

# A NEW STRATEGY FOR PURSUING RACIAL AND ETHNIC EQUALITY IN PUBLIC SCHOOLS

KRISTI L. BOWMAN<sup>†</sup>

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<sup>†</sup> Associate Professor of Law, Michigan State University College of Law; J.D., M.A., Duke University; B.A. Drake University. I thank Derek Black, Craig Callen, Matthew Fletcher, Preston Green, Catherine Grosso, Robert Heverley, Olatunde Johnson, Brian Kalt, Michael Lawrence, Lumen Mulligan, Daphne O'Reagan, Sean Pager, James Ryan, Wendy Scott, Glen Staszewski, and Charles TenBrink for helpful comments; Caitlin Salazer-Reid for research assistance; and the MSU Law Library staff, especially Barbara Bean, for exceptional research support, as always. It is an honor to participate in the inaugural conference and publication of the *Duke Forum for Law and Social Change*, a new journal at my alma mater. Accordingly, I dedicate this piece to the late Professor Jerome M. Culp, Jr., a member of the Duke Law faculty for many years, a teacher who challenged me to think differently, and a person I will always remember with fondness and gratitude.

## INTRODUCTION

Despite decades of expensive school desegregation and school finance litigation, millions of African-American and Latino children remain concentrated in high-poverty, racially/ethnically-isolated schools and school districts across the country.<sup>1</sup> This concentration is highly correlated with unsurprising conditions: when compared to their counterparts, students in these schools generally have lower test scores, higher dropout rates, less qualified teachers, worse learning environments, more limited curricular offerings, poorer health, less parental involvement, and overall a lower quality of education.<sup>2</sup> Staggering inequalities persist, and in the fifty-five years since the *Brown v. Board of Education* decision, much of the relevant legal landscape has changed. Perhaps most importantly, while *Brown* was a ray of hope for civil rights advocates,<sup>3</sup> school desegregation litigation has more or less run its course, although this is not because schools are integrated or children of all races and ethnicities have equally high-quality educational opportunities—far from it.<sup>4</sup> A new strategy is needed, and at this point in time—with a new President and Congress—a different approach may be more likely to succeed than it has been in recent years.

In this essay I sketch out one possible new strategy, inviting the responses of activists, lawyers, and scholars alike. I begin by looking back on the past half-decade of educational equality litigation and reflecting on how we have come to this point. Then I propose a two-part strategy to improve racial and ethnic equality in public schools going forward. The first piece takes advantage of new and emerging legal strategies to challenge racially/ethnically disparate inter-district inputs (funding) and/or outcomes (the adequacy of the education provided). The second piece promotes an emerging policy initiative: integration within districts based not on the race/ethnicity of individual students, but instead on students' socioeconomic status in concert with other factors.

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1. See Bruce D. Baker & Preston C. Green III, *Tricks of the Trade: State Legislative Actions in School Finance Policy That Perpetuate Racial Disparities in the Post-Brown Era*, 111 AM. J. OF EDUC. 372, 372–73 (2005); SHERYLL CASHIN, *THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM* 202, 208, 217 (Public Affairs 2004); see generally Roslyn Arlin Mickelson, *Achieving Equality of Educational Opportunity in the Wake of Judicial Retreat from Race Sensitive Remedies: Lessons from North Carolina*, 52 AM. U. L. REV. 1477 (2003).

2. Of course, correlation does not imply causation. Gary Orfield, Erica D. Frankenberg, & Chungmei Lee, *The Resurgence of School Segregation*, EDUC. LEADERSHIP 16, 19 (2001–02). See Karla Scoon Reid, *Survey Probes Views on Race*, EDUC. WEEK, 1, 15 (May 12, 2004) (profiling a survey of teachers regarding the quality of education in their schools); see *Bd. of Educ. v. Dowell*, 498 U.S. 237, 251–68 (1991) (Marshall, J., dissenting) (citing empirical evidence to this effect); CASHIN, *supra* note 1, at 213. See generally Osamudia R. James, *Business as Usual: The Roberts Court's Continued Neglect of Adequacy and Equity Concerns in American Education*, 59 S.C. L. REV. 793 (2008).

3. See, e.g., CHARLES J. OGLETREE, JR., *ALL DELIBERATE SPEED* 3–4, 14 (W.W. Norton & Co. 2004); Adam Cohen, *The Courts: The Supreme Struggle*, N.Y. TIMES, Jan. 18, 2004, at 4A.

4. See, e.g., Daniel Kiel, *Exploded Dream: Desegregation in the Memphis City Schools*, 26 L. & INEQ. 261 (2008).

## I. HOW DID WE GET HERE?

Over the past several decades, school desegregation litigation and school finance litigation have become common features in the legal battle for educational equality. By now, the first of those movements, school desegregation litigation, is all but exhausted. However, the second, school finance litigation, is not. The conceptual overlap between the two types of litigation is significant, though rarely recognized.

### A. The Demise of School Desegregation Litigation

A decade ago, in 1999, James Ryan described school desegregation litigation as “entering its twilight phase.”<sup>5</sup> In 2002, David Kirp wrote about the “quiet death of school integration,”<sup>6</sup> and Richard Kahlenberg noted that “the conventional wisdom is that school desegregation is dead. As a matter of federal law, this view is essentially correct.”<sup>7</sup> In 2006, Goodwin Liu described school desegregation as having “slowed to a virtual standstill over the past decade.”<sup>8</sup> In 2007, long-time civil rights advocate Derrick Bell wrote:

It is painful for many of us, but it is time to acknowledge that racial integration as the primary vehicle for providing effective schooling for black and Latino children has run its course. Where it is working, or has a real chance to work, it should continue, but for the millions of black and Latino children living in areas that are as racially isolated in fact as they once were by law, it is time to look elsewhere. . . . Civil-rights groups should recognize and support [a variety of programs for at-risk children], not as a surrender of their integration goals, but as an acknowledgement that flexibility is needed in fulfilling the schooling needs of black and Latino children in today’s conservative political landscape.<sup>9</sup>

These scholars’ comments reflect an emerging consensus among progressive academics and others.<sup>10</sup> In significant part, the exhaustion of federal

5. James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 254 (1999).

6. David L. Kirp, *Interring a Dream: The Quiet Death of School Integration*, THE AM. PROSPECT, Aug. 12, 2002, at 17.

7. Richard Kahlenberg, *Beyond Brown: The New Wave of Desegregation Litigation*, EDUC. LEADERSHIP, Dec. 2001–Jan. 2002, at 13.

8. Goodwin Liu, *The Parted Paths of School Desegregation and School Finance Litigation*, 24 L. & INEQ. 81, 82 (2006).

9. Derrick Bell, *Desegregation’s Demise*, CHRON. OF HIGHER EDUC., July 13, 2007, at B11.

10. See also Mark Walsh, *Scholars Weigh Court Influence Over School Practices, Climate*, EDUC. WEEK, Oct. 22, 2008 (describing that participants at an October 2008 conference co-sponsored by the Fordham Institute and the American Enterprise Institute generally agreed that school desegregation litigation is “in its last chapter”); James E. Ryan, *Sheff, Segregation, and School Finance Litigation*, 74 N.Y.U. L. REV. 529, 559 (1999) [hereinafter *Sheff*] (“The continued popular opposition to forced busing, the waning federal court involvement in desegregation cases, the complexity and general misunderstanding of the social science evidence regarding desegregation, and the conservative temper of the times all present obstacles to any state court endorsement of racial or socioeconomic integration.”); see U.S. COMM’N ON CIVIL RIGHTS, BECOMING LESS SEPARATE? SCHOOL DESEGREGATION, JUSTICE DEPARTMENT ENFORCEMENT, AND THE PURSUIT OF UNITARY STATUS xii (2007). However, a conference focused on building political will and legal strategy in pursuit of racially/ethnically integrated education recently was held at the University of North Carolina–Chapel Hill. I was honored to be a part of the April 2, 2009, conference. “Looking to the Future: Legal and Policy Options for Racially Integrated Education in the South and the Nation,”

desegregation litigation has occurred because of the way the doctrine has developed: de facto segregation is beyond the reach of the courts,<sup>11</sup> inter-district remedies are forbidden,<sup>12</sup> and now even voluntary integration and the race/ethnicity-conscious pursuit of diversity are largely disallowed.<sup>13</sup>

Over the past eight years, these doctrinal developments have dovetailed with a Bush Administration policy of reducing the number of open school desegregation cases. Of the approximately 430 open school desegregation cases to which the United States was a party in 2001, at least 164—nearly 40%—have been granted unitary status and thus closed.<sup>14</sup> Generally, a unitary status decree represents the fulfillment of the plaintiffs' goals: because the school district has eliminated the "vestiges of past de jure segregation"<sup>15</sup> "root and branch"<sup>16</sup>—well, "to the extent practicable"<sup>17</sup>—it is excused from federal judicial oversight. However, as the U.S. Commission for Civil Rights reports, "almost 56% of the school districts that have obtained unitary status over the last several decades have done so since 2000."<sup>18</sup> The Court's 1991 *Board of Education v. Dowell* decision made unitary status easier for a district to achieve<sup>19</sup> and many of these cases likely are coming to their natural conclusions.

But, this recent rate of districts achieving unitary status is unprecedented, and the unique relationship of the parties in desegregation cases where the federal government represented the plaintiffs suggests that some of these decrees could have been premature.<sup>20</sup> Here is one possible reason why: in most desegregation cases, the plaintiff or intervenor student class often resists a motion for partial or full unitary status by arguing that the district has not sufficiently remedied the prior segregation. The defendant, the school district, may contend that it has done so and should be released from court oversight—

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<http://www.law.unc.edu/calendar/event.aspx?cid=12140> (last visited April 17, 2009) [hereinafter Chapel Hill Conference].

School desegregation still may be moderately effective in advancing Latino students' rights, however. See, e.g., Kerry Lester, *School Districts Walk Fine Line Between Integration, Discrimination*, DAILY HERALD, Sept. 9, 2008, <http://www.dailyherald.com/story/?id=233316&src=2> (describing the lawsuit filed against the Elgin, Illinois school district U-46 by African-American and Latino plaintiffs). I explore this possibility in a paper presented at the April 2, 2009 at the Chapel Hill conference.

11. *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 195-96 (1973) (defining de jure segregation in the context of Northern segregation).

12. See *Milliken v. Bradley*, 418 U.S. 717, 757 (1974) (rejecting the use of inter-district remedies to address what the Court described as only an intra-district harm). See also CASHIN, *supra* note 1, at 212 (recounting discussions with Justice Thurgood Marshall, for whom she clerked, about *Milliken*).

13. See generally *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007). A 5-justice plurality, including Justice Kennedy concurring, rejected Seattle's and Louisville's efforts to voluntarily integrate their schools. *Id.*

14. U.S. COMM'N ON CIVIL RIGHTS, *supra* note 10, at xii.

15. *Bd. of Educ. v. Dowell*, 498 U.S. 237, 238 (1991).

16. *Green v. County Sch. Bd.*, 391 U.S. 430, 438 (1968).

17. *Dowell*, 498 U.S. at 238.

18. U.S. COMM'N ON CIVIL RIGHTS, *supra* note 10, at xii.

19. *Dowell*, 498 U.S. *passim*.

20. Danielle Holley-Walker, *Examining the Effect of Parents Involved on School District Responses to Desegregation Cases 8-10*, presented at Chapel Hill Conference, *supra* note 10 (unpublished conference paper on file with the author) (discussing the unique role of the Bush Department of Justice vis-à-vis desegregation cases between 2001 and 2008).

or, the district might not aggressively pursue unitary status due to certain benefits discussed below. However, if the plaintiffs in these recently closed cases were represented by the United States (which recently had a goal of reducing the number of open school desegregation cases), then the parties would not be as adverse as if the plaintiffs were represented by private counsel. Accordingly, some plaintiffs may have been more likely to consent to unitary status than they would have been otherwise.

Whether or not that is what happened in some of these cases closed during the past eight years, a declaration of unitary status is a mixed blessing for a school district wanting racial/ethnic diversity in its schools, for various reasons. First, a unitary district has significantly less access to funding for initiatives to equalize educational opportunity for children of different racial and ethnic groups than a district still under court supervision.<sup>21</sup> Second, a unitary district wades into uncertain and potentially treacherous waters if it uses anything other than colorblind measures to address continuing (albeit de facto) racial/ethnic isolation in its schools.<sup>22</sup> Third, although many school desegregation cases have been closed in recent years, public opinion suggests that racial and ethnic equality in public education is not the norm. Only a bare majority of the American public agrees that public education “in the U.S. [has] met the equal opportunity goal of *Brown v. Board of Education*.”<sup>23</sup> Various racial and ethnic groups responded very differently to that question, too: 59% of Whites agreed that the goal of *Brown* has been achieved, compared to only 39% of Latinos, and 23% of African-Americans.<sup>24</sup>

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21. See M. Beatriz Arias, *The Impact of Brown on Latinos: A Study of Transformation of Policy Intentions*, 107 TCHRS C. REC. 1974, 1996 (2005); James E. Ryan, *The Influence of Race in School Finance Reform*, 98 MICH. L. REV. 432, 444–65 [hereinafter *The Influence of Race*]. “It is not true that court success by a white or integrated district will always translate into legislation that equalizes and increases expenditures. But [in those states the impact of litigation] stand[s] in contrast to the tenor of the legislative and popular responses to court decisions in states like New Jersey, Texas, and Arizona. The level and quality of legislative recalcitrance and public opposition is palpably different in the latter states. . . . And in each of these states, the legislature and/or the public has openly and often fiercely opposed devoting more resources to districts attended primarily by minority students.” *Id.* at 471.

22. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2746 (2007); see generally NAACP LEGAL DEFENSE FUND & THE CIVIL RIGHTS PROJECT, *STILL LOOKING TO THE FUTURE: VOLUNTARY K-12 SCHOOL INTEGRATION* (2008) [hereinafter NAACP].

23. Reid, *supra* note 2, at 1.

24. *Id.* at 14. Further questions and answers in this survey:

Question	Whites	Latinos	African-Americans
Would racially diverse classes improve student learning?	44%	54%	67%
Has racially integrated schooling been achieved? [respondents to this question are teachers]	69%	60%	31%
Are equal academic opportunities available to students regardless of race?	63%	52%	28%

*Id.* See also Lawrence D. Bobo & Camille Z. Charles, *Race in the American Mind: From the Moynihan Report to the Obama Candidacy*, 621 THE ANNALS OF THE AM. ACAD. OF POL. AND SOC. SCI. 243, 247

Thus, we are faced with a situation in which many Americans perceive a substantial lack of racial and ethnic equality in educational opportunity, yet many others think the goals of *Brown* have been achieved. The most obvious vehicle for addressing such inequality—school desegregation litigation—has been all but exhausted.<sup>25</sup> Against this background, perhaps it is not surprising that civil rights advocates are turning again, and increasingly, to school finance litigation.

## B. A Brief (And Largely Separate) History of the Relationship Between School Desegregation and School Finance Litigation

### 1. Legal Doctrine

Over the past half-century, school finance litigation and school desegregation seem to have competed with one another for advocates and allies.<sup>26</sup> In many ways the initial goals of the two approaches were the same: to secure for poor and/or non-White children access to the same educational resources that their counterparts had.<sup>27</sup> School finance lawsuits emerged in force during the 1960s when civil rights advocates were dissatisfied with the pace and progress of early school desegregation litigation efforts;<sup>28</sup> indeed, throughout the 1950s and 1960s, the NAACP leadership debated which of these two strategies to prioritize.<sup>29</sup> Then, in 1973, the Court decided two major education cases that widened the conceptual divide between the desegregation and school finance litigation movements. Rather than using the pair of cases to frame a cohesive

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(2009) (describing the “perceptual divide” between Whites and non-Whites and summarizing social science research on this point).

25. This section has considered the doctrinal reasons for such exhaustion. Many other reasons are part of the judicial and public reluctance to support such litigation: for example, integration efforts often are an additional cost for cash-strapped districts; in many circumstances the local taxpayers foot much of the bill for these efforts; the social science evidence about the efficacy of integration efforts is mixed; people disagree about whether race-conscious remedies are appropriate at this point in our nation’s history; and, it is judicially difficult for courts to manage decades-long desegregation remedies.

26. Liu, *supra* note 8, at 82; see also Sheff, *supra* note 10, at 563 n.108 (“[T]he underlying right, equality of educational opportunity, was identical in both desegregation and school finance cases.”).

27. See Ryan, *supra* note 5, at 259, 302.

28. William J. Glen, *Separate But Not Yet Equal: The Relation Between School Finance Adequacy Litigation and African American Student Achievement*, 81 PEABODY J. OF EDUC. 63, 66 (2006) (stating that in the 1960s, “[l]awyers shifted toward school finance litigation due to the slow pace of the implementation of desegregation orders and to address directly one of the root causes of educational inequities: resource disparities between different schools”). See also Ryan, *supra* note 5, at 253 (citing RICHARD F. ELMORE & MILBREY WALLIN MCLAUGHLIN, REFORM AND RETRENCHMENT: THE POLITICS OF CALIFORNIA SCHOOL FINANCE REFORM 35 (Ballinger 1982), and describing now-Professor Derrick Bell’s work as an early advocate of school finance reform after working for NAACP as a school desegregation specialist).

29. Jonathan L. Entin, *Parents Involved and the Meaning of Brown: An Old Debate Renewed*, 31 SEATTLE U. L. REV. 923, 935 (2009) (“For many years the [NAACP] inconclusively debated two different strategies for improving educational opportunities for African-Americans: an equalization strategy that sought to rely on the separate-but-equal doctrine to force improvements in African American schools, and a direct-attack strategy that would seek to have *Plessy* overruled and replaced by a mandate to desegregate public education.”).

doctrine about educational inequality,<sup>30</sup> the Court classified *Keyes v. School District No. 1* as intra-district, de jure, racial/ethnic segregation<sup>31</sup> and *San Antonio v. Rodriguez* as colorblind inter-district funding inequality<sup>32</sup>—distinct harms with distinct remedies, and the latter not welcome in federal courts. In the intervening years, school desegregation and school finance litigation rarely have been paired together in academic and policy literature, in textbooks, or by civil rights advocates.<sup>33</sup>

Especially since 1973, school desegregation battles have been fought in federal courts and school funding disputes have been waged in state courts (supplemented by not-infrequent clashes between a state's judiciary and its legislature about proper funding schemes). Yet, as school desegregation and school funding litigation evolved, their remedies developed a fair amount of conceptual overlap. The hundreds of school desegregation cases brought over the past fifty-plus years<sup>34</sup> initially focused heavily on integration at the building-level and then at the classroom-level, but moved to considering many other factors as well, including equalizing monetary expenditures—though only within the district in question.<sup>35</sup> School funding cases, which have occurred in 46 states over the past 50 years,<sup>36</sup> initially focused heavily on leveling financial inputs across districts, but moved towards considering student outcomes statewide and eventually to creating substantive definitions of an adequate education as defined by state constitutions.<sup>37</sup> Interestingly, despite these similarities, the two strands of litigation may have primarily benefited different groups of students. In 1999, James Ryan concluded that school funding plaintiffs in predominantly White districts were much more successful (73% success rate) than plaintiffs from predominantly non-White districts (25%), and plaintiffs from urban minority districts were least successful of all (12.5%).<sup>38</sup> Ryan further observed that school desegregation litigation in individual districts filled some of these gaps for minority plaintiffs, but predicted that because of the dwindling utility of school desegregation litigation, an increasing number of predominantly-minority districts would be left without relief.<sup>39</sup>

30. Liu, *supra* note 8, at 83, 98.

31. *See generally* *Keyes v. School District No. 1*, 413 U.S. 189 (1973).

32. *See generally* *San Antonio v. Rodriguez*, 411 U.S. 1 (1973).

33. *Sheff*, *supra* note 10, at 529; Liu, *supra* note 8, at 82 (calling this disconnect in legal culture “somewhat puzzling”).

34. *See generally* U.S. COMM’N ON CIVIL RIGHTS, *supra* note 10.

35. *Green v. County Sch. Bd.*, 391 U.S. 430 (1968); *Milliken v. Bradley*, 418 U.S. 717 (1974).

36. John Dinan, *School Finance Litigation* (Oct. 15, 2008) (on file with the author).

37. *See, e.g.*, *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989); Michael Heise, *Litigated Learning, Law’s Limits, and Urban School Reform Challenges*, 85 N.C. L. REV. 1419, 1421 (2007); Liu, *supra* note 8, at 100; Ryan, *supra* note 5, at 260.

38. *The Influence of Race*, *supra* note 21, at 452, 453, 455, 458. Minority districts joining in school funding lawsuits “typically were not receiving any desegregation funding.” *Id.* at 477. Furthermore, “the majority of [the eighteen] successful [school finance] challenges were brought by suburban or rural white districts . . . of the nineteen [unsuccessful school finance] cases, seven were brought either exclusively by urban minority districts, or by a small group of plaintiffs that included at least one urban minority district.” *Id.* at 452.

39. *See* Ryan, *supra* note 5, at 264.

## 2. *Societal Reaction and Social Science Evidence*

Public resistance to racial/ethnic integration efforts is another part of this picture. In a 2007 Pew Research Center study, when asked if it was “more important to go to racially mixed schools” or “more important to go to local community schools,” 23% of Whites, 56% of African-Americans, and 44% of Latinos prioritized attending integrated schools, while 65% of Whites, 33% of African-Americans, and 46% of Latinos prioritized attending schools near their homes.<sup>40</sup> Because of differing views over the prevalence of existing racial/ethnic discrimination, and also disagreement over the propriety of race/ethnicity-conscious remedies, affirmative integration methods have limited public support.<sup>41</sup> However, in James Ryan’s words, some of the appeal of school finance litigation results from its frequent depiction “as a means of moving beyond race as the salient issue in education reform and as an effective way to achieve educational equity and adequacy for disadvantaged students from all racial and ethnic backgrounds.”<sup>42</sup>

Similarly, the Court’s separation of school desegregation from school finance litigation as independent legal claims suggests that in reality, race/ethnicity and poverty also operate and affect education independently of one another.<sup>43</sup> To a degree, this is true. Scholars have concluded that “racial differences in student achievement persist” even when “controlling for school inputs, such as student-teacher ratios and a variety of other student background characteristics.”<sup>44</sup> In fact, over the past fifteen years an increasing number of

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40. PEW RESEARCH CENTER, OPTIMISM ABOUT BLACK PROGRESS DECLINES: BLACKS SEE GROWING VALUES GAP BETWEEN POOR AND MIDDLE CLASS 10 (2007).

41. See generally Darren Lenard Hutchinson, *Racial Exhaustion*, 86 WASH. L. REV. 917 (2009).

42. Ryan, *supra* note 5, at 252–53. Kahlenberg, *supra* note 7, at 13; Hutchinson, *supra* note 41, at 971 (“Given the popularity of the belief that racial inequality results from nonracial factors, social movement actors could consider strategically framing their advocacy around class-based remedies. Indeed many commentators have advocated this approach. Many scholars have advocated class-based agendas, on the grounds that they more directly address material inequity, present fewer problems politically given the opposition to race-conscious state action, and would likely survive judicial review because economic discrimination receives only rational basis review.”).

John Dayton and Anne Profitt Dupre claim that school finance litigation is more likely to be successful than school desegregation litigation, but this does not mean that courts or communities are especially receptive to it. John Dayton & Anne Profitt Dupre, *Blood and Turnips and School Finance Litigation: A Response to Building on Judicial Intervention*, 36 J.L. & EDUC. 481 (2007). They argue that shared public political will is a necessary component of successful school finance changes: in their words, “judicial intervention alone has not been an effective means of resolving the complex fiscal and political problems at the core of school funding disputes” in large part because “when an activist court attempts to force school funding changes that are inconsistent with fiscal and political realities in a state, the net result is likely to be diminished respect for the court, escalating challenges to the court’s authority, political opposition to reform, prolonged litigation, and substantial non-compliance with the court’s orders.” *Id.* at 483–84; see also John Dayton & Anne Profitt Dupre, *School Funding Litigation: Who’s Winning the War?*, 57 VAND. L. REV. 2351 (2004) (analyzing over thirty years of school funding litigation).

43. This way of understanding is not unique to the Court’s jurisprudence; it also has permeated public policy discussions. See, e.g., DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE AMERICAN UNDERCLASS* 218–20 (1993) (summarizing the literature and arguing that it is the interaction of race and class which should instead be the focus).

44. Preston C. Green, III, Bruce D. Baker & Joseph O. Oluwole, *Race-Conscious Funding Strategies and School Finance Litigation*, 16 B.U. PUB. INT. L.J. 39, 40 (2006) [hereinafter *Funding Strategies*]. See also



social scientists have concluded that “targeting funding to minority students might reduce the racial achievement gap.”<sup>45</sup> Two particular interventions may be especially effective: providing additional compensation to better qualified teachers so they are more likely to choose and/or less likely to leave high-minority schools, and funding additional teaching positions so that students have smaller class sizes, a change which appears to benefit African-American students more than White students, even when accounting for students’ poverty.<sup>46</sup>

Similarly, social scientists have identified school-level poverty as a factor that influences student achievement and operates independently of an individual student’s own race, ethnicity, or socioeconomic status.<sup>47</sup> The connection between poverty and lower educational outcomes is widely accepted (the federal government has provided supplemental funding for the education of poor public school students since 1965<sup>48</sup>), although often the connection is assumed to be based on a student’s background rather than a student’s classmates’ backgrounds. In the former context, the debate is not whether to provide any additional funding to counteract the effects of an individual child’s poverty, but rather about how much to provide: estimates of the cost to adequately educate students in poverty vary, ranging from 110% to 140% of the cost to educate non-poor students.<sup>49</sup>

Thus, minority group racial/ethnic isolation and school-wide poverty negatively impact student achievement independently of one another—yet they

Neil Kraus, *Concentrated Poverty and Urban School Reform: “The Choice is Yours” in Minneapolis*, 41 EQUITY & EXCELLENCE IN EDUC. 262, 262 (2008) (“While economic class is a major predictor of academic success, racial minorities face additional obstacles, which are evident when comparing children of different races but similar economic backgrounds.”).

45. Green et al., *supra* note 44, at 40–41 (“Until the early 1990s, the consensus among social scientists was that increases in educational spending did not correlate to increases in student achievement.”).

46. Charles Clotfelter et al., *Teacher Quality and Minority Achievement Gaps* 12–15 (Duke Univ. Terry Sanford Inst. of Pub. Pol’y, Working Paper Series, Paper No. San 04-04, 2004), <http://www.pubpol.duke.edu/research/papers/SAN04-04.pdf>; Eric A. Hanushek et al., *Why Public Schools Lose Teachers*, 39 J. HUM. RESOURCES 326, 350 (2004) (suggesting “that a school with 10 percent more black students would require about 10 percent higher salaries in order to neutralize the increased probability” that White women teachers would leave); Preston C. Green III, Bruce D. Baker & Joseph O. Oluwole, *Achieving Racial Educational Opportunity Through School Finance Litigation*, 4 STAN. J. CIV. RTS. & CIV. LIBERTIES 283, 310 (2008) [hereinafter *Achieving*].

47. Heise, *supra* note 37, at 1443; *Achieving*, *supra* note 46, at 310.

48. Elementary and Secondary Education Act of 1965 § 101, 20 U.S.C. § 6301 (2002).

49. Susan Pace Hamill, *The Vast Injustice Perpetuated by State and Local Tax Policy*, 37 HOFSTRA L. REV. 117, 125–26 (2008) (assuming “that high poverty districts should be funded at approximately forty percent more than” school districts with an average number of students in poverty, and that “most states fail to even come close to this benchmark and no state adequately funds all of their poor school districts”). Hamill’s assumption is based on data which states the forty percent adjustment is “widely used by education researchers” and part of the federal Title I funding scheme. The Center for Public Education, *School Resources, Funding: Is Our School Funding Equitable?*, [http://www.centerforpubliceducation.org/site/c.kjJXJ5MPIwE/b.3589979/k.B249/School\\_resources\\_funding\\_Is\\_our\\_school\\_funding\\_equitable.htm](http://www.centerforpubliceducation.org/site/c.kjJXJ5MPIwE/b.3589979/k.B249/School_resources_funding_Is_our_school_funding_equitable.htm) (last visited April 17, 2009); *see also* Preston C. Green III & Bruce D. Baker, *Urban Legends, Desegregation and School Finance: Did Kansas City Really Prove that Money Doesn’t Matter?*, 12 MICH. J. RACE & L. 57, 88 (2006) (assuming the cost of educating students in poverty is ten percent greater than the cost of educating non-poor students).

also occur together shockingly often. In general, the more black and brown a school's population is, the more likely it is that students in that school are predominantly poor.<sup>50</sup> And when that happens, the demographic characteristics compound one another and cannot ever be completely disentangled.<sup>51</sup> As demographers Douglas Massey and Nancy Denton have argued when discussing public policy approaches more generally, "[r]ace-conscious steps need to be taken to dismantle the institutional apparatus of segregation, and class-specific policies must be implemented to improve the socioeconomic status of minorities."<sup>52</sup> The new strategy proposed in this essay attempts to employ this type of approach.

## II. A NEW STRATEGY

As shown in the table below, 63% of both the approximately 9 million Latino students and almost 8 million African-American students in United States public schools attend schools where at least half the children are poor enough to qualify for the federally-funded Free and Reduced Lunch program (FRL).<sup>53</sup> Twenty-seven percent of the roughly 2 million Asian/Pacific Islander students and 58% of the more than half-million American Indian/Alaskan Native students attend such schools. Only 20.3% of the 27 million White students do.

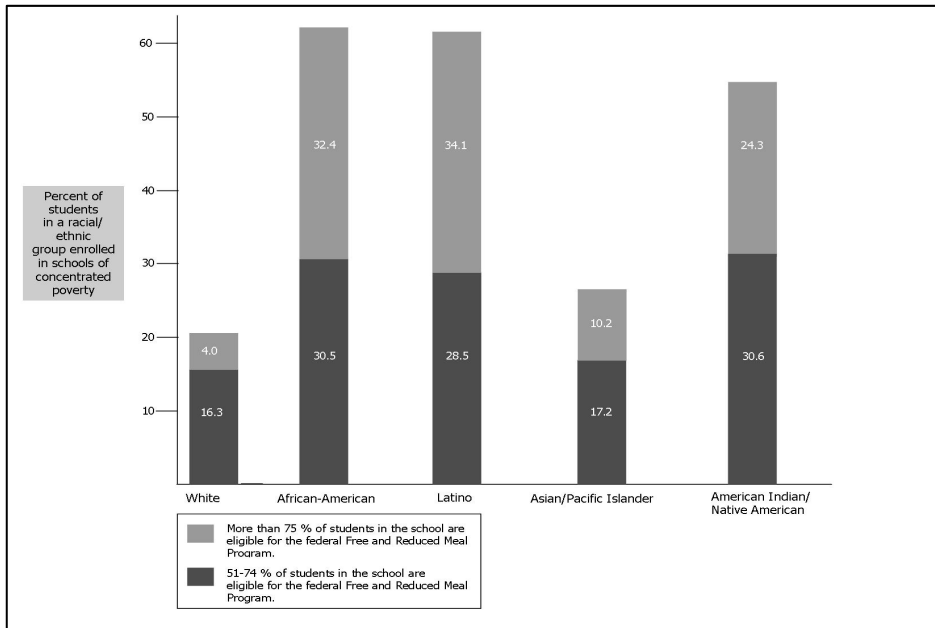
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50. See, e.g., CATHERINE L. HORN & MICHAL KURLAENDER, THE END OF KEYES—RESEGREGATION TRENDS AND ACHIEVEMENT IN DENVER PUBLIC SCHOOLS, THE CIVIL RIGHTS PROJECT 5, 13 (2006) ("[The] majority of the achievement studies in the desegregation literature focus on African-Americans, [but] some have also looked at Latinos. . . . [A summary of these studies] found that average achievement levels for Latinos are higher in desegregated" schools; this is likely connected with funding inequalities because Latinos are "frequently segregated in some of the poorest schools.").

51. WILLIAM O'HARE & MARK MATHER, ANNIE E. CASEY FOUNDATION & POPULATION REFERENCE BUREAU, THE GROWING NUMBER OF KIDS IN SEVERELY DISTRESSED NEIGHBORHOODS: EVIDENCE FROM THE 2000 CENSUS i (2003). In severely distressed neighborhoods, 54% of the children were African-American (accounting for over a quarter of all African-American children nationwide), and almost 30% of the children were Latino (13% of the national Latino child population; because the Latino population is growing so rapidly, even more Latino children are likely living in severely distressed neighborhoods today). *Id.* Thus, in severely distressed neighborhoods, the remaining 16% of the children are White, Asian, or Native-American. "Severely distressed neighborhoods" are communities where the poverty rate exceeds 27%, households run by a single woman account for at least 37%, at least 23% of adults are high school dropouts, and at least 34% of working-age males are not employed. *Id.*

52. MASSEY & DENTON, *supra* note 43, at 220.

53. U.S. DEP'T OF EDUC., NAT'L CTR FOR EDUC. STATISTICS, COMMON CORE OF DATA (CCD), PUBLIC ELEMENTARY/SECONDARY SCHOOL UNIVERSE SURVEY (2006). The table provided in the text was created to show the number and percentage distribution of public elementary and secondary students, by percentage of students in school eligible for free or reduced-price lunch, locale, and race/ethnicity in the school year 2005-06.



The concentration of racial and ethnic minority students in high-poverty schools results from both district-level and school-level factors. Accordingly, the framework I propose in this section addresses both of those levels. The first piece suggests continuing to litigate claims in what I identify as the fourth wave of school finance litigation—the explicitly race/ethnicity-conscious wave—and thus pursues equality between districts, which sometimes are racially/ethnically isolated themselves. Because school finance litigation remains limited by its focus on inter-district comparisons, the second piece proposes advocating for intra-district policies such as multi-factor socioeconomic status (SES) integration. Furthermore, both approaches are mindful of race/ethnicity *and* of sufficiency of resources (whether at the district or student level), and try to address the two in concert.

### A. The First Piece: Race/Ethnicity-Conscious School Finance Litigation

School finance litigation is widely considered to have three initial waves of cases and now arguably is in a fourth. The first wave was based on the federal Equal Protection Clause (contending, in brief, that students in different districts were entitled to equal financial inputs) and ended in 1973 with the Court's holding in *San Antonio v. Rodriguez* that funding disparities among districts survived the rational basis test and did not violate the federal Equal Protection Clause.<sup>54</sup> The second wave took shape as advocates pursued similar equality claims in state courts from 1973 through 1989, based on state constitutions' equal protection clauses and education clauses; in that wave, states generally won.<sup>55</sup> Then, a third wave emerged, based on state constitutions' education clauses, and

54. William E. Thro, *Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model*, 35 B.C. L. REV. 597, 600 (1994).

55. *Id.* at 601-03.

switched its focus away from educational inputs to ask whether states were providing children with a constitutionally adequate education; in this wave, plaintiffs were more successful.<sup>56</sup> The third wave of adequacy cases continues to this day.<sup>57</sup>

I contend that since 1996, a fourth wave has developed alongside some third wave cases. From my perspective, the fourth wave cases have two distinguishing characteristics: first, they are explicitly race/ethnicity-conscious.<sup>58</sup> That is, in contrast with the long history of school finance litigation in which race/ethnicity was the proverbial elephant in the room but the legal harms and remedies were technically colorblind,<sup>59</sup> in fourth wave cases courts recognize racial/ethnic disparities in equality and adequacy as legal harms which call for race/ethnicity-conscious remedies. This occurs even though the alleged violations are not limited to intentional racial/ethnic discrimination. Second, these cases may rely on state education clauses, but they draw most heavily on a variety of state and federal anti-discrimination constitutional provisions and statutes. Accordingly, new state and federal legislation can bolster the legal foundation for future fourth wave cases.

### *1. Tracing the Fourth Wave of School Finance Litigation*

The reason I describe the fourth wave more broadly than the previous three is because it represents an important paradigm shift. Despite the dead ends, multiple sources of law, and changed directions, fourth wave litigants and scholars have continued to press forward with arguments such as those articulated by Denise Morgan in 1998:

[T]he right to equal educational opportunity . . . is violated when school district lines are drawn so that concentrated poverty has more severe adverse effects on the educational experiences of children of color than it does on the educational experiences of White children. That rationale would neither privilege the integrity of geographic boundaries over the need to redress racial divisions, nor conflate race and poverty.<sup>60</sup>

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56. *Id.* at 603-04; Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 175-82 (1995).

57. *See, e.g.*, Access Quality Education: Recent Litigation Events, [http://www.schoolfunding.info/litigation/recent\\_decisions.php3](http://www.schoolfunding.info/litigation/recent_decisions.php3) (last visited April 17, 2009) (detailing the recent chronology of school finance litigation).

58. While *Rodriguez* and many other noted school finance cases grew out of a concern about equalizing funding between poorer, primarily non-White districts and more affluent, primarily White districts, the racially disparate impact of various funding schemes was not a harm for which states explicitly were held liable until very recently. *See* Glen, *supra* note 28, at 75 (saying advocates should consider “a [potentially] more effective approach to school finance litigation”: linking “adequacy and desegregation” and thus possibly “enabl[ing] students to realize greater educational benefits than could be obtained by either approach operating in isolation”).

59. In fact, the Oxford English Dictionary traces the first use of the phrase “elephant in the room” to a 1959 *New York Times* article in which the phrase was used to refer to school finance. Oxford English Dictionary, Elephant, <http://dictionary.oed.com/cgi/entry/50073129?> (last visited April 17, 2009); Green et al., *supra* note 45, at 297-300.

60. Denise C. Morgan, *The Less Polite Questions: Race, Place, Poverty, and Public Education*, 1998 ANN. SURV. AM. L. 267, 286 (1998).

This characteristic argument recognizes that the fourth wave conceptually straddles school desegregation and school finance litigation, and thus has the potential to raise different claims of inequality than arguments about race/ethnicity and resources raised separately from one another. In advancing this characterization of a fourth wave, I unify arguments made by various plaintiffs, lawyers, and scholars.

Accordingly, a very short and simplified history of fourth wave litigation and scholarship is as follows: in 1996 the Connecticut Supreme Court's decision in *Sheff v. O'Neill* granted plaintiffs a victory based on de facto racial/ethnic isolation between districts.<sup>61</sup> Given the supreme court's refusal to recognize racial/ethnic isolation as a legal harm (absent invidious intent) or to permit inter-district school desegregation remedies, this 1996 holding in *Sheff* was particularly noteworthy and the first step in such a direction by any court in over a quarter century.<sup>62</sup> Scholars have argued that *Sheff*'s reach is limited because it was based on such a unique set of state constitutional provisions—only Hawaii and New Jersey's constitutions contain similar anti-segregation clauses<sup>63</sup>—and while that may be true, the willingness of the *Sheff* court to find for plaintiffs on a disparate impact argument is important.<sup>64</sup>

In 2001, the New York case *Campaign for Fiscal Equity v. State* gained public attention because the trial court held that the state education financing scheme violated New York's education clause as well as Title VI of the federal Civil Rights Act of 1964; however, that ruling was quickly reversed.<sup>65</sup> That same year, Denise Morgan fully articulated a legal strategy for a Title VI-based wave of race/ethnicity-conscious school finance litigation,<sup>66</sup> but then the Supreme Court held in *Alexander v. Sandoval* that Title VI does not create a private right of action to enforce disparate impact claims.<sup>67</sup> In 2002, post-*Sandoval*, Maurice Dyson described the rise and fall of what he labeled the fourth wave, a handful of Title

61. *Sheff v. O'Neill*, 678 A.2d 1267 (Conn. 1996); Ryan, *supra* note 10, at 530-31; Gloria Graves Holmes & Susan Clark, *To Choose or not to Choose: Equity in Connecticut in the Wake of Sheff v. O'Neill*, 38 EQUITY & EXCELLENCE IN EDUC. 3, 3 (2005).

62. Kahlenberg, *supra* note 7, at 16; *Sheff*, *supra* note 10, at 530-31.

63. *Sheff*, *supra* note 10, at 535, 546.

64. In 1999, reflecting on *Sheff*, James Ryan suggested that a fourth wave might emerge in which plaintiffs would claim an affirmative right to education of which SES and racial integration would be a vital part. Ryan, *supra* note 5, at 308. In 1998, then-law student Kevin Randall McMillan appeared to be the first to describe an emerging wave of cases similar to *Sheff*; although his technical prediction was not on point, his general idea was. Kevin Randall McMillan, Note, *The Turning Tide: The Emerging Fourth Wave of School Finance Reform Litigation and the Courts' Lingering Institutional Concerns*, 58 OHIO ST. L.J. 1867, 1900 (1998) ("[This wave is] characterized by the inclusion of the racial and ethnic divide in plaintiffs' claims or the use of two distinct state constitutional provisions that coalesce to create a more viable cause of action for the plaintiffs.").

65. No. 111070-93 (N.Y. Sup., Jan 31, 2001) (trial order), *rev'd*, 744 N.Y.S.2d 130 (N.Y. App. Div. 2002).

66. Denise C. Morgan, *The New School Finance Litigation: Acknowledging That Race Discrimination in Public Education is More Than Just a Tort*, 96 NW. U. L. REV. 99, 168-88 (2001). Sarah S. Erving, then a law student, also argued that a fourth wave could be Title-VI based. See generally Note, *New York's Education Finance Litigation and the Title VI Wave: An Analysis of Campaign for Fiscal Equity v. State*, 10 J.L. & POL'Y 271 (2001).

67. 532 U.S. 275, 293 (2001).

VI-based school finance cases.<sup>68</sup> However, Morgan and Dyson had both noted that a private right of action was still available via 42 U.S.C. § 1983 (2000) to enforce the Title VI implementing regulations, and in 2003, Bruce Baker and Preston Green advanced this argument in detail, bolstered by a federal circuit court's holding to the same effect.<sup>69</sup> Also in 2003, a Kansas trial court held in *Montoy v. State* that the impact of the state funding scheme on minority students, English Language Learners ("ELLs"), and students with disabilities violated the state and federal equal protection clauses. The Kansas Supreme Court reversed these findings for lack of discriminatory purpose two years later, although it ultimately required the state to increase funding for public elementary and secondary schools by hundreds of millions of dollars.<sup>70</sup> In 2005, then-law student C. Joy Farmer argued that the race/ethnicity-conscious provisions in No Child Left Behind could form the basis for race/ethnicity-conscious school finance litigation, and in 2006 Green, Baker, and Joseph Oluwole made this argument in greater detail.<sup>71</sup> Some of these approaches remain viable bases for race/ethnicity-conscious school finance claims. Other current dead ends suggest opportunities for legislative action.

## 2. Existing and Potential Legal Foundations of Fourth Wave Claims

Fourth wave claims can be of two main types: disparate impact and intentional discrimination. Although Title VI disparate impact claims are foreclosed after *Sandoval* (unless based on the implementing regulations, arguably), Congress remains free to amend Title VI and effectively nullify *Sandoval*.<sup>72</sup> In 2005, Rachel Moran predicted that a Republican-controlled Congress was unlikely to pass such legislation;<sup>73</sup> both houses have been Democrat-controlled since early 2007,<sup>74</sup> but Congress has not yet amended Title VI. Perhaps this will be a higher priority for the new administration.

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68. Maurice R. Dyson, *Leave No Child Behind: Normative Proposals to Link Educational Adequacy Claims and High Stakes Assessment Due Process Challenges*, 7 TEX. F. ON C.L. & C.R. 1, 18–26 (2002).

69. Bruce D. Baker & Preston C. Green III, *Can Minority Plaintiffs Use the Department of Education Implementing Regulations to Challenge School Finance Disparities?*, 173 ED. L. REP. 679 (2003) (discussing *Robinson v. Kansas*, 295 F.3d 1183 (10th Cir. 2002)). See also *Powell v. Ridge*, 189 F.3d 387, 403 (3d Cir. 1999). But see *Campaign for Fiscal Equity, Inc. v. State*, 801 N.E.2d 326, 329 n.1 (N.Y. 2003); *South Camden Citizens in Action v. N.J. Dep't of Env'tl. Prot.*, 274 F.3d 771, 774 (3d Cir. 2001).

70. *Montoy v. State (Montoy I)*, No. 99-C-1738, 2003 WL 22902963, at \*43, (D. Kan. Dec. 2, 2003); *Montoy v. State (Montoy II)*, 120 P.3d 306, (Kan. 2005) (discussed in Green et al., *supra* note 45, at 308); Associated Press, *National Briefing Midwest: Kansas: Court Approves Increased School Funds*, N.Y. TIMES, July 9, 2005, A10; Gretchen Ruethling, *National Briefing Midwest: Kansas: Court Orders More School Financing*, N.Y. TIMES, June 4, 2005, A12; Access Quality Education: Kansas Litigation, [http://www.schoolfunding.info/states/ks/lit\\_ks.php3](http://www.schoolfunding.info/states/ks/lit_ks.php3) (last visited April 17, 2009).

71. C. Joy Farmer, Note, *The No Child Left Behind Act: Will it Produce a New Breed of School Financing Litigation?*, 38 COLUM. J.L. & SOC. PROBS. 443, 443 (2005); Green et al., *supra* note 44, at 50.

72. Rachel F. Moran, *Undone by Law: The Uncertain Legacy of Lau v. Nichols*, 16 BERKELEY LA RAZA L.J. 1, 5 n.43 (2005) (discussing a bill to this effect which died in committee, forecasting limited likelihood of such a bill passing in a Republican-controlled Congress, and citing *Fairness and Individual Rights Necessary to Ensure a Stronger Society: Civil Rights Act of 2004*, H.R. 3809, 108th Cong. (2d Sess. 2004); S. 2088, 108th Cong. (2d Sess. 2004); *Bill Tracking Report*, H.R. 3809, Cong. Inf. Serv. (2004); *Bill Tracking Report*, S. 2088, Cong. Inf. Serv. (2004)).

73. *Id.* at 6.

74. Associated Press, *Democrats Take Control as Congress Returns*, MSNBC, Jan. 5, 2007, <http://>

Congressional action is not the only way to fill the gap created by *Sandoval*, though. States can create a private right of action for disparate impact claims, and because school districts receive both state and federal funds, this would have the same effect for race/ethnicity-conscious school finance plaintiffs in those states as if Congress amended Title VI as discussed above. This possibility has not been lost on state legislators; in Illinois, such a law – the Illinois Civil Rights Act – was enacted in 2003.<sup>75</sup> In August 2008, a race/ethnicity-conscious school finance case filed in Illinois relied in part on that 2003 statute.<sup>76</sup> In their verified amended complaint, plaintiffs claimed:

[The Illinois] school funding scheme . . . has a demonstrable, disparate and adverse impact on minority students, particularly African Americans and Hispanics . . . [because] school districts that are located in communities with high-concentrations of low-income families and the lowest property wealth are more likely to be [majority-minority districts] and have less funding available for their students. The disparity that results between minority students in these districts and their white peers in majority districts deprives those minority students of equal protection under the law.<sup>77</sup>

Illinois courts have applied the Act in only one earlier case, which described the statute as parallel to Title VI.<sup>78</sup> A 50-state survey reveals that no other states have yet followed Illinois's lead,<sup>79</sup> although legislation modeled on the Illinois Civil Rights Act is pending in Massachusetts.<sup>80</sup> Additionally, Louisiana's state

[www.msnbc.msn.com/id/16464157/](http://www.msnbc.msn.com/id/16464157/).

75. H.R. TRAN., Reg. Sess. No. 39 (Il. 2003) (statement of sponsor in the Illinois House connecting the proposed bill to *Alexander v. Sandoval*, 532 U.S. 275 (2001)); ILL S. TRAN., Reg. Sess. No. 44 (Il. 2003) (statement of sponsor in the Illinois Senate connecting the proposed bill to *Sandoval*); 740 ILL. COMP. STAT. 23/5 (2008) (the text of the legislation as enacted).

76. *Chicago Urban League v. Illinois*, Verified First Amended Complaint, (Oct. 14, 2008), [http://www.thechicagourbanleague.org/723210820132032340/lib/723210820132032340/RE001%20\(8\).pdf](http://www.thechicagourbanleague.org/723210820132032340/lib/723210820132032340/RE001%20(8).pdf).

77. *Id.* at 6, 15, 18.

78. *Ill. Native Am. Bar Ass'n v. Univ. of Ill.*, 856 N.E.2d 460, 467–68 (Ill. App. 2006). Plaintiffs' ICRA claims were dismissed in two cases because the claims predated the effective date of the Act. *Majid v. City of Chicago*, No. 04 C 3707, 2004 WL 2495131, at \*2 (N.D. Ill. 2004); *Nicol v. Lavin*, No. 03 C 6688, 2004 WL 1881786, at \*6 (N.D. Ill. 2004). Plaintiffs also have brought ICRA claims in two cases currently pending: *Daniel v. Bd. of Educ. for Ill. Sch. Dist. U-46*, 379 F. Supp. 2d 952 (N.D. Ill. 2006) (denying defendants' motion to dismiss), and *McFadden v. Bd. of Educ. For Ill. Sch. Dist. U-46*, No. 05 C 0760, 2006 WL 681054, at \*9 (N.D. Ill. 2006) (denying motion for class certification); Slip Copy, 2008 WL 4877150 (N.D. Ill. 2008) (granting motion for class certification). One additional case alleging ICRA claims ended in a negotiated settlement. *Hughes Socol Piers Resnick & Dym, Ltd., Civil Rights/Constitutional Law*, <http://www.hsplegal.com/CivilRights.htm> (last visited April 17, 2009); see also *Bd. of Educ. of Thornton Twp. H.S. Dist. 205 v. Bd. of Educ. of Argo Comm. H.S. Dist. 217*, No. CIV A. 06 C 2005, 2006 WL 1896068, at \*3 (N.D. Ill. 2006) (granting in part and denying in part defendants' motion to dismiss); 2006 WL 2460590, at \*3 (N.D. Ill. 2006) (granting in part and denying in part plaintiffs' motion to strike defendants' affirmative defenses).

79. 50-state survey conducted by Research Assistant Caitlin Salazer-Reid (Feb. 2009) (on file with author). Unless crafted to avoid this outcome, disparate impact legislation also would allow plaintiffs to bring claims at the school district level. See, e.g., *Daniel*, 379 F. Supp. 2d 952 (N.D. Ill. 2006).

80. H.R. 3533, 2008-09 Leg. Session (Ma. 2009) was filed on January 11, 2009 and is currently pending. It reintroduces previous Massachusetts House Bill H.R. 2235, 2007-08 Leg. Session (Ma. 2009), which died in committee at the end of the last Massachusetts legislative session. The primary difference between the currently pending bill, 3533, and its predecessor, is the addition of "sex" as a

constitution contains a disparate impact provision in its school funding article, though it appears that this provision has never been tested in court.<sup>81</sup>

While some fourth wave advocates have been making state law-based disparate impact claims, others have been turning to underutilized aspects of federal law to bring intentional discrimination claims.<sup>82</sup> In a case filed in Alabama in March 2008, plaintiffs brought a claim of intentional discrimination under Title VI and the federal Equal Protection Clause. Quoting the following findings by an Alabama appellate court in a recent higher education discrimination case, the race/ethnicity-conscious school finance complaint said:

Plaintiffs allege that Alabama's tax policies seriously limit the ability of both the State and its counties to raise revenue from property taxes and, therefore, fund its K-12 schools. No one disputes that this is so. Plaintiffs also allege that these constitutionally enshrined tax policies were adopted for segregative purposes and with discriminatory intent. The district court has so held. The trouble is [that the instant case addresses only segregation in higher education].<sup>83</sup>

If the Alabama plaintiffs' claims succeed, they may provide a model for challenges in states with similar histories and present funding schemes across the South.

Additionally, to date, plaintiffs in Arizona have prevailed on their claims that the state-funded programs for ELLs are financed below the level required by rights guaranteed in the federal Equal Educational Opportunity Act of 1974.<sup>84</sup> Interestingly, these specific claims are not unlike traditional third wave school finance adequacy claims. Nonetheless, plaintiffs' victories could be temporary because the case, *Horne v. Flores*, was argued in the U.S. Supreme Court on April 20, 2009.<sup>85</sup> *Flores* will not be decided by the time this piece goes to press, but if the Court holds for the students, the *Flores* decision may provide an important model for how to pursue ELL-based funding claims. If the Court holds for the state, then this litigation avenue for pursuing racial/ethnic equality in public schools, too, will be foreclosed. The U.S. Department of Education reports that in 2003, ELL students comprised 11% of all public school students.<sup>86</sup> Because this

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protected category.

81. LA. CONST. art. 8 § 13 (D)(1). *City of Baker Sch. Bd. v. East Baton Rouge Parish Sch. Bd.* is the only case to cite this provision, and it does so while discussing another portion of the provision unrelated to the disparate impact language. 754 So. 2d 291 (La.App. 1 Cir. 2000).

82. Dinan, *supra* note 36, at 1.

83. Lynch v. Alabama, Complaint, <http://www.schoolfunding.info/states/al/Lynch-v-State.pdf> (N.D. Ala. March 13, 2008) (quoting Knight and Sims v. Alabama, 476 F.3d 1219, 1226 (11th Cir. 2007)).

84. *Flores v. Arizona*, 480 F. Supp. 2d 1157, 1164 (D. Ariz. 2007); Dinan, *supra* note 36, at 21 ("The U.S. District Court of Arizona has generally been receptive to these claims, issuing a series of *Flores v. Arizona* decisions from 2000 to 2007 ordering the state to increase funding for ELL programs and at one point fining the legislature for non-compliance and stipulating that until the state came into compliance ELL students would be exempt from taking the required high school exit exam.").

85. See Transcript of Oral Argument at 1, (No. 08-298), available at [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/08-289.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/08-289.pdf); 516 F.3d 1140 (9th Cir. 2008), *cert. granted*, 129 S. Ct. 893 (2009).

86. National Center for Education Statistics, Fast Facts, Question: How many English Language Learner (ELL) students are receiving services in U.S. public schools?, <http://nces.ed.gov/fastfacts/display.asp?id=96> (last visited April 17, 2009).



population continues to grow—and is growing rapidly in some areas which had very small ELL populations and thus limited ELL services previously<sup>87</sup>—the underlying problem giving rise to *Flores* (inadequate and/or underfunded English-language instruction programs) will likely become increasingly common across the country.

### 3. Competing Legal and Political Considerations

Analysis of the above options is not complete without discussion of probable challenges of, and opposition to, such litigation. Thus, this sub-section first briefly addresses the likely fate of race/ethnicity-conscious school finance measures after the Court's 2007 decision in *Parents Involved in Community Schools v. Seattle School District No. 1* ("*PICS*"),<sup>88</sup> then turns to the political and social costs of such litigation, and finally discusses a practical hurdle in bringing race/ethnicity-conscious adequacy claims.

First, in 2003, the Court decided two higher education affirmative action cases<sup>89</sup> which left open many questions decided a few years later when the Court took an elementary and secondary school voluntary integration case, *PICS*. In its 2007 decision in *PICS*, the Court struck down two school districts' enrollment plans which were intended to enhance the racial/ethnic diversity of the schools<sup>90</sup>—but this is not necessarily a death knell for race/ethnicity-conscious school finance litigation. Although it seems from *PICS* as though the four justices who formed the core of the plurality would be reluctant to find race/ethnicity-conscious school finance measures supported by a compelling interest unless those measures remedied past intentional discrimination, they may be more likely to find the narrow tailoring prong satisfied due to the potentially significant impact of such a policy and the potential for such a policy to influence student achievement.<sup>91</sup> Regardless of the decision reached by those four justices, though, it appears that Justice Kennedy and the four dissenters would find both that a race/ethnicity-conscious school funding plan is driven by the legitimate compelling government interest of educational equity and that such a plan is narrowly tailored to achieve that interest. The *PICS* dissent speaks more clearly to the issue in this situation, identifying remedial, educational, and democratic

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87. According to Richard Fry and Felisa Gonzales, states can be classified as "established," "new," or "emerging" Hispanic states. The established states with large Latino populations but slower population growth are Arizona, California, Colorado, Illinois, New York, Pennsylvania, New Jersey, and Texas. The new Latino states with a growth of more than 200% and more than 200,000 in their Latino population between 1980 and 2000 are Florida, Georgia, Massachusetts, Nevada, North Carolina, Oregon, Virginia, and Washington. The emerging Latino states with a growth of more than 200% but less than 200,000 in their Latino population between 1980 and 2000 are Arkansas, Indiana, Kansas, Maryland, Minnesota, Nebraska, New Hampshire, Oklahoma, Rhode Island, Tennessee, Utah, and Wisconsin. RICHARD FRY AND FELISA GONZALES, PEW HISPANIC CENTER, ONE-IN-FIVE AND GROWING FAST: A PROFILE OF HISPANIC PUBLIC SCHOOL STUDENTS 15-16 (2008), available at <http://pewhispanic.org/files/reports/92.pdf>.

88. 127 S. Ct. 2738 (2007).

89. *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003).

90. *Parents Involved*, 127 S. Ct. at 2746.

91. *Id.* at 2752-58. For a detailed analysis of *Parents Involved* and its implications for race-conscious school finance, I commend the curious reader to Preston Green, Bruce Baker, and Joseph Oluwole's extensive analysis, with which I concur. *Achieving*, *supra* note 46, at 318-38.

purposes as compelling interests, although Justice Kennedy did express his willingness to hold that having a more diverse classroom environment is a compelling interest.<sup>92</sup> The narrow tailoring prong seems even more likely to be satisfied, given that Kennedy is resistant to individual advantage or disadvantage based on race or ethnicity,<sup>93</sup> and such a funding scheme would not function in that manner (Justice Souter, one of the four dissenters, submitted his resignation as this essay was going to press. His successor has not yet been selected; accordingly, the views of that person are unknown. However, it seems likely that President Obama will appoint a Justice who will tend to side with the PICS plurality on these issues).

Furthermore, one other issue to keep in mind when considering the likely success of litigation is the occurrence of such litigation. Individual plaintiffs are unlikely to finance this type of lawsuit and school districts have little incentive to sue unless they are likely to gain from a different financial allocation. Thus, the availability of fee-shifting for successful plaintiffs also will influence the prevalence of fourth wave litigation.

Second, independent of the possibility that a race/ethnicity-conscious school funding scheme would survive constitutional scrutiny if challenged, it is important to also consider the wisdom of strategically pursuing such litigation. I do not suggest a strategy of renewed litigation lightly. The hundreds of school desegregation and school finance victories in courts across the country have brought with them substantial costs. In addition to more general political fallout, other costs have included public skepticism about the legitimacy of the remedy in a given case<sup>94</sup> and the legitimacy of courts generally;<sup>95</sup> ping-pong matches between courts and legislatures about school finance schemes;<sup>96</sup> increasingly heated state supreme court elections focusing not on the qualifications of the candidates per se but rather on their positions on specific issues;<sup>97</sup> and proposed court-stripping legislation.<sup>98</sup> Clearly, these costs are substantial. Yet, a political

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92. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2792, 2822, 2824 (2007).

93. *Id.* at 2795.

94. For an excellent analysis of social science evidence related to school integration and explaining the apparent “contradictions” in the evidence, see Roslyn Arlin Mickelson, *Twenty-first Century Social Science on School Racial Diversity and Educational Outcomes*, 69 OHIO ST. L.J. 1173, *passim* (2008); Roslyn Arlin Mickelson & Martha Bottia Noguera, *Integrated Education and Mathematics Outcomes: A Synthesis of Social Science Research 33-41* (Mar. 26, 2009), *presented at Chapel Hill Conference*, *supra* note 11 (unpublished conference paper on file with the author) (analyzing the apparent debate in social science literature about the impact of racial/ethnic integration on students’ education).

95. Gavel Grab, Jan. 28, 2008, <http://www.gavelgrab.org/?p=135> (discussing failed court-stripping legislation motivated by school finance legislation in Kansas, Missouri, New Hampshire, and New Jersey).

96. See, e.g., Access Quality Education, Ohio Litigation, [http://www.schoolfunding.info/states/oh/lit\\_oh.php3](http://www.schoolfunding.info/states/oh/lit_oh.php3) (last visited April 17, 2009); David J. Owsiany, *Merit Selection Isn’t the Answer to Ensuring a Better High Court*, THE COLUMBUS DISPATCH, Apr. 16, 2004, at 11A.

97. See, e.g., Brian F. Schaffner & Jennifer Segal Diascro, *Judicial Elections in the News*, in RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS 115, 128-29 (Matthew J. Streb ed., 2007) (discussing the Ohio state supreme court elections in 2000 and 2004).

98. Gavel Grab, *supra* note 95.

solution to the problems of educational equality addressed in this essay does not seem especially feasible at this point in time. We are in a recession,<sup>99</sup> states are strapped for cash, making legislators less likely to increase educational appropriations<sup>100</sup> regardless of how much they want to, and even more likely to need political cover if they support race/ethnicity-conscious increases.<sup>101</sup> Families are also experiencing the economic downturn firsthand, in many circumstances probably making it more difficult to justify voting for a state or local increase in their own taxes to benefit their own children, let alone someone else's.<sup>102</sup>

Third, a major practical challenge to bringing a race/ethnicity-conscious adequacy claim is the current lack of sufficient data to support such a claim. To make an adequacy-based race/ethnicity-conscious school funding claim,<sup>103</sup> estimates of the cost of educating children must account for the additional cost of educating minority children equally as well as White children.<sup>104</sup> Not even estimates in scholarly literature currently account for race or ethnicity as a factor in adequacy,<sup>105</sup> and this greatly hampers plaintiffs' ability to bring race/ethnicity-based adequacy claims—although plaintiffs would not be similarly constrained in bringing input-based claims like the Illinois claims previously mentioned. Accordingly, the need for social science research is substantial.

In sum, if the primary purpose of education equality litigation is, as Denise Morgan describes it, "to create a public education system that enhances the intergenerational mobility of the United States citizenry,"<sup>106</sup> then the large gaps—gulfs, really—in equality and adequacy between districts with racially/ethnically disparate demographic profiles cannot be ignored. Addressing these factors at the district level is not enough, though. Within-district inequality also can be dramatic.

## B. The Second Piece: Multi-Factor Socioeconomic Status Integration

Historically, school desegregation litigation was the claim focused on eliminating intra-district racial and ethnic inequality; however, it is now largely

99. See Michael Luo, *Longer Periods of Unemployment for Workers 45 and Older*, N.Y. TIMES, Apr. 13, 2009, at A11.

100. See, e.g., Paul Davenport, *Ariz. Budget Woes Revive Debate Over School Funding*, THE ARIZONA REPUBLIC, Apr. 13, 2009, <http://www.azcentral.com/arizonarepublic/local/articles/2009/04/12/20090412schoolmoney0412.html>.

101. Green and colleagues suggest that "[NCLB] may induce states to adopt race-conscious funding strategies" because of penalties for "racial achievement gaps." *Funding Strategies*, *supra* note 44, at 39, 53. This would provide political cover, but whether it will occur remains to be seen.

102. Luo, *supra* note 99, at A11.

103. The latter has not yet been tested in court. *Funding Strategies*, *supra* note 44, at 286 ("[H]igh-black concentration districts are frequently disadvantaged by race-neutral state distribution policies that tend to favor low-black-concentration school districts. We further claim that to eliminate racial disparities in educational opportunities and outcomes, state-aid application policies may have to adopt race-conscious approaches that go beyond merely providing funding equality.").

104. See *supra* note 46 and accompanying text.

105. *Funding Strategies*, *supra* note 44, at 50; *Achieving*, *supra* note 46, at 311.

106. Morgan, *supra* note 60, at 276.

unavailable, and currently even voluntary racial/ethnic integration often will be constitutionally foreclosed. Thus, this section turns to a district-level policy which may have more public support (or at least less public opposition) than voluntary racial/ethnic integration, and which also is more likely to be deemed constitutionally acceptable if challenged, in large part because it is subject to a more lenient level of scrutiny than individual racial/ethnic classifications.<sup>107</sup>

### 1. Does SES Integration Necessarily Create Racial/Ethnic Diversity?

The first school district to integrate its students based on their socioeconomic status (SES)<sup>108</sup> was LaCrosse, Wisconsin. In the fifteen years since the LaCrosse plan was implemented, more than sixty school districts across the country have followed suit.<sup>109</sup> The policy of SES integration has become increasingly attractive to school districts for many reasons: not only have the Court's decisions severely limited school districts' ability to voluntarily integrate their students based on race or ethnicity<sup>110</sup> (which arguably reflects societal racial exhaustion more generally<sup>111</sup>), but the quantified benefits of income integration for poor children are substantial.<sup>112</sup> Research consistently demonstrates that a school's poverty level and its achievement level are nearly always inversely related: the higher the poverty, the lower the achievement, and vice versa.<sup>113</sup> Furthermore, when schools within a district become more balanced in terms of the percentage of students in poverty, poor children benefit and non-poor children do not suffer a detriment.<sup>114</sup>

107. This section does not contend that districts have an affirmative duty to integrate their students based on SES, but rather that if they choose to do so, such a plan is likely to survive a legal challenge.

108. Socioeconomic status is commonly understood by sociologists to be a combination of "income, occupation, and education." John Iceland & Rima Wilkes, *Does Socioeconomic Status Matter? Race, Class, and Residential Segregation*, 53 SOC. PROBS. 248, 255 (2006). Yet, in these policies, socioeconomic status is often assumed to mean income alone. However, that is not socioeconomic integration; it is merely economic integration. For purposes of consistency with the dialogue about these issues, though (and because multi-factor SES integration often actually does account for various components of SES), I use the term SES integration.

109. Richard D. Kahlenberg, *The New Look of School Integration*, AM. PROSPECT, June 2, 2008, [http://www.prospect.org/cs/articles?article=the\\_new\\_look\\_of\\_school\\_integration](http://www.prospect.org/cs/articles?article=the_new_look_of_school_integration) [hereinafter *The New Look*]; see also Richard Kahlenberg, *Socioeconomic School Integration: Lessons from More Than 60 Districts 12*, presented at Chapel Hill Conference, *supra* note 10 (unpublished conference paper on file with the author).

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

111. See generally Hutchinson, *supra* note 41, *passim*.

112. See generally RICHARD KAHLENBERG, ALL TOGETHER NOW: CREATING MIDDLE CLASS SCHOOLS THROUGH PUBLIC SCHOOL CHOICE 23-76 (2001) (surveying the literature and making the case for SES integration).

113. Heise, *supra* note 37, at 1431-32; James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2103-08 (2002).

114. Neil Kraus describes the disadvantages suffered by students in poverty as:

[Including] lower levels of resources and investments at both the family and school levels, which substantially affect educational outcomes. This research shows that a family's economic well-being can shape a child's cognitive development in the early years, and economically better-off families are more likely to hire tutors, meet with teachers, use "proper" English in the household, and create educationally meaningful leisure time for their children. Further, lower-income students suffer from a wide range of health-related

Especially after the Court's 2007 decision in *PICS*, SES integration is increasingly cast as a colorblind measure of student assignment that can produce racially and ethnically diverse schools.<sup>115</sup> This assumption exists at some very high levels: in 2008, the U.S. Department of Education Office for Civil Rights under the Bush Administration issued a "Dear Colleague" open letter to school administrators across the United States containing the following passage:

The Department of Education strongly encourages the use of race-neutral methods for assigning students to elementary and secondary schools. Unlike the assignment plans in *Parents Involved*, genuinely race-neutral measures—for instance, those truly based on socio-economic status—do not trigger strict scrutiny and are instead subject to the rational-basis standard applicable to general social and economic legislation.<sup>116</sup>

The assumption that SES integration can achieve racial and ethnic diversity—and thus address the racial and ethnic isolation that is of concern to integration advocates—is based in large part on the premise that minority racial/ethnic status and poverty are highly correlated. In fact, a school's White enrollment and its Free and Reduced Lunch (FRL) participation are nearly always inversely related.<sup>117</sup> But, for FRL participation to effectively substitute for racial/ethnic minority status, nearly all middle class and affluent students in a given district would need to be White, and almost all poor students would be racial/ethnic minorities. Such a dynamic does exist in the Wake County, North Carolina public school district and thus income integration has produced a high level of racial/ethnic integration, but according to social scientists the correlation between poverty and racial/ethnic minority status in Wake County is "unusually high" and "rare."<sup>118</sup>

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problems when compared to economically better-off students, including poorer vision and oral hygiene, more asthma and lead poisoning, poorer nutrition, less adequate pediatric care, and more exposure to smoke. The combined influence of all these obstacles faced by students in poverty is "probably huge."

Kraus, *supra* note 44, at 262–63 (2008). *See also id.* at 262 (stating concentrated poverty, prevalent in urban public schools, "produces a variety of negative effects, including lower educational achievement"); Sean F. Reardon, John T. Yun & Michal Kurlaender, *Implications of Income-Based School Assignment Policies for Racial School Segregation*, 28 EDUC. EVAL. & POL'Y ANALYSIS 49, 50 (2006) ("[T]here is wide consensus among researchers that concentrated poverty influences future educational attainment, potential earnings, and societal liabilities such as welfare dependency."); Ryan, *supra* note 5, at 284; Christopher E. Adams, Note, *Is Economic Integration the Fourth Wave of School Finance Litigation?*, 56 EMORY L.J. 1613, 1636–39 (2007).

115. Reardon et al., *supra* note 114, at 53 (stating that there is a nationwide "trend in student assignment toward using socioeconomic factors in place of race (or in place of using race alone) in school assignment policies designed to establish diverse schools").

116. Letter from Stephanie J. Monroe, Assistant Secretary for Civil Rights, U.S. Department of Education, to Colleague, (Aug. 28, 2008), available at <http://www.ed.gov/about/offices/list/ocr/letters/raceassignmentese.html>.

117. HORN & KURLAENDER, *supra* note 50, at 13 fig. 3.

118. NAACP, *supra* note 22, at 49 ("African-American students are about ten times as likely to be poor as white students. . . . [And] Wake County has relatively few white students who come from low-income families and relatively few African-American and Latino students who come from more affluent families."). *See also* Reardon et al., *supra* note 114, at 67.

If Wake County is the exception, then, what is the rule? After modeling the implications of SES-integration policies on racial/ethnic diversity in districts across the country, Sean Reardon and his colleagues concluded:

In general, the results indicate that, under conditions typical of large school districts in the United States [which have high concentrations of poverty and of racial/ethnic minority students] and under practical income-desegregation policies, achieving income desegregation guarantees little to no racial integration. This is not to say, however, that no racial integration would result from an actual income-desegregation policy.<sup>119</sup>

Looking at five school districts which have used SES-integration plans after being declared unitary, Amy Stuart Wells and Erica Frankenberg similarly concluded that racial/ethnic “re-segregation occurred in two of the districts and racial isolation increased in the other three.”<sup>120</sup> Thus, it is not disputed that income integration can benefit poor students, including poor students of color.<sup>121</sup> But, students’ poverty (especially if FRL eligibility alone is used to indicate low socioeconomic status) cannot be used as a substitute for their race or ethnicity.<sup>122</sup> FRL participation is a crude distinction among students, and not even the most accurate one, at that: it probably underestimates the number of students in poverty, especially Latinos.<sup>123</sup>

## 2. A Multi-Factor Approach: What it Means, and Objections

The strength of the correlation between students’ race/ethnicity and income in a given school district is one major factor in determining the degree to which SES integration will produce racial/ethnic diversity; the way in which students are divided into groups for integration purposes is another.<sup>124</sup> In short, the more factors an SES integration policy takes into consideration when it divides students into groups, the greater likelihood that the policy will increase racial/ethnic diversity within a district’s schools.<sup>125</sup>

SES-based integration plans across the country consider both factors that are unique to individual children and those that are characteristic of neighborhoods. In the former category, some districts consider a student’s English language speaking ability, whether English is spoken at home, and whether a student lives in public housing. In the latter category, some districts consider the level of

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119. Reardon et al., *supra* note 114, at 63, 67 (“The only situation in which income integration would necessarily produce racial desegregation is if the White and Black income distributions were far more different than they are in fact.”).

120. Amy Stuart Wells & Erica Frankenberg, *The Public Schools and the Challenge of The Supreme Court’s Integration Decision*, 73 THE EDUC. DIG. 4, 12 (2008).

121. See NAACP, *supra* note 22, at 17.

122. *Id.* at 15 (stating that race and poverty are “certainly connected . . . [but] not perfectly correlated”).

123. See *id.* at 14. If a plan uses the *actual* income of students’ families, it is likely to produce more racial/ethnic diversity—but schools do not presently have access to this information nor would most parents probably want to share this information with their child’s school. Reardon et al., *supra* note 114, at 50, 59. However, if a family is eligible for state-provided social services, the state should have an actual income level for that family, which it could provide to a school district.

124. Reardon et al., *supra* note 114, at 50.

125. *Id.*

poverty within a student's neighborhood, the racial/ethnic characteristics of the neighborhood, the average level of education of adults in the neighborhood, and student achievement levels at a student's neighborhood school.<sup>126</sup>

Multi-factor SES integration faces many challenges, from practical to political to legal. One practical challenge to multi-factor SES integration occurs in districts that reflect especially high levels of residential segregation based on race/ethnicity and/or poverty—demographics characteristic of major urban districts.<sup>127</sup> If the district does not have a substantial number of non-poor students or White students, how can students attend a school integrated along wealth or racial/ethnic lines? Another challenge, this one more political, involves a concern that higher-performing schools will suffer (especially under NCLB) if they admit lower-performing students. Both of these concerns can be addressed to a limited degree by giving receiving schools in the same district and other districts incentives to participate, such as modifying the NCLB annual progress requirements. For example, in 2005, then-Secretary of Education Margaret Spellings introduced a program as part of NCLB in which states could get credit for gains in student learning, even if the students had not yet reached proficiency.<sup>128</sup> If a district is fully engaged in multi-factor SES integration, federal officials could offer the district the opportunity to propose a similar sort of alternative measurement; the same opportunity could be offered to participating schools in neighboring districts. Admittedly, this is not much of a solution for large, high-minority, high-poverty districts, and in fact could create other problems such as students leaving and taking their per capita funding with them, but some inter-district exchange may be better than none.

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126. *Id.* at 52–53 (the La Crosse, Wisconsin program is based on FRL eligibility only). The Wake County, North Carolina program is based on neighborhood characteristics (such as the aggregate neighborhood FRL eligibility) plus schools' test scores; San Francisco, California's program employs a diversity index which operates in a school choice program and affects only oversubscribed schools. *Id.* (“[This] includes information on the following: free and reduced-price lunch eligibility; public housing assistance; low achievement as measured by scoring below the 30th percentile on the Stanford 9; limited or non-English proficient; prior school's California Academic Performance Index; home language if other than English; and residence.”); Cambridge, Massachusetts' program uses—or used, before *Parents Involved* was decided—individual income plus race. *Id.* See also *The New Look*, *supra* note 110; Tess Townsend, *School District's Integration Plan Serves as a Model*, THE DAILY CALIFORNIAN, Feb. 6, 2009, [http://www.dailycal.org/article/104229/school\\_district\\_s\\_integration\\_plan\\_serves\\_as\\_a\\_mod](http://www.dailycal.org/article/104229/school_district_s_integration_plan_serves_as_a_mod).

127. Douglas S. Massey & Nancy A. Denton, *Hypersegregation in U.S. Metropolitan Areas: Black and Hispanic Segregation Along Five Dimensions*, 26 DEMOGRAPHY 373, 378, 382 (1989). In 1980, African-Americans were hyper-segregated in Baltimore, Chicago, Cleveland, Detroit, Gary, Los Angeles, Milwaukee, Newark, Philadelphia, and St. Louis. But “[i]n no metropolitan area [were] Hispanics highly segregated on five or even four dimensions” and in fact “several of the largest Hispanic concentrations in the United States are not highly segregated on *any* dimension at all, including Los Angeles, San Antonio, Miami, and San Diego.” *Id.* at 383.

128. Lynn Olson, *20 States Seek to Join Pilot on NCLB 'Growth Models'*, EDUC. WEEK, March 1, 2006, <http://www.edweek.org/login.html?source=http://www.edweek.org/ew/articles/2006/02/24/25growth.h25.html&destination=http://www.edweek.org/ew/articles/2006/02/24/25growth.h25.html&levelId=2100>; U.S. Department of Education, *Growth Models: Ensuring Grade-Level Proficiency for All Students by 2014*, <http://www.ed.gov/admins/lead/account/growthmodel/proficiency.html> (last visited Apr. 18, 2009).

Finally, if a multi-factor SES integration plan is challenged in court, it is likely to be consistent with the Court's 2007 decision in *PICS* discussed above. Even if a multi-factor SES integration policy was evaluated under strict scrutiny, there appear to be a majority of five justices who would recognize a compelling interest in creating more diverse schools and thus enhancing the educational and democratic opportunities for children in those schools.<sup>129</sup> And, looking at those same four (potentially five) justices, the narrow tailoring requirement probably would be satisfied as long as the plan considered multiple factors and did not classify individual students based on their own race or ethnicity, but instead did something like classify based on the racial/ethnic composition of the neighborhood, if considering race and ethnicity at all.<sup>130</sup>

Creating a true multi-factor SES integration policy is substantially more difficult for districts than using only the most available measure of students' family income: FRL-eligibility. Creating and applying a multi-factor policy would require school districts to expend greater resources at a time when state and local governments do not have them. It is possible, however, that the federal government and private foundations could make grant funding available for this purpose. This is worth considering, because a multi-factor approach is the only satisfactory option if SES-integration plans are going to be likely to address the wealth *and* racial/ethnic isolation that persists within school districts across the country.

#### CONCLUSION

Especially since the Supreme Court announced its decision in *PICS*, civil rights advocates have been trying to take stock of the legal landscape and to establish priorities for the next generation of education-based civil rights advocacy. The goal of this paper is to briefly lay out one approach that may be able to capitalize on likely litigation and policy successes, though both of the approaches identified are uphill roads, to be sure. I certainly do not pretend that in twenty-four pages I have cured these incredibly complex and persistent problems which in many ways are a cancer in our society, nor by addressing these issues do I intend to diminish the efforts of the advocates who have worked tirelessly over the course of decades. Rather, my purpose is to speak straightforwardly about the legal and political constraints in which we operate, and to suggest an approach that will hopefully cause advocates, lawyers, and scholars to think differently about the challenges that lie ahead.

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129. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2792, 2822, 2824 (2007).

130. *Id.* at 2792, 2797; see also *Grutter v. Bollinger*, 539 U.S. 306, 309 (2003).