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Back to the Future with Race

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BACK TO THE FUTURE WITH RACE-BASED MANDATES:
A RESPONSE TO MISSED OPPORTUNITY

Cindy Lavorato† and Frank Spencer††

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This article was written in response to a piece in the William Mitchell Law Review last spring entitled A Missed Opportunity: Minnesota's Failed Experiment with Choice-Based Integration.¹ That article was highly critical of Minnesota's current Desegregation/Integration rule.² Promulgated in 1999, the rule is one of the only, if not the only, state-level education policies providing proactive strategies to address integration both within school districts and across school district boundaries.³ The rule is also unique because participating districts receive substantial funding from the State of Minnesota to fund their

¹ Margaret C. Hobday, Geneva Finn, & Myron Orfield, A Missed Opportunity: Minnesota's Failed Experiment With Choice-Based Integration, 35 WM. MITCHELL L. REV. 936 (2009) [hereinafter Missed Opportunity]. Within the text of this discussion we refer to the article as the “Missed Opportunity article” and to the authors as the “Missed Opportunity authors” for ease of reference.
³ When the rule was promulgated in 1999, only Connecticut and Massachusetts had state level policies in place. See STATE OF MINN. DEP'T OF CHILDREN, FAMILIES, & LEARNING, STATEMENT OF NEED AND REASONABLENESS IN THE MATTER OF THE PROPOSED RULES RELATING TO DESEGREGATION: MINNESOTA RULES CHAPTER 3535 (3535.0100 TO 3535.0180), at 5 n. 3 (Nov. 1998) [hereinafter SONAR]. No other states with similar integration policies were located.
integration efforts.\(^4\)

Most of the criticism in Missed Opportunity is based on the fact that Minnesota's current desegregation policy does not rely on race-based mandates and busing in order to cure the "segregated"\(^5\) conditions that the Missed Opportunity authors assert exist in the metropolitan region. They conclude that the only proper remedy for such "segregation" is busing and racial balancing, both of which are policy approaches that most of the country has largely abandoned, in part, because of their unintended consequences.\(^6\) Notwithstanding those consequences and current case law to the contrary, the Missed Opportunity authors continue to insist that such measures must again be used in this State. And in preparation for the 2010 legislative session, Minnesota legislators apparently relied upon this data as they addressed whether and to what extent changes should be made to this policy.\(^7\)

After reacting to the piece in its pre-publication form,\(^8\) and then reading it after it was published, it became clear that a response was necessary. One of the first concerns prompting a response was the

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\(^4\) See MINN. STAT. § 124D.86 (2009) (showing levels of revenue available to participating districts).

\(^5\) The term "segregated" appears in quotation marks because it is a legal term of art that relates to intentional, discriminatory conduct. See infra Part I.A. However, Missed Opportunity equates racial isolation with intentional conduct, incorrectly referring to both conditions as "segregation." See, e.g., Missed Opportunity, supra note 1, at 940, 948.

\(^6\) Sociological data has clearly demonstrated that race-based mandates, such as busing to achieve racial balance, have led to dramatic instances of white flight. See CHRISTINE H. ROSSELL ET AL., SCHOOL DESEGREGATION IN THE 21ST CENTURY 69–71 (2002) [hereinafter SCHOOL DESEGREGATION]. Missed Opportunity implicitly concedes the point because the authors note that any mandatory measures will have to include metro-wide measures to avoid white flight: "The logic behind metro-wide, mandatory plans is that families cannot easily avoid attending integrated schools by purchasing homes in white-segregated neighborhoods. No matter where families find housing, students will attend integrated schools." Missed Opportunity, supra note 1, at 951.

\(^7\) Professor Lavorato was invited to attend a legislative committee hearing held by the House Education Policy subcommittee on August 13, 2009, to discuss changes to the Integration Revenue statute. A representative from Mr. Orfield's office (the Institute for Race and Poverty) also attended and presented information critical of the current desegregation rule and proposing metropolitan wide changes. At least two other hearings on the issue were conducted by this committee during the fall 2009, at which similar data from the Institute for Race and Poverty was presented. Interview with Sharon Radd, E. Metro Integration Dist. Equity Coordinator (Oct. 5, 2009) (on file with authors).

\(^8\) The Missed Opportunity authors interviewed Professor Lavorato twice as they did background research for their article. Several items attributed either to their conversation with her, or to the work she did, were patently wrong and, at her insistence, were removed.
fact that the article provides a highly selective presentation of Justice Anthony Kennedy's concurring opinion (and the swing vote) in *Parents Involved in Community Schools v. Seattle School District No. 1*, the United States Supreme Court's most recent decision on the use of race-based mandates in student assignments. Thus, Part I in this article discusses the history of desegregation efforts nationally and in Minnesota, the history of desegregation jurisprudence, and culminates in an analysis of *Parents Involved*. That analysis reveals that, contrary to the assertions in *Missed Opportunity*, Minnesota's current policy provides exactly the type of race-conscious remedies supported by Justice Kennedy and a majority of the Supreme Court in *Parents Involved*.

The second concern raised by the article is that it urges a policy direction in Minnesota—forced, metropolitan-wide busing—that is better served by a more nuanced approach. Thus, Part II examines what the authors of *Missed Opportunity* advocate as public policy not only for Minnesota, but also for states across the country. Part I also addresses how mandating racial integration across district lines—which is one of the major suggestions in *Missed Opportunity*—not only has disastrous implications for affected students, but also negatively impacts other compelling educational needs.

The third major reason for writing a responsive piece is that *Missed Opportunity* purports to illustrate the way in which Minnesota's Desegregation/Integration rule has clearly "failed" by pointing to practices in the Apple Valley and Hopkins school districts. However, *Missed Opportunity* relied on outdated, erroneous, and frequently selective data regarding the situations in both school districts. Part III is an effort to give the very dedicated educators and administrators in both of those districts the opportunity to set the record straight about the true nature of their efforts.

A final reason for this responsive piece is that *Missed Opportunity* characterized Minnesota's current desegregation policy as "disastrous," without ever having considered the many ways in which the policy has benefited thousands of Minnesota children and families over the past ten years. To respond to this omission, Part IV includes examples of those success stories that fifteen public policy students at the University of St. Thomas were able to uncover after doing some basic qualitative research. These are stories that the

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11. Those students were: Kristie Anderson, Tracine Asberry-Lindquist, David
authors of Missed Opportunity could have told, but simply did not. If Minnesota policy is to be changed, we sincerely hope that this article will at least provide a more complete review of the record for policymakers and all those interested in providing greater access to equal educational opportunities for all students.

I. MINNESOTA'S DESEGREGATION/INTEGRATION RULE AND THE LIMITS OF RACE-BASED MANDATES

Missed Opportunity makes several assertions about the history and current state of the law in the area of desegregation/integration, and critiques Minnesota's Desegregation/Integration Rule based on those assertions. In particular, the article asserts that mandatory, race-based student assignments are, even now, permissible.1 The article also suggests that the current rule's reliance on voluntary measures to achieve greater interracial contact between students, rather than on mandatory measures to achieve racial balance, was the result of erroneous legal analysis.14

In order to address these assertions, Part I.A begins with a brief description of integration efforts both here in Minnesota and nationally. It concludes with a discussion of how the current rule is intended to work and the underlying rationale for the rule. Part I.B contains an overview of desegregation case law beginning with Brown v. Board of Education5 and concluding with the Court's most recent decision in Parents Involved.16 The review focuses on the fact that for

Werley, Stephanie Graupmann, Ryan O'Hara, Caridad McCrae, Ariel Cohen, Gretchen Godfrey, Randall Hallett, Andrew Hoffman, Brian Kao, Sedric McClure, Nash McMillan, James Nilolai, and Jacob Rudolph. In addition to these fifteen telephone interviews, the authors interviewed a former Minnesota Department of Education (MDE) administrator, two equity coordinators, an assistant superintendent, the chair of the Hopkins Task Force on Boundary Change, former Deputy Commissioner of Education, and former Commissioner of Education, Mr. Robert Wedl. Professor Lavorato also participated in a daylong meeting hosted by West Metro Education Program (WMEP) and attended by equity coordinators from around the state to discuss implementation and policy issues related to the current rule. Informal interviews were conducted with several additional equity coordinators during that meeting. A review of the sources in Missed Opportunity indicates that not one of their sources came from a current interview with any of the numerous parties involved in the development and implementation of the rule. See generally Missed Opportunity, supra note 1.

13. See Missed Opportunity, supra note 1, at 938, 951, 972–73.
14. See, e.g., id., at 959–60.
more than thirty years, the Supreme Court has held that achieving racial balance is not a compelling interest under the Equal Protection Clause, and therefore cannot be used to justify the type of mandatory, race-based student assignments of the kind supported by the Missed Opportunity authors. An analysis of the majority and plurality opinions in the 2007 decision of Parents Involved will reveal that student assignments based on race remain impermissible in all but the most limited circumstances—contrary to the claims in Missed Opportunity. Part I.C ends with an explanation of how Minnesota’s rule is actually consistent with the race-conscious measures encouraged by Justice Kennedy in the Parents Involved decision, contrary to the assertions in Missed Opportunity.

A. The Unintended Consequences of Forced Busing

This country has a long and checkered history regarding efforts to achieve equal educational opportunities for its students of color. Prior to the decision in Brown, seventeen states in the South and the District of Columbia had laws permitting state-mandated segregation.17 Large portions of the North were also segregated, although not pursuant to state mandates.18 This resulted in sub-standard education for millions of African-American students.19 The theoretical assumption underlying Brown was that if schools were forced to desegregate, students of color would be provided the same opportunities to attend good schools as their white peers, which would in turn lead to greater academic success.20 In order to achieve that goal, school districts around the country were ordered to dismantle their dual systems. Some of these efforts included some form of forced busing in order to achieve a degree of racial balance (known as “mandatory plans”).21 Some districts used a combination of techniques including some degree of choice, in conjunction with ceilings on enrollment, in order to ensure the desired racial balance (known as “controlled choice plans”).22 Even when such programs contained

(2007).

18. See id.
20. Id. at 267.
21. SCHOOL DESEGREGATION, supra note 6, at 69.
22. Id.
elements of choice, the desire to achieve a certain degree of racial balance meant that families could be denied the school of their choice if it meant that a particular school would be racially imbalanced.23 Finally, some districts relied on voluntary measures as their approach to integration.24

As long ago as 1975, sociologist James Coleman’s studies revealed that mandatory desegregation plans caused white flight.25 Coleman’s conclusions were “hotly debated” for several years, and many studies were conducted in an effort to respond to those early findings.26 To determine whether a mandatory approach to integration resulted in greater interracial contact between students than would a voluntary approach, sociologists Christine Rossell and David Armor analyzed data commissioned by the U.S. Department of Education to examine the prevalence and characteristics of magnet schools and their impact on desegregation. At the time of their study in 1996, the data they used represented “the largest national sample and most complete data on school desegregation ever assembled” to study the effectiveness of a variety of other desegregation techniques.27 The findings of the authors in analyzing this comprehensive data set revealed the following conclusions:

[D]istricts that have ever had had a mandatory plan exhibit a 33% reduction in White enrollment over the period from 1968 to 1991, at least in comparison to those districts that never had a plan. . . . [H]aving a voluntary-only plan is associated with a mere 2.9% White enrollment decline, and this effect is not statistically significant.28

The authors also stated that “voluntary plans that emphasize both choice and neighborhood schools can produce as much or more interracial exposure than mandatory reassignment plans.”29 More recently, Dr. Rossell summarized the results of the studies that have specifically compared the impact that mandatory versus voluntary

24. SCHOOL DESEGREGATION, supra note 6, at 88.
25. Id. at 93.
26. Id.
27. Rossell & Armor, supra note 23, at 270.
28. Id. at 289.
plans have had on white flight: "[T]n only seven studies . . . have voluntary and mandatory plans been compared specifically. With the exception of only one study, mandatory plans were found to produce more white flight."\(^{30}\)

1. **Developments in the Twin Cities**

The findings cited above regarding the unintended consequences of forced busing policies are disturbingly consistent with the decline in white student enrollment in Minneapolis Public Schools from 1978 to 1997. In 1972, when the Minneapolis School District (MSD) came under court order to desegregate, \(^{31}\) the student of color population was around 15%. \(^{32}\) In 1978, the student of color population was 24.4%. \(^{33}\) By 1984, the student of color population in Minneapolis was 37%; in 1989, it was 50% and by the fall of 1997, the student of color enrollment was 67.86%. \(^{34}\) Most notably, from 1978 to approximately 1997, MSD used racial quotas or "ceilings," among other strategies, to stay in compliance with the then-current desegregation rule (that required racial balance in all Minnesota schools). \(^{35}\) The district also used a controlled choice model in which students could choose from more than eighteen different schools across the district; however, choices were limited when any particular school reached its quota of students of color. \(^{36}\) Although more detailed research would have to be done to determine whether the district's use of racial quotas and controlled choice caused the decline in white student enrollment, it is important to note that the high concentration of students of color in the school district is not at all reflective of the demographics of Minneapolis today. In 2008, the percentage of white students in Minneapolis Public Schools was 30%, \(^{37}\) while the 2006–2008 American Community Survey puts the white population in the city of Minneapolis at 64%. \(^{38}\) A similar pattern of integration efforts and resulting racial

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33. *Id.*
34. *Id.* at 9.
35. *Id.* at 2, 10.
36. *Id.* at 10.
38. See *Metropolitan Council*, *Metro Stats* 10 (Oct. 2009), available at
isolation has emerged in St. Paul Public Schools over the same period of time.9

Minneapolis and St. Paul school districts used racial quotas to achieve racial balance in response to the desegregation policy Minnesota followed from 1978 until 1999.40 But by 1989, the efficacy and practicality of the rule was being called into question for a variety of reasons. First, the rule did not seem to be addressing the changing demographics of the state’s largest urban districts, as they moved steadily towards greater racial isolation in spite of the exacting racial balancing requirements.41 Second, the rule did not address the racial isolation that inner-ring suburban districts had relative to sometimes contiguous “white” districts, nor did it address the changing demographics of districts in other parts of the state.42 Third, the rule’s reliance on race-based measures was of doubtful legality, due to developing case law.43 And finally, the rule did not give the State Board of Education or the Department of Education the authority to address intentional acts of discrimination.44 So, after a very lengthy and involved process,45 an amended rule was promulgated in 1999.46

The current rule is premised on the notion that voluntary measures, designed by local communities to address their unique integra-

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9. In 1969, the student-of-color population in St. Paul Public Schools was 11%; in 1974 it was 14%; in 1979 it was 22%; in 1984 it was 33%; in 1989 it was 42%, and in the 1997-1998 school year it was 60.5%. SONAR, supra note 3, at 9 n.10.

40. See id. at 8-12.

41. See id. The Missed Opportunity authors claim that “[i]n 1992, before the state implemented its current rules, Twin Cities schools appeared to be integrating; a small core of schools in the central cities was segregated, but the inner-ring suburban schools were rapidly integrating.” Missed Opportunity, supra note 1, at 950. Because the authors cite to an unpublished, in-progress manuscript for their conclusion, it was not possible, at the time the article was published, to check their data to see what it was based on. Id. at 949 n.90. Given the statistics referenced above, it is difficult to understand how a claim could be made that “Twin Cities schools appeared to be integrating” or that “a small core of schools in the central cities was segregated.” Indeed, if that were accurate, there would have been little reason to revise the then-current rule.

42. See SONAR, supra note 3, at 79–80.

43. Id. at 13–20.

44. See id. at 31, 32.

45. See id. at 2–4 (documenting the changes to the desegregation rules from 1989 to the authoring of the SONAR in 1998). In fact, the process was so painstaking and took so long that the legislature became quite frustrated with the State Board of Education, ultimately transferring the authority for making the rule change to the Commissioner of Education. See id. at 4.

tion needs, and supported by state funding, is the best way to increase opportunities for students of different races and ethnicities to learn together. It does not rely on any arbitrary determination of when “racial balance” has occurred, in part because that is, at best, an elusive target that changes from year to year. It is also premised on the notion that true integration does not occur simply because children of different colors sit next to each other in a classroom contained within a school building. Instead, the rule recognizes that many of the benefits of integrated learning can happen in after-school activities, in summer activities, through school exchanges, and in a variety of settings where students have frequent, sustained, and meaningful interactions. Thus, the rule does not count how many people have been moved from building to building as a measure of success; rather the point is to increase opportunities for meaningful interaction and to support genuine integration in those interactions.

Both Missed Opportunity and the Legislative Auditor’s Office have been critical of the rule for its failure to “count bodies” in this way. However, seeking greater racial balance in school buildings is

47. The experience of Minneapolis and St. Paul School Districts from 1978 to 1997, even with the use of race-based mandates and ceilings on enrollment, clearly demonstrates the fallacy of using a fixed target for racial balance. See SONAR, supra note 3, at 8–9, 9 n.10.

48. See generally id. at 53–59 (listing variety of ways desegregation may be achieved).

49. These types of meaningful interactions are to be contrasted with those that do not work, such as “brief, superficial programs; programs of information only; and one-shot experiences.” See Eric Anderson & Craig Seath, Stillwater Area Public Schools, Research: What Does the Research Tell Us About Intercultural Student Programming?, http://partners.stillwater.k12.mn.us/Presentations.html (select “Faribault” link) (citing A World of Difference Institute, Anti-Bias Education and Diversity Training, http://www.adl.org/education/edu_awod/ (last visited Apr. 13, 2010)); Fostering Intercultural Harmony in the Schools: Research Findings. Topical Synthesis #7 of School Improvement Research Series, Nw. REGIONAL EDUC. LABORATORY (Nov. 1993), available at http://www.reninc.org/CONTEXTPDFS/94apr110.pdf (internal citations omitted)). The current Minnesota rule protects against these types of ineffectual practices by requiring districts to engage the community through the Community Collaboration Councils, encouraging districts to implement programming that has had demonstrated success in other racially identifiable schools, and outlining long-term planning (including inter- and intra-district enrollment options, staff development, retention of staff with recorded success in teaching protected students, and ongoing culturally-aware programming). See MINN. R. 3535.0160 subpart 3.B (2009).

50. See generally Missed Opportunity, supra note 1.

not the only measure of success for integration programs, and in fact, progressive scholars have criticized "body counting" because it does not address the larger, social problem:

The shortcoming in Brown is that the court proposed an essentially mathematical solution to a sociocultural problem. More specifically, the Supreme Court looked at the sociocultural reality of African-American students—that they were consigned to substandard, ill-equipped schools—and proposed that by physically manipulating the students' school placement the problems of inequality would be addressed.\footnote{52. Tate et al., supra note 19, at 255, 259 (Brown v. Bd. of Educ., 347 U.S. 483 (1954)).}

Gloria Ladson-Billings, who has researched these issues extensively,\footnote{53. At the time these remarks were made, Gloria Ladson-Billings was a Professor at the University of Wisconsin-Madison, and Senior Fellow in Urban Education at the Institute for School Reform at Brown University. Her areas of specialization included successful teaching of African-American children and critical race theory. See Gloria Ladson-Billings, Landing on the Wrong Note: The Price We Paid for Brown, 33 Educ. Researcher 3, 13 (2004).} expressed a similar view in a 2004 lecture she made reflecting on the Brown decision:

[In Brown,] the remedy offered relief in the form of balancing racial numbers with no regard to educational quality. Had the Supreme Court's remedy focused on the quality of education students received, White working class and poor students could have been folded into the decision in a way that might benefit them rather than underscore the adversarial relationship between Blacks and Whites. Instead, the focus on school desegregation obscured the more pressing need for quality education. Actually, the focus on school desegregation obscured the need for school integration and the myriad ways that local K-12 school would thwart the full inclusion of Black children into the school community.\footnote{54. Id. at 8.}

In other words, desegregation is not the same as integration, nor is it synonymous with or even causally connected to a quality, integrated education.\footnote{55. See Eboni S. Nelson, Examining the Costs of Diversity, 63 U. Miami L. Rev. 577 (2009) (reviewing the fallacy of equating racial balance with equal educational opportunity).} To focus on the question of "how many bodies have been moved," rather than on the underlying need for access to a quality education in a welcoming environment, is shortsighted at best. Instead, the policy focus and measure of success should be whether students in racially imbalanced schools have authentic access to high-

\footnote{52. Tate et al., supra note 19, at 255, 259 (Brown v. Bd. of Educ., 347 U.S. 483 (1954)).}

\footnote{53. At the time these remarks were made, Gloria Ladson-Billings was a Professor at the University of Wisconsin-Madison, and Senior Fellow in Urban Education at the Institute for School Reform at Brown University. Her areas of specialization included successful teaching of African-American children and critical race theory. See Gloria Ladson-Billings, Landing on the Wrong Note: The Price We Paid for Brown, 33 Educ. Researcher 3, 13 (2004).}

\footnote{54. Id. at 8.}

\footnote{55. See Eboni S. Nelson, Examining the Costs of Diversity, 63 U. Miami L. Rev. 577 (2009) (reviewing the fallacy of equating racial balance with equal educational opportunity).}
quality schools, and whether they are welcomed and supported if they make the choice to attend such schools. As Part IV will demonstrate, the current rule accomplishes both of these important objectives. Mere body counting of the type advocated for by Missed Opportunity does not begin to address these more compelling social justice goals.

2. Minnesota’s New Desegregation/Integration Rule

So, how did the Desegregation/Integration rule, first promulgated in 1999, address the objective of ensuring access to quality education for Minnesota students?56 First, the rule provided mechanisms to make certain that school districts did not engage in legally actionable segregation. Thus, the rule provided that any member of the public could make a complaint to the Minnesota Department of Education (MDE), which would then be empowered to conduct a full-scale investigation. As part of its investigatory process, the Commissioner was given sweeping power to collect as much information as necessary to make a judgment about whether the activity being complained of was in fact intentional, discriminatory conduct.57

The MDE was also charged with annually investigating schools that had become “racially identifiable”58 during the previous year. If a previously integrated school became racially identifiable, the rule required that MDE obtain information focusing specifically on the history of the acts that led to the racial composition of the school and whether those acts would indicate an intent to discriminate. The information that MDE was required to analyze was quite comprehensive. For instance, “for schools which have been newly added or renovated or if attendance zones have changed” the MDE was required to gather a description of what the attendance zones were and what

56. See 24 Minn. Reg. 7779 (July 6, 1999) (codified as amended at MINN. R. 3535.0100-.0170 (announcing the adoption of the Desegregation/Integration rule).

57. See MINN. R. 3535.0130 (2009). The Missed Opportunity authors claim that “[the rules] do not give the Department any power to prevent decisions that effectively increase racial segregation in its schools” and that “[t]hey also do not explicitly prohibit districts from making decisions about school attendance boundaries or school closings that, in effect, create racially isolated schools.” Missed Opportunity, supra note 1, at 964. This is simply wrong. If a school district is contemplating an action that appears to have a discriminatory intent, any member of the public can make a complaint to the Commissioner, who is then empowered to begin an investigation.

the racial composition of each zone was at the time the school was planned and added or renovated; a description of the assignment and transfer options at each of the schools serving the grade levels in question, and the outreach efforts that were made to ensure parents received information about and were able to understand the availability of those options. . . .

The MDE was also required to make a “comparison of the racial composition of the attendance area of the school in question as it relates to the composition of the district as a whole.”

Additional information that was required for collection and analysis included

B. a list of curricular offerings;
C. a list of the extracurricular options available at each of the schools serving the grade levels in question;
D. a list that breaks down, by race and school, the teachers assigned to all of the schools serving the grade levels in question and, considering the average percentage of teachers of color in the district, an explanation of any concentration of teachers of color assigned at a school at issue;
E. a list that shows how the qualifications and experience of the teachers at the racially identifiable school compares to teachers at the sites which are not racially identifiable;
F. evidence that the racially identifiable school has been provided financial resources on an equitable basis with other schools which are not racially identifiable;
G. a comparison of the facilities, materials, and equipment at the racially identifiable school with schools that are not racially identifiable;
H. information that would allow the Commissioner to determine whether the extent of busing is disproportionate between white students and protected students.

Finally, the rule directed the Commissioner to determine whether there were nondiscriminatory reasons for the concentration of

59. MINN. R. 3535.0130, subpart 2 (2009). These factors were based on the analysis in Green v. New Kent County School Board, 391 U.S. 430, 435 (1968) and Booker v. Special School District No. 1, 351 F. Supp. 799, 808 (D. Minn. 1972). In Green, the U.S. Supreme Court articulated six factors courts should analyze to determine whether schools are racially identifiable as a result of intentional discrimination. Green, 391 U.S. at 435; see also Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1975).

60. MINN. R. 3535.0130, subpart 2 (2009).

61. Id.
students of color at a particular school.\textsuperscript{62}

This data was then to be examined to determine whether racial composition of the school in question was the result of intentional, discriminatory conduct. The Commissioner had only to find the existence of one of the following conditions to conclude that the school was in fact intentionally segregated: (1) whether "the historical background of the acts which led to the racial composition of the school," reveals "a series of official actions taken for discriminatory purposes;" (2) "whether the specific sequence of events resulting in the school's racial composition reveals a discriminatory purpose;" or (3) whether "departures from the normal substantive or procedural sequence of decision making . . . demonstrate a discriminatory purpose."\textsuperscript{63} Both of the following factors could also indicate a discriminatory purpose: "whether the racial composition of the school was the result of acts which disadvantage one race more than another, as evidenced, for example, when protected students are bused further or more frequently than white students" and "whether the racially identifiable composition of the school was predictable given the policies or practices of the district."\textsuperscript{64} Although neither of these factors alone would justify a finding,\textsuperscript{65} they could be used in combination with any of the preceding factors to come to a finding of discriminatory conduct.\textsuperscript{66} If the MDE found a condition of

\begin{itemize}
\item \textbf{62.} Id.
\item \textbf{63.} MINN. R. 3535.0130, subpart 1 (2009).
\item \textbf{64.} Id.
\item \textbf{65.} Id.
\item \textbf{66.} The Missed Opportunity authors are critical of the standard used for making a determination of legal segregation. First, they argue that the factors to be used in making a finding of intentional, discriminatory conduct are "too high." Instead of using the factors articulated above, each of which came directly from Supreme Court precedent regarding the standard necessary for finding discriminatory intent, the authors would instead have relied on \textit{United States v. School District of Omaha}, 5231 F.2d 530, 535 (8th Cir. 1975). See Missed Opportunity, supra note 1, at 962. However, that 1975 decision pre-dated the Supreme Court's decision in \textit{Arlington Heights v. Metropolitan Housing Development Corp.}, 429 U.S. 252 (1977), in which the Supreme Court held that demonstrating a disparate racial impact was not sufficient to support a finding of intentional discrimination. Although the Missed Opportunity authors rely on the fact that the Eighth Circuit reconsidered and affirmed its Omaha decision after Arlington Heights, this does not mean that the Eighth Circuit was presuming to override the standard set by the Supreme Court; rather, it means that, having re-examined the evidence in light of that new standard, a finding of segregation could still be made. Other experts recognize that there is a higher legal standard for finding discriminatory conduct when based solely on disparate impact:
\item Relevant case law suggests that under the Equal Protection Clause, an unjustifiable disparate impact is clearly insufficient to establish racial discrimination. If a discriminatory zoning decision, for example, is made at a
\end{itemize}
segregation, then the agency was given the power to require the offending district to develop a plan to eliminate the segregation. If the Commissioner did not believe that the plan would eliminate the segregated condition, the Commissioner was empowered to develop a plan, which the district was required to implement. 67

Under the rule as it was adopted, if a district failed to comply with any part of this process—whether it was failure to submit data required by the Commissioner, failure to provide or implement a plan to remedy the segregation, or failure to implement a plan developed by the Commissioner—the Commissioner was required to notify the district that its state financial aid would be reduced. The Commissioner was also required to refer the finding of segregation to the Department of Human Rights for investigation and enforcement, and to report the district’s actions to the education committees of the legislature by March 15th of the next legislative session with recommendations for financial or other appropriate sanctions. 68 The Missed Opportunity authors characterize this process as one in which the Department is “a perfunctory bureaucracy, dutifully collecting data and noting whether schools and districts are racially isolated”; 69 however, the type of broad investigatory and enforcement authority granted to the department when the rule was adopted is hardly “perfunctory.”

3. Addressing Racially Identifiable Schools Under the Rule

If, ultimately, the Commissioner determined that a school had become racially identifiable for reasons other than discriminatory conduct, the rule provided incentives, rather than race-based mandates, to address that condition. Districts wishing to receive the substantial per-pupil funding available for integration planning and implementation at the racially identifiable school were required to convene a “multi-district collaboration council” (MDCC) to identify integration issues and develop plans to address those issues. 70 Those

69. Missed Opportunity, supra note 1, at 965.
70. MINN. R. 3535.0170 (2009).
plans could include consideration of a variety of race-conscious (but not race-based) strategies aimed at the creation of opportunities for white students and students of color to engage in meaningful and sustained integrated learning activities. These could range from after-school enhancements to the creation of new magnet schools. After adoption by a school district, plans were then to be provided to the Commissioner of Education, who had the authority to approve the budget for those programs.

Accountability was built into the rule through periodic MDE evaluations and legislative reports. At the end of each academic year after an intra-district plan was implemented, districts were to be required to evaluate those plans to determine whether their integration goals were being met. The Commissioner was also required to evaluate the results and report them to the legislature. Districts meeting their goals were to be rewarded; those that did not were subject to withholding or other monetary adjustments by the legislature.

A second important aspect of the rule was that it also provided a mechanism for racially isolated districts to work with neighboring non-isolated districts. Specifically, in cases where any one district’s student-of-color enrollment was more than twenty percent above its adjacent neighbor, both districts were eligible to receive per-pupil

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71. Id. The SONAR provided the rationale for reports to the legislature: This section of the rule . . . provides for reports to the appropriate legislative committees with recommendations for rewards, in the event of successful compliance, or for corrective action, if such action is needed. This too is reasonable given the limited authority of the Commissioner. The Commissioner does not have the ‘power of the purse.’ Only the legislature can provide financial incentives for districts doing a good job addressing racial imbalance within their boundaries. Further, if a district is doing a poor job at integrating its schools, there may be a variety of reasons, including lack of money. Only the legislature can correct this situation. . . . [I]f a district simply refuses to act to implement a voluntary program, the authority of the Commissioner is limited. Only the legislature can take action to ‘reconstitute’ a school or district; similarly, only the legislature can determine to redistribute education funding to reward or sanction a district. Thus, it is reasonable to keep the legislature informed about what is happening, both positively and negatively, as the ultimate means of enforcing voluntary integration efforts. This rule provides an informed and timely way of accomplishing that goal. SONAR, supra note 3, at 87.

72. At a committee hearing on the Integration Revenue statute on August 13, 2009, Professor Lavorato asked committee members whether the MDE had ever made the required reports. Committee members were not able to recall that any such reports had been made, as required by the rule, even one time during the ten years the rule has been in effect.
funding enhancement if they formed an MDCC to identify integration issues, and develop joint plans for cross-district integration efforts. 73 Again these plans were to be evaluated biennially by the Commissioner, who was then to report the outcomes to the legislature. Once again, the Commissioner was required to make recommendations for further funding or for financial consequences. 74 Beginning in 1997 and thereafter, significant amounts of funds have been provided to school districts statewide specifically to promote their integration efforts through MDCCs. 75

B. The History of Desegregation / Integration Law and the Elusive Quest for Racial Balance

All of the changes discussed above and established in the rule as promulgated in 1999 were necessitated by the disastrous, unintended consequences of forced busing resulting from the previous rule. However, the unfortunate consequences of the previous rule were not the only reason why Minnesota turned to voluntary, choice-based measures when deciding how to amend the 1978 desegregation rule. In addition to sociological evidence regarding white flight, developments in desegregation jurisprudence also demonstrated a need to seek another method for addressing racial isolation. What follows is a review of the development of this case law prior and subsequent to the adoption of Minnesota's current rule.

1. 1954–Early 1970s

Any history of desegregation/integration jurisprudence in the United States must begin with Brown v. Board of Education. 76 In that unanimous decision, the United States Supreme Court held that the government could not intentionally maintain segregated school systems for white and black children. The case marked a critical turning point in the nation's history, because the Court finally

73. MINN. R. 3535.0170 (2009).
74. MINN. R. 3535.0180 (2009). And once again, it appears that the Minnesota Department of Education has consistently failed to make the required reports to the Legislature. See supra note 72.
75. For example, in 2007, the program provided about $85 million to eighty school districts statewide. MYRON ORFIELD ET AL., INSTITUTE ON RACE & POVERTY, A COMPREHENSIVE STRATEGY TO INTEGRATE TWIN CITIES SCHOOLS AND NEIGHBORHOODS 23 (draft Oct. 2009) [hereinafter COMPREHENSIVE STRATEGY], http://www.irpumn.org/uls/resources/projects/3_RegionalIntegration__SchoolsandHousing.pdf.
reversed *Plessy v. Ferguson*, which for more than fifty years had permitted state-sanctioned segregation.

*Brown* is sometimes cited for the proposition that separate can never be equal, no matter whether the separation is a result of state-ordered segregation (de jure segregation) or the result of factors other than state action (de facto segregation). In this vein, some argue that because racially identifiable schools are in effect the same as "segregated" schools, states and school districts must ensure that there is an appropriate "racial balance" of students of color and white students in all public schools so that students of color will receive an equal educational opportunity. This seems to be an underlying assumption of *Missed Opportunity*. With regard to the legal analysis that formed the basis of the current desegregation rule, the *Missed Opportunity* authors state that

> [t]he state's legal analysis rejected the . . . invocation of *Brown* and its legacy as an underlying rationale for the new rules . . . . *Brown*’s holding was then limited to its facts: the state only has an affirmative duty to correct 'government-imposed, intentional segregation of students based on their race,' not racial imbalance.

However, what the *Missed Opportunity* authors fail to mention is that the state's legal analysis limiting *Brown* to its facts was not simply conjured up; it was based on nearly thirty years of United States Supreme Court precedent. Beginning in the 1973 decision *Keyes v. School District No. 1*, the Supreme Court clearly articulated the distinction between "intentional segregation," which *Brown* prohibited, and "racial imbalance," which was never at issue in *Brown*. In *Keyes*, the Court upheld the district court's decision that to show unconstitutional segregation, plaintiffs had to prove "a current condition of segregation resulting from intentional state action directed specifically to the [allegedly segregated] state schools." The Court found that the "differentiating factor between de jure segregation and so-called de facto segregation . . . is purpose

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77. 163 U.S. 537 (1896).
78. For example, the *Missed Opportunity* article cites approval language from a previous draft of the desegregation/integration rule as follows: "In February 1994, the Roundtable Discussion Group submitted a final report to the State Board, which proposed new desegregation rules that reaffirmed Brown’s holding that 'racially segregated schools are inherently unequal.'" *Missed Opportunity*, supra note 1, at 959.
79. *Id.* at 959.
81. *Id.* at 205–06.
or intent to segregate."

Three years later, in *Milliken v. Bradley (Milliken II)*, the Supreme Court, citing an earlier opinion, stated, "[T]he Court has consistently held that the Constitution is not violated by racial imbalance in the schools, without more." School desegregation cases from 1976 to 1978 repeatedly emphasized that the mere presence of predominantly white or predominantly black schools did not offend the Constitution. Professor John A. Powell, founder of the Institute on Race and Poverty and Mr. Orfield's predecessor at the Institute, has recently underscored the significance of the Court's distinction between de jure and de facto segregation and the impact that distinction has on the use of race-based measures:

The import of the de jure/de facto distinction set out in *Keyes* was demonstrated... when the Supreme Court, in a five-to-four decision in *Milliken v. Bradley*... struck down the district court's order requiring interdistrict desegregation of Detroit and fifty-three surrounding suburbs. The Court ruled that cross-district desegregation measures could not be ordered unless it was shown that intentionally racially discriminatory acts of either the state or local officials were a substantial cause of the interdistrict segregation. While this decision...

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82. *Id.* at 208.
84. *See*, e.g., Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 434–35 (1976) (concluding that the school district exceeded its authority by readjusting attendance zones using race criteria); Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 417 (1977) (concluding that a system-wide remedy to rid a school district of all vestiges of school segregation went beyond the scope of the Court of Appeals). It must be noted that our argument here is not that predominantly white or African-American schools are inherently good, or that we fail to recognize the issues associated with schools with a high concentration of poverty. One researcher has noted that "children in racially isolated, high-poverty urban schools face myriad challenges that middle-class suburban children do not face, including substandard or deteriorating facilities, larger demands made on fewer resources which forces the cutting of so-called non-basic opportunities, racial isolation, concentration of poverty, and fewer familial resources." Emera A. Crosby, *Urban Schools: Forced to Fail*, PHI DELTA KAPPAN (Dec. 1999), available at http://www.pdktionl.org/kappan/kcro9912.htm. Moreover, we recognize that there are tremendous benefits to truly integrated environments for students of color and white students. *See* discussion *infra* Part IV (discussing many of the benefits of an integrated school environment). In sum, we do not cite to the Supreme Court as an example of good policy, but rather, *as an intellectually honest presentation of precedent that we are bound to follow*.
86. This is a reference to *Milliken v. Bradley (Milliken I)*, 418 U.S. 717 (1974).
did not completely rule out metropolitan-area-wide desegregation efforts, it set a standard of proof that has since been met only twice, both times in metropolitan areas with only a few suburban school districts.

2. 1978–1995

Despite the developing requirement that a finding of segregation be made before using race-based measures, some schools and universities continued to use race-based admissions decisions, arguing that the desire for a diverse student body should also be recognized as a compelling state interest. In the 1978 case of Regents of University of California v. Bakke, the Court considered the legality of a set-aside of sixteen spaces (out of 100) for members of minority groups or disadvantaged students at the University of California Medical School at Davis.88 The Court's decision was not a majority decision.89 Justice Powell, the swing vote, wrote for the plurality that diversity may be a compelling interest in higher education admissions, even without a finding of prior de jure discrimination; however, he also held that race may only be used as one factor among others.90 Additionally, Justice Powell wrote that the desire to achieve a certain racial balance was not a compelling interest that would justify the use of race-based measures: "If [a school's] purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected . . . as facially invalid."91

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89. Six separate opinions were filed. Justice Powell wrote for the plurality. Id. at 269. Justice Brennan, Justice White, Justice Marshall, and Justice Blackmun concurred in part and dissented in part. Id. at 324. Justice White filed separately. Id. at 380. Justice Marshall filed separately. Id. at 387. Justice Blackmun filed separately. Id. at 402. Justice Stevens concurred in part and dissented in part, joined by Chief Justice Burger, Justice Stewart, and Justice Rehnquist. Id. at 408.
90. Id. at 311-12, 317-18.
91. Id. at 307. Another difficulty with the decision was that its precedential value was in question. In Grutter v. Bollinger, 539 U.S. 306 (2003), Justice O'Connor described the difficulty this way:
   The decision produced six separate opinions, none of which commanded a majority. Four Justices would have upheld the program against all attack on the ground that the government can use race to 'remedy disadvantages cast on minorities by past racial prejudice.' Four other Justices avoided the constitutional question altogether and struck down the program on statuto-
From the *Bakke* decision in 1978 until *Grutter v. Bollinger* and *Gratz v. Bollinger* in 2003, the Supreme Court consistently held that neither racial balance nor diversity constituted a compelling state interest in any educational context, and struck down the use of race-based measures designed to achieve diversity. Moving beyond student quotas, the Court even extended its analysis to employment related decisions. In the 1986 case of *Wygant v. Jackson Board of Education*, the Court held that layoff provisions in a collective bargaining agreement giving preference to teachers based on their race was not permissible. The Court reasoned that having role models for students of color (which is related to the concept of diversity) was not a compelling state interest. The layoff policy was struck down.

Two cases in 1989 and 1995 turned the tide even further away from the permissibility of race-based measures in any government action—including the K-12 arena. In *City of Richmond v. J.A. Croson Co.*, a majority invalidated a city ordinance setting aside thirty percent of its contracting work for minority-owned businesses. The Court found that remedying the distant past effects of general societal

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93. 539 U.S. 244 (2003).
94. The one exception was *Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990). The Court held that racial set-asides for certain minority broadcasters could be sustained in the interest of promoting diversity in broadcasting. *Metro Broad.* 497 U.S. at 600–01. However, a portion of *Metro* was overturned a few years later in *Adarand Constructors Inc. v. Pena*, 515 U.S. 200, 227 (1995).
96. *Id.* at 275–76.
97. *Id.* at 284.
discrimination was insufficient to support a preferential contracting program. The Court also established that “strict scrutiny” would be used to judge the constitutionality of set-aside programs that were race-based, even if the programs were established for a benign purpose. Six years later in Adarand Constructors, Inc. v. Pena the Supreme Court held that any federal race-based classification, even those to bestow a protection or benefit, would be considered inherently suspect and must withstand an exacting analysis in order to be upheld. To pass constitutional scrutiny, all racial classifications, whether municipal, state or federal, were required to (1) satisfy a “compelling governmental interest,” and (2) “be narrowly tailored to meet that interest.


At the same time that these precedents were being established at the United States Supreme Court, the Minnesota State Board of Education began working to revise its desegregation rules. Four years later, the Minnesota Legislature required the board to convene a “Desegregation Roundtable” to develop specific changes to the desegregation rule. The Roundtable worked on a proposal until February 1994, at which point its recommendations were presented as a set of “draft rules” to the State Board of Education. The State Board then sent those “draft rules” to the legislature and asked for authority to promulgate them.

In spite of the developments occurring at the United States Supreme Court and circuit courts regarding desegregation jurisprudence, at no point from 1989 to 1994 did the State Board of Education seek legal advice regarding the policies being recommended. So, when he assumed the position of Deputy Commissioner of Education in early 1994, Robert Wedl determined that it would be prudent to seek legal counsel before proceeding further with the rule. He therefore asked the Minnesota Attorney General’s Office for its guidance regarding the

99. Id. at 499.
100. Id. at 495.
102. Id. at 235.
103. The State Board of Education began working to revise the desegregation rule in 1989. SONAR, supra note 3, at 2.
104. Id. at 3.
105. Id.
106. Id.
"draft rules." 107

The Roundtable draft that was sent to the legislature included many good proposals, most of which were incorporated into the rules that were finally adopted. 108 However, two provisions—the use of race-based mandates to compel racial balance and a requirement that school districts engage in busing across district boundaries—were omitted for legal reasons after review by counsel at the Attorney General’s Office. The omission of those two provisions forms the basis for most of the legal critiques in Missed Opportunity. 109

Specifically, Missed Opportunity suggests that the decision to eliminate mandatory integration measures using race-based assignments was based on faulty legal reasoning, because the state could not predict whether race would be a compelling state interest. 110 However, as the discussion below concerning the development of case law from 1995 to the 2007 decision of Parents Involved indicates, the state’s approach was well-taken. Had race-based measures been used, the rule would now be unconstitutional. 111

Administrative law concerns also required that the Roundtable draft be revised because the legislature did not grant the State Board of

108. See SONAR, supra note 3, at App. B (outlining language that was not adopted by the legislature).
110. Id. at 939. Missed Opportunity is quite critical of the fact that when passed in 1999, the rule made a distinction between de jure and de facto segregation. The article is also critical of the efforts to “predict” whether racial balance would be considered a compelling state interest. The article states: Attempting to predict changes to the Supreme Court’s Fourteenth Amendment jurisprudence, Minnesota thought the Court would not find racially integrated schools to be a compelling governmental interest and that the state could not, therefore, mandate race-based integration. . . . The rules do not require districts to avoid racial isolation proactively or to remedy racial imbalance unless it is proven to be caused by intentional discrimination. The rules instead rely on the voluntary efforts of districts, schools, and parents for racial integration of public schools. This is their fatal flaw.
Id. (citation omitted).
111. In fact, the Seattle school district used a race-based measure that was far less draconian than the one proposed by the Roundtable, and that measure was declared unconstitutional. See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007). As a result, Seattle had to develop new policies in the wake of the Supreme Court case, with all the attendant difficulties that result when education policy is overturned. See Jessica Banchard & Christine Frey, District Vows to Seek Out Diversity Answers Supreme Court Rejects Use of Race as Tiebreaker, SEATTLE POST-INTELLIGENCER, June 29, 2007, at A1. The Louisville district faced a similar dilemma after the decision in Parents Involved. See Nelson, supra note 55, at 578.
Education all of the authority necessary to adopt the recommendations made by the Roundtable. As students of administrative law know, in order for a rule to become promulgated in Minnesota, several exacting procedures must be followed, and the proposed rule must also meet several substantive legal standards. A rule will not be approved by the reviewing Chief Administrative Law Judge if, among other factors, the rule exceeds the discretion given to the agency by its enabling legislation or violates other applicable law.

Missed Opportunity critiques the rule ultimately adopted because while “[t]he rules acknowledge that many factors impact the ability of school districts to provide racially balanced schools, such as housing, jobs, and transportation,” the rules did not “mandate the state do anything to address these other factors.” However, administrative agencies, such as the State Board of Education, cannot order the “state,” i.e., the legislature, to do anything; indeed, the reverse is true. Any authority that an agency has is dependent on a delegation of power from the legislature.

In its grant of authority back to the State Board of Education in May 1994, the legislature did not give the board the authority to address housing, jobs, or transportation. The enabling legislation stated only that “[t]he state board may make rules relating to desegregation/integration.... In adopting a rule related to school desegregation/integration, the state board shall address the need for equal educational opportunities for all students and racial balance as defined by the state board.” This grant of authority thus limited the Board’s rulemaking to education-related policies. Because the legislature had not granted the State Board of Education the authority to address housing, jobs, or transportation, no provisions were included in the rule.

113. Id.
115. A basic rule of administrative law is that administrative agencies have only such authority as is granted to them by statute or is necessarily implied from the express grant of authority. See In re De Laria Transp., Inc., 427 N.W.2d 745 (Minn. Ct. App. 1988).
116. MINN. STAT. § 121.11, subdiv. 7d (1994) (repealed 1998) (current version at MINN. STAT. § 124D.896 (2009)).
117. See, e.g., SONAR, supra note 3, at 3. Even the Roundtable Draft recognized that housing, jobs, and transportation were beyond the authority of the State Board of Education. The Roundtable suggested that SBE “seek ways to collaborate with other governmental authorities” but did not suggest that SBE had the authority to regulate...
The Missed Opportunity authors also argue that the rule was ineffective because it did not require districts to engage in busing across district boundaries. However, the authors again overlook a very important and obvious legal concern: only the legislature, not a state agency, can direct school districts to traverse their boundaries in providing transportation.\textsuperscript{118} And, once again, as the language quoted above indicates, the enabling legislation granted to the State Board did not include the power to order cross-district busing.\textsuperscript{119}

In short, the rules as redrafted addressed both intentional segregation and racial isolation to the maximum extent permitted by constitutional and administrative law at the time. As the subsequent discussion indicates, the decision to eliminate mandatory busing using racial quotas did adequately predict Supreme Court precedent in this area, and, in fact, saved the state policy from being declared unconstitutional.

4. 1999–2003

From 1999, when the rule was passed, to the 2003 decisions in Gratz v. Bollinger\textsuperscript{120} and Grutter v. Bollinger\textsuperscript{121}, the majority of circuit courts considering whether diversity could be a compelling interest either decided the issue on other grounds or continued to hold that diversity could not be considered a compelling interest at the K–12 level or in any other arena, and would not allow the use of race-based measures.

Courts in the third, fourth, fifth and seventh circuits severely limited the use of race-based measures in several different contexts. For
example, in *Hopwood v. Texas*,\(^\text{122}\) decided in the wake of *Adarand*, the Fifth Circuit Court of Appeals held that any racial preferences in admissions policies at a state-operated law school could not be sustained based on the argument that diversity is a compelling state interest.\(^\text{123}\) The *Hopwood* case was not alone in its position on race-based affirmative action. In *Podberesky v. Kirwan*,\(^\text{124}\) the Fourth Circuit declared unconstitutional a merit scholarship program solely for African-American students at the University of Maryland. The concern in *Podberesky*, (which was adopted by the Fifth Circuit in *Hopwood*) was that racial classifications should be avoided because of their innate characteristics: "[o]f all the criteria by which men and woman can be judged, the most pernicious is that of race."\(^\text{125}\) In *People Who Care v. Rockford Board of Education*,\(^\text{126}\) the court struck down racial quotas in student assignments to certain programs and in disciplinary proceedings. With regard to the racial quotas for student discipline (which required that the district not refer a higher percentage of minority than white students for discipline without meeting certain criteria) the court stated: "[r]acial ... quotas violate equity in its root sense.... They place race at war with justice. They teach school-children an unedifying lesson of racial entitlements."\(^\text{127}\)

Several other courts expressed extreme doubt about the viability of diversity as a compelling state interest that would justify the use of race-based mandates. For example, in *Lutheran Church-Missouri Synod v. FCC*, the D.C. Circuit Court considered the constitutionality of an FCC regulation that required licensees to make additional efforts to recruit minorities.\(^\text{128}\) In holding that the regulations were unconstitutional, the court noted that "[w]e do not think diversity can be elevated to the 'compelling' level, particularly when the Court has

\(^\text{122}\) 78 F.3d 932 (5th Cir. 1996).
\(^\text{123}\) Three reasons were given for this holding. Writing for the majority, Judge Smith found that Justice Powell's opinion in *Bakke* never presented the view of a majority of the Court. *Id.* at 944. Second, the court argued that Justice Powell's opinion was not binding, since "[n]o case since *Bakke* has accepted diversity as a compelling state interest under a strict scrutiny analysis." *Id.* After examining subsequent Supreme Court opinions, the Court said that there is "only one compelling state interest to justify racial classifications: remedying past wrongs." *Id.*
\(^\text{124}\) 38 F.3d 147 (4th Cir. 1994).
\(^\text{125}\) *Id.* at 152. (quoting Maryland Troopers Ass'n v. Evans, 993 F.2d 1072, 1076 (4th Cir. 1993)).
\(^\text{126}\) 111 F.3d 528 (7th Cir. 1997).
\(^\text{127}\) *Id.* at 538.
\(^\text{128}\) 141 F.3d 344, 346 (D.C. Cir. 1998).
given every indication of wanting to cut back Metro Broadcasting.”  

In *Wessman v. Gittens*, the First Circuit considered the constitutionality of Boston Latin School’s admissions process, which allocated half of its seats on the basis of “flexible racial/ethnic” guidelines. Although it refused to find that the diversity rationale in *Bakke* had been overruled, the court made a clear distinction between “diversity” and “racial balancing.” Finding that the policy in question was in fact “racial balancing,” the court expressed “considerable skepticism” about whether there may be circumstances “under which a form of racial balancing could be justified.” The court assumed without deciding that diversity may be a compelling interest, but determined that the policy was an unconstitutional means of attempting to achieve that diversity.

In *Taxman v. Board of Education*, the First Circuit Court of Appeals found that a school district’s affirmative action policy of preferring minority teachers over equally-qualified white teachers in layoff decisions was prohibited by Title VII. The court noted that the policy had been adopted to promote racial diversity, not as a remedy for past discrimination. In *Equal Open Enrollment Ass’n v. Board of Education*, a federal district court in the Sixth Circuit considered Akron School Board’s open enrollment policy that prohibited white students from leaving the district because of a concern that white flight under the plan would lead to racial isolation. The question before the court was whether the “prevention of imminent racial segregation [was] a compelling state interest.” The court noted that “absent a finding of past discrimination, no race-based regulation

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129. *Id.* at 354.
130. 160 F.3d 790, 791–93 (1st Cir. 1998).
131. *Id.* at 798–99.
132. *Id.* at 799.
133. *Id.* at 796.
134. 91 F.3d 1547, 1549–50 (3d Cir. 1996).
135. *Id.* at 1563–64. The Fourth Circuit decided a similar question at the K–12 level in *Tuttle v. Arlington Sch. Bd.*, 195 F.3d 698 (4th Cir. 1999). In that case, the court considered whether an oversubscribed school could use a weighted lottery system in the admissions process to promote racial, socioeconomic, and ethnic diversity. *Id.* at 700. The court noted that the Supreme Court had not yet decided whether diversity could be a compelling interest, and therefore decided the case on the grounds that the policy was not narrowly tailored. *Tuttle*, 195 F.3d at 704–05. “Since we conclude below that the Policy was not narrowly tailored, we leave the question of whether diversity is a compelling interest unanswered.” *Id.* at 705.
137. *Id.* at 705.
has been upheld.\textsuperscript{138} The Tenth and Eleventh circuits also expressed extreme reservations about whether the Supreme Court would find diversity to be a compelling state interest.\textsuperscript{139}

A very small minority of circuit courts went in a different direction and found diversity or some related interest to be compelling. For example, in \textit{Brewer v. West Irondequiot Central School District}, the Second Circuit considered a voluntary inter-district transfer program that allowed only minority students to transfer out to suburban schools, and non-minority students to transfer into the city schools.\textsuperscript{140} The court reversed the district court's holding that diversity could not be a compelling interest.\textsuperscript{141} In doing so, the court noted that it was bound by earlier precedent from the Second Circuit which held that reducing de facto segregation serves a compelling interest.\textsuperscript{142} Second, it found that the Supreme Court had not issued a decision dealing with permissible race-based justifications in the educational context, or for race-based classifications generally.\textsuperscript{143} The court therefore vacated the injunction issued by the lower court against the policy, and the case was sent back for trial.\textsuperscript{144}

The Ninth Circuit, out of which one of the two companion cases in \textit{Parents Involved} originated,\textsuperscript{145} vacillated on governmental use of race-based measures. In \textit{Coalition for Economic Equity v. Wilson}, the court considered whether California's newly enacted "Proposition

\textsuperscript{138} \textit{Id.} at 706.

\textsuperscript{139} \textit{See} \textit{Johnson v. Bd. of Regents}, 263 F.3d 1234 (11th Cir. 2001); \textit{Adarand Constructors, Inc. v. Slater}, 228 F.3d 1147 (10th Cir. 2000). In \textit{Johnson v. Bd. of Regents}, the court considered the university's policy of giving preferential treatment to non-white and male applicants in order to achieve greater diversity in student enrollment:

\begin{quote}
We think it clear that the status of student body diversity as a compelling interest justifying a racial preference in university admissions is an open question in the Supreme Court and in our Court... It is possible that the important purpose of public education and the expansive freedoms of speech and thought associated with university environment—recognized in other decisions by the Court—may on a powerful record justify treating student body diversity as a compelling interest. The weight of recent precedent is undeniably to the contrary, however.
\end{quote}

\textit{Johnson}, 263 F.3d. at 1250–51.

\textsuperscript{140} 212 F.3d 738, 741 (2d Cir. 2000).

\textsuperscript{141} \textit{Id.} at 755.

\textsuperscript{142} \textit{Id.} at 749 (citing Parent Ass’n of Andrew Jackson High Sch. v. Ambach, 598 F.2d 705 (2d Cir. 1979); Parent Ass’n of Andrew Jackson High Sch. v. Ambach, 738 F.2d 574 (2d Cir. 1984)).

\textsuperscript{143} \textit{Id.} at 752.

\textsuperscript{144} \textit{Id.} at 758.

denied minorities and women equal protections because of its ban on the use of preferential treatment based on race and sex, among other categories. The court found that "[i]mpediments to preferential treatment do not deny equal protection." In *Hunter v. Regents of the University of California*, the Ninth Circuit found that California had a sufficiently compelling state interest in operating an elementary school as a research laboratory dedicated to improving the quality of education in urban public schools, and concluded that the school's consideration of race and ethnicity in its admission process was narrowly tailored to further that interest. In *Ho v. San Francisco Unified School District*, the court considered continued implementation of a consent decree that required racial balancing at various schools within the district. The court engaged in a lengthy analysis regarding why governmental use of race is generally bad policy and remanded the case for trial with the following caveats:

[T]he Supreme Court has not banished race altogether from our governmental systems. The concept, so long the instrument of governmental evil, so fraudulently promoted by pseudo-science, so corrosive of the rights of persons, may still be employed if its use is found to be necessary as the way of repairing injuries inflicted on persons because of race.

5. 2003: Diversity Again Considered in Higher Education Cases

In the companion cases *Gratz v. Bollinger* and *Grutter v. Bollinger*, a majority of the Supreme Court finally found that diversity could constitute a compelling interest in the context of university admissions.

*Gratz v. Bollinger* concerned the admissions policy used by the University of Michigan to evaluate undergraduate applicants. The University used a 150-point scale to rank applicants, with 100 points

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146. Coal. for Econ. Equity v. Wilson, 122 F.3d 692, 696–97 (9th Cir. 1997).
147. *Id.* at 696.
148. *Hunter v. Regents of the Univ. of Cal.*, 190 F.3d 1061, 1067 (9th Cir. 1999).
150. *Id.* at 864.
151. 539 U.S. 244 (2003).
needed to guarantee admission.\textsuperscript{154} The policy assigned underrepresented ethnic groups—including African Americans, Hispanics, and Native Americans—an automatic twenty-point bonus on this scale, while a perfect SAT score was worth twelve points.\textsuperscript{155} Citing the companion case of \textit{Grutter v. Bollinger}, the Court rejected the argument that diversity could not be a compelling state interest in university admissions.\textsuperscript{156}

Nevertheless the Court found that the policy was unconstitutional, because the policy guaranteed an assignment of twenty points (one-fifth of the points needed to guarantee admission) to students solely because of their race.\textsuperscript{157} Citing \textit{Bakke}, the Court found that the policy was not narrowly tailored because the university did not individually consider each applicant's contribution to diversity.\textsuperscript{158}

In the companion case of \textit{Grutter v. Bollinger}, the Court considered the admissions policy of the University of Michigan Law School.\textsuperscript{159} That policy was designed to attain the educational benefits of having a diverse student body by enrolling a “critical mass” of students who were members of underrepresented minority groups such as African Americans, Hispanics, and Native Americans.\textsuperscript{160} Unlike the policy in \textit{Gratz}, the law school policy required that each applicant be individually considered on the basis of his or her personal statement, letters of recommendation, an essay describing how the applicant would contribute to law-school life and diversity, the applicant's undergraduate grade-point average, and the applicant’s Law School Admissions Test.\textsuperscript{161} The policy also required that the university consider “soft variables” such as recommenders' enthusiasm, the quality of the applicant's undergraduate institution, the applicant's essay, and the areas and difficulty of the applicant's undergraduate course selection.\textsuperscript{162} Finally, the policy did not define diversity solely in terms of racial and ethnic status, or restrict the types of diversity contributions eligible for “substantial weight.”\textsuperscript{163} The Court found that the policy was constitutional because it was narrowly

\textsuperscript{154} Id. at 255.
\textsuperscript{156} \textit{Gratz}, 539 U.S. at 257 (citing \textit{Grutter}, 539 U.S. at 323–25).
\textsuperscript{157} Id. at 270–76.
\textsuperscript{158} Id.
\textsuperscript{159} \textit{Grutter}, 539 U.S. at 311.
\textsuperscript{160} Id. at 312–16.
\textsuperscript{161} Id.
\textsuperscript{162} Id.
\textsuperscript{163} Id.
tailored to serve the law school’s compelling interest in enrolling a critical mass of underrepresented students to achieve greater diversity.\textsuperscript{164}

In holding that diversity would be considered a compelling state interest, the Court went to some lengths to limit its finding to particular uniqueness afforded institutions of higher education and, more particularly, law schools.\textsuperscript{165} Thus, its application to public elementary and high schools would not be resolved for another four years.

6. 2007: Chief Justice Roberts’s Opinion in Parents Involved

In 2007, the Supreme Court finally took up the question of whether using race-based measures in student assignments at the K–12 level, in order to achieve diversity, would be constitutional. The two cases the Court considered were \textit{Parents Involved in Community Schools v. Seattle School District No. 1}\textsuperscript{166} and \textit{McFarland v. Jefferson County Public Schools}.\textsuperscript{167} \textit{Parents Involved} concerned Seattle’s “open choice” program that enabled students to rank order their choice of schools.\textsuperscript{168} The program used a series of tie-breaking factors if schools were over-subscribed.\textsuperscript{169} Although the first tie breaker was not race-based (sibling preference), the second tiebreaker, used at “racially out of balance” schools, was whether the student’s attendance at the school would help mitigate the imbalance of the racial makeup.\textsuperscript{170}

\textit{McFarland} involved a race-based assignment plan implemented by Jefferson County Public Schools in 2001 to ensure racial balance in its non-magnet elementary schools.\textsuperscript{171} The plan required all non-magnet schools to maintain a minimum black enrollment of 15%, and a maximum black enrollment of 50%.\textsuperscript{172} A student would be denied admission to a school if assigning the student to the school would lead to its racial imbalance.\textsuperscript{173} The Jefferson County school district had been subject to a desegregation decree from 1975 until 2000, when a

\begin{thebibliography}{99}
\bibitem{164} Id. at 343.
\bibitem{165} See id. at 328–33.
\bibitem{168} \textit{Parents Involved}, 137 F. Supp. 2d at 1226.
\bibitem{170} \textit{Id}.
\bibitem{171} \textit{McFarland}, 330 F. Supp. 2d at 836.
\bibitem{172} \textit{Parents Involved}, 551 U.S. at 716.
\bibitem{173} \textit{Id}.
\end{thebibliography}
federal court dissolved the decree after finding the district in unitary status. 174

The issues considered by the Supreme Court, reviewing the two cases concurrently, were whether a race-based assignment plan could be used in a public school that had never run legally segregated schools (Seattle School District No. 1), or one that had been found to be unitary (Jefferson County Public Schools). 175 The majority of the Court, including Justice Kennedy as the swing vote, found that both of the plans violated the Equal Protection Clause. 176

Writing for a plurality of the Court, Chief Justice Roberts found only one compelling interest for using race-based assignments in the K–12 arena: remedying the effects of past intentional discrimination. 177 Thus, because the Seattle school district had never operated segregated schools nor been subject to court-ordered desegregation, it could not show a compelling interest for its student assignment plan. 178 As to Jefferson County Public Schools, Chief Justice Roberts found that the school district could not continue to assert a compelling interest in remedying the effects of past intentional discrimination because a federal district court had earlier found that the district had eliminated vestiges of its past intentional discrimination. 179 In his opinion, Justice Roberts stated that "[t]he principle that racial balancing is not permitted is one of substance, not semantics. Racial balancing is not transformed from patently unconstitutional to a compelling state interest simply by relabeling it racial diversity." 180

In his opinion, Justice Roberts used several different tests to determine whether the school district student assignment plans before the Court were narrowly tailored. 181 For example, the Court applied

174. Id. at 715–16.
175. See id. at 710.
176. See id. at 709–11; id. at 782 (Kennedy, J. concurring).
177. The Supreme Court has found two compelling interests that justify using race-based classifications: to remedy "the effects of past discrimination" (id. at 720 (majority opinion) (quoting Freeman v. Pitts, 503 U.S. 467, 494 (1992))), and "diversity in higher education" (Grutter v. Bollinger, 539 U.S. 306, 328 (2003)). Because Grutter only applies to higher education, it does not govern Parents Involved. Parents Involved, 551 U.S. at 725.
178. See Parents Involved, 551 U.S. at 720 (majority opinion) (noting that "remedying the effects of past intentional discrimination" is a compelling state interest and noting "the Seattle public schools have not shown that they were ever segregated by law, and were not subject to court-ordered desegregation decrees").
179. Id.
180. Id. at 732 (plurality opinion).
181. Id. at 782. These tests were discussed and applied in Part III-C of Justice Roberts’s opinion. Because Justice Kennedy joined in that part of the opinion, it can
the "minimal effect and minimal impact test"; under this test, if a race-based plan only has a minimal impact on racial balance, it is not narrowly tailored.\textsuperscript{182} Also, the Court applied the "race-neutral alternatives test;" under this test, the Court considers whether districts using race-based measures have engaged in "serious, good faith consideration of workable race-neutral alternatives."\textsuperscript{183} And although "[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative,"\textsuperscript{184} the Court found that the Seattle school district and the Jefferson County Public Schools gave "little or no consideration" to race-neutral alternatives.\textsuperscript{185} Finally, the Court also found that the plans under consideration were not narrowly tailored because they had no logical stopping points.\textsuperscript{186}

7. Justice Kennedy's Opinion

Justice Kennedy was the swing vote in \textit{Parents Involved}. Because \textit{Missed Opportunity} places so much emphasis on Justice Kennedy's concurring opinion,\textsuperscript{187} it is useful to look carefully at what Justice Kennedy did and did not find.

Justice Kennedy again reaffirmed the distinction between segregation and racial imbalance: for constitutional purposes, the two concepts are not the same and should not be conflated, as the authors so often do in \textit{Missed Opportunity}. Justice Kennedy wrote forcefully that in order to address racial imbalance, "when de facto discrimination is at issue our tradition has been that the remedial rules are different. The State must seek alternatives to the classification and differential treatment of individuals by race, at least absent some extraordinary showing not present here."\textsuperscript{188}

The \textit{Missed Opportunity} authors are correct in pointing out that, unlike the plurality opinion, Justice Kennedy did find that avoiding racial isolation and diversity may be compelling interests.\textsuperscript{189} However,
Justice Kennedy makes a clear distinction between using race-based measures to address this interest, and using race-conscious measures; race-conscious measures are subject to much less exacting scrutiny and may even avoid the imposition of strict scrutiny. Justice Kennedy held that "[i]n the administration of public schools by the state and local authorities it is permissible to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body, one aspect of which is its racial composition." Nevertheless, as Justice Kennedy found, it is an entirely different matter when race-based measures are used, even if there is a compelling interest in avoiding racial isolation. Justice Kennedy stated that "[a]ssigning to each student a personal designation according to a crude system of individual racial classifications is quite a different matter; and the legal analysis changes accordingly."

If school authorities choose to use race-based measures to achieve diversity, those measures will be subject to an arduous "narrow tailoring" analysis that seems to go beyond even that described in the plurality opinion.

If race-based measures are to be used, in addition to the requirements articulated in Justice Roberts's opinion, Justice Kennedy would also require that the government "establish, in detail, how decisions based on an individual student's race are made in a challenged governmental program." This would include an explanation of (1) who makes the decisions, (2) what oversight is employed, (3) the precise circumstances in which race will determine an assignment, and (4) "how it is determined which of two similarly situated children will be subjected to a given race-based decision." The plan must also demonstrate how the racial classifications used are "narrowly tailored" to meet the goal of diversity. Finally, Justice Kennedy explicitly stated that race-based measures should be used after all other measures have been exhausted: "[I]ndividual racial

... A compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue. Likewise, a district may consider it a compelling interest to achieve a diverse student population.

Id. at 787–88, 797–98.
190. Id. at 788 (citations omitted).
191. Id. at 789.
192. See, e.g., id. at 784–87.
193. Id. at 784.
194. Id. at 785.
195. Id. at 786.
classifications employed in this manner may be considered legitimate only if they are a last resort to achieve a compelling interest.” These important findings—which were never discussed in *Missed Opportunity*—have important implications for the race-based measures the *Missed Opportunity* authors are advocating.

C. *Minnesota’s Desegregation/Integration Rule Versus Mandatory, Race-Based Measures after Parents Involved*

After more than fifty years of litigation around this issue, what do we know about using race-based measures and the Equal Protection Clause? And how does that knowledge square with the mandatory, race-based measures being touted in *Missed Opportunity* as “clearly constitutional” versus Minnesota’s current desegregation policy? We respectfully submit that to the extent that the *Missed Opportunity* authors are suggesting that *Parents Involved* now enables Minnesota schools to easily use mandatory, race-based measures to avoid racial isolation, they are simply wrong.

To begin with, let us consider what the authors of *Missed Opportunity* assert regarding the “majority view” in *Parents Involved* and their critique of the current rule: “[T]he majority of the Supreme Court still endorses mandatory, proactive strategies to prevent resegregation.” Attempting to predict changes to the Supreme Court’s Fourteenth Amendment jurisprudence, Minnesota thought the Court would not find racially integrated schools to be a compelling governmental interest and that the state could not, therefore, mandate race-based integration.” And later on the authors claim: “[A] majority of the current Court still permits states to mandate change in the face of racial isolation in their schools.”

Whatever the four dissenting justices may have held, the Roberts plurality opinion clearly does not come to such a conclusion; in fact, quite the contrary. In his concurring opinion, Justice Kennedy, while more sympathetic to the need for this country to address racial isolation in its schools, *did not endorse* “mandates to prevent resegrega-

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196. *Id.* at 790.
198. *Id.* at 939.
199. *Id.* at 940.
200. See, for example, Justice Roberts’s response to the dissent in *Parents Involved*: “We have many times over reaffirmed that [r]acial balance is not to be achieved for its own sake.” *Parents Involved*, 551 U.S. at 729 (citations omitted).
tion” as the Missed Opportunity authors argue. In fact, Justice Kennedy never uses the term “mandatory” in his opinion. Moreover, as the discussion above indicates, Justice Kennedy would severely restrict the use of overtly race-based measures unless they are a last resort.

But there is an even more concerning problem with the position asserted by the authors. The Missed Opportunity authors seem to be arguing that race-conscious measures—which Justice Kennedy did endorse—can be used to achieve their goal of mandatory integration (a system in which districts are punished if they do not achieve a certain level of racial balance). But here is the rub: there is almost no way for a district to achieve the authors’ notion of racial balance—which they narrowly define as “one with a black enrollment between 7% and 35%”—absent the use of race-based measures and mandates.

A closer examination of their proposal reveals the problem. First, as they note, a substantial number of students across the metropolitan area would have to be bused in order to reach the “racial balance” targets they advocate: “If integrating all schools was achieved simply by having students of appropriate races in the appropriate schools

201. See Missed Opportunity, supra note 1, at 937 (“But the majority of the Supreme Court still endorses mandatory, proactive strategies to prevent resegregation.”)
202. See id. at 784–87 (Kennedy, J. concurring).
203. The article makes numerous references to the need for mandatory measures: “[S]tates must mandate, rather than just encourage, integration.” Missed Opportunity, supra note 1, at 940. “Until 1995, it appeared that Minnesota would continue its commitment to mandatory desegregation and adopt rules that would both mandate metro-wide desegregation and penalize noncompliant districts.” Id. at 951. The authors criticized Deputy Commissioner Robert Wedl because he supported an incentives-based approach to desegregation policy rather than mandates: “The rules, while certainly permitting districts to make pro-integrative decisions, do not mandate or even affirmatively support such decision-making.” Id. at 964.
204. A few months after Missed Opportunity appeared in the William Mitchell Law Review, two of the authors—Myron Orfield and Geneva Finn—co-authored a report in which they detail their strategy for integration the Twin Cities. The definition of racial balance comes from that article. See COMPREHENSIVE STRATEGY, supra note 75, at 38.
205. The only viable, mandatory alternative to achieving greater racial integration in schools and classrooms that does not involve the use of race-based measures is that of socioeconomic integration. See RICHARD KAHLENBERG, THE CENTURY FOUNDATION, ISSUE BRIEF, A NEW WAY ON SCHOOL INTEGRATION (2007), available at http://www.tcf.org/publications/education/schoolintegration.pdf (arguing that “socioeconomic integration provides a more powerful way of promoting academic achievement than racial integration”). Notwithstanding the apparent success of some of these programs, the Missed Opportunity authors do not advocate for their use in either of the two articles examined here.
trade places, then roughly 9,900 black students in schools above the 35% ceiling would have to trade places with 9,900 white students in schools below the seven percent floor. In other words, almost 20,000 students would have to be moved under the plan being proposed by the Missed Opportunity authors. More importantly, however, districts would not be able to rely on choice to achieve this vast movement of students: “A choice program would be unlikely to result in one-for-one trades across schools.” If choice is not the method used to make student assignments, it seems very likely that race-based measures would have to be employed to force this level of movement. And if race-based measures are to be used, then all of the aspects of narrow tailoring required in Justice Roberts’s opinion and in Justice Kennedy’s opinion will have to be satisfied before any district plan will pass strict scrutiny. At this point, no such K–12 plan—or even a plan at the undergraduate level—has ever passed the application of a strict scrutiny standard.

D. Minnesota’s Current Rule Meets Justice Kennedy’s Notion of a Race-Conscious Remedy

So, what would meet Justice Kennedy’s notion of a “race-conscious” policy? Minnesota’s current Desegregation/Integration rule comes to mind. A few comparisons between Justice Kennedy’s opinion and the rule illustrate the point. Justice Kennedy offers the following examples of the types of race-conscious plans that districts might use to achieve greater diversity:

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

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207. Id. (emphasis added).
208. Other factors, such as wealth or geography, could be used without triggering a strict scrutiny analysis. See Richard Kahlenberg, Class Based Affirmative Action, 84 Cal. L. Rev. 1037, 1037–38 (1996). However, such an overly broad approach would mean some white students would still be moving to a predominantly white school; the same would be true of African-American students. Thus, even more than 20,000 students would have to be transported in order to reach the authors’ desired level of “racial balance.”
scious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible.\(^{209}\)

Similarly, Minnesota’s Desegregation/Integration rule requires districts to annually track enrollments by race in order to monitor changing trends.\(^{210}\) The rule also suggests several approaches, similar to those described by Justice Kennedy, as districts develop plans to address changing demographics within their schools. Those approaches may include one or more of the following examples:

1. duplicating programs that have demonstrated success in improving student learning at schools that are racially identifiable;

2. providing incentives to help balance racially identifiable schools, for example, providing:
   a. incentives to low-income students to transfer to schools that are not racially identifiable;
   b. transportation; and
   c. inter-district opportunities and collaborative efforts with other districts;

3. providing incentives to teachers to improve the distribution of teachers of all races at schools across the district, including:
   a. staff development opportunities;
   b. strategies for attracting and retaining staff who serve as role models; and
   c. strategies for attracting and retaining staff who have a record of success in teaching protected students, low-income students, or both;

4. greater promotion of programs provided at racially identifiable schools designed to attract a wide range of students;

5. providing smaller class sizes, greater counseling and support services, and more extracurricular opportunities and other resources at racially identifiable schools as compared to schools that are not racially identifiable or at schools with a higher concentration of low-income students.


\(^{210}\) MINN. R. 3535.0120, subpart 1.
The rule goes even beyond intra-district planning, by providing substantial funding to help districts develop collaborative programming across district lines. Again, using race conscious, rather than race-based measures, the rule suggests:

1. providing cooperative transportation that helps balance racially isolated districts;
2. providing incentives for low-income students to transfer to districts that are not racially isolated;
3. developing cooperative magnet programs or schools designed to increase racial balance in the affected districts;
4. designing cooperative programs to enhance the experience of students of all races and from all backgrounds and origins;
5. providing cooperative efforts to recruit teachers of color, and encouraging teacher exchanges, parent exchanges, and cooperative staff development programs;
6. encouraging shared extracurricular opportunities, including, for example, community education programs that promote understanding, respect, and interaction among diverse community populations.

All of these state-funded policy opportunities exist for the express purpose of helping districts proactively address racial isolation within their boundaries and across boundary lines—using the very types of race-conscious measures that Justice Kennedy advocates in *Parents Involved*. These policies—particularly the multi-district collaboratives—are far beyond most state- or district-initiated policies anywhere in the country. And yet, the *Missed Opportunity* authors are critical of these measures because they are not mandated and will not "prevent..."
racial imbalance" in Minnesota's schools and districts. But as the following section shows, the race-based measures the Missed Opportunity authors are promoting will result in significant financial costs and in the loss of many of Minnesota's premier educational initiatives.

II. **MISSED OPPORTUNITY** ARTICLE: POLICY PROPOSALS AND CONSEQUENCES

Because most of Missed Opportunity is spent critiquing the desegregation/integration rule passed in 1999, it is easy to lose sight of the other significant aspect of the article—which we could refer to as the "policy fix." Clearly the authors do not like the current policy; but what, then, is the alternative they propose?

In the article written for the William Mitchell Law Review, the Missed Opportunity authors do not propose a viable alternative to the state's current desegregation/integration policy. Rather, throughout the article they make only passing, undefined references to the need for mandatory integration policies. Several months after the article was written, two of the authors—Myron Orfield and Geneva Finn—signed on to a report issued by the Institute for Race and Poverty (IRP), which gives a few additional details about the nature of the plan they would now propose. That report calls for a region-wide approach to integration, in which the entire seven-county metropolitan area is divided into five "integration districts." All school districts within the seven-county metropolitan area would be required to be a member of one of the jumbo integration districts. These jumbo integration districts would apparently be responsible for assuring that the all of the schools within their regions are "integrated." As the report itself admits, "even with a region-wide district divided into five administrative zones, the distances over which students would have to travel to fully integrate the system are daunting." Indeed, the distances range from central Minneapolis to Hastings and from central St. Paul to Forest Lake.

How, then, are these jumbo districts to ensure that their schools

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214. Missed Opportunity, supra note 1, at 972–73.
215. See, e.g., Missed Opportunity, supra note 1, at 941, 951.
216. See generally COMPREHENSIVE STRATEGY, supra note 75.
217. Id. at 4–5.
218. Id. at 22–24.
219. Id.
220. Id. at 23.
221. See id. at 22.
are integrated? The IRP report suggests that districts would be “incented” to integrate by “rewarding districts on a per student basis for documented pro-integrative student movements and for the number of students attending integrated schools.” Other suggestions include expanding the use of magnet schools throughout each region and “targeted open enrollment programs within individual school districts and between two or more school districts.” Another assumption seems to be that existing attendance boundaries could be re-drawn to achieve integration.

The actual numbers of students who would have to be moved, however, belie the implication that changes can be made using incentives only. At the low end of their estimates, around 12,500 students would have to be bused; at the other end of the continuum, almost 20,000 students would have to be bused.

A. Cost as a Policy Implication

What does that proposal mean in terms of cost? Ten years ago, when the current rules were being adopted, the cost of providing transportation across district lines to an adjacent district added between $387 to $916 per student for each student transported. Today, given the rise in transportation expenses, the cost would double to an estimated $800 to $2000 per student—if not more. Also the costs estimated ten years ago were based on busing students to an adjacent district. If it were necessary to transport students to non-adjacent districts in such distant locations as Forest Lake or Hastings in order to achieve the “integration” Missed Opportunity envisions, the costs could be multiplied several times over. Ultimately, districts would be spending a sizeable portion of per-pupil funding they receive from the state simply to transport their students.

Thus, a crucial question to be weighed in evaluating the policy proposal by the Missed Opportunity authors is this: given the current financial crisis school districts are facing—with budget cuts of millions of dollars every year, with fewer and fewer teachers and with

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222. Id. at 3.
223. Id. at 4.
224. See id.
225. Id. at 38–39.
226. SONAR, supra note 3, at A25.
class sizes rising to as many as forty students in a class—is it worth adding thousands of dollars per pupil to a district’s budget in order to achieve some arbitrary notion of racial balance?  

Another critical factor to consider in judging the true cost of the policy proposed in Missed Opportunity is the non-tangible cost of transporting young children across such distances. Even a sympathetic Supreme Court in Swann v. Charlotte Mecklenberg noted that “[i]t hardly needs stating that the limits on time of travel will vary with many factors, but probably with none more than the age of the students.” Additionally, if students are bused long distances, parents have far less opportunity to participate in their children’s school life. Finally, if mandatory metropolitan wide busing were imposed, and affluent parents were faced with the choice of putting their young children on a bus trip from Minneapolis to Hastings, or putting them in private school, it would not be hard to predict which choice they would make. And as the following discussion demonstrates, choice—whether it is the choice to go to a different district, a different school within the district, or a charter school—would be yet another casualty of the policy the Missed Opportunity authors advocate.

B. Choice: An [Un?]intended Casualty

Moving to a mandatory, metropolitan approach to integration, in which race is the most important determinant in educational policy decisions, has profound implications for parental choice. If all educational decisions regarding student assignments must be made “so as to maximize racial balance,” as Missed Opportunity demands, then choices made by districts or parents that run counter to that
policy goal would have to be severely curtailed, if not eliminated. And choice is an option that most educators, even those working with equity issues, would agree should be made available to parents.\footnote{Equity coordinators interviewed for this article repeatedly emphasized the importance of choice. “We think all families should have choice, because it engages them in their students’ education.” Interview with Scott Thomas, Integration and Educ. Equity Coordinator, ISD #196 (Nov. 18, 2009) (on file with authors) [hereinafter Interview with Scott Thomas]. Tyrize Cox, Integration Equity Coordinator at Robbinsdale Schools, responded to a question about mandatory busing in this way: “I have a problem with that. For one, I believe in school choice...” Telephone Interview with Tyrize Cox, Integration Equity Coordinator, Robbinsdale Area Sch. (Nov. 5, 2009) (on file with authors).}

If choice is no longer part of the educational landscape in Minnesota, many important educational options long offered to Minnesota families would fall by the wayside. First, open enrollment\footnote{Open enrollment is a school choice option available pursuant to Minnesota Statutes section 124D.05. Under that program, all students have the opportunity to apply to attend public schools outside the school district in which they reside, tuition-free. According to the Minnesota Department of Education, “[m]ore than 30,000 Minnesota students participated in open enrollment last year.” Minn. Dep’t of Educ., Open Enrollment, http://education.state.mn.us/MDE/Academic_Excellence/School_Choice/Public_School_Choice/OpenEnrollment/index.html (last visited Mar. 18, 2010).} would need to be eliminated in favor of metro-wide busing and redrawing school attendance boundaries to the extent that choices made by students would otherwise upset the sought-after “racial balance.”\footnote{Tyrize Cox, the Integration Coordinator for Robbinsdale Schools, noted that if the state were to mandate integration via busing, that “busing would end open enrollment as we know it” and that open enrollment “has been incredibly beneficial for many students.” Telephone Interview with Tyrize Cox, Integration Coordinator, Robbinsdale Area Sch. (Nov. 5, 2009) (on file with authors).} The Post Secondary Enrollment Options Program\footnote{The Minnesota State Colleges and Universities website describes this program: The Post-Secondary Enrollment Options program, also known as PSEO, was created in 1985 as a means to ‘promote rigorous educational pursuits and provide a wider variety of options for students.’ Through PSEO, high school students receive both high school and college/university credit for college or university courses that are completed. The program is available to students throughout the state. See Minn. State Colls. & Univs., Post-Secondary Enrollment Options, What Is the PSEO Program?, http://www.mnscu.edu/students/specialprograms/pseo.html (last visited Mar. 20, 2010). “In 2004, 17,812 students took college-level courses through the PSEO programs offered by the Minnesota State Colleges and Universities.” Id. This figure does not include the number of students participating at Minnesota’s private colleges or at the University of Minnesota. Id.} might also be on the chopping block if, for example, too many students of one race elected to attend college courses instead of high school courses, thus
adversely affecting the "racial balance" of their particular school or district.

Charter schools too, would need to be regulated in order to be certain that they met whatever definition of racial balance the authors are advocating. Currently there are more than 150 charter schools in the State of Minnesota. Many of them are based on themes that naturally draw students of a certain racial or ethnic heritage. Presumably these schools would have to change their themes in order to achieve "better" racial balance for incoming students. As for current students, they would likely have to be reassigned to comply with racial balance mandates. This "back to the future" consequence resembles the situation Duluth public schools faced twenty years ago under Minnesota's previous desegregation rule, when an American Indian magnet had to turn away American-Indian students because admitting them would have resulted in non-compliance with the desegregation rule.

In fact, the entire "choice movement," which actually had its origins in the State of Minnesota, would have to be revamped or even scrapped, because giving parents a choice often means that racial balance is disrupted or even thwarted. Is this a policy outcome we, in this state, agree with? Will this actually help the underserved

238. The Duluth School District established a Language Magnet School, which offered Spanish and Ojibwe language and culture programs to help balance its Caucasian and American Indian student enrollments. The magnet was very popular with American Indian students; so popular in fact, that for at least two years the district told some American Indian students that they could not attend the school because the racial balance requirements of the rule had been exceeded. Therefore, a portion of the very population for which this magnet was intended to benefit was being turned away, while white students were being admitted into the program.

SONAR, supra note 3, at 9. This is not an uncommon feature of racial quotas. One author studying the use of quotas in Chicago public schools found that frequently quotas actually limit the opportunities of students of color. See Michael Heise, An Empirical and Constitutional Analysis of Racial Ceilings and Public Schools, 24 SETON HALL L. REV. 921 (1993).
239. See Minn. Ass’n of Charter Schs., supra note 235.
students who are being bused? These are matters on which reasonable people can surely differ.

For example, in 2007, Duane Reed, then president of the Minnesota chapter of the NAACP, was asked to respond to the Supreme Court's ruling in *Parents Involved.* The newspaper article indicated that Mr. Reed's view was that "today the fight is for quality education versus integration for its own sake." Mr. Reed was then quoted as saying: "We're more interested in equity in education, rather than in integration as a tool . . . . The primary thing is that people have access to the same educational resources and the same educational opportunities." Similarly, during the development of the current rule, many in the American-Indian community expressed a strong desire to be exempt from the requirement to engage in integrative activities. They asserted that American-Indian students "do far better academically if they are allowed to attend school together as a 'cohesive group.'" Tom Peacock, then a member of the State Board of Education, stated, "My goal, quite frankly, was to not even have Indians in the rule . . . . People in Indian country would tell me, 'You've got to keep us out of this thing.'" Thus, concentrations of American Indian students at public schools were excluded from the provisions on the rule that would require such schools to engage in integration planning.

But even if we could all agree that the importance of integration takes precedence over the importance of other policy issues, such as parental choice, or the right of students to attend school together in "cohesive groups," racial balance will still elude us. Missed Opportunity mistakenly asserts that we must move to metropolitan-wide busing because "families cannot easily avoid attending integrated schools by

240. Jean Hopfensperger, *Minnesota Ahead of Curve on Integration,* STAR TRIB. (Minneapolis), July 9, 2007, at 1B.
241. Id.
242. Id.
244. Wayne Washington, *Defining Diversity: Indians Balancing at ‘Minority’ Label,* STAR TRIB. (Minneapolis), May 30, 1996, at 3B. See also Nelson, supra note 55 (making the argument that seeking diversity in student enrollment undermines efforts to achieve equal educational opportunity). Professor Nelson cites several articles by Derek Bell who has a similar view on this subject. See id. at 583 n.32. "For at least four reasons, the concept of diversity . . . is a serious distraction in the ongoing efforts to achieve racial justice." Derrick Bell, *Examining “Diversity” in Education: Diversity’s Distractions,* 103 COLUM. L. REV. 1622, 1622 (2003).
purchasing homes in white-segregated neighborhoods. No matter where families find housing, students will attend integrated schools. However, the “solution” is not at all as straightforward as the authors seem to suggest. What they fail to take into account is that families with resources will always have choices, because they can attend private schools. In fact, sociological evidence shows that metropolitan-wide busing plans do not prevent white flight to private schools and are not as effective as citywide voluntary plans:

On the one hand, metropolitan plans eliminate some (but not all) of the suburbs that whites can flee to. But since half of white flight is to suburbs . . . the rest being to private schools—this advantage is not quite as overpowering as it seems. On the other hand, metropolitan plans will have longer busing distances than non-metropolitan plans, all other things being equal, and this is the single greatest predictor of white flight . . . . These crosscutting factors may explain Rossell’s . . . findings that metropolitan mandatory reassignment plans had white flight from desegregation that was only somewhat less than non-metropolitan mandatory reassignment plans. Moreover, the metropolitan mandatory reassignments plans did not achieve as much interracial exposure as a citywide voluntary plan.

Unless and until private schools are outlawed—a policy option that does not seem very likely—some families with money will continue to make choices that will not result in an integrated setting, even with mandatory metropolitan-wide busing. In fact, if history is any indicator, the Missed Opportunity policy will lead some families with resources to do just that.

C. Busing Alone Will Not Achieve the Real Policy Objectives

A final issue raised by mandatory, race-based student assignments is a simple one: without institutional change, busing will not achieve the basic objectives of integration.

Much has been written about the existence of racist structures that prevent students of color from experiencing success—even in “integrated” environments. For example, simply because students of color are placed in “integrated” schools, there is no guarantee that programming will be fair. The Kirwan Institute for the Study of Race and Ethnicity recently featured an article illustrating the problem:

246. Missed Opportunity, supra note 1, at 951.
247. SCHOOL DESEGREGATION, supra note 6, at 70.
Duke University researchers found that even in integrated schools, black students are placed in classes with the least experienced teachers. And UNC sociologist Roslyn Mickelson found that academically qualified black students are not steered into the accelerated classes. "Many African-American parents are aware of in-school segregation, and that's why they no longer support making a car ride an hour across town to a high-achieving school with white kids and their kid ends up sitting in the basement."

Similarly, unless there are appropriate support programs in place to make certain that students of color are welcomed when they arrive in new, more "balanced" schools, they might be trading one set of problems for another. As one scholar noted,

[There is a] need to ensure that black students who decide to participate in the transfer aspect of [a] ... plan are provided with the necessary resources to enable them to adjust academically, psychologically, socially and culturally to predominantly white school environments. Transferring into a racially and culturally different school creates problems for African-American students from the city because many of them are not welcomed.

The Missed Opportunity authors assert that mandatory measures resulting in "racial balance" will cure the ills of racial isolation. This is a dangerous oversimplification of a complex problem. The last sentence of the article is illustrative: "At a minimum, students need to sit next to students from other racial backgrounds in the classroom in order to understand each other—a necessary step in building a fair and equitable future." The operative term in that last sentence is "minimum"—for without more, the policy change they propose will provide only the most minimal impact on the real needs.


250. In fact, the very notion of such proximity-driven solutions was harshly criticized by St. Paul Public Schools' Office of Educational Equity Director Yusef Mgeni. "Merely situating students of protected classes next to white students is a desegregation model [that] stems from a deficit perspective that suggests 'elbow rubbing' with the white, 'dominant culture' is the answer," which in turn, perpetuates a hierarchical system. Telephone Interview with Yusef Mgeni, Office of Educ. Equity Dir., St. Paul Pub. Sch. (Nov. 4, 2009) (on file with the authors). According to Mgeni,
Rather than address the structural limitations of this minimalistic approach to integration, the authors go on to criticize the genuine integration efforts in two Minnesota school districts: Apple Valley (ISD #196) and Hopkins (ISD #270). The following section reveals the problems with that critique.

III. SETTING THE RECORD STRAIGHT

As evidence of their conclusion that the results of Minnesota’s desegregation policy has been "disastrous," the Missed Opportunity authors examine decisions made by the school boards in Hopkins (ISD #270) and Apple Valley (ISD #196) when it became clear that attendance boundaries needed to be changed in both districts. The authors concluded that the boards in both cases made decisions and selected options that were not "pro integrative," ultimately calling into question the efficacy of the Minnesota Rule. However, closer analysis of the actual data underlying both situations demonstrates that the authors were quite selective when presenting information about the actual course of events in both districts. We provide the other side of the story in each situation below by beginning with what Missed Opportunity asserts, and then by providing responsive data. Our information is taken from the most recent database maintained by the Minnesota Department of Education containing statistics from both districts. It is also based on interviews we conducted with administrators in both districts from December 2009, through January 2010. Disturbingly, in both situations, although corrective information was available and even offered, none of that information was included in Missed Opportunity.

251. Missed Opportunity, supra note 1, at 938.
252. Id. at 965.
253. Dr. Nik Lightfoot, Associate Superintendent of Hopkins School District, indicated the following regarding the "fact checking" done by the authors: "I did speak with one of Orfield’s researchers and provide some information. I was not made aware of the article until the law review editor asked to check the sources . . . . The facts were not checked with us regarding any student data or other information you identify in your article." E-mail from Dr. Nik Lightfoot, Assoc. Superintendent, Hopkins Sch. Dist., to Cindy Lavorato, Assoc. Professor (Jan. 13, 2010, 17:20 CST) (on file with the authors). Mr. Robert Mattison, Chair of the Hopkins Boundary Task Force, indicated that he was never once contacted by the authors of Missed Opportunity, and in fact found out about the article from a friend who had somehow come upon it. Telephone Interview with Robert Mattison, Chair, Hopkins Boundary Task Force (Jan. 15, 2010) (on file with the authors). Likewise, Mr. Scott Thomas of the...
A. The Actual Hopkins Experience

This is how Missed Opportunity begins its discussion of the situation in the Hopkins School District:

In 2005, Hopkins’ Katherine Curren Elementary School qualified as racially isolated under Minnesota’s rules . . . . In early 2006, facing a continued decline in enrollment and severe budget constraints, Hopkins decided to close Katherine Curren and to redistribute the Curren students to other elementary schools. In the wake of the school closing, Hopkins considered four options for redrawing school attendance boundaries, the most integrative of which would have dramatically increased the number of students of color at Glen Lake Elementary, the school with the greatest concentration of white students and the lowest poverty level school in the district. The most segregative option assigned most of the students of color at Alice Smith and Eisenhower Elementary, the second and third most racially diverse schools in Hopkins.

Although Missed Opportunity does not provide any information about how the Hopkins Board approached its decision-making, including the history of the process would have been an important part of the story to tell. Thus we provide that context.

Once the district decided to close Katherine Curren Elementary School, the school board and administration set up an elaborate, community-based process for redrawing the boundaries. A task force was established representing the various constituencies in the district. It consisted of parents of elementary students from all the schools, staff and administration, and community members. The district also hired a consultant, Team Works International, a company that specialized in this type of work. The facilitator for the process was Kathleen Macy, a former Superintendent in the Stillwater school district, who also had extensive experience.

Apple Valley School District tried to reach the authors, but was unsuccessful. Interview with Scott Thomas, supra note 231.

254. Missed Opportunity, supra note 1, at 967 (footnotes omitted).
255. See Board of Education Guiding Change: Charter to Hopkins Boundary Task Force (Oct. 2006) (on file with the authors) [hereinafter Hopkins Charter].
256. See Hopkins Boundary Task Force Minutes (Nov. 20, 2006) (on file with the authors).
257. See Memorandum from Kathleen Macy, Facilitator, Stillwater Sch. Dist., to John Schultze, Hopkins Boundary Task Force Members & Interim Superintendent (Jan. 15, 2007) (on file with the authors).
258. E-mail from Robert Mattison, Chair, Hopkins Boundary Task Force, to Cindy
The task force began its work in late 2006 and worked through February 2007. This work was based on a charge from the school board, which included a list of the board’s priorities and preferences. Ethnic balance was the number one priority on that list; balancing class size was a close second. But as with any school closing, the board had to consider a variety of other policy ramifications, including transportation costs, preserving neighborhoods, and minimizing the number of students moved from one school to another.

In order to accomplish its mission, the task force was divided into two subgroups. One group had the job of redrawing the boundaries from scratch: a “zero-based” approach. The other was to come up with options that would place Katherine Curren students in other schools and minimize the disruption to other students. The task force considered a great deal of information, including school sizes and capacity, class sizes, socio-economic and ethnic data, transportation costs, and a multitude of other complex information. Both subgroups came up with many options. At the first full meeting considering options, the task force considered more than twenty different approaches. All of the meetings were open, and during the process the group held at least three public forums.

Missed Opportunity characterizes the ultimate decision made by the board as the “least integrative,” and asserts that the decision was simply the result of political pressure from a “vocal group of Glen Lake parents” who “opposed an influx of minority students into their school.” However, the authors of Missed Opportunity did not cite to interviews with any of the parents at Glen Lake Elementary School, nor did they cite to interviews with the facilitator, the chair of the task force, or any of the administrators involved in the closing in support of this conclusion. Further, no meeting notes from the three public forums conducted by the task force were referenced in the article. Instead, Missed Opportunity chose to rely on remarks from two parents at one school board meeting to come to the conclusion that there was a racially motivated “vocal group” putting political pressure on the

Lavorato, Assoc. Professor (Jan. 14, 2010, 12:43 CST) (on file with the authors).
259. HOPKINS CHARTER, supra note 255.
260. Id.
261. See Notes from Report to Board of Education (Dec. 21, 2006) (on file with the authors) [hereinafter Notes].
262. Id.
263. Id.
264. Id.; E-mail from Robert Mattison to Cindy Lavorato, supra note 258.
265. Missed Opportunity, supra note 1, at 968.
Board. 266

In fact, Robert Mattison, the Chair of the Hopkins Boundary Task Force who had the opportunity to interact with many families during the multi-month process, refuted the conclusion that there was a “vocal group” opposed to an influx of minority students. His notes in response to Missed Opportunity state as follows:

In my extensive conversations with Glen Lake parents on the proposal I never once heard or even picked up an implication that their problem was more minority students at Glen Lake. Several even expressed enthusiasm for more minorities at Glen Lake. To me these discussions were much more credible than a few comments at public meetings by people who were speculating on what others might do and others’ possible motivations.

The Missed Opportunity authors concluded by claiming that the “school board ultimately chose the school attendance boundary that the vocal parents wanted, but that produced the least integration,” thus implying that the board caved to political pressure from this vocal parent group. 268 But once again, describing the option selected as the one the “vocal parents wanted” is a gross mischaracterization of

266. See id. at 968 nn.181–82. Although the Missed Opportunity authors do not explicitly say what motivated this group of parents to oppose the most integrative option, the authors imply that these parents were racially motivated; indeed, the only reason given for these parents’ opposition is that the students coming into “their” school would be minority students. The authors also state: “For example, one Hopkins parent warned the school district that it would experience a ‘financial loss’ due to losing students to open enrollment if it chose the most integrative option—a thinly veiled threat to remove students from Hopkins schools if the Board sent students of color to Glen Lake.” Id. at 968; see also n. 181, 182. The authors characterize this as a “thinly veiled threat”—and the “threat” results directly from the fact that the parent objects to having students of color sent to Glen Lake; no reason, other than the race of the students involved, is given. This all occurs within the context of the argument that mandates are necessary or else the boards would bow to pressure to maintain separate schools:

Without a mandate to integrate schools, and with parental pressure to maintain separate schools, school boards often simply choose the path of least resistance and redraw school boundaries in ways that increase segregation. The story of the Hopkins School District illustrates how school districts can create racial segregation by bowing to public pressure and why mandatory integration rules are necessary to prevent continuing racially segregative school-boundary decisions.

Id. at 966.

267. Personal notes from Robert Mattison, Chair, Hopkins Boundary Task Force, to Dr. Nik Lightfoot, Assoc. Superintendent, Hopkins Sch. Dist. (Feb. 28, 2009) (on file with authors).

268. Missed Opportunity, supra note 1, at 968.
the facts; two parents does not a powerful "vocal group" make. Beyond that, the implication that the board intentionally selected the least integrative alternative, because it was the least integrative alternative, is also simply wrong. Again from Mr. Mattison's notes:

The main reason the Board did not decide on the most "integrative" option was that it would have necessitated transporting students from the east side of Hopkins to Glen Lake. This was several miles away, and would have necessitated adding more busses to the transportation system. That expense would have substantially reduced the cost savings achieved by closing Katherine Curren School. Also, it would have severely limited the opportunity for parent involvement in the school community at Glen Lake for many families of color, who in many instances had far fewer resources.\footnote{Personal notes from Robert Mattison to Dr. Nik Lightfoot, supra note 267.}

With regard to whether the "least integrative option" would have sent most of the students of color to either Eisenhower Elementary or Alice Smith, Mr. Mattison noted:

\begin{quote}
[Missed Opportunity] states that [Katherine Curren] students were sent to two other schools—Eisenhower and Glen Lake, and that most [Katherine Curren] students went to [Eisenhower]. In fact, as far as I can tell, none of the Curren kids went to [Eisenhower]—they were distributed to [Alice Smith], [Glen Lake] and [Gatewood].\footnote{Id.}
\end{quote}

Glen Lake and Gatewood had the highest concentrations of white students in the district.

And how does Missed Opportunity characterize the result of the Board's decision? Relying on information that dates to a time before the students were reassigned to their new schools, the authors assert the following:

Today, 46% of Eisenhower's students are children of color, while Glen Lake, which is adjacent to Eisenhower, is 91% white. Likewise, 43% of Eisenhower's students receive free or reduced lunches as compared to only 6% of Glen Lake's students. With this concentration of low-income students of color, Eisenhower's standardized test scores are also about ten points lower than Glen Lake's in both math and reading.\footnote{Missed Opportunity, supra note 1, at 968–69 (footnotes omitted.).}

However, these conclusions are simply wrong because the Missed Opportunity authors cited incorrect data for their conclusions about

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\footnote{269. Personal notes from Robert Mattison to Dr. Nik Lightfoot, supra note 267.}
\footnote{270. Id.}
\footnote{271. Missed Opportunity, supra note 1, at 968–69 (footnotes omitted.).}
the impact of the board’s decision on the racial makeup of Glen Lake, and Eisenhower Elementary schools. To support their claims that the board’s decision resulted in greater racial imbalance at those schools, the authors cited MDE attendance data from the 2006–2007 school year. This error poses a serious problem for the authors because the MDE data for 2006–2007 is totally irrelevant to claims about the results of the board’s decision-making, as the effects of any changes made by the board would not have occurred until after the 2007–2008 school year. To put it more directly, the Missed Opportunity authors presented data regarding the demographics and student performance at Glen Lake and Eisenhower schools that both predated the closure of Katherine Curren, and predated the implementation of the subsequent attendance boundary changes by the Hopkins Board. This error is particularly unfortunate, as the correct 2007–2008 data set for the schools in question was readily available from the MDE as early as February of 2008, nearly a year before the publication of Missed Opportunity. The Missed Opportunity authors’ use of the word “today” in describing their findings compounds the misleading nature of their analysis because it implies a sense of currency at the time of publication, despite the fact that the data they selected was not only seriously out of date at that time, but also totally inapplicable to the analysis they presented.

The most current data suggests a very different situation. For the 2008–2009 school year (which is the most current information available on the Minnesota Department of Education website), the data demonstrates that none of the elementary schools in Hopkins are racially identifiable. Moreover, when the Hopkins Board made its final decision, the option selected would have increased the student of color population at Glen Lake “by over 70%—from 9.3% to

272. Id. at 968 n. 185.
273. See, e.g., MINN. DEP’T OF EDUC., Content Archive for location: Data/Data Downloads/Student/Enrollment/School, http://education.state.mn.us/WebsiteContent/ContentArchive.jsp?siteId=7&siteSection=Data%2FDData+Downloads%2FSchool%2FEnrollment%2FSchool%3B (showing that a report titled 2007–2008 ENROLLMENTS-SCHOOL—GRADE/ETHNICITY/GENDER was available as of February 21, 2008, at 10:10 a.m.).
274. Missed Opportunity, supra note 1, at 968.
And finally, because of No Child Left Behind provisions, any student at Eisenhower or Alice Smith can transfer to Glen Lake if he or she chooses to do so, and the district must and will provide transportation.\footnote{Missed Opportunity, supra note 1, at 966.}

This is what the authors draw from the experiences and information above:

The lack of any mandate in Minnesota’s rules is most obvious when school districts need to close or open schools. The rules do not give the Department the power to prevent attendance-boundary decisions that will have a segregative effect on a district’s schools. Without a mandate to integrate schools, and with parental pressure to maintain separate schools, school boards often simply choose the path of least resistance and redraw school boundaries in ways that increase segregation. The story of the Hopkins School District illustrates how school districts can create racial segregation by bowing to public pressure and why mandatory integration rules are necessary to prevent continuing racially segregative school-boundary decisions.\footnote{Id. (footnote omitted).}

In fact, the Hopkins situation in no way proves the assertions being made. There was no “parental pressure to maintain separate schools;” the board did not “simply choose the path of least resistance and redraw boundaries in ways that increase segregation;” and the Board did not “bow to public pressure” in making its decisions.\footnote{Quoted phrases are from Missed Opportunity.}

There was not substantial community pressure to maintain “separate” schools, and in fact, the elementary schools in Hopkins school district are not racially identifiable as a result of the re-drawn attendance boundaries. Moreover, with regard to the concentration of students
of color at Eisenhower and Alice Smith elementary schools, it should be noted that those students can choose to attend the school with the lowest concentration of students of color if they wish, and can require the district to transport them to that school. The fact that they are not making that choice does not mean that they are "stuck" at underperforming schools, as Missed Opportunity implies.

The real story of the Hopkins situation is that the community was involved and a variety of competing issues played into the ultimate decision. The district did not "cave" to racist political pressure. The Minnesota Department of Education did not intervene because there was no need to intervene. The real story also illustrates how myopic it is to have all policy decisions of this type driven by the single calculus of whether the decision made provides the greatest integration; in this case, that decision would have been counterproductive for the very families integration is supposed to benefit.

B. The Actual Apple Valley Experience

The Missed Opportunity authors also assert that the Minnesota Department of Education was unable to mandate a "pro-integrative" change in the Apple Valley School District (also referred to as "ISD #196") regarding its student busing and attendance boundaries. This is how the authors describe the situation in Apple Valley from 2004-2007:

Until 2007, the Apple Valley school district bused students from the Cedar Grove Manufactured Housing Park [sic], a high-poverty neighborhood in Apple Valley with a disproportionate number of families of color, across the school district to Cedar Grove Elementary School [sic], the school with the highest student-of-color population in the district. Cedar Grove [sic] students were bused past several largely white, high-income schools to the low-income and increasingly segregated Cedar Grove [sic]. Although the Department recognized that the attendance boundary was glaringly segregative and pushed the district to remedy the attendance boundary, the Department was unable to force the school district to act.

Missed Opportunity suggests that students of color in the Cedar Knolls manufactured housing community were being bused in a "racially segregative manner" to Cedar Park Elementary School—

281. Missed Opportunity, supra note 1, at 970 (internal citations omitted).
which MDE found to be racially identifiable in 2004—without regard to a potential solution the authors characterize as “readily apparent.” That “readily apparent” solution was that the district should have placed the students in “largely white, low-poverty, high-performing” schools located between their homes in Cedar Knolls and Cedar Park Elementary.

What is exceptionally frustrating about the characterization of the situation in Apple Valley is that the authors failed to acknowledge that from 2004 forward, the district acted in good faith, following Minnesota’s Desegregation Rule, and made changes to address the racial imbalance at Cedar Park Elementary. For example, Apple Valley began the process of developing an Integration and Educational Equity Plan (IEEP) beginning in July 2004—pursuant to the requirements of the Desegregation/Integration Rule. The district convened a Community Collaboration Council, as required by the rule, with membership highly representative of the district’s diversity. Additionally, the district retained the services of a consultant to “provide consulting expertise to the council,” and to “design and coordinate the assessment and analysis components of the plan.” The Community Collaboration Council met extensively, and offered numerous opportunities through a variety of channels for other members of the community—particularly those of protected classes—to participate and offer comment on integration efforts.

While the Missed Opportunity authors grudgingly admit that Apple Valley did adopt new attendance boundaries, and ceased busing students from Cedar Knolls to Cedar Park Elementary in 2007, they failed to mention that such efforts were clearly outlined in the district’s 2005–2008 Integration and Educational Equity Plan, and that those changes were made in a timely fashion and in compliance with the desegregation rule. Instead, the authors assert—erroneously—that “the school district’s rule-mandated integration

282. Id. at 969–70.
283. Id. at 969, 972.
286. ISD #196 IEEP 2008, supra note 284, at 5.
287. Interview with Scott Thomas, supra note 231.
plan did not promise to remedy the Cedar Grove [sic]/Cedar Park discontinuous boundary—when in fact it did. Though the authors contend that “the district continued to bus students of color past several largely white, low-poverty, high-performing schools to Cedar Park,” absent from their critique was an accurate depiction of those schools. According to ISD #196 Integration and Educational Equity Coordinator Scott Thomas, there were only two schools—Greenleaf Elementary School and Westview Elementary School—geographically situated as described by the authors. Westview already had a disproportionately high population of low-income students, thus qualifying that school to receive Title 1. Clearly this was not a “low poverty” school as described by the Missed Opportunity authors, nor was it significantly closer for the students bussing from Cedar Knolls than Cedar Park Elementary. While Greenleaf was below the district average of students of color, and did not receive Title 1 funds as a result of concentrated poverty, it was already at capacity, and was even closed as an option for open enrollment most years.

Clearly, the “readily apparent” solution proffered by the Missed Opportunity authors was untenable, and, as stated before, the attendance boundary changes (and resultant busing changes) were ultimately resolved in a timely fashion through a thoughtful and well-documented process, in accordance with the Minnesota Desegregation Rule and the District’s Integration and Educational Equity Plan. The assertion by the authors that the department was not able to “leverage anything other than public opinion to pressure the district” is clearly at odds with the facts; rather, the actions of the department, and the responses of Apple Valley, present a nearly textbook example of the Minnesota Rule being successfully implemented.

By the end of the period allotted to the 2005–2008 plan, one of

289. Missed Opportunity, supra note 1, at 971.
290. See ISD #196 IEEP 2008, supra note 284, at 11–12.
291. Missed Opportunity, supra note 1, at 971–72 (internal citation omitted).
292. Interview with Scott Thomas, supra note 231.
293. Missed Opportunity, supra note 1, at 971–72.
295. Id.
296. See Missed Opportunity, supra note 1, at 969 (“The Department has never mandated that a school district change a decision that had a segregative effect, even when the effect is extreme and the solution readily apparent.”).
297. Missed Opportunity, supra note 1, at 972.
the racially identifiable schools—Glacier Hills Elementary—was no longer racially identifiable. Cedar Park Elementary was transformed into Cedar Park STEM—a science, technology, engineering, and mathematics magnet school.\footnote{ISD #196 IEEP 2008, supra note 284, at 2, 5.} Further, the Cedar Park STEM School now has a waiting list and attracts students from across the district.\footnote{Interview with Scott Thomas, supra note 231.} While the school remains only slightly racially identifiable according to the Minnesota Rule, the previous trend—which was a five to seven percent increase in students of protected classes each year—has been supplanted by a decreasing trend of three percent.\footnote{ISD #196 IEEP 2008, supra note 284, at 4.} In short, Cedar Park STEM is becoming more integrated as a result of the district’s efforts; achieving the goal of the Minnesota Desegregation Rule.

While the Missed Opportunity authors derided the Minnesota Department of Education for awarding ISD #196 $2.8 million through the Integration Revenue Program\footnote{Missed Opportunity, supra note 1, at 972.} (in effect, casting aspersions on the district for what the authors’ believed were egregious and segregative practices), the U.S. Department of Education responded quite differently. Through a competitive process, including review by the U.S. Office of Civil Rights and the Great Lakes Equity Assistance Center, the district was awarded a $5.421 million grant through the U.S. Department of Education Magnet Schools Assistance Program (MSAP).\footnote{E-mail to Frank Spencer, Researcher, from Scott Thomas, Integration and Educ. Equity Coordinator, ISD #196 (Jan. 24, 2010, 21:44 CST) (on file with authors).} Distributed evenly over three years, these funds supported the efforts of all three ISD #196 magnet schools—Cedar Park STEM, Diamond Path School of International Studies, and Glacier Hills Elementary (an arts and science magnet). The monies have been used to purchase equipment, cover the costs of technology, support professional development for faculty, hire magnet specialists, and fund evaluation.\footnote{Id.} The grant monies also helped to defray the most initially expensive aspect of the magnet schools—the start-up costs.

In an ironic response to the Missed Opportunity authors’ implicit critique that the Integration Revenue funds were “wasted” on Apple Valley,\footnote{Missed Opportunity, supra note 1, at 972.} it should be noted that in fact such funds were critical to obtaining the magnet school grant. MSAP does not allow grant recipients to use grant funds for transportation (a considerable cost for a district as large as Apple Valley, which is the fourth-largest

\footnotesize{\footnote{298. ISD #196 IEEP 2008, supra note 284, at 2, 5.} \footnote{299. Interview with Scott Thomas, supra note 231.} \footnote{300. ISD #196 IEEP 2008, supra note 284, at 4.} \footnote{301. Missed Opportunity, supra note 1, at 972.} \footnote{302. E-mail to Frank Spencer, Researcher, from Scott Thomas, Integration and Educ. Equity Coordinator, ISD #196 (Jan. 24, 2010, 21:44 CST) (on file with authors).} \footnote{303. Id.} \footnote{304. Missed Opportunity, supra note 1, at 972.}
district in the state). 305 ISD #196 was able to use Integration Revenue funds to cover transportation expenses. By extending the opportunity to attend these schools to families and students throughout the district, and by covering the expense of transportation (a potential obstacle for participation), the prevailing racial and economic demographics that might coincide with geographically determined attendance boundaries are supplanted by family and student choice—the very locus of the integrative properties of the magnet school model.

To date, administrators from ISD #196 have tried repeatedly to contact the authors of *Missed Opportunity*, which appeared in this journal in 2009 (with portions of the case study appearing elsewhere in presentations) in an effort to address the bias and mischaracterizations that appear. 306 No corrections or additions have been made by the *Missed Opportunity* authors.

In sum, although the data presented in *Missed Opportunity* suggests that the Apple Valley and Hopkins School Districts thwarted efforts to address racial isolation in their schools, a more complete review of the record reveals quite the opposite. We hope that this additional information sets the record straight.

IV. CHANGING DEMOGRAPHICS AND MINNESOTA'S DESEGREGATION POLICY

In this final section we will first respond to assertions in *Missed Opportunity* regarding the state of desegregation in Minnesota, and consider some alternative facts about Minnesota’s demographics. In light of those demographics, we will conclude by arguing that Minnesota’s current policy is an effective response to a changing and complex social problem.

A. The Reality of Changing Demographics Here and Nationally

The *Missed Opportunity* authors make several claims regarding the “disastrous” results 307 the current desegregation rule has had on the composition of schools in the Twin Cities; however, the assertions in that article bear a closer look. For example, the *Missed Opportunity* authors claim that “[t]oday, children of color in the Twin Cities are far more likely to attend a racially isolated school than they were ten

305. E-mail to Frank Spencer, Researcher, from Scott Thomas, supra note 302.
306. Interview with Scott Thomas, supra note 231.
years ago." Interestingly, no authority is given for that assertion; moreover, it is unclear what the authors mean by "racially isolated school." The authors also claim that "today, students of color are more likely to attend a segregated school than they were in 1990." The source for that claim was a manuscript co-authored by Mr. Orfield that had not been published at the time it was referenced in Missed Opportunity. It is also not clear whether this reference is to segregated schools in Minnesota—or rather to the conditions of segregated schools across the country. The authors also claim that "[a]fter nearly ten years of Minnesota's educational school-choice experiment, segregation in Minnesota schools has only intensified—its students of color have steadily become more isolated in high-poverty, low-performing schools." For this claim, the authors cite in a non-specific way to a later discussion in their paper. Finally, the authors claim that "[t]he number of racially isolated [sic] schools in the Minneapolis/St. Paul metropolitan area has more than doubled since 2000, from twenty-two to fifty," and conclude that "[w]hether the rules themselves caused the increased racial isolation or merely allowed it to happen, Minnesota's experience shows the danger of removing integration mandates. . . . Choice-based integration plans will only continue the national trend of resegregation of our nation's schools." As with many of the assertions in Missed Opportunity, it is important to put all of these claims in context. While it is true that the number of racially identifiable schools in the Twin Cities has increased over the past ten years, what is also true is that here—as in most places around the country—the number of white students is declining while the overall number of students of color is rising. In

308. Id. at 949.

309. Minnesota's desegregation rule does not refer to racially isolated schools, but rather to "racially identifiable schools." MINN. R. 3535.0110, subpart 6 (2009). Thus, it is not clear whether the authors are making a mistaken reference to schools covered by the rule, or whether they are using their own definition of a "racially isolated" school.

310. Missed Opportunity, supra note 1, at 949.

311. Id. at n.90.

312. Id. at 939–40.

313. Id. at 949.

314. Id. at 940.

fact, some have argued that the claimed trend towards "resegregation" in this country is erroneous; rather, if racial isolation is increasing, it can be attributable to an increase in the student-of-color population overall.\textsuperscript{316} And as the Missed Opportunity authors admit, the number of white students now attending majority white schools has actually decreased.\textsuperscript{317}

A few other facts about the demographics of Minnesota schools bear mentioning, and seem to refute the claims in Missed Opportunity. According to a 2007 report authored in part by Gary Orfield, Minnesota consistently ranks in the top fifteen states on a scale that measures highest levels of integration for its black\textsuperscript{318} students. For example, Minnesota is fifth in the nation in terms of the percentage of black students who are enrolled in majority white schools, with 47\% of black students attending such schools.\textsuperscript{319} Further, only 18\% of Minnesota's black students attend highly segregated schools (which are defined as schools with fewer than 10\% white students).\textsuperscript{320} Both of these categories have improved markedly since 1992. At that time, Minnesota did not make the list of most integrated states in any category.\textsuperscript{321} None of these figures are included in Missed Opportunity.

What is also not apparent from Missed Opportunity is that previously "white" suburban schools in the Twin Cities have also become more fully integrated in the past ten years. While Minneapolis Public Schools have actually seen a 5\% decrease of their student-of-color (SOC) enrollment, districts such as Edina, Osseo, and Hopkins have seen a large increase in their student-of-color populations. For example, Edina has increased from 5\% to 15\%.\textsuperscript{322} Osseo has gone from 26.7\% to 43\%,\textsuperscript{323} and Hopkins has increased from 15\% to 31\%.\textsuperscript{324}
Although St. Paul Public Schools did see an increase in its student-of-color population over that period of time (going from about 66% to 76% students of color), districts adjacent to St. Paul saw much greater increases in their student-of-color populations. For example, North St. Paul-Maplewood's SOC population increased from 13.81% to 34%, South St. Paul's SOC population increased from 11.24% to 29%, and South Washington County's SOC population increased from 10.33% to 22%.

Statistics, as we all know, can be manipulated. It might be claimed, for example, that Minnesota's current desegregation rule is the reason why Minnesota now ranks among the fifteen most integrated states (at least in terms of its African-American students). It might also be claimed that the increased integration in districts such as Edina is due to the cross-district programming that has resulted since the inception of the current desegregation rule. The fact is, we do not know. What we do know is that it will be increasingly difficult to achieve any degree of racial balance based on the presence of white students in school classrooms:

We are in the last decade of a white majority in American public schools and there are already minorities of white students in our two largest regions, the South and the West. When today's children become adults, we will be a multiracial society with no majority group, where all groups will

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have to learn to live and work successfully together.\textsuperscript{329}

As a result, we argue that focusing on moving students around to achieve racial balance will be an increasingly futile policy initiative. But we also recognize the following:

It is a simple statement of fact to say that the country's future depends on finding ways to prepare groups of students who have traditionally fared badly in American schools to perform at much higher levels and to prepare all young Americans to live and work in a society vastly more diverse than ever in our past. Some of our largest states will face a decline in average educational levels in the near future as the racial transformation proceeds if the educational success of nonwhite students does not improve substantially.\textsuperscript{330}

While not perfect, we argue that Minnesota's current desegregation rule has resulted in the institutionalization of educational reform that will help this generation and future generations learn to live and work successfully together. The rule also institutionalizes change that will address some of the structural racism that impedes the success of students of color. The following is review of some of the changes in infrastructure, cultural competence, curriculum, and leadership that have resulted from the rule. We submit that such changes have enabled Minnesota schools to achieve many of the benefits of integration.

\textbf{B. Changes to the “Way We Do Things:” Making Integration and Equity a Focal Point of Educational Policy}

Professor John Powell has defined “true integration” as follows:

True integration addresses the issues of achievement, opportunity, community, and relevancy at a systemic level. Through a transformative process, the school system becomes a place of learning and growth for students and teachers through innovative curriculum, technology, teaching practices, and administration, as well as a broad cultural understanding and application of that understanding. These instrumental advances then create a grounding for the more far-reaching goals of the radical integrationist, who seeks to build upon the transformation of the school setting to the recreation of a truly democratic society.\textsuperscript{331}

\textsuperscript{329} \textit{Orfield & Lee, supra} note 315, at 4.

\textsuperscript{330} \textit{Id.} at 4.

\textsuperscript{331} \textit{Powell, supra} note 87, at 695.
We would concur with Mr. Powell: true integration happens when the systems underlying school structures change. The following discussion contains an overview of the systematic changes that have been implemented as a result of Minnesota's desegregation rule.

1. Infrastructure Changes

One of the most basic but important changes resulting from the rule is that districts must now annually assess the demographic composition of the schools within their borders, and the Commissioner of Education must also assess the demographics of adjacent districts. Certainly, change cannot happen if administrators are not routinely assessing population changes in their student body. As one equity coordinator put it, "I think the rule has caused us to look at data that we might not have looked at otherwise, and provides a common language to frame our equity/integration work-around." But beyond continuous monitoring, the rule provides incentives for change both within districts and across district boundaries. As a result of the rule, as of fiscal year 2010, 100 or more school districts receive integration revenue. This means that those 100 districts are either working to address racially isolated schools within their districts, or are working collaboratively with adjacent districts. Moreover, five integration districts have been formed as a result of the desegregation rule, with the goal of working on cross-district integration initiatives. Many, including the Missed Opportunity authors, agree that cross-district integration initiatives are essential if racial isolation is to be addressed. As a direct result of the desegregation rule, this state (arguably) has more cross-district initiatives than any other state in the country.

332. To be fair, Mr. Powell also argues that a necessary prerequisite of integration is that schools are racially balanced—a position that, while understandable, has become increasingly difficult, if not impossible, to achieve for all of the reasons previously discussed. See id.


335. E-mail from John Bulger, Minn. Dep't of Educ. to Cindy Lavorato (Feb. 9, 2010, 08:03 CST) (on file with the authors) (providing information about integration revenue districts from fiscal years 2002 through 2010).


337. See generally COMPREHENSIVE STRATEGY, supra note 75.

338. See generally WELLS ET AL., supra note 213. It is not clear whether the report
2. **High-Quality, Integrated Alternatives**

Another result of the current rule has been an increase in the opportunity for students of color to attend high-quality magnet schools across the metropolitan area. For example, as discussed in Part III, a finding by the Minnesota Department of Education that Cedar Park Elementary was racially identifiable resulted in a total reconfiguration of three of Apple Valley's elementary neighborhood schools into state-of-the-art magnet schools. The school that was previously racially isolated now has a waiting list from students around the district who wish to attend it due to its emphasis on science, technology, and math. 339

Similarly, Osseo Schools (ISD #279) has created two elementary magnet schools. Through these choice-driven schools and a comprehensive integration plan, a formerly racially identifiable school in the district no longer meets the criteria as defined in the Minnesota rule. 340 West Metro Education Program (WMEP), one of the five integration districts in the state, operates two magnet schools—one in suburban Crystal the other in Minneapolis—that are open to any of the students who reside in the member districts. According to WMEP Superintendent Dr. Daniel Jett, “[t]hese two magnet schools have shown very promising results with students of color and have outperformed other students of color who attend non-magnet schools.” 341

According to the 2008 Minnesota Department of Education report “Promising Practices: Intra- and Interdistrict Integration,” other magnet schools that developed as a result of the rule and are supported by Integration Revenue Program funds include: Harambee Community Cultures/Environmental Science School, sponsored by the East Metro Integration District and located in St. Paul; Crosswinds Middle School, sponsored by the East Metro Integration District and located in Woodbury; Parkview Center in Roseville; Garlough Elementary in West St. Paul (a racially identifiable school that is in the process of converting to an environmental magnet); Capitol Hill (for gifted and talented students) in St. Paul; Barton Open in Minneapo-

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339. See supra Part III.B.
340. Telephone interview with Sharon Peters-Harden, Coordinator, Dep’t of Equity and Integration, Osseo Sch. Dist. (Nov. 5, 2009) (on file with the authors).
341. Telephone interview with Dr. Dan Jett, Superintendent, WMEP (Oct. 28, 2009) (on file with the authors).
Although not a magnet school program, The Choice is Yours is another program that provides alternatives for students in the Minneapolis Public School District to attend suburban schools. All Minneapolis students who are eligible to receive free or reduced-price lunch may participate in the program. Students receive free transportation to and from the suburban schools. This program was recently cited with approval in a 2009 national study of inter-district school initiatives.

The Minnesota Department of Education (MDE) Promising Practices publication includes several examples of extra-school learning opportunities that provide students with extended opportunities for learning in an integrated environment. One example is “the Starbase U program through the East Metro Integration Program, which provides middle school students from ten districts an opportunity to learn about rockets and airplanes through a seven-day summer learning experience on the Minneapolis/St. Paul Air National Guard base.” The West Metro Education Program also has a summer enrichment program that has extensive offerings. The publication also notes classroom partnerships offered by the East Metro Integration District (EMID), which includes ten St. Paul area districts. For example,

classroom partnerships between Stillwater Area Schools and St. Paul Public Schools include an elementary book club at every grade level that allows students to explore diversity issues through reading and a video connections partnership where students from Stillwater and St. Paul develop school

343. Id. at 3.
344. Id.
345. Id.
346. WELLS ET AL., supra note 213. Interestingly, the authors of the article did not note the existence of the other four integration districts in the state.
347. INTRA- AND INTERDISTRICT INTEGRATION, supra note 342.
348. Id. at 2.
349. Id.
350. “Classroom partnerships pair classrooms from an identified school or isolated districts with adjoining sites. Students share some common curriculum units. They come together across school and/or district lines regularly for project-based learning that is interactive enough and frequent enough for the students to form friendships.” Id.
Another extra-classroom approach described on the MDE’s promising practices page is one in which classes are taught in students’ usual schools, but are then enriched by language camps with others. According to MDE, “[m] any integration districts in southwestern Minnesota are using this strategy to provide elementary Spanish instruction.” The West Central Integration Collaborative—which includes Atwater, Cosmos, Grove City, New London, Spicer, Maynard, Clara City, Raymond, and Willmar school districts—offers one example of this approach.

This strategy starts with joint world language curriculum development across district or school lines. Language teachers in different sites continue to collaborate. Classes are taught in students’ regularly assigned schools but are enriched by cross-district or cross-school activities such as summer immersion camps or field trips throughout the school year that pair the same groups of students.

While such extra-classroom approaches do not result in moving student bodies, they do result in meaningful, sustained opportunities for contact between students of different racial and socioeconomic backgrounds—also part of the value of integrated learning.

A somewhat overlooked aspect of the desegregation rule ensures that students who attend racially identifiable schools have the option to attend schools that are more integrated. If the student-of-color enrollment at a school is more than 25% above the student of color enrollment of the district, or if the student-of-color enrollment exceeds 90% at any given school (whichever is less), the district must provide all students in that school the alternative to attend schools where the enrollment is comparable to the district average. These types of initiatives, accompanied as they are by transportation, result in a genuine opportunity for students to attend high-quality alternatives to their neighborhood schools.

3. Cultural Competence of Staff

While magnet schools and other choices are laudable, offering

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351. Id.
352. Id.
353. Id. at 3.
354. Id.
alternatives to attend schools outside of one’s attendance area is an empty promise if the schools do not provide welcoming environments for arriving students. The cultural competence of staff and administration is the key to ensuring the benefits of an integrated learning environment. Although there are a variety of definitions, the notion of cultural competence generally shares these characteristics:

Cultural competence is defined as a set of congruent behaviors, attitudes, and policies that come together in a system, agency, or among professionals and enables that system, agency, or those professionals to work effectively in cross-cultural situations.

There are five essential elements that contribute to a system’s ability to become more culturally competent. The system should (1) value diversity, (2) have the capacity for cultural self-assessment, (3) be conscious of the “dynamics” inherent when cultures interact, (4) institutionalize cultural knowledge, and (5) develop adaptations to service delivery reflecting an understanding of diversity between and within cultures. Further, these five elements must be manifested at every level of the service delivery system. They should be reflected in attitudes, structures, policies, and services.

We would argue that one of the most positive changes that has occurred as a result of the desegregation rule is that districts have made it a priority to address the attitudes, structures, policies and services that they are providing to their students of color; we would go so far as to say that the rule has resulted in a cultural shift towards equity in many schools and districts. Pat Exner, the Director of Teaching and Curriculum for the West Metro Education Program (serving eleven urban and suburban districts in Minnesota’s Twin Cities metro area), echoed this conclusion and indicated that one of the positive outcomes of the Minnesota rule is that “equity work [has] become much more of a priority in the metro area,” and that “professional development through WMEP is at an all time high.”

This emphasis is apparent in a variety of districts. For example, in Osseo, one of the five programs established in the district’s integration plan is the professional development of the staff to include “support of intercultural understanding, capacity building,


and teacher learning leadership programs." The Hopkins School District (ISD #270) works on staff development in the area of cultural competence through opportunities in their partnership in WMEP and through internal training. The district also supports ongoing work in the area of integration by having an equity specialist in each building (who also serve as liaisons with the Choice is Yours program).

Apple Valley (ISD #196) is working with the Pacific Education Group (PEG), led by Glenn Singleton, to address systemic racism, to understand the connection between race and culture and to eliminate the predictability of race in student achievement. PEG offers a two-day curriculum called "Beyond Diversity" which effectively frames these issues for staff. In some schools, all staff went through this training, and all district leadership has been through the training as well. The program is being expanded internally. For example, equity teams and principals are looking at curriculum, instruction, and assessment as well as climate and culture to determine how to implement equitable change. As one example of change, schools developing site plans have been required to have racial equity target goals along with an action plan to close the achievement gap. Scott Thomas, Integration and Educational Equity coordinator for the district, has described this work as "transformative."

Dinna Wade-Ardley, the Director of Educational Equity for Bloomington Public Schools (ISD #271), also cites the development of cultural competence as one of the biggest ways the current rule and Integration Revenue funds have helped in the district. For example, all principals, administrators, the entire school board, and the entire staff at ten schools have participated in a cultural development inventory. As an extension of how awareness has changed, Ms. Wade-Ardley cites a recent principals' meeting where the

358. Telephone interview with Sharon Peters-Harden, supra note 340.
359. E-mail from Dr. Nik Lightfoot, supra note 253.
360. Id.
361. Interview with Scott Thomas, supra note 231.
362. Id.
363. Id.
364. Id.
365. Id.
366. Id.
367. Id.
368. Telephone interview with Dinna Wade-Ardley, Dir. of Educ. Equity, Bloomington Sch. Dist. (Nov. 5, 2009) (on file with the authors).
369. Id.
principals themselves brought up the ethical need for assessing the existing attendance boundaries in light of integrative goals. The importance of developing the cultural competence of staff, the very people working with an increasingly diverse student population, cannot be underestimated.

These are but a few examples. Nearly all of the roughly twenty administrators interviewed, each of whom are responsible for educational equity in some capacity in their respective districts or district collaborative, cited the importance and prevalence of efforts to improve the cultural competence of adults in the district. For many, it was a key component of their district’s integration plan.

4. Curriculum and Pedagogy

Curricular changes are also important in order to affect true integration. Professor John Powell describes how such curriculum changes should be addressed: “At the site of curricular reform, true integration requires a multicultural curriculum that is incorporated into daily work, and not merely added on or reserved for study during a special month, such as Black History Month.” Similarly, a 2001 University of Michigan study on educational diversity concluded that the “success of . . . curricular initiatives is facilitated by the presence of diverse students and a pedagogy that facilitates learning in a diverse environment.” In other words, schools need to actively address the challenge of structural racism through a diversity-conscious approach to curriculum.

Stillwater Public School District (ISD #834) has based its cross-district classroom partnership curriculum on scholarly research regarding evidence-based practices for Intercultural Student Programming. Using that research, Stillwater’s Office of Equity and Integration has concluded that the efficacy of such initiative relies on

370. Id.
371. Id.
372. See, e.g., Interview with Pat Exner, supra note 357; Interview with Nik Lightfoot, Assoc. Superintendent, Hopkins Sch. Dist. (Nov. 17, 2009) (on file with authors); Interview with Scott Thomas, supra note 231; Telephone interview with Dina Wade-Ardley, supra note 368.
373. Powell, supra note 87, at 695.
375. See Stillwater Public Schools Intercultural Student Programming PowerPoint and Stillwater Public Schools Legislative Presentation (Nov. 11, 2009) (on file with the authors).
the "participation of all students," including the involvement of "children as young as possible with developmentally appropriate experiences," and "programming that is in-depth, long-term, and infused into the overall curriculum." Stillwater uses a model of cooperative learning—a group-based teaching strategy that leverages peer-to-peer teaching and learning relationships in exploring subject areas—as part of its pedagogy. Stillwater (ISD #834) is taking an active leadership role to advance such curricular efforts both within the district and as part of the EMID.

The Stillwater district is not alone in addressing structural obstacles to integration via curriculum or academic opportunities. White Bear Lake Schools, also part of EMID, has advanced from working on integration through extracurricular activities to higher levels of equity/integration education—most recently, working toward fusing the pedagogical model of Authentic Intellectual Work (AIW) with equity and integration programming. Like White Bear Lake Schools, Osseo is shifting the focus of its integration efforts towards student achievement through academic programs.

These programs, outlined in the district's integration plan, include the High Achievers Program, which targets underperforming students affected by socioeconomic conditions.

Apple Valley (ISD #196) has also used integration revenue to support a variety of curricular innovations. For example, the district offers "Kindergarten Plus" which is a full-day kindergarten program. Students who come from families who otherwise could not afford to pay the additional fee for attending all day are given scholarships. This helps to further integrate the classroom setting while promoting important academic activities. The district has also expanded its extended day program by providing targeted services.

376. Id.
377. This too is a research-based approach and has been cited as a very effective approach to diversity curriculum. See Folsom Cordova Unified Sch. Dist., Intercultural Harmony in the Schools, CONTEXT: SOUTHEAST ASIANS AND OTHER NEWCOMERS IN CALIFORNIA'S CLASSROOMS, Apr./May 1994, at 1, http://www.reninc.org/CONTEXTPDFS/94apr110.pdf (citing Kathleen Cotton, Fostering Intercultural Harmony in Schools: Research Findings, http://educationnorthwest.org/webfm_send/522 (Northwest Education Services) (last visited Apr. 20, 2010)).
378. Telephone interview with Nicki Ahrens, supra note 334.
379. Telephone interview with Sharon Peters-Harden, supra note 340.
380. Id.
381. Interview with Scott Thomas, supra note 231.
382. Id.
383. Id.
sessions are provided at all academic levels, rather than being limited to remediation. As a result, the extended day program has been more integrated, and students at all academic levels were receiving services in a blended fashion.

The Advancement Via Individual Determination (AVID) program is another curricular initiative. The program targets support for moderate to underachieving students by identifying and supporting them in higher level courses. This in turn, helps them attend college. Hopkins cites AVID as one of the flagship programs of their integration efforts. Apple Valley's related Young Scholars program fulfills a similar role in identifying and reaching out to students currently underserved through their Gifted and Talented program. In Brooklyn Center, of the twenty-five student AVID cohorts that started five years ago, all twenty-five graduated from high school, and all twenty-five went on to college.

5. Commitment to Implementation: Cultural Shifts

Another major result of the desegregation rule is that districts have implemented the use of equity coordinators to ensure that changes in district infrastructure and policy, staff development, and curriculum advance integration goals in a meaningful way. Our interviews were largely conducted with school administrators responsible for equity issues, most holding positions solely dedicated to equity and integration in the district they serve. These administrators are responsible for the implementation of their districts' respective integration plans. They provide guidance and direction at the district level with regard to the use of Integration Revenue Program funds, monitor ongoing efforts and emergent needs, and provide a voice from within each district that keeps awareness of integration and equity issues at the fore in decision-making processes.

These equity positions exist in virtually all of the approximately 100 districts in Minnesota that are eligible for Integration Revenue

384. Id.
385. Id.
387. Id.
388. Interview with Dr. Nik Lightfoot, supra note 372.
389. Interview with Scott Thomas, supra note 231.
In addition to the district-level equity administrators, a number of districts have equity coordinators and cultural liaisons that work at the school level. For example, ISD #196 has nine intercultural liaisons in their Cultural Family Advocate program, three of whom work exclusively at Cedar Park Elementary (the district's lone racially identifiable school). These advocates work with families, but also serve to “bridge connections between parents and teachers, and teachers and students.”

To sum up, we would argue that the cumulative effect of these efforts—all emerging from Minnesota's desegregation rule—is a cultural shift in the way schools do their business. There is now a much greater awareness of, a commitment to, and a plan for doing the type of equity work that needs to be done “to prepare groups of students who have traditionally fared badly in American schools to perform at much higher levels and to prepare all young Americans to live and work in a society vastly more diverse than ever in our past.” These results do not show up in counting how many students move from one school to another, but they are an equally important measure in determining the efficacy of Minnesota's policy in this important arena.

V. CONCLUSION

Clearly, we in this country face continuing issues regarding the academic needs of our students of color. Some, like the Missed Opportunity authors, will argue that the answer lies in returning to mandates that our schools become racially balanced; others will argue that it is time to move away from our reliance on diverse schools and instead focus on providing the best possible education to students no matter where they are.

We do not fall into either extreme. We continue to believe that there is great value in offering all students the opportunity to learn with peers from different racial, ethnic, and socio-economic backgrounds. This is not only a practical response to our changing demographics—we believe it is the morally correct response. However, attempting to cure the ills of racial and socioeconomic isolation through our nation's public schools by mandating racial
balance, in our view, is simply no longer a viable option.

In conclusion, we believe that Minnesota’s current desegregation/integration rule has created a system to ensure that students are not consigned to underperforming, racially and economically isolated schools; it also provides authentic opportunities for integrated learning in welcoming environments. We encourage Minnesota policymakers to retain and improve a system that has proven its worth.
ERRATUM

“Sex Discrimination Under Tribal Law,” published in Issue 2 of this volume, incorrectly stated that the first federal sex discrimination law was in the form of an executive order in 1967. The first federal sex discrimination law was Title VII of the Civil Rights Act of 1964, which prohibited sex discrimination at its inception.

