Amending No Child Left Behind to Prevent School Rezoning and Resegregation: A Response to the Tuscaloosa City Schools

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After the Tuscaloosa City Schools instituted a neighborhood school policy, black parents complained that it amounted to resegregation of the schools, with black students being transferred to low-performing schools. Such resegregation is becoming a national trend as schools become de facto, rather than de jure, segregated. This de facto segregation is considered constitutional under Supreme Court jurisprudence. Furthermore the recent Supreme Court decision in Parents Involved in Community Schools v. Seattle School District No. 1 *limits the actions a concerned school district may take to prevent this type of resegregation. As for the students in Tuscaloosa, the school board proposed that the No Child Left Behind Act would serve as an effective remedy, but in practice the Act has failed to provide meaningful assistance to students seeking transfers. Four proposed wide-sweeping amendments to NCLB can transform it into an effective remedy for the parents and students of Tuscaloosa, along with all others dealing with constitutional resegregation across the United States: (i) changes in transfer forms; (ii) exemptions for transferred students in AYP analysis; (iii) a limit to the number of transfers that a district can deny; and (iv) a dynamic cap on the socioeconomic ratio of student populations. In cases where these goals are unachievable by school districts, the onus will be placed on the state to implement inter-district plans to reduce disparities between school districts, such as through district reorganization and innovative housing policies.*

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I. INTRODUCTION

On April 19, 2007, the superintendent of Tuscaloosa City Schools in Tuscaloosa, Alabama, presented a demographic study proposal to the Tuscaloosa Board of Education that would reportedly save the school district over $5 million, help alleviate school overcrowding, and reduce students' travel time.[1] The plan was for a return to community schools. Students living in the western district of Tuscaloosa would no longer be bused to the northern district schools, but instead rezoned to a closer western district school.

Many black parents cried foul: almost all the students affected were black and were being forced to transfer from a racially diverse, high-performing northern school to a majority black, low-performing western school.[2] The Tuscaloosa superintendent and board president also acknowledged a secondary goal of the plan: to encourage white students who had fled to private academies to return to the public school system.[3] The black parents claimed that the proposal amounted to resegregation, less than a decade after the school district had been released from a court-ordered desegregation plan.

The school district explained to parents that transferred students were not without recourse: the No Child Left Behind Act ("NCLB") gives any student in a low-performing school the right to transfer to a better school.[4] The parents remained unsatisfied, claiming that NCLB itself was violated by the proposal. However, both the Alabama Department of Education and United States Department of Education stated that Tuscaloosa City Schools' proposal and NCLB are two separate issues and that the school district was currently in compliance with NCLB.[5] Nationally, the situation faced by students and parents in Tuscaloosa is not unique.

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1. Dr. Joyce Levey, Address to the Board of Education, Demographic Study Committee Proposal (Apr. 19, 2007), *available at* http://www.tusc.k12.al.us/super/JLevey4-19-2007.pdf.
2. Sam Dillon, *Alabama Plan Brings Out Cry of Resegregation*, N.Y. TIMES, Sept. 17, 2007, at A1.
3. *Id*.
4. *Id*.; 20 U.S.C. § 6316(b)(1)(E)(i).
5. Press Release, Tuscaloosa City Schools, School Choice 2007–2008 (Sept. 5, 2007), *available at* http://www.tusc.k12.al.us/super/SCPressRelease9-05-07.html.

Like in Tuscaloosa, various measures are being taken across the country that are racially neutral on their face, but are furthering the resegregation of the public school system. The Supreme Court has continued on its jurisprudential path away from the desegregation ideals of *Brown v. Board of Education*[6] with its recent decision in *Parents Involved in Community Schools v. Seattle School District No. 1.*[7] Because of this jurisprudential shift, students and parents are being forced to accept such resegregation as constitutional.

While the actual impact of Tuscaloosa's rezoning is not yet known, it is following a trend of resegregation in schools across the country.[8] In 1968, 77% of black students attended predominately minority schools nationwide, but by 1988 that number had dropped to 63%.[9] In 2005, however, the percentage of black students attending predominately minority schools had risen back up to 73%.[10] With the United States becoming more "multiracial than ever before and . . . in the midst of a demographic transformation, . . . we should be working to understand and foster successful multiracial schools."[11] Instead, "[w]e are floating back toward an educational pattern that has never in the nation's history produced equal and successful schools."[12]

Resegregation is creating "minority schools [which] are highly correlated with high-poverty schools and are also associated with low parental involvement, lack of resources, less experienced and credentialed teachers, and higher teacher turnover — all of which combine to exacerbate educational inequality for minority students."[13] The racial populations of schools will have a significant

6. 347 U.S. 483 (1954) [hereinafter *Brown*].

7. 127 S.Ct. 2738 (2007) [hereinafter *Parents*].

8. *See* ERICA FRANKENBERG & CHUNGMEI LEE, THE CIVIL RIGHTS PROJECT AT HARVARD UNIVERSITY, RACE IN AMERICAN PUBLIC SCHOOLS: RAPIDLY RESEGREGATING SCHOOL DISTRICTS (2002), http://www.civilrightsproject.ucla.edu/research/deseg/Race_in_American_Public_Schools1.pdf.

9. GARY ORFIELD & CHUNGMEI LEE, THE CIVIL RIGHTS PROJECT AT UCLA, HISTORIC REVERSALS, ACCELERATING RESEGREGATION, AND THE NEED FOR NEW INTEGRATION STRATEGIES 28 (2007), http://www.civilrightsproject.ucla.edu/research/deseg/reversals_reseg_need.pdf.

10. *Id*.

11. GARY ORFIELD & JOHN T. YUN, THE CIVIL RIGHTS PROJECT AT HARVARD UNIVERSITY, RESEGREGATION IN AMERICAN SCHOOLS 26 (1999), http://www.civilrightsproject.ucla.edu/research/deseg/Resegregtion_American_Schools99.pdf.

12. *Id*. at 28.

13. ORFIELD & LEE, *supra* note 9, at 5.

impact in the future on relationships between racial groups.[14] There is evidence that "segregation perpetuates itself — that children who attend segregated schools live segregated lives as adults."[15] Furthermore, school desegregation "discourage[s] black students from completing high school or college, [leads] them into segregated, low-level occupations, and limit[s] their contact with whites."[16] In a predominately white society, with major institutions controlled by whites, this isolation of blacks is a very serious issue.[17] On the other hand, minority students educated in desegregated schools "not only [have] more years of college education, but [are] more likely to live in mixed or white neighborhoods, have friends who [are] white, and work in an integrated environment, while being less likely to perceive discrimination around them."[18]

The school board's offered remedy of NCLB makes the Tuscaloosa example unique. NCLB is presented as a safety net for affected parents and students who no longer have the support of Supreme Court desegregation jurisprudence. In its current form, however, NCLB is not an effective remedy for resegregation. Without amendment, NCLB will not help the affected parents and students of Tuscaloosa, nor others across the country similarly situated.

This Note proposes wide-sweeping amendments to NCLB to transform it into an effective remedy for the parents and students of Tuscaloosa, along with all others dealing with constitutional resegregation across the United States. Before proposing the solution, this Note first examines in Part II the shift in Supreme Court desegregation jurisprudence, from *Brown* to the recent *Parents*, which has allowed proposals like Tuscaloosa's to be made. Part III analyzes these types of proposals under current constitutional law, reaching the conclusion that they are constitutional. Part IV then shifts to an examination of NCLB, concluding that in its current form, it fails to deliver an effective remedy

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14. ORFIELD & YUN, *supra* note 11, at 15.

15. George Judson, *Effects of Segregation Told in a Trial*, N.Y. TIMES, Jan. 6, 1993, at B5 (reporting on the testimony of Professor Robert L. Crain, a sociologist from Teachers College at Columbia University).

16. *Id*.

17. ORFIELD & YUN, *supra* note 11, at 15.

18. Judson, *supra* note 15, at B5.

to parents and students affected by resegregation, as was proposed by Tuscaloosa. This Note's solution, a broad amendment of NCLB, is introduced in Part V. Finally, Part VI returns to Tuscaloosa as a test case and a discussion of the feasibility of this Note's solution.

II. CONSTITUTIONAL LAW IN SCHOOL DESEGREGATION: FROM *BROWN* TO *PARENTS*

One of the most heavily litigated issues of the late twentieth century, public school desegregation, began with the involvement of federal courts. Part II.A explores the period of judicially mandated desegregation: beginning with *Brown* in 1954 and ending in the early 1970s, when the Supreme Court began deferring to the traditional control of local school boards. Part II.B describes what Professor Goodwin Liu labeled as the retreat from *Brown*.[19] Finally, Part II.C discusses the most recent Supreme Court case about race in public schools, *Parents*,[20] which exhibits the (conflicted) view of the current Court on racial composition in schools and various attempts to maintain diverse student populations.

A. SUPREME COURT DECISIONS FROM 1954 TO 1971

Perhaps the most celebrated Supreme Court decision of all time, *Brown*[21] was actually a collection of five related cases: *Gebhardt v. Belton*,[22] from Delaware; *Brown v. Board of Education*[23], from Kansas; *Briggs v. Elliott*,[24] from South Carolina; *Davis v. County School Board of Prince Edward County*,[25] from Virginia; and *Bolling v. Sharpe*, [26] from the District of Columbia.[27] While

19. Goodwin Liu, *Brown, Bollinger, and Beyond*, 47 HOW. L.J. 705 (2004).
20. 127 S. Ct. 2738 (2007).
21. 347 U.S. 483 (1954).
22. 91 A.2d 137 (Del. 1952).
23. 98 F. Supp. 797 (D.Kan. 1951).
24. 103 F. Supp. 920 (E.D.S.C. 1952).
25. 103 F. Supp. 337 (E.D. Va. 1952).
26. 344 U.S. 873 (1952).
27. Jack M. Balkin, Brown v. Board of Education — *A Critical Introduction*, *in* WHAT "BROWN V. BOARD OF EDUCATION" SHOULD HAVE SAID 3, 3 (Jack M. Balkin ed., 2001). The *Bolling* case was decided in a separate opinion because the Fourteenth Amendment to the U.S. Constitution did not apply to the District of Columbia, but the Court reached the same conclusion — rejection of the "separate but equal" doctrine in public education — by

Brown represented the beginning of a social revolution against segregation, it was specifically focused on the "separate but equal" doctrine of *Plessy v. Ferguson*[28] as applied to public education.[29] The minor plaintiffs were seeking "the aid of the courts in obtaining admission to the public schools of their community on a nonsegregated basis," which was denied at the district level through adherence to the "separate but equal" doctrine of *Plessy*.[30] The Supreme Court found that segregated schools were "inherently unequal," and that segregating students "solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[31] The Court therefore held that the separate but equal doctrine violated the Equal Protection Clause of the 14th Amendment.[32] Also within the *Brown* opinion was language which came to be considered a "classic doctrinal statement of the importance of education — for individual schoolchildren . . . and for society at large":[33]

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cul-

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using the due process clause of the Fifth Amendment. As explained by Chief Justice Warren in *Bolling v. Sharpe*:

> The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The "equal protection of the laws" is a more explicit safeguard of prohibited unfairness than "due process of law," and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.

347 U.S. 497, 499 (1954).

28. 163 U.S. 537 (1896).
29. Liu, *supra* note 19, at 710.
30. 347 U.S. at 487.
31. *Id*. at 494–95.
32. *Id*. at 495.
33. Liu, *supra* note 19, at 711.

> tural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[34]

The Court did not reach the issue of a proper remedy for segregation in public schools until a year later, in a decision commonly referred to as *Brown II*, in which the Court addressed the issue of relief.[35] The Supreme Court in *Brown II*, faced with the "complexities arising from the transition to a system of public education freed of racial discrimination," held that the desegregation efforts of school districts were best overseen by the local district courts.[36] The Court further decreed that such schools be desegregated with "all deliberate speed."[37]

In *Brown II*, the Court envisioned a "period of transition" while school districts dealt with logistics such as "the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas."[38] This transition period did not actually begin until nearly a decade after the *Brown II* decision, when the Civil Rights Act of 1964 gave desegregation enforcement authority to the Department of Health, Education, and Welfare.[39] Many school districts and school boards stalled at implementing desegregation plans, and when they did, the attempts were often faulty.[40] *Green v. County School Board* struck down a so-called "freedom of choice" plan that was begun 10 years after *Brown II*.[41] Under the freedom of choice plan in *Green,* students could annually choose which of two schools they wished to attend; students who failed to choose were assigned to the schools they previously attended.[42] However, the

34. 347 U.S. at 493.
35. Brown v. Bd. of Educ. (II), 349 U.S. 294 (1955).
36. *Id*. at 299.
37. *Id*. at 301.
38. *Id*.
39. Liu, *supra* note 19, at 715.
40. *Id*. at 714.
41. 391 U.S. 430 (1968).
42. *Id*. at 434.

freedom of choice plan did nothing to facilitate the desegregation of the schools. The Court held that freedom of choice "is only a means to a constitutionally required end — the abolition of the system of segregation and its effects. If the means prove effective, it is acceptable, but if it fails to undo segregation, other means must be used to achieve this end."[43] School officials, the Court said, "have the continuing duty to take whatever action may be necessary to create a unitary, nonracial system.'"[44] The Court failed to precisely define the term "unitary," but instead listed five areas from which the district must eliminate vestiges of segregation: faculty, staff, transportation, extracurricular activities and facilities.[45] However, many Southern school districts instituted similar "charade" desegregation plans like that in *Green*[46] — plans which merely gave the illusion of desegregation — which "led Whites and Blacks to maintain segregation out of habit, fear, or comfort."[47]

In most school districts, the transition period did not begin in earnest until after the Court's decisions in *Green* and *Swann v. Charlotte-Mecklenburg Board of Education*[48] in 1971.[49] The Court in *Swann* noted the "[d]eliberate resistance" and "dilatory tactics" impeding effective implementation of the school desegregation order of *Brown II*.[50] Reaffirming *Green*'s standard that a "school authority's remedial plan or a district court's remedial decree is to be judged by its effectiveness," the Court affirmed the district court's desegregation plan, stating that "[i]n default by the school authorities of their obligation to proffer acceptable remedies, a district court has broad power to fashion a remedy that will assure a unitary school system."[51] *Swann* also established the Court's view that "de facto" segregation, where racial imbalance in schools is created without any state action, is constitutional.[52]

43. *Id*. at 440.
44. *Id*.
45. *Id*. at 435. For a discussion on the definition of "unitary," see Monika L. Moore, *Unclear Standards Create an Unclear Future: Developing a Better Definition of Unitary Status*, 112 YALE L.J. 311 (2002).
46. Liu, *supra* note 19, at 714.
47. *Id*.
48. 402 U.S. 1 (1971).
49. Liu, *supra* note 19, at 715.
50. 402 U.S. at 13.
51. *Id*. at 16, 25.
52. *Id*. at 17–18.

This is opposed to "de jure" segregation which requires state action with a purpose or intent to discriminate, and is unconstitutional.[53]

In sum, for nearly two decades after the *Brown* decision, the Court's vision of an integrated public school system was far from reality. Frustrated with the stalling by school districts, the Court declared that any desegregation plan was "to be judged by its effectiveness"[54] and that "[t]he burden on a school board . . . is to come forward with a plan that promises realistically to work, and promises realistically to work now."[55] This period, however, also marked the beginning of a transition of the Court's ideology regarding school desegregation.

B. THE RETREAT FROM *BROWN*

Between *Brown* in 1954 and *Swann* in 1971, the Supreme Court issued eighteen unanimous desegregation orders against various school districts.[56] Since 1971, the Court has issued zero.[57] Instead, the Court decided a jurisprudential line of cases that relied on the concept of traditional local control over schools.[58] This tradition, at least from one perspective, stems from the founding of the United States as a group of fiercely independent colonies, and was magnified by the nation's western expansion.[59] This led to the formation of thousands of tiny schools spread out over a vast landscape, operated by local communities and harboring a distrust of state and federal government intervention.[60]

Milliken v. Bradley, decided in 1974, dealt with a multidistrict, metropolitan area remedy to the segregation within the Detroit school system.[61] The lower court had assumed that the Detroit schools could not be truly desegregated unless the racial composition of schools reflected the composition of the entire met-

53. *See* Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 208 (1973).
54. *Swann*, 402 U.S. at 25.
55. Green v. County Sch. Bd., 391 U.S. 430, 439 (1968).
56. Liu, *supra* note 19, at 717.
57. *Id*. at 718.
58. *Id*.; *see also* Milliken v. Bradley, 418 U.S. 717 (1974); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973); Wright v. City of Emporia, 407 U.S. 451 (1972).
59. DAVID C. THOMPSON, R. CRAIG WOOD & FAITH E. CRAMPTON, MONEY AND SCHOOLS 6–7 (4th ed. 2008).
60. *Id*. at 7.
61. 418 U.S. at 730.

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ropolitan area, necessitating the transfer of students between predominately minority Detroit and the nearby predominately non-minority suburban school districts.[62] In *Milliken*, rejecting such a remedy, the Court expounded its new appreciation for local control:

> No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process. . . [L]ocal control over the educational process affords citizens an opportunity to participate in decision-making, permits the structuring of school programs to fit local needs, and encourages "experimentation, innovation, and a healthy competition for educational excellence."[63]

School districts, which the Court told only three years earlier to implement realistic desegregation plans which would work immediately, were suddenly being given deference because of the recently articulated — but apparently "deeply rooted" — tradition of local control.[64]

The Court followed *Milliken* with more cases that eroded the principles of *Green* and *Swann*. *Board of Education v. Dowell* involved a formerly segregated school district seeking to dissolve a desegregation decree imposed on it by a district court.[65] In determining the standard by which the decree could be judged, without explanation the Court in *Dowell* replaced *Green*'s and *Swann's* standard, which judged desegregation plans by their effectiveness, with an inquiry into whether the school board complied in good faith with the decree.[66] The next year, in *Freeman v. Pitts*, a district court sought to withdraw its control over certain areas of a school district that had not yet achieved full unitary status.[67] The Supreme Court, in upholding the district court's

62. *Id*. at 740.
63. *Id*. at 741–42 (quoting *Rodriguez*, 411 U.S. at 50).
64. *Id*.
65. 498 U.S. 237 (1991).
66. Liu, *supra* note 19, at 728.
67. 503 U.S. 467 (1992).

partial withdrawal of control, declared that a district court's goal is to return control of school districts to local authorities as soon as practicable, including by relinquishing control in incremental stages before full compliance had been achieved.[68] Finally, in *Missouri v. Jenkins*, where the state of Missouri challenged a district court's order to increase staff salary and continually fund "quality education" programs due to low student achievement in a previously segregated school district,[69] the Court eliminated the presumption that segregation caused a system-wide reduction in achievement, requiring a showing of "the incremental effect that segregation has had on minority student achievement" for funding of these programs.[70] Together *Dowell*, *Freeman*, and *Jenkins* "effectively abandoned the causal presumptions, proof burdens, and test of remedial efficacy established in *Green* and *Swann*."[71]

Following the decisions in *Dowell*, *Freeman*, and *Jenkins* in the 1990s, statistics show that resegregation began to take hold.[72] In 1964, 2.3% of Southern black students attended majority white schools; by 1988 that number had risen to 43.5%.[73] That percentage has been declining since the early 1990s; in 2005 only 27% of Southern black students attended majority white schools.[74] Nationwide, in 1968, 77% of black students attended predominately minority schools; in 1988 that had dropped to 63%; but by 2005, it had risen back up to 73%.[75] In school districts that had had court-ordered desegregation plans lifted, such as Tuscaloosa, most districts experienced dramatic declines from the apex of their integrated status.[76]

68. Liu, *supra* note 19, at 728–29.

69. 515 U.S. 70, 73 (1995).

70. Liu, *supra* note 19, at 729 (quoting *Jenkins*, 515 U.S. at 101).

71. *Id*.

72. ORFIELD & LEE, *supra* note 9, at 5. (mentioning Charlotte, where "while the average black student was in a 51 percent white school in 1991, two decades after the original bussing order, he or she now attends a school that is 76 percent nonwhite;" DeKalb County, Georgia, the site of the *Freeman* decision, where "the typical black student in this unitary district is in a 95 percent nonwhite school and the magnet plan for voluntary desegregation has been shut down by the courts;" and Kansas City, the site of *Jenkins* decision, where "the average black student now attends a school with eight percent white students").

73. *Id*. at 23.

74. *Id*.

75. *Id*. at 28.

76. *Id.* at 43.

C. RECENT SUPREME COURT JURISPRUDENCE: *PARENTS*

The most recent Supreme Court case to deal with race in public schools, *Parents Involved in Community Schools v. Seattle School District No. 1*,[77] addressed school assignment programs established to ensure racially integrated student bodies in two districts. The defendants in *Parents* were two school districts: Seattle, Washington and Jefferson County, Kentucky. The Jefferson County district had a history of de jure segregation and was declared to have achieved unitary status in 2000;[78] Seattle had no history of de jure segregation.[79] Both districts employed student assignment plans which relied on racial classifications.[80] Seattle classified children as either white or nonwhite, while Jefferson County used black or "other."[81] These racial classifications were "used to allocate slots in oversubscribed high schools" in Seattle, and "to make certain elementary school assignments and to rule on transfer requests" in Jefferson County.[82] In sum, both school districts "relie[d] upon an individual student's race in assigning that student to a particular school, so that the racial balance at the school [fell] within a predetermined range based on the racial composition of the school district as a whole."[83] Parents of students who were denied admission to their chosen schools under the plans brought suit, claiming the plans were a violation of the Equal Protection Clause of the 14th Amendment.[84]

Chief Justice Roberts, writing for the Court,[85] held that only two compelling interests satisfy the strict scrutiny test for using racial classifications in the school context: (1) the remedy of past intentional discrimination, and (2) diversity in higher education.[86]

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77. 127 S. Ct. 2738 (2007).
78. *Id.* at 2752.
79. *Id.*
80. *Id*. at 2746.
81. *Id*.
82. *Id*.
83. *Id*.
84. *Id*.
85. The Chief Justice's opinion was joined in its entirety by Justices Alito, Scalia, and Thomas. Justice Kennedy joined Chief Justice Robert's opinion only as to Parts I, II, III-A, and III-C, creating a 5-4 majority for those sections. For clarity, those sections of Chief Justice Robert's opinion which Justice Kennedy joined will be referred to as the opinion of the Court, while the remaining sections will be referred to as the plurality opinion.
86. *Parents*, 127 S. Ct. at 2752–53.

Furthermore, the Court declined to extend the diversity interest available to institutions of higher education, found in *Grutter v. Bollinger*,[87] to the primary and secondary levels.[88] The school districts were thus left with only one possible winning argument to justify their use of race: the remedy of prior intentional discrimination, which was unavailable to Seattle, having no history of de jure segregation. Moreover, because Jefferson County had achieved unitary status, its past intentional discrimination had been remedied and any continued use of race would have to be justified on some other basis.[89] Quoting the Court's second opinion in the *Milliken* litigation,[90] the Court stated "the Constitution is not violated by racial imbalance in the schools, without more."[91] Unable to meet either of the Court's two compelling interests, the school districts' plans were held unconstitutional.[92]

While the opinion of the Court in *Parents* severely limits the use of racial classification, the plurality opinion goes farther, flatly disagreeing with the belief that racial balance ought to be preserved. Chief Justice Roberts writes that racial balance is "an objective [that the] Court has repeatedly condemned as illegitimate."[93] In short, the plurality views *Brown*[94] as allowing the dichotomy of a high-performing white school and a low-performing black school. The Chief Justice writes, "[i]t was not the inequality of the facilities but the fact of legally separating children based on race on which the Court relied to find a constitutional violation in [*Brown*]."[95]

While this statement comports with the long standing jurisprudence that there is no constitutional guarantee to an education,[96] it gives the impression that four of the justices are willing to move even farther away from *Brown*. One of the four, Justice Thomas, stated in his concurrence, "Racial imbalance is not se-

87. 539 U.S. 306 (2003).
88. *Parents*, 127 S. Ct. at 2754.
89. *Id*.
90. Milliken v. Bradley, 433 U.S. 267 (1977).
91. *Id.* at 281 n.14.
92. *Parents*, 127 S. Ct. at 2768.
93. *Id.* at 2743.
94. Brown v. Bd. of Educ., 347 U.S. 483 (1954).
95. *Parents*, 127 S. Ct. at 2767.
96. *See* San Antonio Ind. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973) ("Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.").

gregation. Although presently observed racial imbalance might result from past de jure segregation, racial imbalance can also result from any number of innocent private decisions, including voluntary housing choices."[97] In Justice Thomas' mind, "[n]othing but an interest in classroom aesthetics and a hypersensitivity to elite sensibilities justifies the school districts' racial balancing programs."[98]

The plurality does not express an opinion — even in dicta — on the validity of other means of achieving diversity.[99] However, Justice Kennedy, who joined sections of Justice Robert's opinion to form the 5-4 majority opinion of the Court, wrote a separate concurring opinion which stated that a compelling interest exists in avoiding racial isolation and that student diversity was itself a compelling interest.[100] He stated that other methods are likely not to merit strict scrutiny: site selection of new schools, redrawing attendance zones with neighborhood demographics in mind, allocating resources for special programs, targeted recruiting of students and teachers, and tracking enrollment, performance and other statistics by race.[101] Thus, for the time being, the door has been left open for school districts to institute remedial measures to undo the growing racial imbalance in schools, so as long as race is not taken into account. Against this backdrop of jurisprudential evolution, the question remains whether proposals such as Tuscaloosa's are constitutional.

III. IS THIS TYPE OF RESEGREGATION CONSTITUTIONAL?

Tuscaloosa's proposal is, on its face, racially neutral — purely a return to neighborhood schools, drawing students from the communities in which they are located. Therefore, the strict scrutiny test of *Parents* would not be the appropriate standard for review. The question, therefore, is the same as it was in *Brown*:

97. *Parents*, 127 S. Ct. at 2769.

98. *Id*. at 2770 n.3.

99. *Id*. at 2766 ("These other means — e.g., where to construct new schools, how to allocate resources among schools, and which academic offerings to provide to attract students to certain schools — implicate different considerations than the explicit racial classifications at issue in these cases, and we express no opinion on their validity — not even in dicta.").

100. *Id.* at 2789, 2791.

101. *Id*. at 2792.

does this proposal violate the Equal Protection Clause of the 14th Amendment?[102] If the plan were unconstitutional, then the parents and students of Tuscaloosa could challenge it in court and need not look to NCLB. As will be discussed, however, this is not the case.

A. THE EQUAL PROTECTION CLAUSE IN THE SCHOOL CONTEXT

Since achieving unitary status, Tuscaloosa no longer requires court authorization for implementation of policies like school rezoning, but all of its policies and practices are still subject to the test of equal protection.[103] A violation of the Equal Protection Clause requires state action with disproportionate or discriminatory impact and discriminatory intent.[104] This intent can be inferred from such facts as "the segregative impact of the decision, historical background, specific sequences of events, departures from the normal procedural or substantive standards, contemporary statements by members of the decision-making body, and the totality of the circumstances."[105] In school districts with no history of statutory segregation, plaintiffs bear the burden of showing both impact and intent,[106] but in a district with a history of segregation, the schools bear the burden of showing that school assignments are genuinely nondiscriminatory.[107] Tuscaloosa's explanation, however, neither discussed the Equal Protection Clause, nor its history of de jure segregation; it was merely a return to neighborhood schools.

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102. U.S. CONST. amend. XIV, § 1.

103. A school district which has been released from an injunction imposing a desegregation plan no longer requires court authorization for the promulgation of policies and rules regulating matters such as assignment of students and the like, but it of course remains subject to the mandate of the Equal Protection Clause of the Fourteenth Amendment. Bd. of Educ. of Okla. City Pub. Sch. v. Dowell, 498 U.S. 237, 250 (1991).

104. Washington v. Davis, 426 U.S. 229, 239 (1976).

105. United States v. Yonkers Bd. of Educ., 837 F.2d 1181, 1227 (2d Cir. 1987).

106. *See* Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 198 (1973).

107. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 26 (1971).

B. BACKGROUND ON AND BENEFITS OF "NEIGHBORHOOD SCHOOLS"

The Tuscaloosa school board introduced the proposal as a return to community, or neighborhood, schools.[108] The tradition of neighborhood schools in America began with the Massachusetts common schools founded in the 1850s.[109] The founders "envisioned schools that would serve as linchpins of the community," tuition-free and open to all.[110] Educational reformers, most notably Horace Mann, sought to "bring local school districts under centralized town authority and to achieve some degree of uniformity among the towns through a state agency."[111] However, the reformers "did not seek direct authority over local schools, given the public-at-large's opinion against central government control of education," but instead "worked to extend the state's role in defining what would be taught in schools and preparing those whom would teach in them."[112]

Evolving from the original common schools, which "were funded and maintained by community residents who, in turn, took great interest in their progress and pride in their accomplishments," modern public education is heavily controlled by states and the federal government, with only private and select charter schools plausibly retaining some local control.[113] Many educational reformists argue that a return to neighborhood schools is long overdue.[114]

Taking the idea even further, the Coalition for Community Schools, an alliance of education, youth development, community development, family support, and health services networks,[115] envisions "community schools" that integrate education and

108. *See* Levey, *supra* note 1.

109. *See* Lawrence Baines & Hal Foster, *A School for the Common Good*, 84 EDUC. HORIZONS 221 (2006).

110. *Id*. at 221.

111. MATTHEW J. BROUILLETTE, THE MACKINAC CENTER FOR PUBLIC POLICY, MIDLAND, MICHIGAN, SCHOOL CHOICE IN MICHIGAN: A PRIMER FOR FREEDOM IN EDUCATION 9 (1999), http://www.mackinac.org/archives/1999/s1999-06.pdf.

112. *Id*.

113. Baines & Foster, *supra* note 109, at 222.

114. *See*, *e.g.*, Robert Lowe, *Neighborhood Schools: Déjà Vu*, 14 RETHINKING SCH. 3 (2000), *available at* http://www.rethinkingschools.org/archive/14_03/deja143.shtml.

115. Coalition for Community Schools, Who We Are, http://www.communityschools.org/index.php?option=content&task=view&id=4&Itemid=25 (last visited Feb. 20, 2009).

community resources, staying open seven days a week to offer academics along with health and social services and community development.[116] An argument has also been made by one commentator that neighborhood schools present more effective ways to fight segregation.[117] Many critics, however, have noted that a policy of neighborhood schools in districts with segregated housing creates segregated schools, and that the subtext is that many reformists merely want a return to segregated education.[118]

Whatever the true intention of those pushing for a return to neighborhood schools, a shift towards neighborhood schools would most likely not be seen as segregation without other acts of discrimination; "[a]ll things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes."[119] Tuscaloosa's school board highlighted the desirable positives of its plan — a decrease in student travel time, reduction of overcrowding in certain schools, and savings of millions of dollars which could be then spent directly on classroom

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116. Report, Coalition for Community Schools, Community Schools: Partnerships for Excellence, *available at* http://www.communityschools.org/CCSDocuments/partnershipsforexcellence.pdf.

117. *See* Kenneth O'Neil Salyer, *Beyond Zelman: Reinventing Neighborhood Schools*, 33 J.L. & EDUC. 283, 288 (2004) ("[N]eighborhood schools allow for more effective ways to fight segregation while achieving the same integrated learning environment. An example of this includes pairing schools for sporting, social, and other extracurricular events."). While the pairing of a school located in a predominately white neighborhood with one in a predominately minority neighborhood would certainly create diverse sporting, social, and other extracurricular events, the logic of how this would create an integrated learning environment remains a mystery to the author of this Note.

118. *See, e.g.*, GARY ORFIELD & NANCY MCARDLE, THE CIVIL RIGHTS PROJECT AT HARVARD UNIVERSITY, THE VICIOUS CYCLE: SEGREGATED HOUSING, SCHOOLS AND INTERGENERATIONAL INEQUALITY (2006), http://www.jchs.harvard.edu/publications/communitydevelopment/w06-4_orfield.pdf; Nancy Levit, *Embracing Segregation: The Jurisprudence of Choice and Diversity in Race and Sex Separatism in Schools*, 2005 U. ILL. L. REV. 455 (2005). For statistical data on segregation in housing and schools in the Boston metropolitan area, see JOHN R. LOGAN, DEIRDRE OAKLEY & JACOB STOWELL, LEWIS MUMFORD CENTER FOR COMPARATIVE URBAN AND REGIONAL RESEARCH UNIVERSITY AT ALBANY, SEGREGATION IN NEIGHBORHOODS AND SCHOOLS: IMPACTS ON MINORITY CHILDREN IN THE BOSTON REGION (2003), http://mumford1.dyndns.org/cen2000/colorlines/Logan%20Color%20Lines%20report%20format.pdf.

119. Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 212 (1973). S*ee also* 20 U.S.C. § 1701(a)(2) (1974) ("the neighborhood is the appropriate basis for determining public school assignments"); 20 U.S.C. § 1714(c) (1974) (noting that "residential shifts in population" shall not be the basis for any new desegregation plans of a formerly segregated school system which has achieved unitary status); Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007) (holding that racial imbalance in the schools without more is not a constitutional violation).

instruction — which match those proffered by similar reformists.[120] There can be no argument against the benefits of less student travel time, less classroom overcrowding, and more money for educational spending; all would certainly improve the educational experience for students. Tuscaloosa's school board, however, failed to mention what benefits would be lost from the tradeoff, such as limiting segregation of students later in life,[121] or how the decision would disproportionally affect minority students.[122] With this background, the question remains whether a return to neighborhood schools, such as in Tuscaloosa, violates the Equal Protection Clause.

C. THE REMOTE POSSIBILITY OF AN EQUAL PROTECTION VIOLATION IN TUSCALOOSA

Notwithstanding Tuscaloosa's failure to point out the negative consequences, the proposed benefits of a neighborhood school plan may not be sufficient for a school district with a history of de jure segregation to meet its burden under an equal protection challenge. In *United States v. Yonkers Board of Education*,[123] the Yonkers school board argued that its adherence to a neighborhood-school policy resulted in segregated schools because of the city's segregated residential patterns, but that there was no discriminatory intent.[124] The Second Circuit rejected this defense, finding discriminatory intent based upon the foreseeable segregative effect of housing, selective enforcement to the neighborhood-school policy, other decisions and practices that increased racial

120. *See* Salyer, *supra* note 117, at 288.

121. See Judson, *supra* note 15.

122. For the disproportionate effect, see ORFIELD & YUN, *supra* note 11, at 3 ("When school districts return to neighborhood schools, white students tend to sit next to middle class students but black and Latino students are likely to be next to impoverished students."). The pedagogical value of a diverse student body was the basis of the University of Michigan Law School's successful argument in *Grutter v. Bollinger*, 539 U.S. 306 (2003), which had significant support from amici briefs; "[t]he Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer. The Law School's assessment that diversity will, in fact, yield educational benefits is substantiated by respondents and their *amici*." 539 U.S. at 328. Of course, the *Parents* decision declined to extend this same deference to K-12 educational judgment.

123. 837 F.2d 1181 (2d Cir. 1987).

124. *Id.* at 1226.

identifiability of schools, and constant rejection of desegregative alternatives.[125]

Several courts, however, have declined to follow Yonkers because of factual differences.[126] Such factual differences are present in the Tuscaloosa case as well. Tuscaloosa does not appear to have the selective enforcement of the neighborhood-school policy found in *Yonkers*, in which the school board drew arbitrary attendance zones — a form of racial gerrymandering — and failed to apply the neighborhood-school policy to special-education classes and vocational schools.[127] Further, the *Yonkers* school board had been appointed by a mayor who campaigned on a promise not to construct any more subsidized housing in the city,[128] while Tuscaloosa's board is popularly elected.[129] On the other hand, the Tuscaloosa school board vote for the proposal broke down along racial lines: the two votes against the proposal came from the only two black board members.[130] Also, Tuscaloosa has a history of de jure segregation and its school-board-stated goal of attracting white students to the public schools,[131] neither of which were present in the *Yonkers* case. This leaves a chance, though remote, that the school district could fail to meet its burden of showing the proposal to be genuinely nondiscriminatory.[132]

Thus, parents in Tuscaloosa may be able to bring a case against the proposal as a violation of the Equal Protection clause. However, a victory would be by no means assured. Unless the specific facts of Tuscaloosa's proposal and its history persuade a

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125. *Id.* at 1229.

126. *See* Flax v. Potts, 915 F.2d 155, 162 n.10 (5th Cir. 1990) (noting that the Yonkers city council had fiscal control over the school board's operations and that members of the board were appointed by the mayor); Leslie v. Bd. of Educ. for Ill. Sch. Dist. U-46, 379 F. Supp. 2d 952, 963 (N.D. Ill. 2005) (noting that *Yonkers* was not decided on a motion to dismiss).

127. *Yonkers*, 837 F.2d at 1229.

128. *Id*. at 1210.

129. *See* Tuscaloosa City Schools Board of Education, http://www.tusc.k12.al.us/board/index.html (last visited Jan. 27, 2008). The 5th Circuit in *Flax* distinguished the *Yonkers* case by noting that the Fort Worth Independent School District school board was not appointed by the mayor and that there was no evidence of collusion. *Flax*, 915 F.2d at 162 n.10.

130. *See* Dillon, *supra* note 2.

131. For an article which calls it "erroneous to expect that . . . operating neighborhood schools will produce . . . large white enrollment returns," see Gary Orfield & David Thronson, *Dismantling Desegregation: Uncertain Gains*, *Unexpected Costs*, 42 EMORY L.J. 759, 774 (1993).

132. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

court to follow the unusual *Yonkers* decision,[133] this return to neighborhood schools, like so many others in this nationwide movement, would most likely be viewed as constitutional under the auspices of *Parents*. Therefore, affected parents and students will require a statutory solution. Tuscaloosa suggested that NCLB is such a solution.

IV. IS NO CHILD LEFT BEHIND CURRENTLY A SOLUTION TO THIS PROBLEM?

The Tuscaloosa school district attempted to appease angry parents by stating that NCLB offered a remedy for their students. Part IV will present some background on NCLB and discuss why the school board's statement is misleading.

A. BACKGROUND ON NCLB

Passed in 2001, NCLB is both a reauthorization of the Elementary and Secondary Education Act of 1965, and a solution to President George W. Bush's concern that too many needy children were trapped in failing schools.[134] The U.S. Department of Education describes NCLB as incorporating "increased accountability for States, school districts, and schools; greater choice for parents and students, particularly those attending low-performing schools" and "more flexibility for States and local educational agencies . . . in the use of Federal education dollars."[135] The greater choice promised for parents and students is achieved through the option of voluntary transfers from low-performing schools to high-performing ones.[136] School performance is evaluated through students' standardized test scores.[137] Notably, rather than looking only at school test scores in the aggregate,

133. "Yonkers represents the first and only case in which a district court has held municipal officials liable for intentionally segregating local schools, and required them to cure school segregation." Michael H. Sussman, *Discrimination: A Unitary Concept*, 80 MINN. L. REV. 875, 877 (1996).

134. U.S. DEPT. OF EDUC., EXECUTIVE SUMMARY OF THE NO CHILD LEFT BEHIND ACT OF 2001 1 (2002), http://www.ed.gov/nclb/overview/intro/execsumm.pdf (last visited Feb. 20, 2009).

135. *Id*.

136. *See* Choices for Parents, http://www.ed.gov/nclb/choice/index.html (last visited Feb. 20, 2009).

137. 20 U.S.C. § 6316(a)(1)(A) (2006).

NCLB also breaks down the students into various subgroups: (1) economically disadvantaged students; (2) students from major racial and ethnic groups; (3) students with disabilities; and (4) students with limited English proficiency.[138] States are required to set annual goals of test score improvements which each subgroup of students must meet.[139] This set percentage point improvement is defined as adequately yearly progress ("AYP").[140] If a subgroup of students at a school fails to make AYP for two consecutive years, then the school is deemed in need of improvement.[141]

Once a school has been identified as needing improvement, the district must notify students, not later than the first day of school, of the option to transfer to another public school in the district, including a public charter school, which has not been identified for improvement, unless the school has specific admission requirements under state law (e.g. a magnet school).[142] Priority for these transfers is given to the "lowest achieving children from low-income families."[143] Furthermore, non-failing schools cannot claim lack of space in order to deny accepting transferring students.[144] If all schools within a district are failing, then the district, to the extent practicable, shall establish a cooperative agreement with other districts in the area for transfers.[145] NCLB neither attempts to define the extent of practicability, nor offers any incentives for districts to engage in such agreements.[146] However, there is evidence that school districts have attempted

138. § 6311(b)(2)(C).

139. *Id*.

140. *Id*.

141. § 6316(b)(1)(A).

142. § 6316(b)(1)(E)(i).

143. § 6316(b)(1)(E)(ii).

144. Regulations of the Offices of the Department of Education, 34 C.F.R. § 200.44(d) (2002) ("An LEA [Local Educational Authority] may not use lack of capacity to deny students the option to transfer . . . .").

145. § 6316(b)(11).

146. *See* Goodwin Liu & William L. Taylor, *School Choice to Achieve Desegregation*, 74 FORDHAM L. REV. 791, n.73 (2005) (noting that "one commenter recommended that the Department of Education regulate the state role in encouraging interdistrict transfer agreements. The Secretary of Education declined, explaining that 'it would be inappropriate to regulate in this area of State authority'").

such agreements, though success is limited.[147] Sadly, this is only a sliver of the deficiencies of NCLB.

B. PROBLEMS AND LIMITATIONS OF NCLB IN ITS CURRENT FORM

The Tuscaloosa school board's statement was accurate to an extent: if the re-zoning resulted in a student being transferred to a low-performing school, that student has the option of requesting a transfer. However, without even considering the stress upon students forced to transfer twice within a year, there are problems with the implementation of this option. A study of ten school districts found that NCLB's transfer provision fails in practice.[148] Some of its findings were: less than 3% of students eligible to transfer actually transferred; no district was able to approve all requests; and many students that transferred went from one school with low achievement levels to another with similarly low levels.[149] Many parents were also disappointed when

147. *See*, *e.g.*, INSTITUTE ON EDUCATION LAW AND POLICY, RUTGERS UNIVERSITY – NEWARK, NEW JERSEY'S INTERDISTRICT PUBLIC SCHOOL CHOICE PROGRAM 45–46 (2006) , *available at* http://ielp.rutgers.edu/docs/schoolchoicereport_final.pdf ("School districts throughout the country have had difficulty satisfying these requirements. As a result, only a tiny percentage of eligible students have been able to take advantage of the choice opportunities offered by [NCLB].").

148. JIMMY KIM & GAIL L. SUNDERMAN, THE CIVIL RIGHTS PROJECT AT HARVARD UNIVERSITY, DOES NCLB PROVIDE GOOD CHOICES FOR STUDENTS IN LOW-PERFORMING SCHOOLS? 6 (2004), http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/29/dc/98.pdf.

149. *Id*. at 6. Besides a lack of good schools to transfer to, another reason parents may not request transfers for their children is a lack of knowledge about the options. *C.f. Hearing on Parental Awareness and Involvement in Supplemental Educational Services as part of NCLB*, 109th Cong. (2006) (testimony of Barbara Anderson, Vice President, Education of Knowledge Learning Corporation-School Partnerships), *available at* https://www.educationindustry.org/eia/files/ccLibraryFiles/Filename/000000000133/KLC%20Testimony%20on%20SES%20before%20House%20Ed%20Comm%209-21-06.pdf ("Our company's experience indicates that too many parents remain unaware of Supplemental Educational Services [under NCLB] and the process and procedure to gain access to services. Unfortunately, in too many places, parent notification letters are full of legal terms and long complex explanations that only serve to confuse parents."). Other reasons may be due to socioeconomic status, according to one Seattle principal; "Thompson believes there are a host of reasons for [parents' failure to apply for eligible transfers]. Rainier View is in the poorest part of the city. Many parents are working more than one job to put food on the table. Some don't speak English. Parents may not have felt well-equipped to assess the advantages of the other schools outside their neighborhood." JIM DANIELS, CONNECT FOR KIDS, A SHAKY START: NCLB TRANSFERS HARD TO IMPLEMENT, ASSESS (2006), http://www.connectforkids.org/node/3857. For a study indicating that

their children did transfer to higher performing schools: most failing schools were receiving Title I funding, giving students the opportunity to take advantage of extra services, such as tutoring, which were not available at the new schools.[150]

Other problems arise on the school-side of the equation. In many cases, low-performing students who transfer to a high-performing school will post low scores on the next few standardized tests. If enough low-performing students transfer to a school, this could cause the receiving school to fail to make AYP.[151] Thus, there is an incentive for schools to refuse to accept transfers through the blatantly illegal, but likely used, "lack of space" argument.[152] Furthermore, many poor districts lack any high-performing schools to act as receiving schools.[153] While NCLB allows for inter-district transfer agreements when practical, most districts lack such agreements.[154] Therefore, while Tuscaloosa is correct in asserting that affected parents and students have an *option* in NCLB, significant problems prevent it from being an effective *solution*. For it to be a viable solution, changes must be made to NCLB.

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parents' choices of schools for their children "varied systematically by social-class background," see Courtney A. Bell, *All Choices Created Equal? How Good Parents Select "Failing" Schools* 2, Paper presented at the Annual Meeting of the American Sociological Association (Aug 12, 2005), *available at* http://www.allacademic.com/meta/p20207_index.html.

150. KIM & SUNDERMAN, *supra* note 148, at 18.

151. While this scenario has been discussed by many commentators, no empirical evidence was found to substantiate it. *See* James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 962 (2004).

152. From Professor Ryan's article:

> [W]here there is diversity within a given district, space constraints will surely limit the amount of movement. It is inconceivable that states and districts will abide by the regulation that suggests a lack of space is no excuse for failing to guarantee school choice. Saying that space is not a constraint does not make it so. To the extent districts are willing to ignore this regulation, they also may be willing to manipulate space constraints if doing so works to their advantage.

Id. at 967; *see* Richard D. Kahlenberg, *Socioeconomic School Integration*, 85 N.C. L. REV. 1545, 1560–61 (2007).

153. Kahlenberg, *supra* note 152, at 1561.

154. *Id*. at 1562; *see also* CYNTHIA G. BROWN, CITIZENS' COMMISSION ON CIVIL RIGHTS, CHOOSING BETTER SCHOOLS: A REPORT ON STUDENT TRANSFERS UNDER THE NO CHILD LEFT BEHIND ACT 66–67 (Dianne M. Piche & William L. Taylor eds., 2004), http://www.cccr.org/choosingbetterschools.pdf.

C. NCLB NEEDS TO BE AMENDED TO FUNCTION AS A SOLUTION

In light of the *Parents* decision, any amendment to NCLB that takes race into account would most likely be struck down, since race may only be used in remedying past intentional discrimination in non-unitary school districts or for achieving diversity in higher education.[155] On the other hand, the opinion of the Court does not reach as drastic a result as the plurality, and Justice Kennedy's concurrence hints that other methods are likely not to merit strict scrutiny: site selection of new schools, redrawing attendance zones with neighborhood demographics in mind, allocating resources for special programs, targeted recruiting of students and teachers, tracking enrollment, performance and other statistics by race.[156] Therefore, relying upon Justice Kennedy's concurrence, this Note will propose amendments that are tailored to diversifying socioeconomic status in schools, after discussing solutions offered up by others.

V. PROPOSAL: AMEND NCLB WHILE FOLLOWING THE IDEAS SET FORTH IN *PARENTS*

A. SOLUTIONS BY OTHERS AS A STARTING POINT

A laudable series of NCLB amendments were proffered by Richard D. Kahlenberg.[157] Kahlenberg notes that NCLB is a strong vehicle for socioeconomic integration:[158] only students in low income schools are eligible to transfer,[159] and busing students to a non-neighborhood school is an acceptable expense.[160] Kahlenberg proposes a five-part solution to facilitate socioeconomic integration: (1) create incentives for high-performing schools to recruit transferring students;[161] (2) mandate inter-district transfers when intra-district transfers are impossible;[162] (3) manage transfers to

155. Parents Involved in Community Schools v. Seattle School District No. 1, 127 S. Ct. 2738, 2752–63 (2007).
156. *Parents*, 127 S. Ct. at 2792.
157. *See* Kahlenberg, *supra* note 152.
158. *Id*. at 1560.
159. *Id*. at 1558.
160. *Id.* at 1560.
161. *Id*. at 1562–64.
162. *Id.* at 1564–66.

prevent the creation of more failing schools;[163] (4) create magnet schools in urban districts;[164] and (5) institute research programs to track academic success.[165]

Using Kahlenberg's solution as a starting point, this Note advocates going further with revisions of NCLB. Kahlenberg does not propose any redrawing of the school districts themselves. Under his plan, while a suburban district may be forced to accept a transfer student from an adjacent urban district, its boundaries would remain the same, and while urban districts may receive new magnet schools, they would retain the same administration, tax base, and other elements. The benefits of larger districts in achieving desegregation were highlighted by Gary Orfield in an article written before NCLB was enacted.[166] This Note will attempt to weave Kahlenberg's and Orfield's ideas together and present a unified proposal to amend NCLB. This unified proposal also has the advantage of being post-*Parents*: it takes advantage of Justice Kennedy's concurrence which reassured the constitutionality of socioeconomic integration.

B. AN OUTLINE OF THIS NOTE'S SOLUTION

The solution proposed by this Note includes four changes to NCLB and its implementation: (i) transfer forms should be in an easy-to-understand format and sent to the parents of eligible students before the end of the school year, discussed in Part V.C; (ii) schools receiving any transferring students should have an exemption for these students under their AYP analysis, and receive extra funding to support these new students, discussed in Part V.D; (iii) a limit to the number of transfers that a district can deny, with reorganization of districts exceeding this limit, discussed in Part V.E; and (iv) a dynamic cap on the socioeconomic ratio of

163. *Id*. at 1566–67.
164. *Id*. at 1567–68.
165. *Id*. at 1568.
166. Gary Orfield, *Metropolitan School Desegregation: Impacts on Metropolitan Society*, 80 MINN. L. REV. 825 (1996). Some of the benefits include: (1) larger districts face more media scrutiny than smaller districts; (2) teachers cannot shop among several small districts and choose to work in the wealthier areas; (3) all schools in large districts share the same tax base; (4) a large district has a single voice in the eyes of the legislature, rather than many competing voices; and (5) larger districts lower incentives for affluent families to purchase homes under the belief they are entitled to homogenous, high-status schools. *Id*. at 844, 853.

student populations, tied to the overall socioeconomic ratio of the district, discussed in Parts V.F and V.G. However, in many cases, these four steps will be unachievable by school districts as they are presently configured. In those cases, the onus will be placed on the state to implement inter-district plans to reduce disparities between school districts, discussed in Part V.H. While states will have freedom to choose their plans, they risk losing federal money if the plans fail. This Note proposes two possible inter-district solutions: mixed-income housing initiatives; and the redrawing of school district boundaries, discussed in Parts V.H(1) and V.H(2).

C. TRANSFER FORMS SENT TO EVERY ELIGIBLE STUDENT

Rather than merely informing students of their right to transfer, districts should be mandated to send an easy-to-understand transfer application to all affected students, so that every eligible student, regardless of their parents' level of education, has the opportunity to transfer to a better-performing school.[167] The applications should also be mailed out prior to end of the school year.[168] The current practice of informing parents on the first day of school forces the student to transfer schools mid-semester, putting them at a disadvantage compared to their peers at their new school. It may be that many parents choose not to transfer a student to avoid the stress of switching schools mid-semester. While transferring schools is difficult for any child, midyear transfers are especially stressful.[169] The affected students in Tuscaloosa are forced to begin the school year at their new schools, adjust to a new building, new teachers, and new peers, while contemplating the idea of requesting a transfer to yet another new

167. The Citizens' Commission on Civil Rights found several instances of school districts informing parents late of a possible transfer and requiring inconvenient procedures to request, or even learn more information about, a transfer. *See* BROWN *supra* note 154, at 58–59,

168. While school districts may balk at the logistics of mailing out transfer applications, New York City Schools, the largest school district in the nation, was able to notify parents during May 2008 of possible transfers beginning in September 2008. NYC Dep't of Ed. Public School Choice, http://schools.nyc.gov/ChoicesEnrollment/Changing Schools/ NCLB/PSC/default.htm (last visited Jan. 15, 2009).

169. Lawrence Kutner, *Parent & Child*, N.Y. TIMES, Jan. 18, 1990, at C8 (quoting a clinical psychologist who specializes in childhood stress: "[midyear] transfers 'are much harder on children because they tend to remain outsiders for the rest of the year'").

school. The stress of three different schools in two years is great for any student, and may outweigh the cost of staying in a low-performing school. School districts could easily improve the transfer form language and mail the forms before the end of the school year, the feasibility of which is demonstrated by the New York City school system sending transfer forms out in May.[170]

D. EXEMPTIONS FROM AYP ANALYSIS AND OTHER INCENTIVES FOR RECEIVING SCHOOLS

Schools which receive transfer students will also be stressed. NCLB should also be amended to protect these schools. Various reformers have called for a grace period for transfer students in AYP calculations, allowing receiving schools a chance to improve the scores of low-performing students who have transferred.[171] In an educational atmosphere so focused on test scores,[172] receiving schools must be given a grace period to eliminate a major disincentive to accepting transfers. This grace period will allow recently transferred students time to gain the knowledge and skills their previous schools may have failed to provide, and permit the AYP of the receiving school to accurately reflect its educational value. Such a grace period would merely require a change in the data analysis of AYP, easily implemented and imposing no new costs. However, this grace period must not become a loophole for schools to continually shuffle low-performing students from school to school every couple of years, effectively keeping their scores from ever being counted.[173] Therefore, sequential grace periods should be disallowed.

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170. *See supra* note 168.

171. *E.g.*, Kahlenberg, *supra* note 152, at 1563; BROWN, *supra* note 154, at 13.

172. For a critical look at the industry behind the new emphasis on standardized testing, *see* THOMAS TOCH, EDUCATION SECTOR, MARGINS OF ERROR: THE EDUCATION TESTING INDUSTRY IN THE NO CHILD LEFT BEHIND ERA 5 (2006), http://www.educationsector.org/usr_doc/Margins_of_Error.pdf ("[T]he scale of the NCLB testing requirements, competitive pressures in the testing industry, a shortage of testing experts, insufficient state resources, tight regulatory deadlines, and a lack of meaningful oversight of the sprawling NCLB testing enterprise are undermining NCLB's pursuit of higher academic standards.").

173. Since the enactment of NCLB, school districts have been looking for ways to ensure they achieve AYP in the immediate future, even if the decision will pose difficulties further down the road. A prime example is that many states back-loaded their expected yearly AYP goals, setting low, easily reachable targets at the beginning, with much higher, and likely unattainable, gains in the later years. These states are betting on a future

Monetary incentives have also been proposed, in the form of a weighted student-funding formula, which gives more funds to low-income students.[174] A system that allows funds to follow a student, wherever he or she transfers, could ensure that services received at a prior school, such as tutoring, would be received at the new school. However, even if the funds were available, the school might not allocate the funds in that direction.[175] Therefore, on the transfer application, receiving schools should list how they will spend any extra funding received with the transferring student. Parents can then decide whether their student should attend a school that will offer a service their student was receiving at his or her previous school (e.g. math tutoring) or instead attend a school that uses the funding for a different purpose (e.g. increased extracurricular activities or sports).[176] Once again, this would require minimal change, with principals providing a copy of their most recent budget allocations, showing how transfer money was spent that year.

E. POSSIBLE DISTRICT REORGANIZATION

Beyond individual schools, district-wide reforms will also be needed to accommodate the increased number of student transfers. In Tuscaloosa's case, any large increase in requested transfers will result in overcrowding in the better schools and a significant amount of inefficient busing — the exact problem that led the school board to propose the rezoning. It will also limit the amount of successful transfers, since high-performing schools will not have the capacity to accept all transfer applicants, even

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Congress revising the NCLB provisions before they are forced to meet the unattainable AYP goals. WAYNE RIDDLE, ADEQUATE YEARLY PROGRESS (AYP): IMPLEMENTATION OF THE NO CHILD LEFT BEHIND ACT 24 (Cong. Research Serv., CRS Report for Congress Order Code RL32495, Oct. 26, 2005); *see also* Sam Dillon, *Under No Child' Law*, *Even Solid Schools Falter*, N.Y. TIMES, Oct. 13, 2008, at A1.

174. Kahlenberg, *supra* note 152, at 1563–64.

175. *See* THOMAS B. FORDHAM INSTITUTE, FUND THE CHILD: TACKLING INEQUITY & ANTIQUITY IN SCHOOL FINANCE 3 (2006) http://www.defendcharterschools.org/FundtheChild.pdf. ("[Funding] should arrive at the school as real dollars (i.e., not teaching positions, ratios, or staffing norms) that can be spent flexibly . . . .").

176. For a study showing that parents choose schools for their children just as effectively as educational experts, see Joseph L. Bast & Herbert J. Walberg, *Can Parents Choose the Best Schools for their Children?*, 23 ECON. OF EDUC. REV. 431, 431 (2004) ("[T]he hypothesis that parents can choose the best schools for their children conforms with economic theory and is not refuted by reliable empirical data.").

though lack of available space is not a viable excuse under NCLB.[177] In practice this excuse is used quite frequently by school districts.[178] For example, the New York State Education Department has the following information for parents available on its website:

> There may be circumstances in which public school choice is not available because the school district does not have any other schools at the same grade level that are able to accept transfer students, but the U.S. Department of Education has not provided definitive guidance regarding this possibility.
>
> However, neither draft federal regulations nor the NCLB legislation refer to capacity as a basis for denying public school choice, although preliminary federal guidance does indicate that students may be denied the option to transfer to a school building if the transfer would cause the school building to violate health and safety codes by exceeding its capacity.[179]

Therefore, NCLB should be amended to create a cap of allowable denied transfers for logistical reasons. If a district is unable to grant at least 53% of requested transfers, then the districts must be forced to reorganize.[180] With the cap based upon historical data, school districts are assured of an attainable goal, which can then be adjusted upwards year by year as schools become more adept at the transfer process.

177. Regulations of the Offices of the Department of Education, 34 C.F.R. § 200.44(d) (2008) ("An LEA [Local Educational Authority] may not use lack of capacity to deny students the option to transfer . . . .").

178. *See* BROWN, *supra* note 154, at 10, 62–63 ("Many districts continue to use lack of school capacity to deny parents choices of some or all higher performing schools.").

179. NCLB Information for Parents, http://www.emsc.nysed.gov/deputy/nclb/parentfacts.htm (last visited Feb. 20, 2009).

180. The 53% figure is reached by calculating the mean of the percentages granted by seven school districts during the 2002–03 school year: Fresno, CA (60.7%); Chicago, IL (48.5%), Buffalo, NY (82.3%), New York, NY (23.6%), Richmond, VA (24.4%), Atlanta, GA (65.6%), and DeKalb, GA (69.4%), and rounding down to 53%. Statistics taken from JIMMY KIM & GAIL L. SUNDERMAN, THE CIVIL RIGHTS PROJECT AT HARVARD UNIVERSITY, DOES NCLB PROVIDE GOOD CHOICES FOR STUDENTS IN LOW-PERFORMING SCHOOLS? 16 (2004), http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/29/dc/98.pdf.

School districts that are unable to meet the 53% goal will be forced to implement some reorganization to prevent failure the following year. Two possibilities include closing larger, unsuccessful schools, and replacing them with several, smaller academies, or creating magnet schools within the district. Both strategies have gained force in the educational community, undertaken by school districts via voluntary reforms.[181] The new, smaller schools may appeal to parents seeking transfers who might not have otherwise considered transferring their children to larger schools.[182] The new magnet schools would attract high-performing students from high-performing schools,[183] seeking to take advantage of the special curricula, thereby creating space for transfers at the high-performing, non-magnet school. School districts would be free to implement other logistical changes besides these two options. A school district would need to evaluate its current physical plant and staffing to formulate a plan which would realistically work to increase successful student transfers the following year. By not forcing districts to apply prefabricated reorganization models, the feasibility of this reform is increased. Districts can combine these transfer-focused reforms with educational-quality reforms, improving the educational experience for non-transferring students as well as transferring students, thereby increasing public acceptance.

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181. New York City under its current mayor, Michael Bloomberg, has shut several failing, large high schools and opened small schools and "specialized" magnet schools throughout the city. *See* David M. Herszenhorn, *Mayor Plans New Education Measures, Including Reshaping 8 Troubled High Schools*, N.Y. TIMES, Nov. 18, 2005, at B3.

182. For a study of small schools in Chicago and an argument for why they benefit students, see PATRICIA A. WASLEY ET AL., BANK STREET COLLEGE OF EDUCATION, SMALL SCHOOLS: GREAT STRIDES 2 (2000), http://www.bankstreet.edu/gems/publications/smallschools.pdf. The authors explain:

> Why create small schools? Above all, in order to address four specific problems: to create small, intimate learning communities where students are well known and can be pushed and encouraged by adults who care for and about them; to reduce the isolation that too often seeds alienation and violence; to reduce the devastating discrepancies in the achievement gap that plague poorer children and, too often, children of color; and to encourage teachers to use their intelligence and their experience to help students succeed.

Id.

183. For a study on the benefits of magnet schools, see ERWIN FLAXMAN, ANNABELLE GUERRERO & DENISE GRETCHEN, NATIONAL CENTER FOR RESEARCH IN VOCATIONAL EDUCATION, UNIVERSITY OF CALIFORNIA AT BERKELEY, CAREER DEVELOPMENT EFFECTS OF CAREER MAGNETS VERSUS COMPREHENSIVE SCHOOLS (MDS-803), (1999), http://ncrve.berkeley.edu/AllInOne/MDS-803.html.

However, regardless of the reorganization plan chosen, the influx of transfer students must be monitored and controlled to prevent a critical mass of poverty within any one school. The next two Parts discuss the benefits of diversifying socioeconomic status in schools, why high-poverty schools should be avoided, and how a socioeconomically diverse student population can be achieved.

F. BACKGROUND: BENEFITS OF USING SOCIOECONOMIC STATUS

Solutions that create diversity of student socioeconomic status are not only constitutional under the view of the *Parents* decision, but also improve students' academic achievement in a measurable way. The famous "Coleman report" in the 1960s listed "socioeconomic status" as second only to family influence in factors determining a student's academic success.[184] It is thus no surprise that poor students perform worse on standardized test scores than their middle class peers. For example, on the 2007 National Assessment of Educational Progress, eighth grade students who were not eligible for free or reduced-cost lunch scored 291 points on average out of a possible 500, compared to 274 points for students eligible reduced-cost lunch, and 263 points for students eligible for free lunch.[185] Researchers have found that schools with a high level of poverty present difficult environments for student learning, and even those isolated high-poverty schools with high success rates are unable to sustain that level of achievement over time.[186] Schools that avoid high concentrations of poverty perform better overall, and low-income students who are placed in middle class schools perform better than middle-class students attending high-poverty schools.[187]

Socioeconomic integration has often been resisted, however, by the notion that wealthy families who purchase large homes in fancy suburbs have the right to send their children to high-performing schools that exclude students from surrounding, poor-

184. JAMES S. COLEMAN ET AL., U.S. DEP'T OF HEALTH, EDUC., & WELFARE, EQUALITY OF EDUCATIONAL OPPORTUNITY 325 (1966).

185. U.S. DEPT. OF EDUC., THE NATION'S REPORT CARD: MATHEMATICS 2007 29 (2007), http://nces.ed.gov/nationsreportcard/pdf/main2007/2007494.pdf.

186. Kahlenberg, *supra* note 152, at 1547–48.

187. *Id.* at 1549.

er areas.[188] Supreme Court jurisprudence has recognized the independence of local school boards, which have allowed this idea of elitist suburban schools to prosper.[189] *Milliken v. Bradley* struck down an inter-district desegregation plan that would have bused students from Detroit into the surrounding suburban schools.[190] The Court felt it unfair to burden suburban districts which had no history of de jure segregation. The Court also claimed deference to the local control of school boards, even though the dissent argued that Michigan had a history of state-controlled education, which arguably undermined the Court's reliance on the tradition of local control.[191]

On the other hand, the *Parents* plurality opinion, which felt that racial balance was an illegitimate goal, rejected the idea of deference to local school boards: "[s]uch deference 'is fundamentally at odds with our equal protection jurisprudence. We put the burden on state actors to demonstrate that their race-based policies are justified.'"[192] If this lack of deference extends to socioeconomic-based policies as well, then *Parents* may represent a shift away from *Milliken* jurisprudence. This gives hope to a multi-district, socioeconomic-based balancing plan.

Socioeconomic integration would also achieve racial diversity in most cases while abiding by the opinion of the Court in *Parents*. According to 2006 U.S. Census data, 30.6% of African-Americans between the ages of 5 and 17 inclusive were below the poverty line,[193] with Hispanics at 25.5%,[194] and Whites 9.1%.[195]

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188. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 24 (1973) (noting that the Equal Protection Clause does not require absolute equality or precisely equal advantages with respect to wealth); *see also* Gary Orfield, *Metropolitan School Desegregation: Impacts on Metropolitan Society*, 80 MINN. L. REV. 825, 853 (1996) ("Although Americans strongly support the goal of equal educational opportunity for all, they also support — without recognizing the contradiction — the reality of far better educational opportunity for those who have the money to buy it . . . .").

189. *See* Milliken v. Bradley, 418 U.S. 717, 741–42 (1974) ("No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process.").

190. *Id*.

191. *Id.* at 793–94 (Marshall, J., dissenting); *see also* Missouri v. Jenkins, 515 U.S. 70, 99 (1995) (referring to local autonomy of school districts as a vital national tradition).

192. Parents Involved in Community Schools v. Seattle School District No. 1, 127 S. Ct. 2738, 2766 (2007) (quoting Johnson v. California, 543 U.S. 499, 506 n.1 (2005)).

193. U.S. Census Bureau Table, http://pubdb3.census.gov/macro/032007/pov/new01_100_06.htm (2007).

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Therefore, in a school district with diverse races, any program based upon socioeconomic status would have a greater effect on blacks and Hispanics. Furthermore, since the plan would be racially neutral on its face, it would avoid the strict scrutiny test of *Parents*, which can only be satisfied in cases where the school district has a history of past intentional discrimination and had never achieved unitary status.[196] Instead, the plan would be subjected to the deferential rational basis test, which requires only that the plan "rationally furthers a legitimate state purpose or interest."[197] Though Justice Thomas' concurrence might find that this plan fails the rational basis test, furthering only "an interest in classroom aesthetics and a hypersensitivity to elite sensibilities," the opinion of the Court in *Parents* has left this door open.[198]

While a socioeconomic plan would most likely help reverse the resegregation of the Tuscaloosa schools, it is unlikely that the current school board would reverse its ideology and vote for such a plan. It is also unlikely that the Alabama legislature would propose such a solution; the political consequences of disrupting all school districts throughout the state would be severe.[199] Instead, the solution should come from NCLB, the law the Tuscaloosa school board used to justify its actions. The amendments, while constituting an ideological shift for the law, would merely allow it to achieve the results for which it currently strives.

G. DYNAMIC CAP FOR SCHOOLS' SOCIOECONOMIC RATIOS

In order to prevent receiving schools from becoming high poverty schools overnight, there must be a cap set on the number of low-income students allowed to transfer to a particular school.

194. U.S. Census Bureau Table, http://pubdb3.census.gov/macro/032007/pov/new01_100_09.htm (2007).

195. U.S. Census Bureau Table, http://pubdb3.census.gov/macro/032007/pov/new01_100_04.htm (2007).

196. *Parents*, 127 S. Ct. at 2752.

197. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 55 (1973).

198. *Parents*, 127 S. Ct. at 2770 n.3.

199. There is evidence that Alabama citizens have not completely embraced desegregation. In 2004, a referendum was put forth to remove now-unenforced, segregation-era language from the Alabama constitution which required separate schools for "white and colored children." The referendum was narrowly defeated. Manuel Roig-Franzia, *Alabama Vote Opens Old Racial Wounds; School Segregation Remains a State Law as Amendment Is Defeated*, WASH. POST, Nov. 28, 2004, at A1.

Kahlenberg proposes a 50% cap,[200] but a static cap would allow some districts with relatively few low-income students to funnel all such transfers to a single school. According to NCLB, a school district must give every student in a failing school the opportunity to transfer to another public school which is not failing, but the law puts no restrictions on the number or kind of such receiving schools except that they themselves are not failing.[201]

The cap should instead be dynamic, calculated as equal to the percentage of low-income students within the district, with a maximum value of Kahlenberg's proposed 50%.[202] This system would not be unlike racial balancing systems now deemed unconstitutional in *Parents*, without involving the constitutional issues of race.[203] This dynamic cap would ensure a consistent socioeconomic ratio across all schools within a district, a likely racially diverse student population,[204] prevent a relatively economically non-diverse school district from funneling all of its low-income students to a single school, and avoid the strict scrutiny test of *Parents*.[205]

If the educational advantages of a socioeconomic ratio are explained to parents within a district, support is likely to be high for such a plan. Low-income parents, whose students may be transferring from majority low-income, failing schools would be guaranteed that their children would not be transferred into a similar situation. Middle and high-income parents, whose students may already attend a high-performing, major middle-income school — a destination for future transferring students — would be assured that the influx of low-income students would

200. Kahlenberg, *supra* note 152, at 1567.

201. 20 U.S.C. § 6316(b)(1)(E)(i) (2006).

202. This plan would, of course, require some logistical maneuvering. However, it's not unrealistic, considering that students are evaluated for free or reduced-fee lunch on an annual basis. *See* USDA, ELIGIBILITY MANUEL FOR SCHOOL MEALS (2008), *available at* http://www.fns.usda.gov/cnd/governance/notices/iegs/EligibilityManual.pdf. Title I funding for schools, part of NCLB, is also calculated annually. *See* Michael Janofsky, *Federal Spending Increases, but More Schools Will Get Less Money for Low-Income Students*, N.Y. TIMES, July 4, 2005, at A9. The shuffling of students would be no less difficult than allowing students to transfer on a yearly basis under NCLB in its current form.

203. *Parents*, 127 S. Ct. at 2747 (noting that the Seattle school district deemed any school which had a racial composition not within 10 percentage points of the city's overall white/nonwhite balance as "integration positive" and subsequently assigned students to that school based upon race).

204. *See supra* notes 193–195.

205. 127 S. Ct. 2738.

not overwhelm their successful school. However, not all school districts will be able to successfully implement the dynamic cap — the rate of poverty within the district may be too great. Therefore, inter-district solutions must be available when the intra-district dynamic cap fails.

H. INTER-DISTRICT SOLUTIONS WHEN INTRA-DISTRICT SOLUTIONS FAIL

In many large, poor, urban districts, it would be impossible for school districts to meet the 50 percent dynamic cap. In Atlanta and Detroit, for example, the estimated percentage of children living in poverty is nearly 50 percent.[206] Surrounding districts will need to provide help. Yet, instead of only mandating inter-district transfers, NCLB should be amended to put the focus on the state governments who allowed such disparate school districts to be created. Putting the responsibility on states has not been universally supported; notably the New York Court of Appeals stated:

> Holding the State responsible for the demographic composition of every school district, moreover, would mean either making it responsible for where people choose to live, or holding that it must periodically redraw school district lines, negating the preferences of the residents. Alternatively, holding that students must be allowed to attend schools outside their districts at no additional cost . . . would likewise diminish local control and participation, as the residents of more attractive districts would end up having to provide for students from other districts.[207]

However, four years after this statement by the Court of Appeals, the Supreme Court decided *Parents*, and declined to defer to local control of school boards.[208] Therefore, today, states should be re-

206. BROOKINGS INSTITUTION SURVEY SERIES, KIDS IN THE CITY: INDICATORS OF CHILD WELL-BEING IN LARGE CITIES FROM THE 2004 AMERICAN COMMUNITY SURVEY 5 (2006), http://www.brookings.edu/~/media/Files/rc/reports/2006/08poverty_fixauthorname/20060810_KidsCity.pdf.

207. Paynter v. State, 797 N.E.2d 1225, 1230 (N.Y. 2003).

208. *Parents*, 127 S. Ct. at 2766 ("Such deference 'is fundamentally at odds with our equal protection jurisprudence. We put the burden on state actors to demonstrate that

quired to either implement inter-district solutions, or redraw the district boundaries entirely. If the era of local control in education, which helped strike down the inter-district plan in *Milliken v. Bradley*,[209] is truly behind us, as the *Parents* decision seems to imply, then these inter-solutions should be put back on the table. As stated in *Milliken*, "[s]chool district lines and the present laws with respect to local control, are not sacrosanct . . . ."[210] Nevertheless, since there is no constitutional violation the solution may not come from the federal courts.[211] Therefore, the solution must be statutory.

The Supreme Court rejected the notion of local control over the racial issues in *Parents*.[212] The same notion should be rejected as well for socioeconomic status and the inequalities of public school systems through an NCLB amendment. States must be held accountable for allowing school districts in which there are high concentrations of failing schools and impoverished students to develop. These districts have reached a critical point where they cannot be saved by internal shuffling of students or schools. And oftentimes, these districts border others which use their greater wealth to significantly outspend the failing district.[213] Rather than merely forcing the two districts to accept each others transfers, the state should be put to task to eliminate the disparity.

This disparity is a nationwide issue: in 27 states "the highest-poverty school districts receive fewer resources than the lowest-poverty districts;" nationwide, "$907 *less* is spent per student in the highest-poverty districts than in the most affluent dis-

their race-based policies are justified.'") (quoting Johnson v. California, 543 U.S. 499, 506 n.1 (2005)).

209. 418 U.S. 717 (1974).

210. *Id*. at 744.

211. *See id*.

212. 127 S. Ct. 2738.

213. An example of this extreme disparity is shown by Detroit and its surrounding suburbs. *See* Nida Syed, *Comparing 6th Grade Science Classrooms: Inner-City versus Suburb*, 5 AM. J. UNDERGRAD. RES. 19, 19 (2006), *available at* http://www.ajur.uni.edu/v5n1/Syed%20%20pp%2019-26.pdf.

> The school funding disparities between the urban and suburban school districts are sharp. For example, a wealthy suburban school district such as in Bloomfield Hills, Michigan, where the median household income is $152,752, spends more than $12,000 per student. This is in sharp contrast to a Detroit school district, where the median household income is $40,986 and $7,259 is spent per student. *Id.*

tricts."[214] The cause of this disparity is that "[s]tates rely on locally generated dollars to cover a significant part, often more than 50 percent, of education funding," which "benefits wealthier locales with strong tax bases."[215] This disparity has "a huge impact on the ability of high-poverty schools to educate their children."[216] In sum, in the words of some school finance reformists, "[f]or youngsters on the caboose of the socio-economic gravy train, we spend tens of thousands of dollars less on their educations than we do on their more advantaged peers."[217]

States themselves can reform their educational funding formulas to focus less on local tax bases, which would allow more money to flow into poorer school districts. To this end, there has been some progress in a few states,[218] which may be indicative of a broader national trend of acceptance of educational equity issues. Assuming this trend continues to grow, then there is hope that a national-scale solution could be adopted. An amendment to NCLB would thus assure that all states address these equity issues in their educational policies. This amendment would not be limited merely to increasing funding, but also eliminating the situation where a student is trapped in a high poverty-school district with no successful schools, adjacent to a high-income, high-performing district.

Therefore, in states where the disparate socioeconomic makeup of school districts prevents the goals of student achievement and choice under NCLB from being fully realized, the states should be mandated to correct the situation. States would be given freedom to choose their solutions, but would face the risk of losing federal education funding if their solution fails. This Note offers two possible solutions, but stresses that solutions should be decided on a district-by-district basis.

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214. THE EDUCATION TRUST, SPECIAL REPORT, THE FUNDING GAP 2005 2 (2005), http://finance.tc-library.org/DefaultFiles/SendFileToPublic.asp?ft=pdf&FilePath=c%3A%5CWebsites%5Crockefeller%5Ftclibrary%5Forg%5Fdocuments%5C197%5F1833%2Epdf&fid=197_1833&aid=2&RID=1833.

215. THOMAS B. FORDHAM INSTITUTE, FUND THE CHILD: TACKLING INEQUITY & ANTIQUITY IN SCHOOL FINANCE 18 (2006), http://finance.tc-library.org/DefaultFiles/SendFileToPublic.asp?ft=pdf&FilePath=c%3A%5CWebsites%5Crockefeller%5Ftclibrary%5Forg%5Fdocuments%5C197%5F8351%2Epdf&fid=197_8351&aid=2&RID=8351.

216. *Id.* at 9.

217. *Id.* at 2.

218. EDUCATION TRUST, *supra* note 214, at 7.

1. *One Possible Solution: Housing Policies*

One possible solution for states would be to implement new housing initiatives such as building mixed-income housing in high-income school districts. Federal funds could be made available to assist states in creating this new housing and the district could receive federal funding for transferring low-income students. High-income developments could also be planned in moderate to low-income areas. Mixing income levels throughout a school district's attendance zones would prevent "neighborhood school" plans such as Tuscaloosa's from effectively resegregating the district. A housing solution is feasible in southern school districts such as Tuscaloosa because they tend to be larger than their northern counterparts.[219] There may be neighborhood resistance to a new low-income project, but from a district-wide perspective, these types of solutions may be feasible.

However, in many northern cities, housing solutions are unlikely to succeed. The small northern school districts may contain pockets of great wealth and poverty, oftentimes adjacent to each other.[220] Elected officials of the suburbs may bow to public outcry against building low-income housing in their wealthy enclaves, while suburban residents may be unwilling to move into new luxury housing located in the inner city.[221] Thus, deadlock at the local level might prevent these housing policies from being feasible in many smaller districts, and other solutions must be attempted.

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219. *See* Sarah Battersby & William A. Fischel, *The Competitive Structure of Urban School Districts in the United States* 1 (Sept. 2006) (unpublished draft), *available at* http://ssrn.com/abstract=953228 ("In the South, segregated schools were a diseconomy of scale that also required larger districts to achieve graded schools for whites and, later on, for blacks. These arguably oversize school districts persist because of the political and legal difficulties in breaking up school districts.").

220. *See, e.g.*, Syed, *supra* note 213, at 19 (noting the disparities between Detroit and Bloomfield Hills).

221. This presents a chicken-and-egg problem: attracting wealthy suburbanites into the inner city is a step towards improving inner city schools, but many wealthy residents choose their housing based upon the high-performing schools already present. *See* Orfield, *supra* note 188, at 858 ("When prospective home buyers are hunting for locations, the chances are that they won't want to 'risk' moving into an area of 'questionable stability.' The school clearly becomes part of that 'risk quotient.'").

2. *Another Solution: Redrawing of District Boundaries*

In cases where states voluntarily agree, or where prior solutions have failed to achieve results, the states' school districts could have their boundaries redrawn. Rather than following municipal or county dividing lines, neighboring school districts could be combined into a single, larger school district. Gary Orfield wrote an article in 1996 which stressed the benefits of larger school districts in furthering desegregation.[222] He found that those states with the highest level of segregated black students had relatively small and fragmented school districts.[223] Orfield cited the ideas of James Madison regarding the tyranny of a narrow majority as a philosophic rational for larger school districts.[224] Madison stated that "the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression."[225] To solve this problem, Madison opined that by "[e]xtend[ing] the sphere . . . you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens."[226] Following this philosophy, Orfield argues that large districts would be more democratic, leading to increased public participation, lower teacher turnover, and racially diverse schools.[227]

State legislatures can reclaim the boundary-drawing power that many had vested in local officials[228] and redraw school dis-

222. *Id.*
223. *Id*. at 839.
224. *Id*. at 835.
225. THE FEDERALIST No. 10, at 111 (John C. Hamilton ed., 1869).
226. *Id*.
227. Orfield, *supra* note 188, at 843–45.
228. In New York, the legislature has vested the power over school district boundaries in local superintendents: "[a] district superintendent may organize a new school district out of the territory of one or more school districts which are wholly within the geographic area served by his board of cooperative educational services, whenever the educational interests of the community require it." N.Y. EDUC. LAW § 1504(1) (2007). The Alabama legislature has vested such power in the county superintendents: "[the county superintendent] shall recommend a plan for the laying out of such local attendance district or districts as will best serve the interests of the entire county and shall submit the same for approval and adoption by the county board of education." ALA. CODE § 16-9-17(b) (1975).

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tricts to eliminate extreme socioeconomic disparity.[229] These larger districts would make a dynamic cap of 50% poverty achievable in schools traditionally located in areas of high poverty.[230] The creation of larger districts would also eliminate overhead costs, freeing up money for possible increased transportation costs. The increased size would allow for all NCLB transfers to be approved and give more leeway to administrations in reassigning principals and teachers. As failing schools are closed and others created, the enlarged district can wield more resources in achieving these tasks.

As stated previously, the political consequences of disrupting all school districts throughout a state would be severe. On the other hand, the political consequences faced by a state legislature might be curtailed by the threat of loss of federal education funding. Nevertheless, opponents would argue over the disruption to local property tax maps. In response, however, school finance reformers argue that the reliance on local taxes as the basis for educational funding is a main cause of educational disparity between districts, and ought to be eliminated.[231] In sum, as more and more states push for school finance reform, the redrawing of school district boundaries as a solution to education inequity may become more politically palatable. Today, however, this is presented merely as an option for states to pursue. In a case such as Tuscaloosa, a less drastic solution may be sufficient.

VI. Conclusion: Tuscaloosa and Beyond

Tuscaloosa was at the heart of desegregation in the southern United States, made famous by George Wallace's stand at the door of the University of Alabama in 1963, in which he blocked the doorway of Foster Auditorium, in a symbolic protest of the enrollment of the schools first black students.[232] In that decade, all public schools in Alabama were faced with the task of developing a plan for desegregation. In 1970, the Fifth Circuit affirmed a

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229. *See, e.g.*, Syed, *supra* note 213, at 19 (noting the disparities between Detroit and Bloomfield Hills).

230. *See, e.g.*, Brookings Institution Survey Series, *supra* note 206, at 5.

231. *See* Education Trust, *supra* note 214, at 8.

232. Claude Sitton, *Governor Leaves; But Fulfills Promises To Stand In Door And To Avoid Violence*, N.Y. Times, June 12, 1963.

desegregation plan for the Tuscaloosa school system.[233] In 1978, the same court found that several Tuscaloosa schools were still racially identifiable, and ordered further relief to achieve so-called "unitary status."[234] It took Tuscaloosa City Schools another two decades before it was found to have achieved unitary status in 2000.[235]

With control of the schools back in local hands, the school district reevaluated its current facilities and student assignment plan, which dated from 1995 and its successful achievement of unitary status. Citing population growth and shifting demographics, the district commissioned a study which led to the proposal at issue in this Note.

As of the writing of this Note, the proposal is in the process of being implemented for the 2008–2009 school year. Meetings where affected parents could ask questions have been held,[236] and updated zoning maps are available on the internet for download for both elementary[237] and middle[238] schools. No successful legal challenges have been presented, and it is unknown how many parents will request transfers under NCLB or which schools will allow student transfers and which schools will be eligible to receive transfers.[239]

Today, NCLB is mentioned as a solution for the parents and students of Tuscaloosa, but six years after NCLB's enactment, it

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233. Lee v. Macon County Bd. of Educ., 429 F.2d 1218 (5th Cir. 1970).

234. Lee v. Tuscaloosa City Sch. Sys., 576 F.2d 39 (5th Cir. 1978). The term "unitary status" has no set definition. In the words of the Supreme Court:

> [I]t is a mistake to treat words such as "dual" and "unitary" as if they were actually found in the Constitution. . . . Courts have used the terms "dual" to denote a school system which has engaged in intentional segregation of students by race, and "unitary" to describe a school system which has been brought into compliance with the command of the Constitution. We are not sure how useful it is to define these terms more precisely . . . .

Bd. of Educ. of Okla. City Pub. Sch. v. Dowell, 498 U.S. 237, 245–46 (1991).

235. Dillon, *supra* note 2 (noting that federal desegregation ended in 2000).

236. Press Release, Tuscaloosa City Schools, School Re-zoning Meetings Scheduled (Nov. 19, 2007), *available at* http://www.tusc.k12.al.us/news/releases07/11192007 Zone-Meetings.pdf.

237. Elementary school zoning map for 2008–2009 in PDF format, http://www.tusc.k12.al.us/super/Elem.pdf (last visited Feb. 20, 2009).

238. Middle school zoning map for 2008–2009 in PDF format, http://www.tusc.k12.al.us/super/Middle.pdf (last visited Feb. 20, 2009).

239. For a list of schools allowing transfers and schools eligible to receive students for the 2007–2008 year, *see* Tuscaloosa City Schools For Parents, http://www.tusc.k12.al.us/parents/sc0708main.html (last visited Feb. 20, 2009).

is clear that its effectiveness is limited. If NCLB is amended as proposed in this Note, it would force transfer applications to be sent to all parents of the Tuscaloosa students forced to transfer from the racially diverse, high-performing northern school to the majority black, low-performing western school.[240] The Tuscaloosa school district would then have to grant at least 53% of the transfers back to the higher performing school, which presumably would be filed by the parents. The socioeconomic ratio at each school would be monitored, so that it does not exceed the district-wide ratio. If the ratio at a school did exceed that ratio, then Tuscaloosa would have to devise a district-wide plan to correct the situation the following year. As a large, southern school district, it is conceivable that Tuscaloosa could devise a feasible plan to address the situation. It is, therefore, unlikely that the burden would shift to the Alabama state government to devise a solution.

On a larger scale, those who view the situation in Tuscaloosa as indicative of a broader, unfortunate shift can no longer look to the courts to support their case. Therefore, using theories of socioeconomic integration and the language of *Parents* to bypass local control arguments, those supporters can look to a statutory solution through NCLB amendments. This Note presents a multi-faceted solution, with school district reforms devised on a case-by-case basis. Depending upon the severity of the situation, the solution can be as simple as guaranteeing the number of successful transfers, to as complex as redrawing school district boundaries. With no prefabricated models for districts, this solution ensures that a feasible plan can be created as close to the situation as possible, involving higher authorities only when necessary to achieve the underlying goals — the original goals of NCLB — that students in low-performing schools are no longer trapped, but have the choice to attend a high-performing school and the opportunity to achieve.

240. *See* Dillon, *supra* note 2.