these special transfers).

181. *See id.* (concluding this from the general course of conduct from the district).

182. *See* Heilman, *supra* note 153, at 171-73.

183. *See* Heilman, *supra* note 153 at 175.

184. *See* Heilman, *supra* note 153 at 170.

185. Gregor W. Pinney, *Desegregation Strips Race Labels Off Schools*, STAR TRIB. (Minneapolis), Aug. 31, 1981, at 1A.

186. *See id.* at 172.

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schools, Judge Larson's doubts have proven to be well-founded.

During the 1980s, with significant in-migration of Blacks and Latinos after the lifting of federal supervision, Minneapolis's schools underwent a sweeping racial transformation. Yet, white enrollment had fallen to less than 50% by 1989.¹⁸⁷ Minneapolis and St. Paul were in an untenable position as white flight and minority enrollment increased and as many neighborhood schools underwent racial transition, white parents and politician stepped up the call again for neighborhood schools. In 1993, a Black mayoral contender sought political backing from a largely white electorate by echoing this call for a return to neighborhood schools.¹⁸⁸ The School Board followed the mayor's lead, and the District went back to neighborhood schools in 1995 and many city schools—already experiencing flight and decreased enrollment by the middle class—became deeply segregated.¹⁸⁹ Sadly, documents uncovered after the decision reveal that school leaders in Minneapolis knew in advance that a return to neighborhood schools and increased funding was doomed to fail.¹⁹⁰

Achievement and graduation in those schools began to plummet. The district built schools of various sizes in poor segregated neighborhoods that would be virtually all minority the day they opened. It added mobile class rooms to the increasingly white and in-demand schools on the city's affluent southwest side.

As the district went through massive racial change in the 1990s, it experienced a catastrophic loss of enrollment clearly

187. Nat'l Ctr. for Educ. Statistics, U.S. Dep't of Educ., Common Core of Data, <http://nces.ed.gov/ccd> (table on file with author).

188. Monika Bauerlein, *Separate But Equal*, CITY PAGES (Minneapolis), Nov. 1, 1995, available at <http://www.citypages.com/databank/16/778/article2353.asp>. Proposals to return to neighborhood schooling are sometimes framed in the context of funding shortfalls, prompting school officials to reduce bus services and school choice. See Sanjay Bhatt, *Seattle Won't Close Schools*, SEATTLE TIMES, May 18, 2005, at A1.

189. See Bauerlein, *supra* note 188. Not only did White enrollment decline and move to the suburbs, but minority suburbanization is increasing among the Black middle-class, with more than half of the country's minorities living in the suburbs. See MYRON ORFIELD & TOM LUCE, MINORITY SUBURBANIZATION AND RACIAL CHANGE REPORT: STABLE INTEGRATION, NEIGHBORHOOD TRANSITION, AND THE NEED FOR REGIONAL APPROACHES (2005), available at http://www.irpumn.org/uls/resources/projects/MinoritySubn_050605wMAPS.pdf.

190. See KAHLENBERG, *supra* note 21, at 176. Political leaders in other regions around the country have also accepted accelerated funding in exchange for the withdrawal of desegregation suits. See James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 263-64 (1999) (explaining the use of desegregation lawsuits to extract money from the state for poor schools).

related to the pattern of school resegregation.¹⁹¹ As each neighborhood school would become majority poor and middle-class wave of white, black, asian, and Latino middle-class households would move to more stably integrated neighborhoods in the city or the suburbs. In the few areas with consistent access to magnet schools designed to maintain racial integration and in the majority white school areas on the far south side, middle-class white enrollment grew and housing prices soared.

2. School Enrollment Today

After the return to neighborhood schools, at least 15 elementary schools in Minneapolis were virtually all-minority; by 2004, that number rose to nearly 30.¹⁹² On the south side, a wave of Latino emigration transformed elementary schools like Jefferson and Anderson.¹⁹³ North Minneapolis elementary schools like Broadway and Jordan Park were heavily minority, with few or no White students in many of their grades.¹⁹⁴ By 2005, 39 standard public schools out of 65 were more than 75% minority in a region that was 9% minority.¹⁹⁵

Concomitant with these demographic changes, the poorest and most racially isolated schools have not closed the achievement gap. A recent *Star Tribune* article noting the success of some Minneapolis and St. Paul schools in statewide testing also mentioned abysmal test scores in some schools.¹⁹⁶ Jordan Park K-8, for example, saw a decline from 28% to 13% in math test passing rates.¹⁹⁷ Central city schools like these receive the most state funding because they contain some of the poorest and, therefore, neediest children.¹⁹⁸

¹⁹¹ Myron Orfield, *Metropolitcs* 92 (1997).

^{192.} See Institute on Race and Poverty, *Twin Cities Demographics*, at <http://www.irpumn.org/uls/resources/projects/irppres%2009-12-04.ppt> (slides 2 through 9) (showing pictorial presentation of demographics).

^{193.} See Institute on Race and Poverty, *Twin Cities Demographics*, at <http://www.irpumn.org/uls/resources/projects/irppres%2009-12-04.ppt> (slides 2 through 9) (showing pictorial presentation of demographics).

^{194.} *Id.*

^{195.} *Id.* The alternative schools within the district, which are even more segregated than the standard schools, are even more segregated.

^{196.} Norman Draper & Steve Brandt, *State's Schools Meet the Test*, *STAR TRIB.* (Minneapolis), Apr. 2, 2005, at B1.

^{197.} *Id.*

^{198.} JOHN BIEWEN, *Schooling Poor Kids in Minneapolis*, in *THE FORGOTTEN FOURTEEN MILLION, AMERICAN RADIOWORKS*, May 1999,

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Examples of specific schools reveal that in certain areas segregation is even worse than the general, area-wide data indicates. Hall Elementary School had 350 students in 2001-2002, 313 of which were Black, and now has a 96% enrollment of free or reduced lunch students.¹⁹⁹ Bethune is nearly 100% non-White and has seen a rapid decline in enrollment from a high of 668 elementary students to 334 in 2003, with a corresponding poverty rate of 95% free or reduced lunch enrollment.²⁰⁰ These examples are not atypical, as many of the schools in Near North and South Minneapolis enrolled similarly high numbers of poor children.²⁰¹

There have also been schools in inner-ring suburbs that have experienced substantial racial change. Robbinsdale's Northport Elementary, for example, saw a precipitous decline in White students and a corresponding increase in Black students.²⁰² Its minority enrollment was at 27% in 1995, with 340 White children; in 2003 the school went to 66% minority and 174 White children enrolled.²⁰³

http://americanradioworks.publicradio.org/features/14_million/poor2.shtml (last visited Sept. 26, 2005). Inner-city schools receive above-average per pupil resources, but it cannot be said they receive the highest per pupil expenditures because some rural districts are, per pupil, very expensive to operate. *See, e.g.*, Minn. Dept. of Educ., School Report Card: Red Lake: Report to Taxpayers, http://education.state.mn.us/ReportCard2005/loadFinanceAction.do?SCHOOL_NUM=000&DISTRICT_NUM=0038&DISTRICT_TYPE=01 (last visited Oct. 25, 2005). However, the inner-city districts receive, total, far more resources than any districts in the state because they have the most students. The state average hovers around \$8,000—almost exactly that of the national average. *See* NAT'L CTR. FOR EDUC. STATISTICS, COMMON CORE OF DATA, REVENUES AND EXPENDITURES FOR PUBLIC ELEMENTARY AND SECONDARY EDUCATION: SCHOOL YEAR 2002-03 10 (April 2005), available at <http://nces.ed.gov/pubs2005/2005353.pdf>. The Minneapolis-St. Paul schools receive about \$3,000 more. *See* Minn. Dept. of Educ., School Report Card: Minneapolis: Report to Taxpayers, http://education.state.mn.us/ReportCard2005/loadFinanceAction.do?SCHOOL_NUM=000&DISTRICT_NUM=0001&DISTRICT_TYPE=03 (last visited Nov. 1, 2005).

199. *See* Minn. Dep't of Educ., *supra* note 44; *see also* Minn. Dept. of Educ., School Report Card: Hall EL., http://education.state.mn.us/ReportCard2005/schoolDistrictInfo.do?SCHOOL_NUM=287&DISTRICT_NUM=0001&DISTRICT_TYPE=03 (last visited November 6, 2005).

200. *See* Minn. Dep't of Educ., *supra* note 44. *See also* Minn. Dept. of Educ., *supra* note 21.

201. *See* Institute on Race and Poverty, Twin Cities Demographics, at <http://www.irpumn.org/uls/resources/projects/irppres%2009-12-04.ppt> (slides 2 through 9) (showing pictorial presentation of demographics).

202. *See* Minn. Dept. of Educ., *supra* note 44.

203. *Id.*

3. *Declining Enrollment and Charter Schools in Minneapolis*

The statistics above tell the story of the rapid racial and socioeconomic change that Minneapolis experienced after the end of the *Booker* court's supervision.²⁰⁴ Still, change continues to affect Minneapolis schools. The MSD has lately begun to see steep drops in enrollment, particularly in the most segregated schools, and is projecting even further changes. From 49,242 in 1998, the school district enrolled about 43,397 students in 2003, with part of the loss going to open enrollment.²⁰⁵ Today, Minneapolis enrolls just under 40,000 students.²⁰⁶ The state Department of Education reported that Minneapolis is losing a total of more than 7,500 children to other districts and charter schools and gaining only 1,200 from other areas.²⁰⁷ Minneapolis projects that by 2008 enrollment may drop near 30,000 students—nearly half that of a decade previous.²⁰⁸

In some of Minneapolis's neighborhoods, as the quality and opportunity associated with their schools has declined, some students have chosen to attend charter schools.²⁰⁹ Charter schools were once proposed as a remedy to poorly run inner-city schools, teaming up parental involvement with less District oversight and

204. See Institute on Race & Poverty, *supra* note **Error! Bookmark not defined.**, slide 22. One statistic indicates the number of preschool children, aged 0 to 4, declined sharply. *Id.* at slides 19-25. Areas like Minnetonka and Maple Grove saw double-digit increases in the numbers of young White children in their jurisdictions. *Id.* This data should be interpreted carefully and not just attributed to White flight because other demographic factors could play a role.

205. NAT'L CTR. FOR EDUC. STATISTICS, COMMON CORE OF DATA, 1987-2002 School Years, <http://nces.ed.gov/ccd> (table on file with author); see also Minn. Dep't of Educ., Academic Excellence School Report Card (2005), http://education.state.mn.us/ReportCard2005/schoolDistrictInfo.do?SCHOOL_NUM=000&DISTRICT_NUM=0001&DISTRICT_TYPE=03 (last visited Sept. 26, 2005).

206 Minn. Dep't of Educ., Academic Excellence School Report Card (2005), http://education.state.mn.us/ReportCard2005/schoolDistrictInfo.do?SCHOOL_NUM=000&DISTRICT_NUM=0001&DISTRICT_TYPE=03 (last visited Sept. 26, 2005).

207. See Minn. Dep't of Educ., *supra* note 205.

208. HAZEL REINHARDT, A REPORT TO THE MINNEAPOLIS SCHOOL DISTRICT AS PART OF THE FACILITIES UTILIZATION PLAN: AN ANALYSIS OF ENROLLMENT AND ENROLLMENT PROJECTIONS 26 (2004), available at http://www.mpls.k12.mn.us/sites/78254f07-8bd2-4334-a7cb-fca95ff9dcb9/uploads/demography_report.pdf.

209. Tim Pugmire, *Charter School Competition Heats Up in Minneapolis*, MINN. PUB. RADIO NEWS, Nov. 25, 2003, http://news.minnesota.publicradio.org/features/2003/11/25_pugmire_charter/ (last visited Sept. 26, 2005).

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management.²¹⁰ Indeed, charters operate independently of the school district in which they reside and permit parents or their sponsors to try to create innovative learning strategies.²¹¹ Minnesota was the first state to enact charter school legislation and has seen a relatively large increase in the number of children attending charter schools. Between 2000 and 2004 alone the number of children in Minnesota charter schools increased 127%, or by nearly 8000 students.²¹² Among Minneapolis residents, the number of K-12 students attending charters increased to nearly 3500 students in 2003.²¹³ Because of their proximity to urban neighborhoods with residential segregation, charter schools also tend to be heavily minority—approximately 53% in 2004—and poor.²¹⁴ Many schools within Minneapolis were more than 80% minority, sometimes nearly 100%.

Several studies recently commissioned found widespread failure to practice good accounting practices among Minnesota's charter schools.²¹⁵ In particular, many schools neglected to adequately divide accounting duties among a sufficient number of individuals, a measure that increases financial accountability and

210. See PATRICIA ANDERSON, MINN. OFFICE OF STATE AUDITOR, FINANCIAL TRENDS OF MINNESOTA SCHOOL DISTRICTS AND CHARTER SCHOOLS: FOR PERIOD 2000 TO 2004, at 35 (2005), available at http://www.auditor.state.mn.us/reports/gid/2004/schooldistrict/schooldistrict_04_report.pdf. A recent report by the state auditor found that many charter schools have failed due to lack of oversight and poor management. *Id.* at 35-36. The Minnesota Department of Education only recently required management training for leaders in charter schools. *Id.* at 35-38.

211. WILLIAM LOWE BOYD ET AL., WHAT REALLY HAPPENED: MINNESOTA'S EXPERIENCE WITH STATEWIDE PUBLIC SCHOOL CHOICE PROGRAMS 11 (2002). As charters are independent of the school district, a student attending a charter school within the city limits of Minneapolis is not considered in the "head count" of the MSD. We may speak of declining enrollment in the MSD, even if 100% of the outflow is to charter schools wholly within the city limits.

212. ANDERSON, *supra* note 210, at 2, 6, 35-38.

213. HAZEL REINHARDT, A REPORT TO THE MINNEAPOLIS SCHOOL DISTRICT AS PART OF THE FACILITIES UTILIZATION PLAN: AN ANALYSIS OF ENROLLMENT AND ENROLLMENT PROJECTIONS 26 (2004), available at http://www.mpls.k12.mn.us/sites/78254f07-8bd2-4334-a7cb-fca95ff9dcb9/uploads/demography_report.pdf.

214. ANDERSON, *supra* note 214, at 6; see also Insitute on Race and Poverty, Charter School Demographics (on file with author).

215. Matt Entenza, Charter Schools Study 2003, 1, 2-3 (2003) (unpublished study on file with author). See also Duchesne Paul Drew, *Entenza to Call for Charges in Charter-School Cases*, STAR TRIB. (Minneapolis), Mar. 7, 2001, at B3; Duchesne Paul Drew & Anthony Lonetree, *A Call to Act on Charter School Woes*, STAR TRIB. (Minneapolis), Feb. 7, 2001, at A1.

helps protect against fraud.²¹⁶ These studies found limited segregation of duties in 84% of charter schools in 2002,²¹⁷ concluding that there was improper assurance that fraud did not occur in at least one internal operation in over 70% of charter schools.²¹⁸ Similarly, Minnesota's charters schools have increasingly failed to keep an updated list of General Fixed Assets, which is an important safeguard against theft.²¹⁹

In addition to problems with accounting, Minnesota's charter schools have not been in compliance with other oversight measures. For example, many of the state's charter schools have routinely failed to file their audits on time with the Department of Children, Families, and Learning.²²⁰ Opportunities for hiding financial problems and perpetrating fraud increase without the transparency provided by audits and access to board meeting minutes.²²¹

With Minnesota charter schools getting more than \$100 million from the state, the lack of oversight is a serious matter.²²² Within Minneapolis and St. Paul, at least eight schools have closed because of financial mismanagement or ineptitude.²²³ Closure of charter schools because of mismanagement or financial failure is not only a serious problem because of the misuse of public funds, but because it inevitably leaves hundreds of children stranded in the middle of their education.²²⁴

216. Entenza, *supra* note 215, at 2-3. Of the 30 schools that had filed their year 2000 reports by January 24, 2001, 73% had not adopted national accounting standards designed to prevent excessive control by any one individual over a school's spending and record-keeping. Drew & Lonetree, *supra* note 215, at A1. The studies indicated that the schools viewed the staff increases necessary to comply with proper accounting practices as cost prohibitive. Entenza, *supra*, at 3.

217. Entenza, *supra* note 215, at 2.

218. For example, in 2001, Excel Academy for Higher Learning was found to have no policy of issuing receipts or other standard method for handling incoming funds, the school failed to document the amounts of salaries that were paid to employees, and it lacked a system for obtaining formal approval of expenditures by individuals with spending authority. *Id.* at 6-7.

219. *See id.* at 4.

220. *See id.* at 3.

221. *See* Entenza, *supra* note 215, at 3; *see also* Draper, *supra* note 241, at B1.

222. *See* James Walsh, *Entenza Calls Many Charter Schools Lax*, STAR TRIB. (Minneapolis), Aug. 13, 2004, at B3.

223. *See* Institute on Race & Poverty, Chart Schools Presentation, (on file with author).

224. *See, e.g.,* Lourdes Medrano Leslie & Anne O'Connor, *Closing of School Hits Hard*, STAR TRIB. (Minneapolis), June 1, 2000, at A1.

2005] *Minneapolis Desegregation Settlement* 1414. *Effect of Instability in Minneapolis Schools*

In addition to a loss of enrollment due to charter schools and open enrollment options, the racial change in the wake of *Booker* and the return to neighborhood schools played a large role in the declining enrollment in Minneapolis schools. During the *Booker* era of desegregation in Minneapolis, White enrollment in Minneapolis public schools declined by almost half, reducing the percentage of Whites in the district by twenty percentage points.²²⁵ Middle-class people of color followed this trend of disinvestment from declining communities, with more than half of their households moving to the suburbs.²²⁶

At the outer edge of the city, as schools experience rapid White flight and transition, neighborhoods rapidly lose population.²²⁷ Northside schools like Bethune and Lincoln all saw rapid declines in enrollment from 1995 to 2003.²²⁸ Bethune elementary is nearly 100% minority and has seen a rapid decline in enrollment from a high of 668 students in 1997 to a low of 334 in 2003—exactly a 50% loss in enrollment.²²⁹ Some schools, such as the well-integrated Lake Harriet Upper Campus and Barton, saw an increase in enrollment over the same period.²³⁰

The instability created by declining enrollment causes some of Minneapolis's most talented teachers to leave in search of a district with increasing enrollment.²³¹ Suburban schools with increasing diversity need the skills teachers from Minneapolis possess from working with low-income and minority children, and

225. Heilman, *supra* note 153, at 169

226. See Myron Orfield & Tom Luce, *Minority Suburbanization and Racial Change*, at 1 (May 5, 2005) (unpublished draft), at http://www.irpumn.org/uls/resources/projects/MinoritySubn_050605wMAPS.pdf.

227. See ORFIELD, *supra* note **ERROR! BOOKMARK NOT DEFINED.**, at 39-40.

228. Minn. Dep't of Educ., *School Report Card: Bethune, Lincoln*, at http://education.state.mn.us/ReportCard2005/schoolDistrictInfo.do?SCHOOL_NUM=107&DISTRICT_NUM=0001&DISTRICT_TYPE=03 and

229. *Id.*

230. *Id.*

231. See Steve Brandt, *Urban Teacher Exodus Swells*, STAR TRIB. (Minneapolis), Aug. 11, 2005, at A1. Declining enrollment, if severe enough, can lead to school closures and teacher layoffs. Combined with an already-stressed administration and lack of attention to teacher needs, the threat of future layoffs has driven some qualified teachers to seek employment in Bloomington and other nearby districts with booming enrollment. *Id.* One teacher noted that in the six years of her employment with Minneapolis, she had received five layoff notices but had been hired back each year. *Id.*

thus are in a position to lure Minneapolis teachers away.²³² After their departure and the continuing decline in enrollment, the school board finds itself in a position of having to close schools despite vehement local opposition.²³³ On top of the already-difficult problems of educating children in schools of concentrated poverty, the inner-city districts now face insurmountable problems from declining enrollment and staffing.

5. *Segregation in inner-ring suburbs*

Inner-ring suburban school districts are also undergoing the same sort of transformation Minneapolis schools experienced a generation before. Bloomington and Osseo school districts provide concrete examples of this increasing stratification. Osseo has been in violation of the state desegregation rules since 1993, but the state has yet to take action that would correct the problem.²³⁴ In Osseo, more than one-third of the district's schools are "racially identifiable,"²³⁵ as the Minnesota desegregation rules define them.²³⁶ Osseo's Park Center Senior High is more than 55% minority,²³⁷ twenty-six points higher than the district high school student average.²³⁸ Conversely, nearby Maple Grove Senior High has 8% minority enrollment.²³⁹ The spatial separation of Whites and minorities in the Osseo schools is even starker in the elementary schools, which are typically smaller schools with higher racial concentrations.²⁴⁰

In Osseo, parents fought to keep the status quo, as

²³² *Id.*

²³³ Mary Jane Smetanka, *Plan Rekindles Memories of '82*, STAR TRIB. (Minneapolis), Feb. 10, 2004, at A8 (noting threat of school closures due to decline in enrollment); see also Sanjay Bhatt, *Draft Plan to List School Closures*, SEATTLE TIMES, Apr. 20, 2005, at B1; John Gehring, *Dips in Enrollment Posing Challenges for Urban Districts*, EDUC. WEEK, Mar. 2, 2005.

²³⁴ Myron Orfield, 17 Ham. J. L. & Pub. Pol'y 271, 287 (1996).

²³⁵ See Memorandum from Scott Crain, Research Fellow, University of Minnesota Law School Institute on Race and Poverty, on Minnesota Public School Segregation, to Professor Myron Orfield, University of Minnesota Law School (Oct. 2004) (on file with author).

²³⁶ See MINN. R. ch. 3535 subp. 6 (2003).

²³⁷ Crain, *supra* note 235.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*

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residential segregation within the district was inevitably translated into school segregation.²⁴¹ The district now contains ten racially identifiable schools, out of twenty-seven standard high, middle, and elementary schools.²⁴² Its total minority enrollment is 36%, more than 20% higher than neighboring Wayzata, which is at 14%, barely qualifying Osseo as a racially isolated district.²⁴³

Contemporaneous to this increasing racial isolation in Osseo's schools was a contentious disagreement over the redrawing of attendance lines in the 1990s. Parents protested and the superintendent declared that no east-west busing would occur—the remedy that could conceivably bring Osseo's schools into racial balance.²⁴⁴ John Shulman, an attorney for the NAACP and a participant in the *NAACP* and *Xiong* litigation, blamed board members for orchestrating segregation.²⁴⁵ The *Star Tribune* noted that the school plan was reminiscent of highly visible controversy in Maple Grove, a suburban city at the western edge of the Osseo school district. That issue involved an attempt to prevent the building of low-income housing in their community.²⁴⁶ The result of the controversial boundary adjustments was that the school board chose neighborhood schools over integration, and Osseo's schools have become predictably more and more segregated.²⁴⁷

Recent boundary adjustments in Bloomington provide another example of the effect that racial change and neighborhood schooling have on the segregation of opportunities in suburban districts. Prior to the fall of 2001, Bloomington's public schools included a combination of neighborhood and district-wide schools from kindergarten to high school.²⁴⁸ Two district-wide

241. See Norman Draper, *Battle of the Borders*, STAR TRIB. (Minneapolis), Jan. 29, 2001, at A1 ("Recently, Osseo parents revolted over a plan to turn one school into an early-education center and another into a kindergarten center . . . parents were up in arms over what they feared was an effort to redraw school boundaries to lessen the racial imbalance . . .").

242. Crain, *supra* note 235.

243. *Id.*

244. See Mike Kaszuba, *District Wrestles with Racial Imbalance*, STAR TRIB. (Minneapolis), Oct. 11, 1998, at B1.

245. *Id.*

246. *Id.* See also Myron Orfield, *Metropolitics* 127-128 (1997).

247. See Crain, *supra* note 247; Myron Orfield, *Metropolitics* 50 (1997).

248. See School Board News (Bloomington Pub. Sch., Bloomington, MN), Feb. 9, 1999.

“intermediary” schools were used for grades five through eight.²⁴⁹ The school board planned to consolidate the grades into middle schools so that the children would have fewer transition points as they progressed to high school, providing stronger school and peer ties by increasing the amount of time spent in each school.²⁵⁰

In facts similar to those found in the Supreme Court’s decision in *Columbus v. Penick*,²⁵¹ the district proposed four attendance boundary plans for the Bloomington middle schools.²⁵² They varied in terms of the segment of the city they captured but ultimately focused on achieving certain goals: keeping contiguous boundaries with existing elementary schools, maintaining racial balances, and increasing the proportion of children within walking distance of the school they attend.²⁵³ Bloomington was out of compliance with the state desegregation rules, as some other districts had been since the enactment of the new rules in 1999.²⁵⁴ Opposition from the Bloomington School Board and residents to the most integrative plan seemed to focus mostly on the time it would take to bus certain children, and others were troubled by the fact that the buses would pass by the nearest schools and proceed to schools farther away.²⁵⁵ Another group of concerned residents, 250 in all, signed a petition asking the School Board to not choose a plan that would worsen racial and social

²⁴⁹ *Id.*

²⁵⁰ *See id.*

²⁵¹ *Columbus v. Penick*, 443 US 449 (1979).

²⁵² BLOOMINGTON PUB. SCH., TRANSITION REPORTS: PROS AND CONS OF MIDDLE SCHOOL BOUNDARY OPTIONS A-D, at 1-5, (2000) (on file with author).

²⁵³ *See id.* at 1-5.

²⁵⁴ *See* Myron Orfield, *Metropolitics* 44 (1997). Bloomington currently has one racially identifiable elementary school—meaning that the minority enrollment at the school is 20 percentage points above the district minority enrollment—and one that is on the cusp of becoming racially identifiable. *Compare* Minnesota Department of Education, “School Report Card: Bloomington”, (2005) at http://education.state.mn.us/ReportCard2005/schoolDistrictInfo.do?SCHOOL_NUM=000&DISTRICT_NUM=0271&DISTRICT_TYPE=01, with Minnesota Department of Education, “School Report Card: Valley View Elementary” (2005) at http://education.state.mn.us/ReportCard2005/schoolDistrictInfo.do?SCHOOL_NUM=459&DISTRICT_NUM=0271&DISTRICT_TYPE=01 (showing that Valley View Elementary minority enrollment is more than 20 percentage points above Bloomington minority average).

²⁵⁵ *See id.* at 1-2.

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segregation.²⁵⁶ Seventeen residents also testified to the School Board about the boundaries and the negative impact school segregation would have on their community.²⁵⁷ The District chose what was termed “Plan D,” which kept contiguous boundaries with elementary schools, but did not maintain racial balance in the three schools.²⁵⁸

The redistricting in Bloomington may have had the effect of causing one middle school to rapidly concentrate by race and class. In 2001, when the boundary change went into effect, the racial averages of the three schools were slightly different: Olson middle school was at 16.8% minority, Oak Grove was at 21.6% minority, and Valley View was at 32.8% minority.²⁵⁹ However, the average minority enrollment at Valley View has increased since the middle school boundaries were redrawn in 2000-2001.²⁶⁰ Presently, Olson Middle School is 18.5% non-White; Oak Grove is 27% non-White; and Valley View is 40% non-White.²⁶¹ The district-wide average of minority students in Bloomington middle schools is 27.9%.²⁶² Thus the trend in minority enrollment has generally been increased diversity, though at a greater rate in some schools.²⁶³

T.1 Middle School Enrollment in Bloomington, by Grade 2004-05 School Year²⁶⁴

| | Grade | Minorities | Total Enrollment | Minority Percentage |
|-----------|-----------------|------------|------------------|---------------------|
| Oak Grove | 6 th | 86 | 301 | 28.57143 |
| | 7 th | 67 | 271 | 24.72325 |
| | 8 th | 71 | 259 | 27.41313 |
| | Total | 224 | 831 | 26.95548 |

256. Bloomington Sch. Bd., *Meeting Minutes*, BLOOMINGTON PUB. SCH. 7 (Jan. 8, 2001) (on file with author).

257. *Id.*

258. See Bloomington Sch. Bd., *Meeting Minutes*, BLOOMINGTON PUB. SCH. 3 (Jan. 22, 2001) (on file with author); BLOOMINGTON PUB. SCH., *supra* note 252.

259. *Id.*

260. See *id.*

261. *Id.*

262. *Id.*

263. See *id.*

264. MINN. DEPT OF EDUC., RACE DATA BY SCHOOL FOR THE 2004-05 SCHOOL YEAR (2005) (on file with author) (figures may not add up to 100% due to rounding).

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| | | | | |
|-------------|-----------------|-----|-----|----------|
| Valley View | 6 th | 97 | 217 | 44.70046 |
| | 7 th | 104 | 246 | 42.27642 |
| | 8 th | 83 | 240 | 34.58333 |
| | Total | 284 | 703 | 40.39829 |
| Olson | 6 th | 57 | 244 | 23.36066 |
| | 7 th | 51 | 288 | 17.70833 |
| | 8 th | 49 | 317 | 15.45741 |
| | Total | 157 | 849 | 18.49234 |

The trend in all three middle schools is for increased minority enrollment, as each sixth grade class in the 2004 fall enrollment had a higher percentage of minority students.²⁶⁵ Table 1 indicates that Oak Grove has the least amount of racial transition between its three grades. An analysis of the enrollment patterns is beyond the scope of this paper, but the Oak Grove attendance area tends to traverse east-west boundaries in Bloomington.²⁶⁶ Plans that could have conceivably drawn all three schools into a closer racial balance were not selected, most likely for reasons such as walking distance, elementary boundary cohesiveness, and opposition to busing.²⁶⁷ By creating school boundaries that captured a diverse population in Bloomington and incorporated distinct neighborhoods, Bloomington should have been able to create a system that did not segregate its schools.

II. The Choice Is Yours: An Attempt to Desegregate Minneapolis Public Schools From 1995 to Today

After Judge Larson ended court supervision, integration became an elusive goal in Minneapolis's public schools. The District began operating under the state "15%" rule, which required each school in a district to have minority enrollment no higher than 15% of the district average.²⁶⁸ In 1995, the state Board of Education officially abandoned the 15% rule.²⁶⁹ A

265. *See id.*

266. *See* BLOOMINGTON PUB. SCH., *supra* note 252.

267. *See* BLOOMINGTON PUB. SCH., *supra* note 252, at 1-5.

268. Heilman, *supra* note 153, at 169.

269. Bauerlein, *supra* note 188.

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metropolitan rule, requiring schools across the region to be in balance, was proposed and rejected in 1999 in favor of less stringent rules.²⁷⁰ By then, over 14% of the District's elementary schools were in violation of the rule.²⁷¹

A. *The NAACP and Xiong Lawsuits*

Dismayed by this increasing segregation, the Minneapolis Branch of the NAACP filed suit in state court on September 19, 1995, on behalf of all children enrolled in Minneapolis public schools.²⁷² The named defendants included the State of Minnesota, the Board of Education, both chambers of the Minnesota legislature, the Metropolitan Council,²⁷³ and various state officials.²⁷⁴ The complaint in the suit began by noting the racial and economic disparity between Minneapolis schools and suburban schools.²⁷⁵ Minneapolis schools were over 59% minority and 55% poor at the time of the complaint, while the schools of surrounding suburbs were "overwhelmingly white" and more affluent.²⁷⁶ By the time the *Xiong* complaint was filed in 1998, the statistics had increased to about 70% each.²⁷⁷

The plaintiffs argued that this segregated education constituted a *per se* violation of the Minnesota State Constitution's education and equal protection clauses.²⁷⁸ The year before the

²⁷⁰ *In the Matter of Proposed Adoption of Rules Relating to Desegregation, Minn. Rule Parts 3535.0100 to 3535.01800*, para. 31, Jan. 20, 1999, at <http://www.oah.state.mn.us/aljBase/130010448.rr.htm> (noting Dr. Orfield and Roundtable proposal for a metropolitan-wide desegregation rule).

²⁷¹ *Id.*

²⁷² See Class Action Complaint at 2, Minneapolis Branch of the NAACP v. State, No. 95-14800 (Minn. Dist. Ct. Sept 19, 1995) [hereinafter NAACP Compl.]. The allegations in this complaint were substantially the same as those filed on February 23, 1998. See Class Action Complaint, Xiong v. State, No. 98-2816 (Minn. Dist. Ct. Feb 23, 1998) [hereinafter Xiong Compl.].

²⁷³ The Met Council is a powerful regional government authority in the Twin Cities, with substantial control over the development priorities of the region. See Myron Orfield, *Metropolitics* 189-196 (1997) (appendix A).

²⁷⁴ See NAACP Compl., *supra* note 272, at 1-2.

²⁷⁵ See NAACP Compl., *supra* note 272, at 2; see also Xiong Compl. at 2.

²⁷⁶ See NAACP Compl., *supra* note 272, at 11.

²⁷⁷ See Xiong Compl., *supra* note 272, at 10 ("[T]he public schools of the City of Minneapolis are approximately 70 percent children of color and approximately 70 percent low-income.").

²⁷⁸ NAACP Compl., *supra* note 272, at 13, 17-19; see also Xiong Compl., *supra* note 129 at 2, 18-20 (alleging *per se* violations of the education and equal protection clauses of the Minnesota Constitution).

filing of the NAACP complaint, the Minnesota Supreme Court had found that the state's Education Clause—which places a duty on the state legislature “to establish a general and uniform system of public schools”²⁷⁹—created a fundamental right to education.²⁸⁰ The NAACP's framing of segregation as a state constitutional problem mirrored the strategy of plaintiffs who had been successful to varying degrees using state equal protection and education clauses to promote school funding equity.²⁸¹ The claim that segregated schools violated a state constitutional education clause was argued in a contemporaneous action by plaintiffs from Hartford, Connecticut, under that state's constitution.²⁸² The final decision in that case, which was argued nine days after the filing of the NAACP complaint, held that the state's education clause, along with other constitutional provisions, required Connecticut to remedy Hartford's segregated schools.²⁸³

The plaintiffs in *NAACP v. State* alleged that the segregated Minneapolis schools also, as an issue of fact, provided an inadequate education

[b]ecause the Minneapolis public schools must devote disproportionately large resources to dealing with the many problems and difficulties that accompany poverty and racial segregation²⁸⁴

This inadequate education was reflected, the plaintiffs alleged, in the lower test scores and higher non-graduation rates of Minneapolis students as compared with state suburban students.²⁸⁵ The NAACP complaint also alleged that the segregation of the Minneapolis Public Schools had a negative

279. MINN. CONST. art. XIII, § 1.

280. See *Skeen v. State*, 505 N.W.2d 299, 313 (Minn. 1993) (holding that education is a fundamental right under the Minnesota constitution both because of its importance to the state and the language of the education clause); see also NAACP Compl., *supra* note 272, at 17 (noting fundamental right to an adequate education under the Education Clause of the Minnesota constitution).

281. See Michael Heise, *State Constitutions, School Finance Litigation, and the “Third Wave”: From Equity to Adequacy*, 68 TEMP. L. REV. 1151 (1995). The choice of plaintiffs to proceed in state court on adequacy theories is discussed; the article particularly focuses on *Sheff v. O'Neill*, 678 A.2d 1267 (Conn. 1996).

282. See *id.*

283. *Sheff*, 678 A.2d, at 1270-71.

284. NAACP Compl., *supra* note 272, at 13. See also Xiong Compl., *supra* note 272, at 11-12, 19 (alleging factual inadequacy due to substandard character of the education and inequality to that provided in surrounding suburban districts).

285. See NAACP Compl., *supra* note 272, at 14; see also Xiong Compl., *supra* note 272, at 13-14.

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effect on its students' chances for employment and higher education.²⁸⁶

The NAACP plaintiffs charged that Minneapolis's failure to enforce current state rules on capping minority enrollment in its schools, among other actions, showed that the State had not taken effective action to desegregate Minneapolis schools.²⁸⁷ Additionally, they claimed the State reinforced racial and economic inequality through its school construction policies and failure to promote integrated housing.²⁸⁸ The plaintiffs asked the court to order the State to end its segregative practices and provide the children of Minneapolis's public schools with "an adequate and desegregated education."²⁸⁹

The defendants claimed that Minnesota's Education Clause only created a limited duty to establish schools,²⁹⁰ and that there was no equal protection violation because no intentional acts were alleged.²⁹¹ The district court judge, after hearing arguments in April 1996, ordered several defendants dismissed but allowed the case to go forward.²⁹² The district court also determined that the issues raised in the case were sufficiently novel and important enough to be decided directly by the Minnesota Supreme Court.²⁹³ The higher court refused to hear the certified questions, and the defendants subsequently sought unsuccessfully to have the case dismissed on jurisdictional grounds.²⁹⁴

286. See NAACP Compl., *supra* note 272, at 14; see also Xiong Compl., *supra* note 272, at 14.

287. See NAACP Compl., *supra* note 272, at 15; see also Xiong Compl., *supra* note 272, at 15-16.

288. NAACP Compl., *supra* note 272, at 16; see also Xiong Compl., *supra* note 272, at 16-17 (noting, as an example, the failure of Metropolitan Council to ensure that the suburb of Maple Grove kept its fair housing obligations).

289. NAACP Compl., *supra* note 272, at 19; Xiong Compl., *supra* note 272, at 21.

290. See Defendants' Amended Notice of Motion and Motion to Dismiss Plaintiffs' Complaint at 1-2, *Minneapolis Branch of the NAACP v. State of Minnesota*, No. 95-14800 (Minn. Dist. Ct. Feb 27, 1996); Memorandum of Law in Support of Defendants' Mot. to Dismiss at 4, 10-19, *Minneapolis Branch of the NAACP v. State*, No. 95-14800 (Minn. Dist. Ct. Feb 27, 1996) [hereinafter Mem. Of Law in Supp. Of Defs.' Mot. To Dismiss].

291. See Mem. of Law in Supp. of Defs.' Mot. to Dismiss, *supra* note 290, at 21-23.

292. See *Minneapolis Branch of the NAACP v. State*, No. 95-14800, slip op. at A24 (Minn. Dist. Ct. June 26, 1996) (order granting defendants' motion to dismiss in part and denying in part and denying plaintiffs' motion for summary judgment).

293. *Minneapolis Branch of the NAACP v. State*, No. 95-14800 (Minn. Dist. Ct. Nov. 21, 1996) (order for certification of questions on appeal).

294. *Minneapolis Branch of the NAACP v. State*, No. 95-14800, slip op. at 1-2 (Minn. Dist. Ct. July 21, 1997) (order denying motion for judgment on the

The effort of the NAACP to join the Metropolitan Council for a combined schools and housing remedy was defeated on res judicata grounds because of the consent decree in the housing discrimination case *Hollman v. Cisneros*.²⁹⁵ Claims against the Metropolitan Council were heard in the U.S. Court of Appeals for the Eighth Circuit,²⁹⁶ whose decision was vacated and remanded by the U.S. Supreme Court.²⁹⁷ Ultimately, however, the Metropolitan Council was successful in dismissing claims against it.²⁹⁸ This was an important loss in the *NAACP* case because of the remedial power of the Metropolitan Council to coordinate affordable housing and school desegregation.²⁹⁹

Not to be confused with the 1995 filing of the *NAACP* case, a later suit, *Xiong v. State*, was filed in 1998,³⁰⁰ and contained virtually identical claims to the *NAACP* case. Dan Shulman, the attorney for the NAACP in the original lawsuit, noted that the new case contained an additional due process claim and could possibly help move the State toward a settlement, though settlement was not the reason *Xiong* was filed.³⁰¹ The Hennepin County District Court later consolidated both cases for purposes of trial.³⁰²

On the verge of proceeding to trial, the attorneys for the

pleadings).

295. *Xiong v. State*, no. 98-961 (Minn. Dist. Ct. Sept 15, 1998) (discussing preclusive effect of the consent decree in *Hollman v. Cisneros*). *Hollman* was “a class action challenging the concentration of public housing in certain neighborhoods in Minneapolis.” See *NAACP, et al. v. Met. Council*, 125 F.3d 1171 (8th Cir. 1997), *petition for certiorari filed*, (June 16, 1998), at 5.

296. *Xiong v. State*, 195 F. 3d 424 (8th Cir. 1999).

297. *Minneapolis Branch of the NAACP v. State*, 522 U.S. 1145 (1998) (vacated and remanded). At issue was the use of a housing segregation claim against the Met Council, which the Council asserted was effectively settled by the consent decree in *Hollman v. Cisneros*. See *Xiong v. State*, No. 98-961, slip. op. at 2 (D. Minn. Sept. 15, 1998). The Met Council removed both the *NAACP* and *Xiong* litigation to federal court under the All Writs Act. *Id.* at 3.

298. *Xiong*, 195 F.3d at 4271 (1999) (remanding plaintiff’s claims against Metropolitan Council with directions to dismiss with prejudice).

299. See Myron Orfield, *Land Use and Housing Policies to Reduce Concentrated Poverty and Racial Segregation*, ___ FORDHAM URB. L.J. ___ (forthcoming 2006) (manuscript at 27, on file with author).

300. See *Xiong Compl.*, *supra* note 129.

301. See Debra O’Connor, *Parents File Lawsuit over Minneapolis Schools*, PIONEER PRESS (St. Paul), Feb. 24, 1998, at 2B.

302. See Settlement Agreement, Case Nos. 95-14800, 98-2816 (Minn. Dist. Ct. 2000), at Part 2(c) (“On October 16, 1998, the Court ordered that the actions be consolidated for the purposes of trial only.”).

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Minneapolis NAACP felt that settlement best served the interests of the children in Minneapolis and would provide the best remedy.³⁰³ A settlement that precluded extensive litigation and provided a pilot program for Minneapolis children would at least provide support for a future, more extensive effort. In early 1999, the parties began to work on the settlement, first by exchanging proposals and then by mediated settlement negotiations.³⁰⁴ In 2000, before the case was to be tried, the parties reached an agreement.³⁰⁵

The settlement agreement established three key programs: 1) to allow low income Minneapolis students to attend suburban schools, 2) to give low income Minneapolis students preferred access to magnet schools within the District, and 3) to increase the accountability of the MSD to parents.³⁰⁶ The suburban plan set aside 2000 spaces over four years for Minneapolis students from low-income families to attend suburban schools which are part of the West Metro Education Program, a consortium of school districts in the western metropolitan area.³⁰⁷ Although the suburban program aspect was set to expire at the end of the 2004-05 school year, it was extended to the 2005-06 school year.³⁰⁸ The settlement also increased access for low-income children to existing magnet school programs and intradistrict transfers.³⁰⁹

303. See Dan Shulman, Address at the Institute on Race and Poverty Race and Regionalism Conference, (May 7, 2005), http://www.irpumn.org/website/conference/audio/Session6_DanShulman.m3u.

305. See Settlement Agreement at 1, *Minneapolis Branch of the NAACP v. State*, No. 95-14800 (Minn. Dist. Ct. May 8, 2000) [hereinafter Settlement Agreement]; *Xiong v. State*, No. 98-2816 (Minn. Dist. Ct. 2000) (unpublished case, on file with author); see also KAHLBERG, *supra* note 21, at 176-77 (2004) (noting that settlement was reached in 2000 to expand upon existing suburban transfer program).

306. See Settlement Agreement, *supra* note 305, at ex. B.

307. *Id.* at 2. The initial plan included the following districts: Richfield, St. Louis Park, Wayzata, Columbia Heights, Edina, Hopkins, Robbinsdale, St. Anthony/New Brighton. *Id.* at 1. Sometime thereafter, Eden Prairie was also added. See West Metro Education Program, *supra* note 35.

308. See Allie Shah, *School-Choice Plan Extended*, STAR TRIB. (Minneapolis), Jan. 8, 2004, at B1.

309. See Settlement Agreement, *supra* note 305, at 2. Minneapolis agreed to adopt an Enhanced Choice program and an Accountability program. *Id.* These are important aspects of the choice plan, though they are not the primary focus of this article. Intra-district transfer can only achieve so much in a school district that is overwhelmingly poor and minority. Thus, the lion's share of the discussion is reserved for the suburban transfer program, which is at the same time the most controversial and promising aspect of CICY.

B. The Choice Is Yours and Participant Response to the Program

CIY works by expanding upon Minnesota's open enrollment laws.³¹⁰ CIY children may transfer into suburban districts, bringing with them a substantial portion of state aid.³¹¹ Likewise, because CIY children are by definition poor, they bring in more money than a middle-class child would due to Minnesota's funding schemes.³¹² These features, combined with free transportation for the children,³¹³ makes CIY an attractive program for all sides.

Children are already permitted under state law to attend schools outside their district,³¹⁴ but they must pay for their own transportation to the district and compete for available spaces.³¹⁵ The suburban CIY program gives priority access to open spaces in certain suburban districts to Minneapolis students who are eligible for free or reduced lunch.³¹⁶ If demand for the program outstrips availability then residents in certain regions within Minneapolis receive higher priority.³¹⁷ Suburban districts may only refuse to accept a CIY student if there is not space available in the program.³¹⁸ Interstate 394 is a north/south dividing line, and Minneapolis residents north of the freeway may have priority in suburban districts north of the freeway, and similarly in suburban districts south of the freeway.³¹⁹

At the beginning of its fifth year in the fall of 2005, 1680 students were participating in the suburban choice component of the program.³²⁰ More than 3,500 had participated in the program

310. *See id.* at i-ii.

311 *Id.*

312 *Id.*; *see also* Tim Strom, Minnesota House Research Department, Minnesota School Finance: A Guide for Legislators, 19 (Nov. 2005) ("The formula that generates compensatory revenue is a concentration formula based on each school building's count of students that are eligible for free or reduced price meals.")

313 *See* Settlement Agreement, *supra* note 305.

314. *See id.* at i (noting that over 30,000 students participated in open enrollment in the 2002-03 year).

315. *See id.*

316. *See id.* at i-ii.

317. *See id.* at vii, 9. The neighborhoods are roughly near-North Minneapolis, downtown, parts of Northeast near the river, Seward, and South Minneapolis.

318. *See id.* at 8, 10.

319. *See id.* at 1 n.3.

320. Minneapolis School District, Student Accounting Department, Choice is Yours Enrollment (9/27/05); *see also* ASPEN ASSOCS., MINNESOTA VOLUNTARY

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over its five year lifetime.³²¹ The majority of the participating suburban schools had considerably fewer children of color than Minneapolis schools.³²² In the first two years, only eight of the sixty suburban schools had more than 35% minority enrollment.³²³ The suburban schools also enrolled relatively few students who were eligible for free or reduced price lunches.³²⁴ A study covering the first three years of CIY showed 52% of the program's participants came from two zip codes in north Minneapolis, which had mostly racially isolated schools.³²⁵ By far the largest percentage of students (37%) went to Robbinsdale, followed by Richfield (14.4%).³²⁶ Both these districts were spurred to the program in part based on their declining enrollment, and in part based on a desire to help with a west-metro desegregation program.

The earliest years of CIY suffered from poor publicity.³²⁷ In an evaluation of the first several years, the MDE found that of the families that were eligible and did not utilize or apply for CIY, 9 of 10 did not even know that it existed.³²⁸ Even among families that utilized the suburban CIY program, some did not realize they were participating in it.³²⁹ This most likely demonstrates that there is an information gap for low-income or minority families that can keep them from accessing the program. Moreover, the state and school districts had difficulty making the program known to parents, as name recognition was so low.³³⁰

Parents chose to enroll their children in suburban school districts as part of the CIY program primarily for reasons of academic quality.³³¹ Parents of CIY participants were also more likely than city parents to give school safety as a reason for

PUBLIC SCHOOL CHOICE 2003-2004 13 (2004).

³²¹ Minneapolis Public Schools, Student Accounting.

³²² See PALMER, *supra* note 37, at 17.

³²³ See *id.* at 3.

³²⁴ See *id.*

³²⁵ See ASPEN ASSOCS., *supra* note 320, at 14.

³²⁶ See *Id.*

³²⁷ See ELISABETH A. PALMER, *supra* note 37, at 30; Randy Furst, *School-Choice Info Misses Some Parents*, STAR TRIB. (Minneapolis), May 27, 2001, at B1.

³²⁸ See PALMER, *supra* note 37, at 29 ("Only 1 in 10 parents of eligible, non-participating students . . . recognized the program by name.").

³²⁹ See *id.* at 30.

³³⁰ See *id.*

³³¹ See PALMER, *supra* note 37, at 40 (finding that 32.8% of parents cited academic quality as their primary reason for enrolling their children).

choosing the school than parents of students in Minneapolis schools.³³² Interviews with parents of participants in the programs showed great satisfaction with the program.³³³

Interest in the suburban transfer program is highest among Black families. Before the creation of the CIY program, nearly 60% of suburban transfer students were White.³³⁴ Now, nearly 50% are Black and only 37% are White.³³⁵ Forty-seven percent of CIY participants were previously enrolled in a Minneapolis public school, and 7% were previously enrolled in a charter or private school.³³⁶

Parents rated the schools well in a wide variety of indicators, including setting high standards for achievement, creating community, and making students feel welcome.³³⁷ Though parents seemed pleased with the suburban schools' approach to diversity, interviews with teachers showed that they thought fewer teachers were comfortable talking about racism and prejudice than parents believed and that students of different races did not work well together.³³⁸ Only 17% of CIY withdrawals in the first four years returned to the Minneapolis Public Schools,³³⁹ indicating that parents were perhaps more satisfied with suburban schools than with their previous schools. The remainder of those withdrawing may have chosen to attend charter schools or some other non-MPS, non-CIY school. Some anecdotal evidence also suggests that families may be moving out of Minneapolis to relocate in the districts where their children attend school.³⁴⁰ In that case, the families would no longer be CIY enrollees, but new suburban residents eligible for local enrollment.³⁴¹

There is little hard data measuring the achievement of CIY students in relation to those students in Minneapolis schools.³⁴² A

332. *See id.* at 44 tbl. 2.16.

333. *See* ASPEN ASSOCS., *supra* note 320, at 14 (relaying that 90% of CIY parents would choose the same school again).

334. *See id.* at 13.

335. *See id.* at 13-14.

336. *Id.* at 14.

337. *See id.* at 66 tbl.3.2; *see also id.* at app. A-26 tbl.25.

338. *See id.* at 67-68.

339. Minneapolis Public Schools, Student Accounting Department, Choice is Yours Program Transfers Out of Minneapolis, June 17, 2005.

340. *See id.*

341. *See id.*

342. *See id.* at 22.

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comparison of program participants in suburban schools with students in Minneapolis schools, which did not control for other factors, showed increases in scores in four out of five comparisons.³⁴³ The group responsible for releasing the first two reports on CIY and the Minnesota Department of Education planned to release data on student achievement in June of 2005 but has not followed through with a public release, as of January 2005.³⁴⁴

Focus groups held during the 2002-03 school year showed that most students had an easy transition into their new schools.³⁴⁵ The vast majority of students stated that they felt welcome in their new schools.³⁴⁶ Students at nearly half of the participating schools, however, reported difficulties transitioning due to the new cultural environment or not knowing anyone at their new school.³⁴⁷ Some students reported being unfavorably singled out in class, while others reported that teachers gave them extra help.³⁴⁸ Students often faced stereotypes held by fellow students and, to a lesser extent, teachers.³⁴⁹ When students were asked what advice they would give to the program's administrators, the most common suggestion was to improve transportation.³⁵⁰

Although students were not asked about their overall satisfaction with the program, a third of the respondents replied to that effect on their own. Overall, an analysis of the students' responses in focus groups found that the students utilizing CIY interpreted their experiences in their new schools "quite positively."³⁵¹

343. Palmer, *supra* note 37, at 86 (showing increases in year one participants in fifth grade math and year two participants in third grade reading, third grade math, and fifth grade reading; showing lower scores for year one participants in eighth grade reading).

344. In discussions with staff at the Minnesota Department of Education, it appears that the student achievement data will be publicly available at some point, but the Department indicated no plans to make a public release of the data.

345. See PALMER, *supra* note 37, at 93, 96.

346. See *id.* at 98.

347. See *id.* at 97.

348. See *id.* at 98-99.

349. See *id.* at 99-100.

350. See *id.* at 107.

351. *Id.* at 109.

C. Minnesota's Desegregation Rules

Contemporaneous with the CIY settlement and the end of the NAACP litigation, the Minnesota Department of Education enacted administrative rules to deal with segregation. Minnesota administrative rules provide guidance for assessing racial balance in schools and school districts. A "racially identifiable" school is defined as one that is twenty percentage points above the district average for that grade level in terms of minority enrollment.³⁵² A "racially isolated" school district is one where the enrollment of minority students exceeds 20 percentage points of district-wide enrollment at any adjoining school district.³⁵³ Some types of schools are specifically exempted from the effect of the rules. Among other types, this includes charter schools and schools designed to "address limited English proficiency."³⁵⁴ For segregated schools not the result of intentional discrimination, a separate plan exists.³⁵⁵ All districts are required to provide the commissioner with racial composition data each year in order to determine which schools are racially isolated.³⁵⁶

The remedy for isolated school districts is similar to that for segregated schools not the result of intentional discrimination.³⁵⁷ After a finding that the district is isolated, the Commissioner is required to notify the isolated district and the surrounding districts.³⁵⁸ The affected districts must then establish a "multidistrict collaboration council" to "identify ways to offer cross-district opportunities to improve integration."³⁵⁹ A plan is then approved, which may include incentives listed in the rules.³⁶⁰ Some of the incentives involve transportation aid, developing cooperative magnet schools, creating cooperative efforts to recruit

352. See MINN. R. ch. 3535.0110, subp. 6 (2003).

353. See *id.* subp. 7.

354. *Id.* subp. 8. Schools which are designed to address individual education needs, special education, or alternative education are also exempted. *Id.*

355. See MINN. R. ch. 3535.0160, subp. 1 (2003).

356. See *id.* ch. 3535.0120, subp. 1.

357. See MINN. R. ch. 3535.0160, subp. 1 (2003).

358. See MINN. R. ch. 3535.0170, subp. 1 (2003). The same exceptions exist for American Indian concentrations. *Id.*

359. *Id.* subp. 2.

360. See *id.* subp. 5. The plan is required to include community outreach preceding the plan, cross-district, integration issues, goals of integration, and methods to accomplish the goals. *Id.* subp. 6(A).

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minority teachers, and creating community education programs.³⁶¹ A plan remains in effect for four years from the time it is created.³⁶²

While the rules generally will not create a mandatory integration remedy,³⁶³ they can increase interaction between districts to encourage voluntary desegregation. Under the present statute, broad authority resides in the Commissioner of Education to “address the need for equal educational opportunities for all students and racial balance” through the use of administrative guidelines.³⁶⁴ Administrative rules create voluntary remedies for districts that are segregated or have segregated schools.³⁶⁵ The practical effect of the rules has been to encourage “collaboration councils” that work to support integration initiatives between racially isolated and non-racially isolated school districts.³⁶⁶ Unfortunately, a recent review of this system by the Legislative Auditor revealed that the Department of Education is not following through with the rules by evaluating district desegregation plans.³⁶⁷

With the enactment of the rules in 1999, seven school districts in the metro area were found to be racially isolated.³⁶⁸ This brought twenty-six districts within the auspices of the administrative rule requiring multidistrict collaboration.³⁶⁹ The West Metro Education Program, as the administrator of CIY, among other programs, is one such example of this.³⁷⁰ Another is the Northwest Integration School District, which was created specifically to address the identification of Brooklyn Center and Osseo school districts as racially isolated following the enactment of the 1999 rules.³⁷¹

361. *See id.* subp. 6 (B).

362. *Id.* subp. 8.

363. *See supra* notes 363. *See supra* notes **Error! Bookmark not defined.---**
Error! Bookmark not defined. and accompanying text. and accompanying text.

364. MINN. STAT. § 124D.896, (b) (2004).

365. *See* MINN. R. ch. 3535.0170.

366. *See* MINN. R. ch. 3535.0170, subp. 2, 3 (1999).

³⁶⁷ Minnesota Office of the Legislative Auditor, School District Integration Revenue, 28 (2005), at <http://www.auditor.leg.state.mn.us/ped/pedrep/integrevf.pdf>.

368. *See id.* para. 56.

369. *See id.*

370. *See* West Metro Education Program, *supra* note 307.

371. *See* Northwest Integration School District, <http://www.nws.k12.mn.us/background.html> (last visited August 5, 2005).

III. The Leading Edges of Integration Today

The increasing school segregation witnessed in inner-ring suburbs in the Twin Cities mirrors the pattern of segregation that occurred in the central cities a generation ago.³⁷² Legal challenges to these patterns are the new frontier of civil rights in *Brown*-like principles of integration.³⁷³

The inner-ring suburbs are arguably seeing the same types of boundary adjustments and indifference to segregation that produced the lawsuit in *Booker*.³⁷⁴ Resegregation after decades of fighting to produce equality in our schools has brought schools throughout the country back to 1968 levels of segregation.³⁷⁵ Moreover, remedies that rely exclusively on funding have failed to equalize opportunity and achievement.³⁷⁶ Indeed, as the segregated urban school districts receive greater and greater funding per pupil we have an education system that is “separate and more than equal.”³⁷⁷

The recent half-century anniversaries of the *Brown* decisions have produced much discussion and more than a few symposia trying to answer the question of what exactly *Brown* accomplished.³⁷⁸ First, Southern schools were radically altered when *de jure* segregation was struck down in *Brown*.³⁷⁹ Conversely, Northern schools were faced with a more fragmented system of government that permitted Whites to flee to suburban enclaves.³⁸⁰ Thus, Northern schools might have also faced substantial integration were it not for the *Milliken* decision.³⁸¹

372. See discussion *supra* notes 235-243 and accompanying text (Osseo and Bloomington discussion).

373. See *supra* notes 373. See *supra* notes 140 and accompanying text.

374. See *supra* Part I.B.4.

375. Gary Orfield, *The Growth of Segregation*, in DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF *BROWN V. BOARD OF EDUCATION* [hereinafter DISMANTLING DESEGREGATION] 53, 54-55 (Gary Orfield & Susan Eaton eds., 1996).

376. See *supra* notes 376. See *supra* notes 196--198 and accompanying text. and accompanying text.

377. Susan Eaton et. al., *Still Separate, Still Unequal: The Limits of Miliken IF's Monetary Compensation to Segregated Schools*, in DISMANTLING DESEGREGATION, *supra* note 375, at 143, 143-178.

378. See, e.g., 24 L. & INEQ. 1 (2006).

379. See Gary Orfield, *Turning Back to Segregation*, in DISMANTLING DESEGREGATION, *supra* note 375 at 1, 7-8.

380. See Gary Orfield & Susan Eaton, *Dismantling Desegregation*, in Dismantling Desegregation, *supra* note 375, at 1, 15.

381. Richard Thompson Ford, *Brown's Ghost*, 117 HARV. L. REV. 1305, 1309-1312 (2004). Ford refers to *Milliken v. Bradley*, 418 U.S. 717 (1974). Northern schools

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Brown accomplished much, but since the early 1990s institutions have faced the threat of resegregation in previously integrated schools.³⁸² This threat is becoming more and more prevalent in older suburbs, where school boundaries are transforming residential segregation into segregation in public schools.³⁸³ If this kind of drastic resegregation and socioeconomic concentration can happen in a region as wealthy and as White as the Twin Cities, it can conceivably happen anywhere in the country. The principles of integration must be brought to bear on the problem of fragmented government that permits these separate school systems to exist in metropolitan regions.

If federal desegregative lawsuits were the vehicle for bringing the system of *de jure* segregation to a halt, then the newer state constitutional remedies are the leading edge of *Brown* and the desegregation movement today, promising to end *de facto* segregation. The first part of the following section discusses the continuing validity of some of the federal case law.³⁸⁴ Next the article turns to the relatively new area of state constitutional desegregation lawsuits.³⁸⁵ Beginning with *Sheff* and paralleled in the Minnesota cases *NAACP* and *Xiong*, plaintiffs are avoiding the federal courts and enforcing their state fundamental education rights in an attempt to do away with *de facto* segregation in our nation's schools. In Minnesota, the result of state litigation has been a promising choice program that could be an effective element of a more comprehensive desegregation plan.

However, while federal desegregation remedies still exist for new constitutional violations, pursuing lawsuits against each suburban school district would be both difficult and ultimately unproductive. Without a metro-wide plan to desegregate the entire region they would simply experience white flight as Minneapolis did. On the other hand, if a metropolitan-wide remedy does not become available, plaintiffs may be forced to sue for the temporary relief district-by-district remedies can provide.

are often in smaller districts, more closely aligned with municipal boundaries, while Southern schools were more closely aligned with county boundaries, permitting the type of metro-wide relief that is necessary for effective integration. See, e.g., AMY STUART WELLS AND ROBERT CRAIN, *STEPPING OVER THE COLOR LINE* 31-32 (1997).

382. See Orfield, *supra* note 379, at 19-22.

383. See Gary Orfield, *Segregated Housing and School Resegregation*, in *DISMANTLING DESEGREGATION*, *supra* note 375, at 291, 292.

384. See *infra* Part III.A.2.

385. See *infra* Part III.B.

A. The Decline of Federal Legal Remedies for Desegregation

1. The “Dismantling” of Desegregation

Since the 1990s, academics have documented the “quiet reversal” of the school integration created by *Brown* and its progeny.³⁸⁶ The Supreme Court, since the time of *Milliken v. Bradley*, treated integration, or “unitary” status, as a one-time goal that, once reached, cured the harms segregation wrought in the past.³⁸⁷ School districts were free to dismantle their desegregation programs and return to neighborhood schools.³⁸⁸

Minneapolis returned to neighborhood schools promptly after Sharon Sayles Belton, a Black mayoral candidate, promised a largely white electorate that she would work to stop intra-city busing.³⁸⁹ Minneapolis now features an open enrollment policy and a limited intradistrict transfer program as options for inner-city children, but, undeniably, most schools in the district are segregated by race and income.³⁹⁰

Milliken is a bad precedent for an integrated society for several reasons, including its presaging of the dismantling of federal desegregation law.³⁹¹ Most importantly, it remains the worst precedent for integration because it bars metropolitan desegregation under the federal constitution.³⁹² Without a violation that somehow crosses municipal boundaries, federal courts are without power to order interdistrict remedies—arguably the most effective remedies for creating stable educational and

386. See generally DISMANTLING DESEGREGATION, *supra* note 375.

387. See *Milliken*, 418 U.S. 717. In later cases, on a showing of “unitary” (i.e. non-segregated) status and “[operation] in compliance with the commands of the Equal Protection Clause,” the Court permitted a school district to dismantle its integrative programs. *Bd. of Educ. of Oklahoma City Public Sch. v. Dowell*, 498 U.S. 237, 247 (1991); see also *Freeman v. Pitts*, 503 U.S. 467, 499 (1992) (giving district courts authority to return oversight to school districts even when full compliance is not yet reached).

388. *Id.*

389. See Scott Russell, *Schools Become Big Issue in Mayor’s Race*, SKYWAY NEWS (Minneapolis), Sept. 26, 2005, available at <http://www.skywaynews.net/articles/2005/09/26/news/news02.txt> (last visited Oct. 12, 2005).

390. The current subsidized inter-district transfer program is too small to meet demand and effectively desegregate schools. See *supra* note 317 and accompanying text. Indeed, the availability of open enrollment could be a constitutional imperative when a person’s neighborhood school is segregated by race.

391. See *supra* note 387 and accompanying text.

392. See *Milliken*, 418 U.S. at 745.

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residential integration and for boosting student achievement and opportunity.³⁹³ Municipal and school district boundaries are creations of state law,³⁹⁴ so limiting remedies for constitutional violations to these boundaries makes the efforts futile because it gives the state broad discretion to control the pace of integration.

It is clear that federal legal remedies are currently inadequate to address de facto segregation. The Minnesota Rules dealing with desegregation coincide precisely with the federal case law in the past 15 years permitting a return to segregated schools. Minnesota law permits separate schooling for Whites and minorities as long as the state is not foolish enough to advertise its intent to segregate its schools.³⁹⁵

Gary Orfield discusses this tendency in his book, *Dismantling Desegregation*, noting that the United States Supreme Court can have a normalizing and legitimizing effect on government actions.³⁹⁶ When, for example, the Supreme Court approved the “separate but equal” doctrine in *Plessy v. Ferguson*,³⁹⁷ it accepted the idea that racial segregation is natural and unsolvable. Orfield draws this parallel a hundred years later, noting that the Court in *Dowell* and *Milliken* claimed natural boundaries and local preferences make true integration impossible.³⁹⁸ Likewise with the desegregation rules in Minnesota: the law is only concerned with obvious and stark racism that rarely exists in reality.

2. The Continuing Validity of *Keyes*

Booker clearly anticipated the Supreme Court’s decision in *Keyes*, relying on the underlying district court *Keyes* decision and other lower federal court decisions.³⁹⁹ In both *Booker* and *Keyes*

393. See, e.g., ROBERT CRAIN ET AL., DESEGREGATION PLANS THAT RAISE BLACK ACHIEVEMENT: A REVIEW OF THE RESEARCH 28-31 (June 1982).

394. See, e.g., Richard Briffault, *Our Localism*, 90 COLUM. L. REV. 1, 6-7 (1990) (explaining black-letter law principles of local government’s powerlessness against state intrusion). Briffault goes on to show that in the area of school finance and land use, the state gains some real legal authority, although still ultimately subject to state supreme control. See *id.* at 24-39, 40-59.

395. See *supra* notes 395. See *supra* notes **Error! Bookmark not defined.**---371 and accompanying text. and accompanying text.

396. Gary Orfield, *Plessy Parallels: Back to Traditional Assumptions*, in DISMANTLING DESEGREGATION, *supra* note 375, at 23, 26-27.

397. 163 U.S. 537, 548-49 (1896).

398. Gary Orfield, *Unexpected Costs and Uncertain Gains of Dismantling Desegregation*, in DISMANTLING DESEGREGATION, *supra* note 375, at 73, 88, 93.

399. *Booker v. Special Sch. Dist. No. 1*, 351 F. Supp. 799, 808 (1972) (citing to

de facto segregation was labeled a product of explicit school and housing segregation.⁴⁰⁰ *Keyes* imposes a requirement that an entire district will be subject to court supervision if even the smallest portion of its attendance boundaries are gerrymandered to produce racial isolation in schools.⁴⁰¹

It is fascinating to examine recent boundary adjustments in suburban Minneapolis districts under the holdings of *Booker* and *Keyes*. Although the facts are not fully developed for this article, the conduct observed strongly suggested repeated federal constitutional violations as the racially diverse suburbs set their attendance boundaries.⁴⁰²

Keyes outlined the elements of intentional segregation a plaintiff would have to prove in a northern desegregation case. The court declared:

Where plaintiffs prove that the school authorities have carried out a systematic program of segregation affecting a substantial portion of the student schools teachers and facilities within the school system, it is only common sense to conclude that there exists a predicate for a finding of the existence of a dual school system. ... First, it is obvious that a practice of concentrating Negroes in certain schools by structuring attendance zones or designating feeder schools on the basis of race has the reciprocal effect of keeping other schools predominantly white. Similarly the practice of building a school ... with *conscious knowledge* that it would be a segregated school So also the use of mobile class rooms, the drafting of student transfer policies, the transportation of students, and the assignment of faculty and staff on racially identifiable bases have the clear effect of earmarking schools according to their racial composition.⁴⁰³

The Court continued, stating that these effects of segregating

Keyes v. Sch. Dist. No. 1, 313 F. Supp. 61, 73 (D.C. Colo. 1970).

⁴⁰⁰ See *supra* notes 400. See *supra* notes 162--181 and accompanying text. and accompanying text.

⁴⁰¹ See *supra* note 401. See *supra* note 157--160 and accompanying text. and accompanying text.

⁴⁰² See *supra* Part ___.

⁴⁰³ 413 US at 201-203 (emphasis added).

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schools directly led to residential segregation.⁴⁰⁴

In *Washington v. Davis* and *Massachusetts v. Feeney*, the Supreme Court clarified the need to prove intent to establish a violation of the equal protection clause and the 1964 Civil Rights Act. In light of these cases, the Supreme Court reaffirmed the *Keyes* standard of establishing segregative intent in a school desegregation case in both *Dayton* and *Columbus* decisions.⁴⁰⁵ In both cases, the court found that segregative boundary decisions that have a “foreseeable and anticipated disparate impact are relevant to prove segregative intent.”⁴⁰⁶

⁴⁰⁴ *Id.*

⁴⁰⁵ See *Dayton Board of Education v. Brinkman*, 433 US 406 (1977) (Dayton I); *Dayton Board of Education v. Brinkman*, 443 US 526 (1979) (Dayton II) and *Columbus Board of Education v. Pennick*, 443 US 449 (1979)

⁴⁰⁶ 449 US at 464. The court specifically declared that “Adherence to a particular policy or practices ‘with full knowledge of the predictable effects of such adherence upon racial balance in a school system is one factor among many others.’”

In *Dayton*, the court found that: 1) segregated schools, 2) segregated faculty assignments, 3) optional attendance zones that allowed whites to avoid integrated schools and 4) school construction policies that enhanced segregation were sufficient to establish a presumption of segregative intent and shift the burden to the defendant school district. This burden could only be satisfied with evidence to support a finding that the segregative actions “were not taken in effectuation of a policy to create or maintain segregation.” Similarly, in *Columbus* the court found that: 1) Segregated schools 2) segregated faculty assignments, 3) discontinuous attendance areas and 4) segregative boundary changes established such intent. The Court in *Columbus* confirmed the lower courts which found that choosing between two boundary plans, one which was integrative and one which was segregative, could be used as evidence of segregative intent. *Penick*, 443 US at 463 n. 10 citing 429 F. Supp. At 248-250 (“The Board chose the segregative option, and the district court was unpersuaded that it had any legitimate education reasons for doing so.”).

In FN 11 the court noted:

The district court found that, of the 103 schools built by the board between 1950 and 1975, 87 opened with racially identifiable student bodies and 71 remained that way at the time of trial. This result was reasonably foreseeable under the circumstances

Penick, 443 U.S. at 463 n.11.

Interestingly and relevant to modern cases the Court also noted that:

Local community and civil rights groups, [a blue-ribbon university commission], and officials of the Ohio State Board of Education all called

Subsequent case law decided under *Keyes*, *Dayton*, and *Columbus* has stated if a number of the following factors are present, segregative intent will be presumed and once these factors are established it would warrant “an inference and a finding that segregative actions “were not taken in effectuation of a policy to create or maintain segregation or were not among the factors...causing the existing condition of segregation in these schools.”⁴⁰⁷ The relevant factors are laid out here:

- 1) segregative drawing or altering of an attendance zone
- 2) segregative location of new schools
- 3) segregative expansion of existing schools (such as enlarging minority schools rather than transferring minority students to nearby white schools with available space)
- 4) school board’s failure to relieve overcrowding at white schools by transferring white students to nearby minority schools with available space
- 5) Discriminatory hiring of teachers and administrators
- 6) Discriminatory promotion of teachers and administrators
- 7) School board’s perpetuation or exacerbation of school segregation by strict adherence to neighborhood school policy after a segregated school system had been developed
- 8) School board’s failure to adopt a proposed integration plan or implement previously adopted plan
- 9) School board’s adoption of open enrollment or free transfer policies with the effect of allowing whites to transfer out of black schools without producing a significant movement of blacks to white schools or whites to black schools.
- 10) School segregation de facto rather than the result of state action.

It appears from *Keyes*, *Dayton*, and *Columbus* that foreseeable consequences of segregation, in addition to several of

attention to the problem of segregation and made curative recommendations.... But the board’s response was minimal. .

Penick, 443 U.S. at 463 n.12.

⁴⁰⁷ *Penick*, 443 U.S. at 535, (citing *Keyes v. Sch. Dist. No. 1*, 413 US 189, 214 1973)).

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these factors being present, establishes a presumption of segregative intent, which must be rebutted by the defendant district. Unless a school board could then convince the court that the segregative action was isolated in its effect and that it had never been influenced by racial considerations, the presumption is established. The shifting of the burden, in the vast majority of desegregation cases, has been determinative.⁴⁰⁸

B. State Constitutional Remedies: The Promise of Sheff v. O'Neil

An abolition of legal formalities in segregation—refusing to pretend that segregation in the housing market and in public schooling are independent results of personal preference—is a worthwhile goal but not likely a winning argument in court. Federal legal remedies remain discouraging for metro-wide relief,⁴⁰⁹ but some relatively recent state constitutional cases have become the new basis for legal attacks on segregation.

Litigants have turned to state constitutional law to argue that school officials must act to prevent segregation.⁴¹⁰ A certain degree of wariness about legal remedies to enforce integration is warranted, but plaintiffs' groups should not submit to the kind of pessimism that allows school officials to make their decisions in a vacuum. State constitutions are a sound basis for recent pro-integrative decisions and settlements in both Connecticut and Minnesota.⁴¹¹

The Connecticut case *Sheff*⁴¹² and the Minnesota case *Xiong*⁴¹³ provide examples of integrative lawsuits at work today. Faced with a choice between settling for increased resources and proceeding to sue to desegregate their school districts, these plaintiffs rejected the sidetrack strategy of increasing funding to segregated schools.⁴¹⁴ While the *Sheff* court stopped short of ordering a remedy, its sweeping opinion declaring segregated schooling to be an inherently inadequate education provides the

⁴⁰⁸ See GARY ORFIELD, MUST WE BUS at 18-21.

⁴⁰⁹ See *supra* Part III.A.1.

⁴¹⁰ See *infra* note 440 and accompanying text.

⁴¹¹ See *infra* note 432 and accompanying text (discussing *Sheff*); *supra* note 295 and accompanying text (discussing *Xiong*).

⁴¹² 678 A.2d 1267 (Conn. 1996).

⁴¹³ See *supra* part II.A. (discussing case in detail).

⁴¹⁴ See *infra* note 425 and accompanying text.

best example of what desegregation litigation can achieve if vigorously pursued.⁴¹⁵

Connecticut, in the 1970s, first found a right to equal education for every child in *Horton v. Meskill*.⁴¹⁶ Like many states, Connecticut's constitution requires the state to provide a free education to all children within the state.⁴¹⁷ Since *Horton*, this principle has been interpreted as a requirement to provide adequate funding and to equalize the funding disparities that appeared between school districts with high property wealth and poorer inner-city districts.⁴¹⁸ *Horton*, however, declined to address race as a possible avenue for equalizing education.⁴¹⁹ *Sheff* sought to remedy that oversight.

As in *Brown*, the *Sheff* plaintiffs attempted to prove that a segregated education is inherently an unequal education for all children, White or minority.⁴²⁰ In part based on the same claims pursued in *Horton* and in part on Justice Douglas's keen insight into the nature of *de facto* segregation,⁴²¹ the plaintiffs argued that no intent need be shown for a constitutional violation to occur; *de facto* segregated schooling violated equal protection, regardless of whether it resulted from housing discrimination, attendance boundary gerrymandering, or the spatial separation of wealth and poverty.⁴²²

The Supreme Court of Connecticut considered four claims, the first of which, and the prevailing claim, was a "garden variety *Brown*" claim.⁴²³ The second claim accused the defendants of

415. See *infra* notes 415. See *infra* notes 401--**Error! Bookmark not defined.** and accompanying text. and accompanying text.

416. 376 A.2d 359, 374 (Conn. 1977) ("We conclude that . . . in Connecticut, elementary and secondary education is a fundamental right, that pupils in the public schools are entitled to the equal enjoyment of that right . . .").

417. CONN. CONST. art VIII, § 1 ("There shall always be free public elementary and secondary schools in the state. The general assembly shall implement this principle by appropriate legislation.").

418. See Lauren Wetzler, *Buying Equality: How School Finance Reform and Desegregation Came to Compete in Connecticut*, 22 YALE L. & POL'Y REV. 481, 484-85 (2004) (discussing some funding disparities before the *Horton* lawsuit).

419. See *id.* at 487-88 (explaining plaintiff's desire not to "mix up race" in the lawsuit).

420. See *id.* at 496.

421. See *id.*; *Keyes v. Sch. Dist. No. 1, Denver, Colo.*, 413 U.S.189, 214-17 (1973) (Douglas, J., concurring).

422. Wetzler, *supra* note 418, at 496-97 (discussing the plaintiff's claims and arguments).

423. *Id.* at 496-97.

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maintaining and perpetuating racial and social segregation in Hartford in a discriminatory manner, thereby violating both equal protection and the right to a public education.⁴²⁴ This second claim recognizes that, while intentional state action may not have created segregated schools, state knowledge of de facto segregation and the continued maintenance of such a school system remains unconstitutional, particularly if the district has used a neighborhood schooling plan.⁴²⁵

The third claim, some have noted, resembled a school finance claim.⁴²⁶ By comparison to neighboring school districts, Connecticut maintained the Hartford district in such poor condition so as to disadvantage the children residing there, again in violation of equal protection and the state education clause.⁴²⁷ The fourth claim is not usually discussed and is not relied upon here.

Connecticut attempted to defend the case on appeal based on a state action theory that it won at trial and with which the Supreme Court of Connecticut promptly disagreed.⁴²⁸ Proof that the state acted to segregate schooling was unnecessary, the court stated, because Connecticut law “imposes an affirmative constitutional obligation on the legislature to provide a substantially equal educational opportunity for all public schoolchildren”⁴²⁹ Principles of state action and proof of discriminatory intent which would have been fatal to the *Sheff* claims if brought in federal court provided no defense in state court precisely because the plaintiffs sued under the state constitution.⁴³⁰

The court found that the fundamental right to an education, established in *Horton*,⁴³¹ was denied to inner-city children in Hartford because of the extreme racial segregation, thereby violating the state’s equal protection clause.⁴³² The court ordered

424. *Sheff v. O’Neill*, 678 A.2d 1267, 1271 (Conn. 1996).

425. *See id.* at 1287-88.

426. *See Wetzler, supra* note 418, at 497-98.

427. *See Sheff*, 678 A.2d at 1271-72.

428. *See id.* at 1277-78.

429. *Id.* at 1280.

430. *Id.* (noting that state, not federal, constitution obviates need for proof of discriminatory intent).

431. *See Sheff*, 678 A.2d at 1286 (“[I]n Connecticut the right to education is so basic and fundamental that any infringement of that right must be strictly scrutinized.”) (quoting *Horton v. Meskill*, 376 A.2d 359 (Conn. 1977)).

432. *See id.* at 1287. The three-step test from *Horton* was used to show (a) a

the state to fix the problem and provide Connecticut's inner-city children with an adequate education.⁴³³ The court found that, since the duty to provide an adequate education is an affirmative obligation, the state action doctrine that bars most federal desegregation litigation would not bar the claims asserted in *Sheff*.⁴³⁴

An important and sometimes overlooked aspect of *Sheff* is that the court ordered the state to act, as opposed to the traditional "command and control" model utilized by the federal courts in the heyday of desegregation.⁴³⁵

The fundamental right to an education found in *Horton* and used in *Sheff* is precisely the right that federal courts denied to plaintiffs in *San Antonio Independent School District v. Rodriguez*.⁴³⁶ It provides the best hook on which to base a *Brown*-style desegregation claim and is perhaps more appropriate than a lawsuit brought in federal court, as state governments are the best equipped to deal with their own schools. While *Keyes* remains good law and potentially provides a valuable claim in federal litigation, *Sheff* obliterates the distinction between intentional state action to segregate schools and the de facto segregation that already exists in housing and schooling.⁴³⁷ A *Sheff*-like result also requires the input of both parties to reach enumerated goals and acquires the legitimacy of a remedy crafted by consent of the

more than de minimis disparity in educational disadvantage, (b) a shifting of the burden to the state to prove that the disparities are legitimate objectives, and a failure to hold that burden, and (c) if proving the burden, the continuing disparities still may not be so great as to be unconstitutional. *See id.* at 1287.

433. *See id.* at 1290-91.

434. *Id.* at 1280. The Court noted:

The fact that the legislature did not affirmatively create or intend to create the conditions that have led to the racial and ethnic isolation in the Hartford public school system does not, in and of itself, relieve the defendants of their affirmative obligation to provide the plaintiffs with a more effective remedy for their constitutional grievances.

Id. A lack of state action would normally be a bar to relief in federal courts, as they have only interpreted their duty to be the remediation of *de jure* segregation or intentional actions leading to segregated schools. *See supra* notes 428-429 and accompanying text.

435. *See* Charles F. Sabel & William F. Simon, *Destablization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1024 (2004) (explaining "vast provinces of administration" of federal oversight in desegregation cases).

436. 411 U.S. 1, 35 (1972).

437. *See supra* note 434 and accompanying text.

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democratically elected legislature.⁴³⁸ Any lawsuit brought to desegregate a school district should be tailored in such a way as to take advantage of the theories in *Sheff* in the hope that it will convince more courts to take a hard look at de facto segregation.

C. Adequacy Through Funding: An Inadequate Remedy

Some have commented that desegregation rarely fails because it has been tried and found wanting; more often, however, “desegregation has been. . . found difficult and not tried at all.”⁴³⁹

Such is not the case with strategies to increase school funding. School finance litigation has touched many states—almost all of them—and finance systems have been found unconstitutional in at least 26 states.⁴⁴⁰ After failure in the federal courts,⁴⁴¹ and on a suggestion of Justice Brennan,⁴⁴² plaintiffs’ lawyers went to state courts to pursue justice in equalizing education finance. They have achieved some notable successes.⁴⁴³ In a period of twenty years, from 1972 to 1992, court-ordered finance reform provided the hammer that legislation could not, reducing inequities in spending by 16 to 38 percent.⁴⁴⁴ In the early 1970s, states covered 40 percent of the cost of education; today, that figure is closer to 60.

In spite of their success in increasing resources to inner-city schools, increased resources generally have not translated to improved educational outcomes.⁴⁴⁵ Inner-city Minneapolis has

438. See *supra* note **Error! Bookmark not defined.** and accompanying text.

439. Goodwin Liu & William Taylor, School Choice to Achieve Desegregation, (Aug. 8, 2003) (unpublished draft on file with author).

440. See Campaign for Fiscal Equity, State-by-State, at http://www.schoolfunding.info/states/state_by_state.php3 (last visited November 15, 2005). Recently, the Kansas Supreme Court ordered their state legislature to double the amount it planned to spend on its schools to provide adequacy. See Gretchen Ruethling, *Court Orders More School Funding*, N.Y. TIMES, June 4, 2005, at A12.

441. See, e.g., *Rodriguez*, 411 U.S. 1.

442. William Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977) (“State constitutions . . . are a font of individual liberties, their protections often extending beyond those required by the Supreme Court’s interpretation of federal law.”).

443. See Access, Litigation Overview, <http://www.schoolfunding.info/litigation/litigation.php3> (last visited Sept. 11, 2005). Forty-five states have seen litigation, and 29 have rendered decisions in contested cases. *Id.*

444. See Melissa C. Carr & Susan H. Fuhrman, *The Politics of School Finance in the 1990s*, in NATIONAL RESEARCH COUNCIL, *supra* note 440, at 136, 149.

445. Molly McUSIC notes that socioeconomic integration would be more effective

many schools of concentrated poverty, some of the neediest children in the country, and students that speak over 90 different languages,⁴⁴⁶ producing the most difficult-to-educate district in the state. In 2005, the average student in Minnesota generated \$8,516 for their school.⁴⁴⁷ The large, inner-city district of Minneapolis now receives about \$3,000 more per pupil than the state average, or about \$11,393 per student.⁴⁴⁸ These figures include costs for non-General Education revenue, such as special education and building expenditures.⁴⁴⁹

Some schools within the MSD spend much more than even the Minneapolis per pupil average and invariably these are racially isolated schools of concentrated poverty. For example, Barton Elementary is integrated (47% minority) and has a lower than average free lunch ratio and receives about \$9101 per pupil, less than the Minneapolis average.⁴⁵⁰ On the other hand, North Star elementary is segregated at 97% minority and more than 96% free or reduced lunch and receives more than \$13,000 per pupil.⁴⁵¹ These statistics are in some respects truisms because state financing schemes direct increased funding to schools with high proportions of poor students.⁴⁵²

It is clear that increasing funding cannot by itself address the problems that schools of concentrated poverty are creating in Minneapolis. Scholars have long known that educating children

than increased funding in increasing the education attainment of poor, minority children. See Molly S. McUsic, *The Future of Brown v. Board of Education: Economic Integration of the public Schools*, 117 HARV. L. REV. 1334, 1353-56 (2004) (noting that increased funding has not succeeded in providing poor students with an "equal education" while class integration has produced positive results).

446. See CITY OF MINNEAPOLIS, MINNEAPOLIS EMPOWERMENT ZONE 8, available at <http://www.ci.minneapolis.mn.us/ez/docs/ez-ch2.pdf>.

447. MINN. DEP'T OF EDUC. DIV. OF PROGRAM FIN., K-12 EDUCATION FINANCE OVERVIEW 2004-2005 15 (2004).

448.

http://education.state.mn.us/ReportCard2005/loadFinanceAction.do?SCHOOL_NUM=000&DISTRICT_NUM=0001&DISTRICT_TYPE=03.

449 *Id.*

450

http://education.state.mn.us/ReportCard2005/loadFinanceAction.do?SCHOOL_NUM=106&DISTRICT_NUM=0001&DISTRICT_TYPE=03

451

http://education.state.mn.us/ReportCard2005/loadFinanceAction.do?SCHOOL_NUM=185&DISTRICT_NUM=0001&DISTRICT_TYPE=03

452 See MINNESOTA DEP'T OF EDUC., *supra* note 447, at 19.

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from low-income families is different and more difficult than educating middle-income children.⁴⁵³ Because funding does not address the root problem—broken homes, parents working two jobs, poor health, and oppositional culture—it cannot effectively increase these students’ educational outcomes.⁴⁵⁴ This is not to say that low-income children cannot be adequately educated; it says that low-income children can be most effectively educated in schools that have fewer children with similar problems, peers who will influence positive attitudes about school achievement, and teachers who have the time and training to work with them. Programs designed to assist low-income children should not be based on the exception to the rule—such as the shining example of the charter school that worked—but should be based around creating stable middle-class schools with students from diverse backgrounds because these are known to work.

D. Adequacy Through Choice: Expanding and Improving on CIY

While Minnesota already provides open enrollment, a low-income student’s freedom to choose is meaningless without the means to get to the school.⁴⁵⁵ CIY improves on open enrollment by providing transportation.⁴⁵⁶ Another key asset of the program is its broad bipartisan support in Minnesota, as evidenced by its recent continuation.⁴⁵⁷ Moreover, the force behind the

453. JAMES COLEMAN, EQUALITY OF EDUCATIONAL OPPORTUNITY 22 (1966). This phenomenon is well observed and exceeds even spending in importance as to life outcomes. See generally RICHARD D. KAHLENBERG, ALL TOGETHER NOW 26 (2001). More and more, modern scholars call for socioeconomic integration only, as opposed to racial and socioeconomic integration, as a way of avoiding the thorny legal problems associated with race. See *id.*; see also McUSIC, *supra* note 445. This tactic may achieve some similar objectives, as race often corresponds with poverty, but does not fully address the issue of racial integration by requiring interaction between people of different races.

454. See Kahlenberg, *supra* note 21, at 208-12.

455. PALMER, *supra* note 455. PALMER, *supra* note 455. PALMER, *supra* note 37, at i., at i., at i.

456. *Id.* at ii.

457. See Bruce Fuller et al., *Policy-Making in the Dark: Illuminating the School Choice Debate*, in WHO CHOOSES? WHO LOSES?: CULTURE, INSTITUTIONS, AND THE UNEQUAL EFFECTS OF SCHOOL CHOICE 1, 3 (Bruce Fuller et al. eds., 1996). The authors note that school choice has always had a broad appeal, between conservatives who wanted to improve local schools, and by “the Left as a way to empower poor and working-class families to challenge paternalistic bureaucracies.” *Id.* at 3.

settlement—the *NAACP* and *Xiong* litigation—utilized theories and remedy-building strategies similar to those employed in *Sheff*.⁴⁵⁸ The following recommendations are based on the belief that creating middle-class schools throughout the region is in everyone’s best interest. Two key recommendations are to expand the program throughout the region to include more districts and to solve the transportation problem by tying affordable housing into the structure of the program. Part of this section also addresses the issue of what will become of Minneapolis if CIY is permitted to expand.

1. Expanding CIY to More School Districts

Encouraging student mobility will have the effect of reducing student enrollment in the immediate future. Indeed, the number of children that are required to move to stabilize the region’s schools seems daunting. Recent research conducted by the Institute on Race & Poverty have determined that more than 15,000 Black students would need to leave majority Black schools to bring the seven-county metro-area schools into some semblance of racial stability. Slightly less than 9,000 students would need to come from Minneapolis alone.⁴⁵⁹ However, these numbers are similar in comparison to some successful metropolitan plans.⁴⁶⁰

However, increasing open enrollment options for low-income children can be a benefit for Minneapolis schools. Tough decisions about closing neighborhood schools will certainly have to be made, but fewer or smaller schools may help Minneapolis focus on narrowing the gap with the children that remain.⁴⁶¹

Moreover, as noted above, Minneapolis expects to face severe

⁴⁵⁸ See *supra* note 281 and accompanying text.

⁴⁵⁹ IRP’s findings are based on a ceiling of no more than 35% Black students in any metro-area school. See Memo from IRP Staff to Myron Orfield (date) (on file with author).

⁴⁶⁰ See, e.g., Amy Stuart Wells & Robert L. Crain, *Stepping over the Color Line* 102 (1997).

⁴⁶¹ New York City, for example, recently started a small schools program, attempting to reduce drop out rates and the problems of densely crowded schools. David Herszenhorn, *In New York’s Smaller Schools, ‘Good Year and a Tough Year,’* N.Y. TIMES, Aug. 8, 2005, at A1. The program is still in the initial stages with the attendant growing pains, but school boards around the country are taking notice. *Id.*

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enrollment declines in the next 5 years whether or not CIY is extended and expanded.⁴⁶² The region experienced a similar turn of events in the 1990s when enrollment dropped off and recently built schools were rendered unnecessary.⁴⁶³ At the least, this demonstrates the volatility of the enrollment in public schools and the tough decisions about school closures that school board officials are sometimes required to make.

However, the promise of integrated schools and an integrated region—which is achievable here in the Twin Cities—is too great a goal not to at least encourage integration through choice. CIY should be expanded to accommodate interest in the program. Minneapolis will need to craft a strategy that can encourage Minneapolis residents to enroll in Minneapolis Public Schools, thereby replacing the loss of low-income minority students and creating a diverse student body. A consolidation of schools that focuses on the students that remain and attempts to lure the middle class back is Minneapolis's best hope of creating an attractive educational climate.

2. Tying School Choice Into Affordable Housing

The largest federal housing program for new housing starts, the Low Income Housing Tax Credit,⁴⁶⁴ operates in some ways like CIY, in that the prime motivator is private action. The credit funds low-income housing starts by granting a tax credit to developers who promise to maintain a certain percentage of their units for low-income tenants only.⁴⁶⁵ Developers sometimes build these units in areas of low opportunity and high-minority populations, exacerbating the ghetto problem.⁴⁶⁶ Sometimes they do not, however, and the distribution of these units in areas of opportunity can help moderately low-income residents access good jobs and schools.⁴⁶⁷

State housing agencies can prioritize the awarding of tax credits and, as such, are able to direct affordable housing

462. *See supra* note 145 and accompanying text.

463. *See supra* note 233 and accompanying text.

464. *See* 26 U.S.C. § 42 (2004).

465. *See* Myron Orfield, *Racial Integration and Community Revitalization: Applying the Fair Housing Act to the Low-Income Housing Tax Credit*, __ VAND. L. REV. __ (forthcoming 2005).

466. *See id.*

467. *See* John A. Powell, *Opportunity-Based Housing*, 12 J. AFFORDABLE HOUS. & COMMUNITY DEV. 188-89 (2003).

production into appropriate areas.⁴⁶⁸ Housing agencies can locate areas that can sustain low-income populations, such as those with adequate public transportation and a surplus of lower-wage jobs. The flexibility of the state to prioritize the location of affordable housing production, with the tax credit in particular, makes the prioritization of housing starts toward CIY families possible and productive.

The Institute on Race & Poverty has also considered preliminary evidence about the ability of well-sited housing policies to increase suburban integration. While the research is preliminary and beyond the scope of this paper, our initial research shows that the number of minority children that would have to transfer to suburban schools for racial equality would be significantly fewer if proactive housing policies had been pursued.⁴⁶⁹

Maintaining racially and socially integrated schooling in the suburbs is important not only for the life opportunities of the children, but also for the maintenance of integrated housing markets. Middle-class homebuyers undoubtedly make their decisions based in part on the quality of the public schools in the area.⁴⁷⁰ When every school is a middle-class school that is more or less racially integrated, the housing market becomes homogenous and reduces the possibility of creating White, middle-class enclaves.

3. Solving Transportation Limitations

One of the inherent problems with school choice is that parents are only willing to send their children a certain distance to be educated. To remedy some of the inherent transportation problems in CIY, affordable units, as indicated above, should be prioritized by the state housing finance agency that distributes the credits to favor CIY participants who send their children to outlying suburban districts. Thus, if parents like a school in the extreme western region of Osseo or Eden Prairie—a trip that could take up to an hour or more—and benefit from increased opportunity in that neighborhood, but the school is too far from

468. See Orfield, *supra* note 468. See Orfield, *supra* note 465. .

469 Institute on Race & Poverty, Tables and Research on Housing Integration (unpublished).

470. See MYRON ORFIELD, *AMERICAN METROPOLITICS* 9 (2002).

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home, they should receive priority for housing in that area. Likewise, proposals for credits could be given priority if they are within a certain distance of a CIY destination school in one of the participating districts.⁴⁷¹

Disparate government agencies who work in these areas—the Minnesota Housing and Finance Agency, which oversees the tax credit program, and the Minnesota Department of Education—should work together on a memorandum of understanding. They can coordinate their efforts as noted above to improve access for low-income and minority families to opportunity-rich areas and high-achieving schools.

4. Ensuring Racial Integration

Recent commentators have ducked the thorny issue of racial integration in schools and instead turned to class integration, almost as a proxy.⁴⁷² The best work by one of these commentators, Richard Kahlenberg's *All Together Now*, argues that the current legal structure makes racial integration impossible and that a focus on race reduces the likelihood of class integration.⁴⁷³ Kahlenberg is correct in noting that the creation of all poor, but integrated inner-city schools would not be the best step forward.⁴⁷⁴ Kahlenberg also argues that racial integration runs the risk of alienating “white working-class voters.”⁴⁷⁵ While Kahlenberg is also correct in requiring the social integration of schools—low-income students are proven to learn better when surrounded by middle-income children⁴⁷⁶—we cannot ignore the benefits of racial diversity and the pitfalls of racial isolation.

A similar concern with race-neutral remedies is the historical experience in housing cases. In New Jersey's *Mount Laurel* remedy, thousands of units of affordable housing were built in the suburbs in an attempt to deconcentrate poverty for the largely

471. Because of the “not-in-my-backyard” (“NIMBY”) issue with low-income housing, however, this could have the perverse incentive of turning suburban attitudes against the CIY program, as it would be more likely to bring low-income housing into their neighborhoods. However, the result of creating mixed-income neighborhoods and mixed-income schools is too important to permit NIMBYism to interfere.

472. See, e.g., McUsic, *supra* note 445.

473. See KAHLENBERG, *supra* note 21, at 92-96.

474. See *id.* at 93.

475. See *id.* at 96.

476. See KAHLENBERG, *supra* note 21, at 58-61.

minority poor of New Jersey's inner cities.⁴⁷⁷ Unfortunately, because the program was race-neutral, much of the suburban housing went to low-income whites, and minorities retained their dilapidated housing stock in the impoverished inner cities.⁴⁷⁸

Part of this sense of defeatism with respect to racially integrative policies is a fixation on busing as the method of integration.⁴⁷⁹ But school choice, even if it grants preferences to minorities, is not comparable to busing because White suburban "voters" are not required to send their children back into the city. The recent Supreme Court case *Grutter v. Bollinger* may have breathed new life into voluntary school desegregation remedies, allowing districts to be cognizant of race while also allowing school choice to predominate.⁴⁸⁰

The legal review under the federal standard is strict scrutiny when dealing with a race-conscious plan, and strict scrutiny has often been referred to as "strict in theory, but fatal in fact."⁴⁸¹ Nevertheless, the legal landscape surrounding the use of race consciousness and school choice to integrate schools is encouraging. The First Circuit recently upheld a voluntary desegregation plan in Lynn, Massachusetts, permitting the school district to deny voluntary transfers to maintain racial balance in the district's schools.⁴⁸² Similarly, the Ninth Circuit upheld the use of racial tiebreakers in Seattle's high school assignment plan.⁴⁸³ Finally, in a per curiam opinion, the Sixth Circuit also upheld a similar program in Louisville that considered race as an

⁴⁷⁷ NAOMI BAILIN WISH & STEPHEN EISDORFER, *THE IMPACT OF MT. LAUREL INITIATIVES: AN ANALYSIS OF THE CHARACTERISTICS OF APPLICANTS AND OCCUPANTS 68-76* (1996).

⁴⁷⁸ NAOMI BAILIN WISH & STEPHEN EISDORFER, *THE IMPACT OF MT. LAUREL INITIATIVES: AN ANALYSIS OF THE CHARACTERISTICS OF APPLICANTS AND OCCUPANTS 68-76* (1996) (analyzing data collected by the New Jersey Affordable Housing Management Service).

⁴⁷⁹ See Kahlenberg, *supra* note 21 (Kahlenberg refers to busing as a politically charged issue in his reference to working-class voters).

⁴⁸⁰ *Grutter v. Bollinger*, 539 U.S. 306, 307 (2003) (holding that the "narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body is not prohibited by the Equal Protection Clause").

⁴⁸¹ See, e.g., *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980).

⁴⁸² See *Comfort v. Lynn Sch. Comm.*, 418 F.3d 1 (1st Cir. 2005).

⁴⁸³ *Parents Involved in Comm. Sch. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162 (9th Cir. 2005).

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assignment factor.⁴⁸⁴

The programs in these cases share many similarities. First, they are all the product of voluntary choices. In Seattle, students rank their preferred schools and school administrators do their best to take student preferences into account.⁴⁸⁵ At the same time, race is one of several factors used to create a stably integrated school district.⁴⁸⁶ None of the plans involved involuntarily busing students or the use of rigid quota systems. Thus, it could be expected that the schools would not have a uniform enrollment of whites and minorities, but would each fall within a range around the district's average enrollment.⁴⁸⁷ Importantly, however, the range around each school's enrollment would reflect the district average, thereby discouraging racial identification of schools.

Minnesota currently does not use similar methods to encourage racial integration, yet we have the legal means to do so. Many of the metro-area districts belong to a collaboration council or have their own desegregation plan. Minnesota's open enrollment laws permit a district receiving a nonresident student application for enrollment to deny that student admission if the enrollment of that student would conflict with the district's desegregation plan.⁴⁸⁸ Thus, through the use of desegregation

⁴⁸⁴ *McFarland v. Jefferson County Board of Education, et al.*, 320 F. Supp.2d 834 (WD Ky. 2004), aff'd, 416 F.3d 513 6th Cir. (2005).

⁴⁸⁵ See *Parents Involved in Comm. Sch.*, 426 F.3d at 1169-70 (noting that Seattle Plan used four tiebreakers if student's preference resulted in oversubscribed high schools).

⁴⁸⁶ See *McFarland v. Jefferson County Board of Education, et al.*, 320 F. Supp.2d 834 (WD Ky. 2004), aff'd, 416 F.3d 513 6th Cir. (2005).

⁴⁸⁷ See *McFarland*, 320 F. Supp.2d at 857-58 (noting discussion of what does and does not constitute a quota).

⁴⁸⁸ See Minn. Stat. 124D.03, subd. 4 (2005). Thus, the power to deny nonresident student admission based on race under these circumstances is limited to districts with approved desegregation plans. The Minnesota Rules governing desegregation, however, do limit the ability of districts to discriminate on the basis of race. They note that segregation is the "intentional acts" of a school district that discriminate against a student based on race, and that also has the effect of increasing a concentration of protected students at a school. Minn. R. 3535.0110, subp. 9 (2005). While this could be construed to prohibit any race "discrimination"

plans—and limited to students taking advantage of open enrollment or CIY—school districts can encourage minority enrollment in schools with few minorities, and curtail minority enrollment in schools that are on the verge of “tipping.” Likewise, suburban school districts can discourage white flight from Minneapolis or inner suburban districts with high-minority schools by deprioritizing white transfer students.

Any improvement on CIY must be cognizant of race, giving preference to minority students in racially isolated schools, or to White students transferring to integrated schools if they are leaving all-White schools. Likewise, CIY-participating districts have the power to deny transfers to students who do not make integrative transfers. CIY is now only required to look at applicants by free or reduced lunch status.⁴⁸⁹ Instead, CIY could give preference to minorities in racially isolated schools who intend to transfer to suburban schools with a certain racial makeup. If CIY children are attending schools in danger of reaching a tipping point, then the rules should be revised to steer children away from these schools. Desegregation of the Minneapolis schools by resegregating the suburban districts is not an acceptable option.

5. The Choice is Yours Allows a Future for the Minneapolis School District

The next logical question becomes: If the Choice is Yours is fully implemented, what happens to the Minneapolis schools and the children left behind? In a choice regime, the children not choosing to leave will be worse off, particularly if CIY continues to skim off motivated, high-achieving poor students.

It is true that if CIY is expanded and fully implemented, Minneapolis and Saint Paul would likely have fewer students, would have to close school buildings, and would lay off teachers. But this possibility must be viewed in light of the reality of what is now happening—not an ideal alternative where segregated school districts are stable and provide an adequate education.

in school assignments, it is more likely that the text only applies to actions that are taken with the discriminatory purpose of creating minority schools, such that whites do not have to interact with minorities in the district.

489. See *supra* Part ___.

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CIY also must be evaluated viewed in terms of the experience of stably integrated regions to stop white flight and rebuild white and middle-class enrollment in central cities and older suburbs. In reality, the process of flight caused by racial and social segregation and resegregation in the Minneapolis schools is already at catastrophic levels and enrollment declines will continue for Minneapolis.⁴⁹⁰ Decline is attributable to both flight to the suburbs and inner-city flight to charter schools.⁴⁹¹ Moreover, this flight is even present and gaining strength in the older suburbs with diversifying neighborhoods. Flight to the suburbs from Minneapolis cannot only be attributed to white flight, but it is also flight by more than half of blacks and Latinos to suburban neighborhoods.⁴⁹²

If this process is not interrupted, it will continue until Minneapolis's schools are much worse off, resembling the economically and racially segregated schools on Chicago's south side, in Cleveland, or in Washington, DC. Any potential short-term transitions from offering expanded choice under CIY must be judged in light of rapidly worsening conditions that have already left many of the poorest children with the fewest life choices behind in the worst schools in the region. We can preserve status quo school systems—or we can protect children and their rights to educational opportunity.

Finally, in evaluating the potential effects of an expanded school choice program, we have to remember that the present ongoing catastrophe is occurring with the poorest schools and most segregated schools for which funding has not been a successful remedy. As stated earlier, funding is not likely to be increased significantly by the state because of resistance and resentment against inner-city schools.⁴⁹³ High spending and poor results has already become the foil for opportunistic politicians seeking to divide individuals and communities on the basis of race by blaming the victim. It is an age-old strategy, and it works. It works even better when what they are saying is partly true, because the districts they attack have no realistic strategy to make a difference with the funding. This aid, which is forthcoming only

⁴⁹⁰ See Reinhardt, *supra* note 213 at 2.

⁴⁹¹ See notes 204-224 and accompanying text.

⁴⁹² See *supra* (section on IRP research).

⁴⁹³ *Supra* introduction.

because of the threat of integration,⁴⁹⁴ will disappear if we grow complacent in a segregated society.

If CIY were fully expanded, there would be more socio-economic balance in school enrollments, and stable racial and social integration for all children would be possible. Minneapolis would have fewer kids and schools in the short term, but its kids, schools and neighborhoods would do better. And as its performance improved, so would public support for Minneapolis, both within the city and in the region.

Most optimistically, if the experience of other cities and regions with strong metropolitan desegregation holds true, a smaller, stably integrated, and uniformly strong Minneapolis school system would begin to gain students. In many of the regional desegregation cities, place like economically booming Raleigh, North Carolina, and Charlotte-Mecklenburg, where metropolitan school desegregation was fully implemented, central city neighborhoods experienced “reverse white flight.”⁴⁹⁵ This also meant reverse middle-class flight. When the central cities schools became stably integrated, middle-class, white families began to move back.⁴⁹⁶

Minneapolis’s own experience with its stably integrated schools and majority middle-class schools in its southwest quadrant bears this out.⁴⁹⁷ While the enrollment in segregated and resegregation schools continues to plummet, stably integrated and majority middle class school experience strong, constant demand. White middle-class families with choices move into their boundaries and participate in competitive lotteries to attend them. White, middle-class families living in neighborhoods with segregated schools often apply and are content to have their children bused across town to go to an opportunity-rich, racially and socially integrated school while they continue living in the neighborhoods they like.

In Minneapolis, white parents with high incomes and suburban choices remain in their neighborhoods if their children

⁴⁹⁴ See *supra* Part __ (discussing threat of lawsuits for increased funding).

⁴⁹⁵ NYT Article re: Raleigh.

⁴⁹⁶ Gary Orfield, *Metropolitan School Desegregation*, in IN PURSUIT OF A DREAM DEFERRED: LINKING HOUSING & EDUCATION POLICY (John Powell et al., eds.) at 133 (citing, Education Week, May 16, 1993, school enrollments compiled by the center for Education stats).

⁴⁹⁷ See Institute on Race & Poverty, Twin Cities Demographics, at slides __.

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are admitted to stably integrated schools, even if it means riding a bus. If forced to attend severely segregated neighborhood schools that children can walk to, they leave. This is increasingly true with middle-income nonwhite families as well. The experience in Minneapolis and other places shows how more access to integrated magnet schools, like Barton, has the possibility to create stability in other neighborhoods across the city, even if these schools are not “neighborhood schools.”

Two further examples in southwest Minneapolis also illustrate the rebuilding power of stably integrated schools. Lake Harriet upper campus (formerly Minneapolis Audubon) and Burroughs Elementary, because of the effect of city-only desegregation, became majority minority and poor schools. They, like all the other resegregating schools, were losing white and middle-class enrollment within their attendance areas. When the Minneapolis School District resumed assigning students to neighborhood schools, these schools’ boundaries were re-drawn so that their white neighborhoods would contribute to no more than two-thirds of their enrollment.

In 2004, growing Lake Harriet Upper, with 11 percent poor and 18 percent nonwhite students, averaged state test scores that were higher than all but a handful of elementary across the region.⁴⁹⁸ Moreover, because of the peculiarities in the state funding formula, Lake Harriet Upper is one of the lowest-spending schools in the metro area, compared with some schools in Minneapolis spending much more with worse results.⁴⁹⁹ These schools, while still integrated, could soon become all white, unless—as in county-wide school systems like Raleigh—their boundaries are adjusted to allow more children of color to attend,

⁴⁹⁸ Minnesota Department of Education, “School Report Card: Lake Harriet Upper,” *at* http://education.state.mn.us/ReportCard2005/schoolDistrictInfo.do?SCHOOL_NUM=121&DISTRICT_NUM=0001&DISTRICT_TYPE=03; *see also* Norman Draper & Steve Brandt, *State’s Schools Meet the Test*, STAR TRIB. (Minneapolis), April 2, 2005, at B4.

⁴⁹⁹ Minnesota Department of Education, “School Report Card: Lake Harriet Upper,” *at* http://education.state.mn.us/ReportCard2005/loadFinanceAction.do?SCHOOL_NUM=121&DISTRICT_NUM=0001&DISTRICT_TYPE=03. Lake Harriet spends more than the state average per building due to high special education and building costs, but spends less than the state average on general education funds. *Id.*

and more integrated school opportunities are created throughout the region.

Conclusion

The threat of suburban segregation is real and imminent. In the past fifteen years we have witnessed the “quiet reversal” of many of the gains from *Brown v. Board of Education*. These policies and the pessimistic belief that the law has nothing to say about contemporary segregation contribute to the widening spatial and socioeconomic gap between Whites and minorities in this country. As Blacks and Latinos continue to migrate to suburban communities, questions of segregation and resegregation become vitally important to preserving integrated and balanced communities. Funding remedies have proven inadequate in buoying inner-city schools from the disastrous effects of concentrated poverty.

With so few remedies remaining to try to bring children out of poor performing schools and the ill effects of urban poverty and racial isolation, it is essential that we consider remedies that are proven to work. Minnesota is known for being a progressive state. Minnesota’s Republicans all supported civil rights in the 1960s. Walter Mondale was a senior author and staunch advocate of the Fair Housing Act. Hubert Humphrey, a pro-civil rights and integrationist mayor from Minneapolis, led the charge to include desegregation in the 1948 Democratic platform, helping encourage the shift of Southern votes to the Republican Party.⁵⁰⁰ Minnesota was also a pioneer of charter schools as an innovative solution to failing, high-poverty schools; that reform has shown itself to be, in some instances, a way for parents to have input on curriculum and educational issues. Many charter schools in Minnesota have, however, faced significant challenges to their viability as a result

500. MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 190 (2004).

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of financial mismanagement.⁵⁰¹ Choice programs that permit poor children to access high-achieving schools is not a panacea, but it is the most promising new development in recent years.

Sheff and *Xiong* provide examples that litigation can work to further the goal of desegregation. In *Sheff*, litigation pushed the legislature to provide a desegregation plan and adequate funding to encourage desegregation. *Xiong* created a well-funded voluntary plan in the Twin Cities that has benefited 2000 children so far. Integrating communities through wise housing policy also promises to create high-functioning schools throughout the metropolitan region. Plaintiffs and courts can advance the cause of desegregation even further when they work to show that the high level of racial and socioeconomic concentration in Minnesota schools is not merely the result of personal preference, but is instead the legacy of decades of discriminatory policies that have created and maintained urban ghettos. *Sheff* and *Xiong* prove there is no cause for pessimism and that school desegregation can really happen.

The examples and scenarios contemplated in this article show that once cities in decline have stable, middle-class, and integrated schools, demand and enrollment will increase. This strategy is particularly likely to make a difference in parts of the city that have comparatively affordable family housing. Housing in desirable school districts is rapidly becoming beyond the reach of many middle-class families. Segregation and resegregation limit the choices not only of nonwhite families, but also of white families who want their children prepared to excel in a multi-cultural world by attending stably integrated schools.

If more comprehensive options are offered to students of color to make gains against the achievement gap, then it will become more likely that Minneapolis will be able to overcome the image of failed schools and rebuild its reputation. It is in the interest of all Minnesotans to begin the process today. Those who would oppose offering the choice of educational opportunity to the poor must have a reason to deny choice. Otherwise, they should stand aside.

501. See PATRICIA ANDERSON, FINANCIAL TRENDS OF MINNESOTA SCHOOL DISTRICTS AND CHARTER SCHOOLS 35-36 (2005).

