

## A Missed Opportunity: Minnesota's Failed Experiment with Choice-Based Integration

By Margaret C. Hobday,\* Geneva Finn,\*\* and Myron Orfield\*\*\*

*America must realize that purging the taint of racism requires more than color blindness and race neutrality in a free market. Color-blind remedies are also blind to the historical fact that the law sanctioned racial oppression for centuries. Because blacks suffered and Whites prospered as classes, any realistic remedy must also be class-based...America must reject out of hand any policies that tend to separate the races.*<sup>1</sup> –Judge Gerald W. Heaney

In June of 2007, the United States Supreme Court came within one vote of ending school integration and moving to the type of race-neutral, free-market remedy to educational inequality that Judge Heaney warned against in 1985.<sup>2</sup> The non-binding portion of Chief Justice Roberts's plurality opinion in *Parents Involved in Community Schools v. Seattle School District No. 1* asserts that states may only remedy racial imbalance in its schools caused by intentional discrimination, while proactive efforts to racially integrate schools should be left to parental choice.<sup>3</sup> But the majority of the Supreme Court still endorses mandatory, proactive strategies to prevent resegregation. Justice Kennedy's concurrence in *Parents Involved* acknowledges that race-conscious decision-making is still necessary in our nation and rejects the plurality's colorblind approach.<sup>4</sup> Kennedy's opinion provides at least limited avenues for states to

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<sup>1</sup> Gerald W. Heaney, *Busing, Timetables, Goals, & Ratios: Touchstones of Equal Opportunity* 69 MINN. L. REV. 735, 819-20 (1985). Authors Hobday and Orfield clerked for the Honorable Gerald W. Heaney, whose cautionary words, written 20 years ago, still provide guidance today. This article is a tribute to this fine jurist who, during his tenure on the Eighth Circuit Court of Appeals, oversaw the school desegregation cases in St. Louis and Kansas City. Judge Heaney has also co-authored a history of the St. Louis case. GERALD W. HEANEY & SUSAN UCHITELLE, UNENDING STRUGGLE: THE LONG ROAD TO AN EQUAL EDUCATION IN ST. LOUIS (2004).

<sup>2</sup> The non-controlling portions of Chief Justice Roberts's plurality opinion in *Parents Involved in Community Schools v. Seattle School District no. 1*, expressed the belief that, under a Fourteenth Amendment analysis, states do not have a "compelling interest" in racially balanced schools. 551 U.S. \_\_\_\_, 127 S. Ct. 2738, 2757 (2007).

<sup>3</sup> *Id.*

<sup>4</sup> *Parents Involved in Cmty. Sch.*, 551 U.S. \_\_\_\_, 127 S.Ct. at 2791-92 (J. Kennedy, concurring).

proactively address racial isolation<sup>5</sup> in their schools, including the explicit consideration of race in the drawing of attendance boundaries and in the decisions to open and close schools.<sup>6</sup> The Court's holding, therefore, does not *require* school districts to resort to choice-based integration programs. Yet a growing number of states have been moving in that direction in the wake of declining court oversight over desegregation programs.<sup>7</sup> While educational choice admittedly can serve some public good, there is reason to be cautious about integration plans that rely heavily on the voluntary decision-making of local school boards and parents.<sup>8</sup>

Nearly ten years ago, Minnesota adopted rules that do just that, and the results have been disastrous. Minnesota, the land of Hubert Humphrey and Roy Wilkins, a state with a powerful and long-standing tradition of Republican support of civil rights and known for its progressive education policies,<sup>9</sup> chose its voluntary integration rules over a much stronger proposal that mandated racial integration in all public schools and sanctioned noncompliant schools and

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<sup>5</sup> Adopting Justice Kennedy's articulation of the states' compelling interest in addressing racial isolation, this article speaks primarily in terms of "racial isolation" and "racial balance" to describe the state of our schools. In doing so, we do not accept that racial balance, or desegregation, is the same thing as integration. This is Justice Thomas's view in *Parents Involved*. 515 U.S. \_\_\_ at 2769 n.2 (Thomas, J., concurring). True integration of public schools requires much more than numerical balancing of schools' racial compositions. *See, e.g.* John A. Powell, *The Tensions Between Integration and School Reform*, 28 HASTINGS CONST. L.Q. 655, 681 (2001) ("Educational integration is the systemic transformation of a school to create a diverse and inclusive environment within the school and the curricula, achieved through a variety of reforms.") But the elimination of racially isolated schools, having schools with racial compositions that better reflect our racially diverse society, is a first, and necessary, step for metropolitan districts concerned with integrating their schools. *Id.* ("We must always be aware of the fact that our ultimate goal is integration, and that desegregation is only a first step on the road to the good society" (quoting MARTIN LUTHER KING, JR., *THE ETHICAL DEMANDS FOR INTEGRATION* (1962))).

<sup>6</sup> *Parents Involved in Cmty. Sch.*, 551 U.S. at \_\_\_\_, 127 S.Ct. 2738, 2792 (Kennedy, J., concurring).

<sup>7</sup> Charles J. Ogletree, Jr. & Susan Eaton, *From Little Rock to Seattle and Louisville: Is "All Deliberate Speed" Stuck in Reverse?* 30 U. ARK. LITTLE ROCK L. REV. 279, 291 (2008) (describing moves to end school desegregation programs in the wake of *Parents Involved*); Reardon, S. and Yun, J. (2003). *Integrating neighborhoods, Segregating Schools: The Retreat from School Desegregation in the South, 1990-2000*. 81 N.C.L.REV.1463, 1563-1596 (2002); GARY ORFIELD & SUSAN E. EATON, *DISMANTLING DESEGREGATION. THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION*, 20-22 (2000).

<sup>8</sup> For a strong critique of school choice models, *see See, e.g.* John A. Powell, *The Tensions Between Integration and School Reform*, 28 HASTINGS CONST. L.Q. 655, 671-80 (2001).

<sup>9</sup> *See* Karen Evans Stout & Byron Stevens, *The Case of the Failed Diversity Rule: A Multiple Stream Analysis*, 22 EDUC. EVALUATION & POL'Y ANALYSIS 341, 342-43 (2000) (observing that "Minnesota has enjoyed a reputation for leadership in education policy circles" and that it has a "progressive legacy"); Tim L. Mazzoni, *The Changing Politics of State Education Policy Making: A 20-Year Minnesota Perspective*, 15 EDUC. EVAL. & POL'Y ANALYSIS 357, 361 (1993) ("Minnesota's political culture has often been lauded for its grassroots participation, governmental effectiveness, and policy innovations.").

districts. The alternative proposal had been drafted by a select panel of school district representatives and civil rights advocates and had been endorsed by both the State Board of Education and the state legislature.<sup>10</sup> Instead, in the face of conservative opposition to the rules and left to the work of one assistant attorney general, Minnesota opted for rules that do not mandate racial integration. Attempting to read the tea leaves of the Court's Fourteenth Amendment jurisprudence, Minnesota predicted that it would not find racially integrated schools to be a compelling governmental interest and that it could not, therefore, mandate race-based integration. Minnesota's approach is not colorblind, as the rules require significant reporting of race-based data, however; the rules do not require any proactive strategies for avoiding racial isolation, nor require districts to remedy racial imbalance if its proved to be caused by intentional discrimination.<sup>11</sup> The rules instead rely on the voluntary efforts of districts, schools, and parents for racial integration of public schools. This is their fatal flaw.

After nearly ten years of Minnesota's educational school-choice experiment, segregation in Minnesota schools has only intensified: its students of color have steadily become more isolated in high-poverty, low- performing schools.<sup>12</sup> Minnesota is moving away from providing a racially integrated education for all of its students. Whether the rules themselves caused the increased racial isolation or merely allowed it to happen, Minnesota's experience shows the danger of removing integration mandates. Minnesota's experience suggests that if educational equity for all students is the goal, there must be a compelling interest in proactively addressing racial isolation in schools and states must mandate, rather than just encourage, integration.

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<sup>10</sup> See *infra* pp 15-19.

<sup>11</sup> MINN. R. 3535.0160 (2007). See *infra* pp 10-13 and accompanying notes.

<sup>12</sup> See *infra* p. 13.

Choice-based integration plans will only continue the national trend of resegregation of our nation's schools.<sup>13</sup>

This article advocates for states to proactively address racial isolation rather than wait for the inevitable to happen. States must mandate consideration of race in their educational policies so that public schools begin to reflect the racial diversity of this nation and so that all students can benefit from education in a racially-integrated setting. Part I summarizes the Court's most recent school-integration case, clarifying that a majority of the current Court still permits states to proactively mandate change in the face of racial isolation in their schools and highlights the benefits of racially-integrated schools. Part II outlines Minnesota's current choice-based integration rules and documents the increasing segregation for students of color in Twin Cities schools. Part III traces the history of Minnesota's decision to adopt choice-based integration, and illustrates how this mechanism has not been effective for Minnesota schools and is not the model other states should follow. In particular, this section documents that since Minnesota adopted its integration rules, racial isolation in its schools has increased dramatically. Part IV explains, through two district examples, how Minnesota's approach provides little support for districts attempting to affirmatively integrate their schools and leaves the state powerless to do anything when districts make attendance-area decisions that will inevitably lead to, and do in fact cause, increased racial isolation in their schools. Part V thus concludes that Minnesota, and all states whose integration policies fail to effect change in the face of increasing racial isolation, needs to modify its rules to, at a minimum, mandate districts to consider race when making attendance-

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<sup>13</sup> Today, while demographic trends mean that fewer White students attend White-segregated schools, a growing number of Blacks and Latinos attend minority-segregated schools—a fact that is not accounted for by increasing racial diversity. Despite this increasing diversity, the average White student attends a school that is 77 percent White. Conversely, the average Black or Hispanic/Latino student attends a school that is more than half Black and Latino. See GARY ORFIELD AND CHUNGMEI LEE, CIVIL RIGHTS PROJECT/*PROYECTO DERECHOS CIVILES*, HISTORIC REVERSALS, ACCELERATING RESEGREGATION, AND THE NEED FOR NEW INTEGRATION STRATEGIES, 21-30 (2007).

area decisions and to draw such lines in a manner that will maximize racial integration in the schools.

## **I. States Have a Compelling Interest in Addressing Racial Isolation in K-12 Education.**

### **A. The Supreme Court's Decision in *Parents Involved*.**

Any discussion of state efforts to racially integrate its schools must acknowledge the Supreme Court's most recent decision on the issue in *Parents Involved*.<sup>14</sup> This case is particularly important for a discussion of Minnesota's integration rules because Minnesota's supposed rationale for implementing its rules was its *prediction* of what the Supreme Court would say about states' voluntary integration plans.<sup>15</sup>

In *Parents Involved*, a majority of the Court struck down Seattle's and Louisville's race-based plans, which proactively integrated their public schools, holding that the plans were not sufficiently tailored to pass a strict-scrutiny analysis.<sup>16</sup> Led by Chief Justice Roberts, four of the justices also wanted to proclaim that states do not have a "compelling interest" in addressing racial isolation in K-12 education.<sup>17</sup> These four justices, two of whom were not on the Court when Minnesota adopted its current rules, would continue to limit race-conscious policies in K-12 education to only those situations where they are necessary to remedy intentional discrimination.<sup>18</sup> Ironically, they rely on *Brown* in doing so.<sup>19</sup> They limit *Brown* to its particular

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<sup>14</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1* 551 U.S. \_\_\_\_, 127 S.Ct. 2738 (2007)

<sup>15</sup> See *infra* p. 23.

<sup>16</sup> *Parents Involved in Cmty. Sch.*, 551 U.S. at \_\_\_\_, 127 S.Ct. 2738, 2760 (2007); *Id.* at 2790-91 (Kennedy, J. concurring).

<sup>17</sup> *Id.* at 127 S.Ct. 2738, 2757-58 (2007) (Roberts, C. J. joined by Scalia, Thomas, and Alito; *Id.* at 127 S.Ct. 2768-69 (Thomas, J., concurring).

<sup>18</sup> *Id.* at 127 S.Ct. 2738, 2752 (2007). Justice Thomas would further limit this remedial interest to only those situations in which a "school district has a 'history of maintaining two sets of schools in a single school system deliberately operated to carry out a governmental policy to separate pupils in schools solely on the basis of race.'" *Id.* at 127 S.Ct. 2771 (quoting *Swann*, 402 U.S., at 5-6) (Thomas, J., concurring). Justice Thomas further states, "In most cases, there either will or will not have been a state constitutional amendment, state statute, local ordinance, or local administrative policy explicitly requiring separation of the races." *Id.* at n 4. In other words, Justice Thomas would limit this interest to addressing only discrimination of the blatant type that existed during the Jim Crow era.

facts and conclude that it only prohibited state-mandated racial separation in schools. According to these four justices, racially isolated schools are legally equal as long as they cannot be directly tied to state intentional discrimination. States cannot remedy *de facto* racial isolation.<sup>20</sup> To do so, in the already infamous words of Justice Roberts (but again not joined by a majority of the Court) would be to continue “discriminating on the basis of race.”<sup>21</sup>

But a majority of today’s Court rejects these parts of the plurality opinion and explicitly recognizes that states have a compelling interest to address racial isolation in their schools. Justice Kennedy characterizes Roberts’s “postulate that ‘[t]he way to stop discriminating on the basis of race is to stop discriminating on the basis of race’” as too simplistic. He explains:

Fifty years of experience since *Brown* . . . should teach us that the problem before us defies so easy a solution. School districts can seek to reach *Brown*’s objective of equal educational opportunity. The plurality opinion is at least open to the interpretation that the Constitution requires school districts to ignore the problem of *de facto* resegregation in schooling. I cannot endorse that conclusion. To the extent the plurality opinion suggests the Constitution mandates that state and local authorities must accept the status quo of racial isolation in schools, it is, in my view profoundly mistaken.<sup>22</sup>

Justice Kennedy concludes this section of his opinion with a strong statement in favor of states’ interest and right to address racial isolation in their schools:

This Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its children.

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<sup>19</sup> The plurality’s analysis has been criticized as an “astonishing attempt to rewrite the history of desegregation and to use *Brown* as justification for blocking efforts to integrate schools.” James E. Ryan, *The Supreme Court and Voluntary Integration*, 121 HARV. L. REV. 131, 133 (2007). Justice Stevens, in his dissent, writes “There is a cruel irony in the Chief Justice’s reliance on our decision in *Brown v. Board of Education*.” *Id.* at 127 S.Ct. 2738, 2797 (2007) (Stevens, J. dissenting). Justice Breyer states that the plurality “undermines *Brown*’s promise of integrated primary and secondary education that local communities have sought to make a reality.” *Id.* at 127 S.Ct. 2800 (Breyer, J., dissenting).

<sup>20</sup> *Id.* at 127 S.Ct. 2738, 2767-68; *Id.* at 127 S.Ct. 2786 & n. 27 (Thomas, J., concurring).

<sup>21</sup> *Id.* at 127 S.Ct. 2738, 2768. Roberts’s plurality opinion reflects the opinion of Minnesota’s legal advisor at the time the current desegregation rules were implemented. An assistant attorney general predicted that the Supreme Court might rule in this manner and therefore recommended that the state adopt rules that do not require school districts to do anything in the face of racial isolation in their schools unless it could be *proven* that such isolation was caused by intentional discrimination. The state’s legal analysis similarly limited *Brown* to its facts, criticizing an expanded reading of the underlying significance of that historic decision. *See infra* pp 24.

<sup>22</sup> *Parents Involved in Cmty. Sch.*, 551 U.S. \_\_\_\_, 127 S.Ct. 2738, 2791 (2007) (Kennedy, J., concurring).

A compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise may choose to pursue.<sup>23</sup>

Justice Breyer—in his dissenting opinion joined by Justices Stevens, Souter, and Ginsburg—identified Seattle’s and Louisville’s interest as “greater racial ‘integration’ of public schools,” or “the districts’ interest in eliminating school-by-school racial isolation and increasing the degree to which racial mixture characterizes each of the district’s schools and each individual student’s public school experience.”<sup>24</sup> He agreed that such an interest is compelling because it addresses consequences of prior conditions of segregation,<sup>25</sup> seeks to “overcome the adverse educational effects produced by and associated with highly segregated schools,”<sup>26</sup> and promotes an “educational environment that reflects the pluralistic society in which our children will live.”<sup>27</sup> Breyer concludes, “If an educational interest that combines these three elements is not ‘compelling,’ what is?”<sup>28</sup>

#### **B. Demonstrated Benefits of Racially Integrated Schools.**

Social-science research continues to support the state’s compelling interest in pursuing racially integrated education. Integrated schools give all students access to social networks that are connected to opportunity and social mobility.<sup>29</sup> Minority students who graduate from desegregated schools have higher career aspirations than students who attend segregated schools and tend to choose more lucrative occupations in which minorities are historically underrepresented.<sup>30</sup> Black male students that attend desegregated schools tend to complete more

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<sup>23</sup> *Id.* at 127 S.Ct. 2738, 2797 (Kennedy, J., concurring).

<sup>24</sup> *Id.* at 127 S.Ct. 2738, 2820 (Breyer, J., dissenting).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 127 S.Ct. 2738, 2821 (Breyer, J., dissenting).

<sup>28</sup> *Id.* at 127 S.Ct. 2738, 2823 (Breyer, J., dissenting).

<sup>29</sup> Mark Granovetter, *The Micro Structure of School Desegregation*, in *SCHOOL DESEGREGATION RESEARCH: NEW DIRECTIONS IN SITUATIONAL ANALYSIS* 99-107 (J. Prager, D. Longshore and M. Seeman eds., 1986).

<sup>30</sup> R. L. CRAIN & J. STRAUSS, *CTR FOR SOC. ORG. OF SCH., SCHOOL DESEGREGATION AND BLACK OCCUPATIONAL ATTAINMENTS: RESULTS FROM A LONG-TERM EXPERIMENT* 15, 27-8 (1985); Jomills H. Braddock & James M.

years of education<sup>31</sup> and have higher college attendance rates.<sup>32</sup> The demonstrated benefits of integration for students of color include improved test scores,<sup>33</sup> higher graduation rates,<sup>34</sup> higher post-graduation incomes,<sup>35</sup> and better life opportunities.<sup>36</sup> With respect to White students, integration does not negatively affect their performance,<sup>37</sup> improves critical thinking skills,<sup>38</sup> reduces racial prejudice,<sup>39</sup> and prepares students for life in a multi-racial society.<sup>40</sup>

Racially segregated schools do not offer students equal opportunity; instead they expose students to a culture of intergenerational poverty and its attendant challenges. Non-White, economically segregated schools “often transmit lower expectations to minority students and offer a narrower range of educational and job-related options.”<sup>41</sup> Racially segregated, nonWhite schools are almost always high-poverty schools.<sup>42</sup> High poverty schools typically have less qualified and less experienced teachers, more limited, less challenging curriculums, and produce

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McPartland, *How Minorities Continue to be Excluded from Equal Employment Opportunities: Research on Labor Market and Institutional Barriers*, 43 J. SOC. ISSUES 5-39 (1987).

<sup>31</sup> R. L. CRAIN & J. STRAUSS, CENTER FOR SOCIAL ORGANIZATION OF SCHOOLS, SCHOOL DESEGREGATION AND BLACK OCCUPATIONAL ATTAINMENTS: RESULTS FROM A LONG-TERM EXPERIMENT 26-28 (1985).

<sup>32</sup> *Id.*

<sup>33</sup> Geoffrey D. Borman & N. Maritza Dowling, *Schools and Inequality: A Multilevel Analysis of Coleman's Equality of Educational Opportunity Data* 42 (April 2006) (Unpublished paper presented at the annual meeting of the American Educational Research Association); Kathryn Borman et al., *Accountability in a Post-desegregation Era: The Continuing Significance of Racial Segregation in Florida's Schools*, 41 AM. EDUC. RES. J. 622 (2004); Roslyn Arlin Mickelson, *Segregation and the SAT*, 67 OHIO ST. L. J. 175 (2006); Roslyn Arlin Mickelson, *The Academic Consequences of Desegregation and Segregation: Evidence from the Charlotte-Mecklenburg Schools*, 81 N. C. L. REV. 1546 (2003).

<sup>34</sup> Michael A. Boozer et al., *Race and School Quality Since Brown v. Board of Education*, in BROOKINGS PAPERS ON ECONOMIC ACTIVITY. MICROECONOMICS. 305 (Martin Neil Bailey & Clifford Winston eds., 1992).

<sup>35</sup> *Id.*

<sup>36</sup> Mark Granovetter, *The Micro Structure of School Desegregation*, in SCHOOL DESEGREGATION RESEARCH: NEW DIRECTIONS IN SITUATIONAL ANALYSIS 81-110 ( J. Prager, D. Longshore and M. Seeman eds., 1986).

<sup>37</sup> RICHARD KAHLENBERG, ALL TOGETHER NOW: CREATING MIDDLE-CLASS SCHOOLS THROUGH PUBLIC SCHOOL CHOICE 228-257 (2001).

<sup>38</sup> Anthony Lising Antonio et al., *Effects of Racial Diversity on Complex Thinking in College Students*, 15 PSYCHOL. SCI. 509 (2004).

<sup>39</sup> Thomas Pettigrew & Linda Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, 90 J. PERSONALITY & SOC. PSYCHOL. 766 (2006).

<sup>40</sup> Jomills H. Braddock, Robert L. Crain, & James M. McPartland, *A Long-Term View of School Desegregation: Some Recent Studies of Graduates as Adults*, 66 PHI DELTA KAPPAN 259-64 (1984).

<sup>41</sup> Michael A. Boozer et al., *Race and School Quality Since Brown v. Board of Education*, in BROOKINGS PAPERS ON ECONOMIC ACTIVITY. MICROECONOMICS. 305 (Martin Neil Bailey & Clifford Winston eds., 1992).

<sup>42</sup> GARY ORFIELD & CHUNGMEI LEE, THE CIVIL RIGHTS PROJECT AT HARVARD UNIVERSITY, *BROWN AT 50: KING'S DREAM OR PLESSY'S NIGHTMARE*, 20-21 (2004).

lower educational expectations.<sup>43</sup> Perhaps most importantly, integrated schools decrease racial prejudice among students and facilitate positive interracial relations.<sup>44</sup> Both this social-science research and a majority of today's Court thus acknowledge racial integration as a compelling interest states may proactively pursue.

## II. Minnesota's Choice-Based Integration Rules

### A. Minnesota's Commitment to Racially Integrated Schools.

Until the early 1990s, Minnesota explicitly recognized these benefits and sought to proactively address racial integration in its schools. Its State Board of Education had a strong record of advocating for policies that would eliminate racial separation of students.<sup>45</sup> As early as 1967, the Board unanimously adopted a policy that recognized that "racial imbalance can be educationally harmful to both White and nonWhite children as it encourages prejudice and presents an inaccurate picture of life as pupils prepare to live and work in a multi-racial community, nation, and world."<sup>46</sup> Perhaps most significantly, a few years later,<sup>47</sup> the Board adopted desegregation rules that sought to assist school districts in identifying and eliminating racial segregation in its schools.<sup>48</sup> The Board recognized the value of "integrated education, sensitively conducted, in improving academic achievement of disadvantaged children, and in increasing mutual understanding among students from all backgrounds."<sup>49</sup>

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<sup>43</sup> GARY ORFIELD & CHUNGMEI LEE, THE CIVIL RIGHTS PROJECT AT HARVARD UNIVERSITY, WHY SEGREGATION MATTERS: POVERTY AND EDUCATIONAL INEQUITY, 16-30 (2006).

<sup>44</sup> Thomas Pettigrew & Linda Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, 90 J. OF PERSONALITY AND SOC. PSYCH. 751-83 (2006).

<sup>45</sup> EEO SECTION OF MINN. DEPT. OF EDUC., DESEGREGATION POLICY ANALYSIS 29-31 (Jan. 19, 1988).

<sup>46</sup> *Id.* at App. A (Jan. 19, 1988) (attaching Department of Education, *Policy on Racial Imbalance and Discrimination in Public Schools* (Jan. 1967)).

<sup>47</sup> During this same time in Minnesota history, the federal court began oversight of desegregation efforts in the Minneapolis School District as a result of class-action litigation brought by the NAACP. *See Booker v. Special Sch. Dist. No. 1*, 351 F. Supp. 799 (D. Minn. 1972); *see also*, Cheryl W. Heilman, *Booker v. Special School District No. 1: A History of School Desegregation in Minneapolis, Minnesota*, 12 LAW & INEQ. 127 (1993) (detailing the history of this desegregation case under which the court exercised jurisdiction for over ten years, from 1972 until 1983).

<sup>48</sup> MINN. R. 3535.0300 (1973)(amended 1999)

<sup>49</sup> MINN. R. 3535.0300 (1973 )(amended 1999)

Minnesota's former desegregation rules required each school board to report the racial composition of its schools to the Commissioner of Education and, to the extent any school were out of compliance, to submit and implement a "comprehensive plan for the elimination of such segregation."<sup>50</sup> The penalty for any district's failure to comply with the rules was reduction of state aid.<sup>51</sup> In any mandated desegregation plan, school boards were to use methods that were "educationally sound and administratively and economically feasible," which could include "voluntary metropolitan or inter-district cooperative plans."<sup>52</sup> The rules also explicitly required boards to consider the racial impact of new-school construction or addition to existing buildings and prohibited the Commissioner from approving any plans that would "perpetuate or increase racial segregation."<sup>53</sup>

### **B. Minnesota's Choice-Based Rules.**

Minnesota's current rules state their commitment to racially integrated education,<sup>54</sup> but effectively end any affirmative obligation to address racial balance in Minnesota's schools. They instead adopt a model that relies heavily on school choice. Contemporaneous media described the new rules as "'end[ing] mandatory integration in Minnesota, as long as districts could prove students had a choice of schools to attend beyond their neighborhood."<sup>55</sup> The rules proclaim that "the primary goal of public education is to enable all students to have opportunities to

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(quoting United States Senate Report of the Select Committee on Equal Educational Opportunities). In 1978, these rules were amended to specify that segregation occurred when the minority population in any school building exceeded that of the district by 15 %. MINN. R. 3535.0200, subp. 4 (1978).

<sup>50</sup> MINN. R. 3535.0400 (1973) (amended 1999).

<sup>51</sup> MINN. R. 3534.0400 (1973) (amended 1999). The rule authorized the Commissioner to approve a variance from the 15 % standard, which could allow school buildings to exceed "50 % minority enrollment" if school boards could "justify an educational reason" for the variance. In determining whether the district's rationale justified the variance, the State Board was to consider "whether other alternatives [were] educationally and economically available to the district such that the variance [was] not needed." MINN. R. 3535.0700 (1973) (amended 1999).

<sup>52</sup> MINN. R. 3535.1000 (1973) (amended 1999).

<sup>53</sup> MINN. R. 3535.1100 (1973) (amended 1999).

<sup>54</sup> MINN. R. 3535.0100(B)(2007).

<sup>55</sup> Paul Tosto, *State Leaders Drafting New Plan for Desegregation in Schools*, ST. PAUL PIONEER PRESS (August 28, 1998).

achieve academic success”<sup>56</sup> and highlight that providing parents a *choice* in where their children attend school is “an important component of Minnesota’s education policy.”<sup>57</sup> The rules only “*encourage*” districts to provide opportunities for students to attend racially balanced schools<sup>58</sup> and “*encourage* adjoining districts to work cooperatively to improve cross-district integration.”<sup>59</sup> The rules acknowledge that many factors impact the ability of school districts to provide racially balanced schools—such as housing, jobs, and transportation—and then do not mandate that the state do anything to address these other factors.<sup>60</sup>

In terms of proactively seeking to racially integrate public schools, the rules require very little of Minnesota school districts. The rules mandate a reporting-mechanism for information about the racial composition of all schools.<sup>61</sup> A district’s report that indicates a “racially identifiable school”—defined as having an “enrollment of protected students” that is “more than 20 percentage points above the enrollment of protected students in the entire district”<sup>62</sup>—triggers an investigation by the Commissioner as to whether such racially identifiable schools were “motivated at least in part by a discriminatory purpose,” and in the course of this investigation, the district must submit additional information to the Commissioner.<sup>63</sup> But it is only after a full investigation and a finding by the Commissioner that a school district has engaged in intentional segregation<sup>64</sup> that the rules *require* the district to address the racial isolation in its schools.<sup>65</sup> The

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<sup>56</sup> MINN. R. 3535.0100(A) (2007).

<sup>57</sup> MINN. R. 3535.0100(D)(2007). Cross-district efforts to improve integration are also supposed to provide parents and students “meaningful choices.” MINN. R. 3535.0100(H).

<sup>58</sup> MINN. R. 3535.0100(G)(2007) (emphasis added).

<sup>59</sup> MINN. R. 3535.0110(H)(2007).

<sup>60</sup> Minn. R. 3535.0100(C)(2007). The rules also explicitly exempt certain public schools from the integration efforts, including charter schools, area learning centers, alternative programs, and treatment facilities. MINN. R. 3535.0110 subp.8 (2007).

<sup>61</sup> MINN. R. 3535.0120 (2007).

<sup>62</sup> MINN. R. 3535.0110, subp. 6 (2007).

<sup>63</sup> MINN. R. 3535.0130 (2007).

<sup>64</sup> MINN. R. 3535.0130 subp. 1 (2007)..

rules thus set a high threshold for mandating any effort to address racial concentration. In fact, notwithstanding the growing racial segregation in Minnesota schools, the Commissioner of Education has not found *any* district to have intentionally segregated its students under these current rules.<sup>66</sup>

The rules rely almost exclusively on voluntary mechanisms for addressing racial isolation. The rules require districts with “racially identifiable schools” to develop plans that “provide options to help integrate” the schools and to establish and work with community collaboration councils in doing so.<sup>67</sup> The goal of such plans is “increased opportunities for interracial contact between students.”<sup>68</sup> The rules require the Commissioner to evaluate such plans annually and report its findings and recommendations to the legislature.<sup>69</sup> The rules require racially isolated school districts to create multidistrict collaboration councils with adjoining districts to develop an integration plan.<sup>70</sup> By statute, Minnesota also provides integration revenue to all districts that have a racially isolated school or that are themselves a racially isolated district.<sup>71</sup> Nowhere in the rules is the key term, “integration,” defined, however, and the rules

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<sup>65</sup> After a finding of intentional segregation, the school district must implement a plan to remedy such discrimination and its failure to cooperate with the Commissioner in developing or implementing such a plan may result in reduction of state aid and other appropriate sanctions. Minn. R. 3535.0150.

<sup>66</sup> As of November 2005, Minnesota’s Office of the Legislative Auditor reported that the MDE had conducted only three in-depth reviews of school districts to determine whether intentional segregation exists, and there were twelve districts at that time with racially identifiable schools that MDE should review. Office of the Legislative Auditor, *School District Integration Revenue* 30 (Nov. 2005).

<sup>67</sup> MINN. R. 3535.0160. The rules specifically exempt from this requirement any school that is racially identifiable because of a concentration of enrolled American Indian students that exists either because of special programs for such students or voluntary choices by such students or their parents. MINN. R. 3535.0160 subp. 1(B)(2007).

<sup>68</sup> MINN. R. 3535.0160, subp. 3(A)(2007).

<sup>69</sup> MINN. R. 3535.0160, subp. 4 (2007).

<sup>70</sup> MINN. R. 3535.0170 (2007).

<sup>71</sup> MINN. STAT. § 124D.86 (2007). In addition to the failure of the rules themselves to effect positive change in Minnesota schools, the state’s provision of integration funding may, in fact, provide *disincentives* for districts to remedy racial imbalance because, except for three designated cities (Minneapolis, St. Paul, and Duluth), the additional funding depends on a finding of racial isolation in either a school or the district itself. See Office of the Legislative Auditor, *School District Integration Revenue* 32 (Nov. 2005).

define “racial balance” as “increased interaction of protected students and White students within schools and between districts,” without providing any specific criteria or measurable goal.<sup>72</sup>

### **C. Under the Rules, Minnesota Schools Resegregate.**

Today, children of color in the Twin Cities are far more likely to attend a racially isolated school than they were ten years ago. The number of racially isolated schools in the Minneapolis/St. Paul metropolitan area has more than doubled since 2000, from 22 to 50.<sup>73</sup> Today, students of color are more likely to attend a segregated school than they were in 1990.<sup>74</sup> And these segregated, minority-dominated schools are poor schools. In the Twin Cities, the poverty rate at minority-segregated schools is two and a half times greater than the poverty rate of integrated schools and eight and a half times higher than the poverty rate at predominantly White schools.<sup>75</sup>

In 1992, before the state implemented its current rules, Twin Cities schools appeared to be integrating: A small core of schools in the central cities was segregated, but the inner-ring suburban schools were rapidly integrating.<sup>76</sup> By 2002, however, these integrated schools had

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<sup>72</sup> MINN. R. 3535., supb. 5 (2007).

<sup>73</sup> OFFICE OF THE LEGISLATIVE AUDITOR, SCHOOL DISTRICT INTEGRATION REVENUE 24 (Nov. 2005); MINNESOTA DEPARTMENT OF EDUCATION, RACIALLY IDENTIFIABLE SCHOOLS WITHIN A DISTRICT FOR 06-07 (Feb. 23, 2007).

<sup>74</sup> Myron Orfield, Thomas Luce, Baris Gumus-Dawes and Geneva Finn, *Neighborhood and School Segregation in the Twin Cities Region*, in REGION: LAW, POLICY, AND THE FUTURE OF THE TWIN CITIES (MYRON ORFIELD & THOMAS LUCE) (forthcoming 2009) (manuscript at 24, on file with authors). The Institute on Race and Poverty defines non-White segregated schools as schools where the share of blacks, Hispanics or Asian students exceeds 50 percent or, in schools with varying combinations of black, Hispanic, and Asian students, where the relative share of White students in the schools does not exceed 30 percent. In predominantly White schools, the share of each non-White group is smaller than 10 percent. *Id.* at 23. Any school that is neither non-White segregated nor predominantly White is considered integrated. In other cities, researchers have shown that this increasing racial isolation of students of color is not merely attributable to rising numbers of students of color, but rather is attributable to school district policies in the wake of the termination of court oversight. Charles T. Clotfelter, Jacob L. Vigdor, & Helen F. Ladd, *Federal Oversight, Local Control, and the Specter of “Resegregation” in Southern Schools*, 8 AM. L. & ECON. REV. 347 (2006).

<sup>75</sup> Myron Orfield, Thomas Luce, Baris Gumus-Dawes and Geneva Finn, *Neighborhood and School Segregation in the Twin Cities Region*, in REGION: LAW, POLICY, AND THE FUTURE OF THE TWIN CITIES (MYRON ORFIELD & THOMAS LUCE) (forthcoming 2009) (manuscript at 8, on file with authors).

<sup>76</sup> *Id.* at 26-30.

become segregated.<sup>77</sup> Families of color that moved to the suburbs to escape segregated, high-poverty, inner-city schools were now caught in segregated, high-poverty suburban schools.<sup>78</sup> The resegregation of Twin Cities schools was the result of unstable integration, a situation where integration was only a stopping point on the path to segregation.<sup>79</sup>

If Minnesota had implemented the metro-wide plan proposed in 1995, it would not have experienced this extreme resegregation. Other states that implemented metro-wide school desegregation plans did not experience neighborhood or school resegregation to the same degree as the Twin Cities.<sup>80</sup> For example, when the Charlotte-Mecklenburg school district, a metro-wide district in North Carolina, had a court-ordered desegregation plan, neighborhoods across the county remained relatively integrated.<sup>81</sup> When the school district ended its court-ordered desegregation plan and moved to a neighborhood school model, neighborhoods rapidly resegregated.<sup>82</sup> The logic behind metro-wide, mandatory plans is that families cannot easily avoid attending integrated schools by purchasing homes in White-segregated neighborhoods. No matter where families find housing, students will attend integrated schools. Minnesota's rules, however, encourage piecemeal, voluntary integration plans, which have allowed realtors and

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<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> The process of unstable school integration and resegregation occurred as follows: Schools start to resegregate at about the same time that they begin to look integrated, when the school has a student of color population of around 31-36 percent.. When the student-of-color population reaches this threshold, White parents, steered away by realtor or personal perceptions that integrated schools are inferior, stop moving to the school's attendance zone. Conversely, families of color are steered into integrated schools and neighborhoods. This process leads to neighborhood segregation, which usually trails school segregation. While resegregating schools are not usually high-poverty schools, once the schools are segregated, the schools become high-poverty as the parents with the means to leave the school do so. Once schools have become identifiably segregated, high-poverty schools, reintegration is extremely difficult, as parents are reluctant to send their children to segregated high-poverty schools when alternatives exist.

*Id.* at 12-31

<sup>80</sup> *Id.* at 12.

<sup>81</sup> Brief for the Swann Fellowship as Amici Curiae Supporting Respondent, *Parents Involved in Community Schools v. Seattle Schools*, 551 U.S.\_\_\_\_(2007), (Nos. 05-908, 05-915).

<sup>82</sup> Jeffery Weinstein, *The Relationship Between School Characteristics and Neighborhood Characteristics: Evidence from School Redistricting* (Job Market Paper, Nov. 11, 2007) 23 available at <http://econweb.tamu.edu/Job%20Candidates/2008/Papers/Weinstein.pdf>.

families to steer clear of integrated schools. The result has been rapid school segregation in inner-ring suburbs, greater racial and economic segregation for children of color, and reduced life opportunities for a large part of the Twin Cities population.<sup>83</sup>

### **III. A Brief History of Minnesota's Integration/Desegregation Rule**

#### **A. Minnesota's Rules Emerged out of Political Chaos.**

Until 1995, it appeared that Minnesota would continue its commitment to mandatory desegregation and adopt rules that would both mandate metro-wide desegregation and penalize non-compliant districts. A brief history of the current rules reveals that at this pivotal point in time, Minnesota chose a different path. In the face of great political opposition to the proposed rules, Minnesota instead opted for rules that were heavy in reporting mechanisms and light on any real mandates or effective remedies. And it did so claiming that the law required such an approach. In hindsight, these rules were neither legally required nor effective in preventing racially isolated schools.

#### **B. Minnesota Seeks to Address Growing Racial Isolation in its Schools.**

In 1988, the Minnesota Department of Education concluded that although the original rules were effectively desegregating the schools, its numerical definition of segregation was becoming unworkable, particularly in districts such as Minneapolis and St. Paul where the minority population had increased significantly.<sup>84</sup> In addition, by the 1990s, families of color

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<sup>83</sup> Myron Orfield, Baris Gumus-Dawes, Thomas Luce, and Geneva Finn, *Neighborhood and School Segregation in the Twin Cities Region*, in REGION: LAW, POLICY, AND THE FUTURE OF THE TWIN CITIES (MYRON ORFIELD & THOMAS LUCE) (forthcoming 2009) (manuscript at 7-11, on file with authors).

<sup>84</sup> Specifically, in Minneapolis, the minority-student population grew from 24.4% in 1978, when the rule was adopted, to 50% in 1989. STATE OF MINNESOTA DEPARTMENT OF CHILDREN, FAMILIES, & LEARNING, STATEMENT OF NEED AND REASONABLENESS IN THE MATTER OF THE PROPOSED RULES RELATING TO DESEGREGATION: MINNESOTA RULES CHAPTER 3535 (3535.0100 TO 3535.0180) 8-9 (Nov. 1998) [hereinafter SONAR]. Similarly, the St. Paul School District's minority enrollment increased from 22% to 42% in the same time period. *Id.* As of 1997, the state argued that to qualify as "segregated" a school under the old rules, a school in Minneapolis would have had to be over 82% protected students. And, with the 30% variance, it could have had more than 97% students of color and still be in compliance. *Id.* at 9.

were moving from the central cities to the suburbs, and suburban schools were beginning to integrate. State officials feared that this integration would be unstable and lead to minority-segregated schools in the same way city schools had segregated ten and twenty years earlier.<sup>85</sup>

In light of these phenomena, the Department recommended that the Board provide leadership in promoting racial integration across the state.<sup>86</sup>

For over two years, the Board actively pursued this work, holding public meetings on the need for new desegregation rules and completing several drafts.<sup>87</sup> In May 1991, the State Board recommended, among other things, that metro-wide desegregation be pursued by declaring the seven-county metropolitan area a special government area for school integration purposes and that the Governor should convene a task force to address segregation at the state level in the areas of planning, housing, education, transportation, and civil rights.<sup>88</sup> In 1992, the State Board drafted new rules that, notably, defined desegregation and segregation as “intentional or unintentional” racial separation of students or staff within schools and districts and required all schools within the seven-county metropolitan area to consult with Minneapolis and St. Paul in developing their integration plans.<sup>89</sup>

### **C. Roundtable Discussion Group Began Working on a “Great New Experiment.”**

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<sup>85</sup> STATE BOARD OF EDUCATION, STATE BOARD OF EDUCATION DESEGREGATION./INTEGRATION RECOMMENDATIONS (May 14th 1991). See also Memorandum from Donald Hadfield, Ed. Specialist, Equal Educ. Opportunities to Robert Wedl, Deputy Comm’r, Minn. Dep’t of Ed. (Oct 14 1988) (on file with author) (expressing school districts’ fears that existing rules would not lead to stably integrated schools).

<sup>86</sup> EEO SECTION OF MINN. DEPT. OF EDUC., DESEGREGATION POLICY ANALYSIS 39-41, 49 (Jan. 19, 1988). The Department’s report emphasized the societal benefits of racially integrated education for all students in preparing them “as citizens to live and function productively in a pluralistic society.” EEO Section of Minn. Dept. of Educ., *Desegregation Policy Analysis* 7-8 (Jan. 19, 1988). And it acknowledged the state’s obligation to remedy not only subjectively intentional separation of students by race, but also such segregation that was a “natural and foreseeable consequence” of state policy. EQUAL OPPORTUNITY SECTION OF MINNESOTA DEPARTMENT OF EDUCATION, DESEGREGATION POLICY ANALYSIS 15 (Jan. 19, 1988).

<sup>87</sup> SONAR at 8-9.

<sup>88</sup> STATE BOARD OF EDUCATION, STATE BOARD OF EDUCATION DESEGREGATION./INTEGRATION RECOMMENDATIONS. 5-6 (May 14, 1991).

<sup>89</sup> MINN. R. 3535.0300, subps. 3, 6 (February 2, 1992 Draft)(amended 1999).

In 1993, the legislature became involved in the desegregation rulemaking efforts. Responding to the State Board's work, the legislature specifically directed the Board to convene meetings to address the proposed rule changes.<sup>90</sup> In mid-1993, the Board quickly assembled what became known as the "Roundtable Discussion Group," whose membership list reflected the broad-based participation the legislature mandated.<sup>91</sup> The Deputy Commissioner of Education characterized it as a "great new experiment."<sup>92</sup> He said that no expert could provide a specific roadmap for developing the new desegregation rules because, from his perspective, it was unusual for a state to tackle this work proactively rather than in response to litigation or court-ordered desegregation.<sup>93</sup>

In February 1994, the Roundtable Discussion Group submitted a final report to the State Board, which proposed new desegregation rules<sup>94</sup> that reaffirmed *Brown*'s holding "that racially segregated schools are inherently unequal" and stated that "segregation in schools prevents equal educational opportunity and leads to segregation in the broader society."<sup>95</sup> The rules called for

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<sup>90</sup>1993 MINN. LAWS page no. 281-82.

<sup>91</sup> The report includes a list of roughly 50 individuals who participated in the discussions. ROUNDTABLE DISCUSSION GROUP ON DESEGREGATION/INTEGRATION AND INCLUSIVE EDUCATION FINAL REPORT TO: STATE BOARD OF EDUCATION AND STATE LEGISLATURE, i and app. A (Feb. 1994). The actual participation in the meetings was reportedly much smaller, however, with a core group of about a dozen members actively participating, including representatives from the NAACP, the PTA, St. Paul and Minneapolis school districts, the School Boards Association, the Urban League, the Urban Coalition, and the Asian-Pacific Coalition. Interview with Robert Wedl, former Commissioner of the Department of Children, Families, & Learning, in St. Paul, Minn. (Nov. 8, 2007).

<sup>92</sup> *Id.*

<sup>93</sup> Interview with Robert Wedl, former Commissioner of the Department of Children, Families, & Learning (Nov. 8, 2007)

<sup>94</sup> The work of the Roundtable Discussion Group included both proposed rules relating to desegregation, or the student population at specific school sites, and what later became known as the "education diversity rule," rules relating to closing the achievement gap between students of color and White students. After 1995, the State Board separated the diversity rule from the desegregation rule and ultimately abandoned it altogether. This article is concerned primarily with the history and application of the desegregation rules. For more information about the diversity rule and its demise, see Karen Evans Stout & Byron Stevens, *The Case of the Failed Diversity Rule: A Multiple Stream Analysis*, 22 EDUC. EVALUATION & POL'Y ANALYSIS 341 (Winter 2000).

<sup>95</sup> ROUNDTABLE DISCUSSION GROUP ON DESEGREGATION/INTEGRATION AND INCLUSIVE EDUCATION FINAL REPORT TO: STATE BOARD OF EDUCATION AND STATE LEGISLATURE. (Feb. 1994); ROUNDTABLE'S DRAFT RULE 3535.0200 (Jan. 10, 1994) app. D to the ROUNDTABLE DISCUSSION GROUP ON DESEGREGATION/INTEGRATION AND INCLUSIVE EDUCATION FINAL REPORT TO: STATE BOARD OF EDUCATION AND STATE LEGISLATURE. [Hereinafter ROUNDTABLE'S DRAFT RULE].

intra-governmental responsibility in promoting desegregation,<sup>96</sup> metro-wide school integration,<sup>97</sup> measurable and results-oriented desegregation plans,<sup>98</sup> and strong penalties for noncompliance.<sup>99</sup>

Describing the Roundtable's report, the then-President of the Board stated:

These proposals present the state policymakers, including the state board, commissioner, governor and legislature, an opportunity to provide strong and creative leadership in addressing one of the critical issues of this decade. . . . Now is the time for state policymakers to provide strong and proactive leadership. The window of opportunity is closing quickly—if nothing is done, we face a very serious threat of major litigation, which may result in costly and prescriptive solutions ordered by the courts.<sup>100</sup>

The legislature endorsed the Roundtable's rules by giving the Board authority to implement them.<sup>101</sup>

#### **D. State Rules Take a Right Turn.**

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<sup>96</sup> The rules, recognizing that school districts alone cannot effect desegregation, looked to other governmental authorities for assistance in creating housing, employment, and transportation policies that support school desegregation. *ROUNDTABLE'S DRAFT RULE 3535.0200* (Jan. 10, 1994).

<sup>97</sup> The draft rules defined the "metropolitan area" to include school districts from seven counties and used the percentage of learners of color in this metro-wide area as the comparison for determining whether a particular district within the metro area was segregated. *ROUNDTABLE'S DRAFT RULE 3535.0300, subp.5, 11*. The rules, which defined "segregation" as "intentional or unintentional separation of learners of color or staff of color within a building or school district," considered segregated those school districts that have 15% or more learners of color than the metro-wide percentage. *Id.* at subp. 11(A) & (B). The rules also defined segregation in the context of particular schools within a district, but based those on comparisons between the schools and their district-wide average. *Id.* at subp. 11(C). The rules also considered segregated those districts that have fewer than 10% learners of color or less than half of the percentage of metro-wide learners of color, whichever was larger. *Id.*

<sup>98</sup> The rules included specific desegregation goals and strategies, both inter- and intra-district, and practices relating to staffing as well as building and remodeling programs. *ROUNDTABLE'S DRAFT RULE 3535.0400* (Jan. 10, 1994).

<sup>99</sup> Districts that did not comply with rules were given limited time and assistance to do so, after which time the district would lose state aid. The rules also gave the Commissioner authority to order schools that fail to meet its educational goals within three years be reconstituted. *ROUNDTABLE'S DRAFT RULE 3535.0900* (Jan. 10, 1994). Prospectively, the rules mandated local school boards to consider and "give maximum effect to" preventing and eliminating both racial and socioeconomic segregation in schools, and stated that the Commissioner would not approve plans for additions to schools or new construction "when such approval will perpetuate or increase racial segregation." *Id.*

<sup>100</sup> Memo from John Plocker, President Minnesota State Board of Education to Sen. Larry Pogemiller (Chair, Senate Education Committee) and Reps. Lyndon Carlson (Chair, House Education Committee) and Kathleen Vallenga (Chair, House Education Finance Division) re: Desegregation/Educational Diversity Roundtable Report 3 (Feb. 17, 1994).

<sup>101</sup> 1994 MINN. LAWS Ch. 647, art. 8, § 1. At the same time, the legislature established an Office of Desegregation/Integration in the Department of Education and mandated the commissioner to coordinate the office activities and create an advisory board of eight superintendents and a representative from each of the same four councils specified in the creation of the Roundtable Discussion Group. *Id.* § 2.

In 1995, legal and political forces led to a stark change-in-direction in Minnesota's desegregation rules. Early opposition to the Board's work on the desegregation rules came from the Department of Education. For example, in December 1994, the then-Assistant Commissioner advocated for a voluntary approach to inter-district integration that would use incentives rather than mandates. In January 1995, the Department recommended that the rule should not mandate "equal educational outcomes," but rather provide "equal educational opportunities," and emphasize choice. It further recommended eliminating both the penalty of reconstituting non-complying schools and the requirement that the Commissioner consider desegregation when approving new school sites, arguing that neither was legally permissible.<sup>102</sup>

Comment [g1]: Needs a footnote from an earlier draft

In March of 1995, The Center of the American Experiment<sup>103</sup> published a 115-page monograph by Katherine Kersten that challenged the benefit of racial balance in schools and highlighted the costs associated with such plans.<sup>104</sup> Kersten argued both that the State was not legally obligated to enact proactive desegregation rules and that, in doing so, it would expose itself to greater liability in any future litigation because the rules would impose higher legal standards.<sup>105</sup>

<sup>102</sup> Memo to Members of the Roundtable Discussion Group from Robert J. Wedl, Assistant Commissioner, Desegregation/Integration in Minnesota (Dec. 15, 1994). In February 1995, the State Board adopted a preliminary draft of the rules still based largely on the work of the Roundtable Discussion Group and presented them to the House Education Committee. REVISED RECOMMENDATIONS FROM THE ROUNDTABLE DISCUSSION GROUP 3 (Feb. 13, 1995). The local newspaper described the Board's action as taking "another step down the road to equality." Paul Drew Duchesne, *State Board of Education's Latest Desegregation Plan is on the Table*, Minneapolis Star Trib. 2B (Feb. 24, 1995). Notably, this version of the rules included in the policy section that the State and local boards would seek ways to collaborate with other authorities dealing with housing, jobs, planning and transportation.

<sup>103</sup> At the time, The Center for the American Experiment was a relatively new presence in Minnesota. With support from the corporate community and several so-called moderate Democrats, the Center was a part of network of deeply conservative institutions associated with the Heritage Foundation.

<sup>104</sup> KATHERINE A. KERSTEN, CENTER OF THE AMERICAN EXPERIMENT, GOOD INTENTIONS ARE NOT ENOUGH: THE PERIL IMPOSED BY MINNESOTA'S NEW DESEGREGATION PLAN (1995).

<sup>105</sup> *Id.* at 3. Before Minnesota implemented its new rules, the Minneapolis NAACP did in fact initiate litigation on behalf of children enrolled in the Minneapolis public schools. Complaint, NAACP v. State, No. 95-14800 (Minn. Dist. Ct. 1995). In state court, Plaintiffs alleged that the State had not taken effective action to desegregate the schools and that it reinforced racial and economic inequality through its school-construction policies. *Id.* The lawsuit contended that the resulting segregated education violated the Minnesota State Constitution's education and equal protection clauses. *Id.* The litigation was, in large part, modeled after the ongoing litigation in Connecticut, *Sheff v.*

The House Republican Task Force on Student Achievement and Integration formally responded to the proposed rules, echoing many of Kersten's arguments.<sup>106</sup> The task force questioned the Roundtable's objectivity, arguing that it failed to consider the negative consequences of mandatory school integration plans and questioning its selection of national consultants.<sup>107</sup> The task force also strongly opposed the use of any penalties against non-conforming schools and called the reconstitution penalty a "draconian measure that has never worked."<sup>108</sup>

The public controversy over the rules coincided with the re-election of the Governor, who appeared influenced by the strong opposition to the rules coming from his party. The Governor began to appoint more politically conservative members to the Board, and later exerted even more pressure over the Board's work.<sup>109</sup> During the last half of the Governor's second term, the controversy surrounding the Board's policy initiatives grew even stronger. This time, the public response was to a related, but then distinct, set of proposed rules, known as the "Diversity

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*O'Neil*, which similarly alleged a violation of the state's constitution in providing inadequate education to low-income, minority students. 678 A.2d 1267 (Conn. 1996). For further discussion of *Sheff* and its relevance to Minnesota's rules, see *infra* nn. \_\_\_\_ to \_\_\_\_.

<sup>106</sup> House Republic Task Force on Student Achievement & Integration, *Bridging Gaps & Breaking Barriers: A Minnesota Model for Student Achievement & Integration* (Nov. 1995) (hereinafter "Task Force Report"). Both the Task Force Report and the Kersten monograph rely heavily on the work of David Armor in his 1995 book, *Forced Justice: School Desegregation and the Law* in questioning the educational benefits of school desegregation. Kersten specifically noted that in June 1994, David Armor spoke in the Twin Cities with legislators, school superintendents, and members of the State Board of Education. Katherine A. Kersten, *Good Intentions Are Not Enough: The Peril Imposed by Minnesota's New Desegregation Plan*, Ch. 4, p. 8. (Center of the American Experiment, March 1995).

<sup>107</sup> Task Force Report at 5. In particular, the task force was concerned that the Minneapolis school system had retained Hogan & Hartson (former law firm of consultant, Judge Tatel) to advise it on the merits of filing a lawsuit against the state. Task Force Report at 2. The task force recommended that the State Board suspend the rulemaking process until it "obtains a great deal more information from a broader array of experts" and that it consider the impact that any changes to the present rule will have in providing a basis for or even expanding state liability in lawsuits like the one brought by the Minneapolis NAACP. *Id.* at 5-6. The task force criticized the use of mandatory interdistrict efforts as "a remedy more sweeping than one that could ever be imposed by a federal court" and argued that the rules should not use racial percentages or enrollment quotas. *Id.* at 6. The task force opposed the use of integration councils as usurping the role of local school boards and the collection and reporting of racial and ethnic data as "repugnant." *Id.* at 7-8.

<sup>108</sup> Task Force Report at 8. Ironically, these are the very measures now employed by the federal No Child Left Behind Act for high-poverty schools receiving Title I funding that fail Annual Yearly Performance standards. No Child Left Behind Act of 2001 Pub. L. 117-110 § 1116(b) (2001).

<sup>109</sup> Karen Evans Stout & Byron Stevens, *The Case of the Failed Diversity Rule: A Multiple Stream Analysis*, 22 EDUC. EVALUATION & POL'Y ANALYSIS 341, 350 (Winter 2000).

Rules.” Again, Kersten used her pen to mount a vicious attack of the Board’s work, this time in her bi-weekly newspaper column.<sup>110</sup> She called for a public response, which came quickly and with force. The article “sparked a maelstrom of bluster on talk radio, and hundreds of calls and letters concerning the proposed rule—including two death threats—poured into the department of Children, Families, and Learning.”<sup>111</sup> The then-Board President drafted a response to Kersten’s article, but was instructed by the governor not to release it.<sup>112</sup> After initial public hearings on the rule, the governor asked the Board to stop implementation of the rule because it was “not in the best interest of Minnesota children.”<sup>113</sup> Although the Board initially voted against withdrawing the rules, two members’ terms then expired, and the governor chose to appoint two new members, which shifted the balance so that the Board withdrew the Diversity Rules.<sup>114</sup> Shortly thereafter, the Minnesota legislature abolished its State Board of Education<sup>115</sup> joining Wisconsin as the only state without such a policy-setting entity.<sup>116</sup>

#### **E. State Attorney General Advises No Compelling Interest in K-12 Diversity.**

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<sup>110</sup> Kersten characterized the rules as “the State Board of Education’s brave new multicultural work” that requires schools to teach “communication skills to enable cross-cultural and inter-ethnic group interaction” of the kind that works so well in Beirut.” Katherine Kersten, *State School Board’s Dubious Diversity Rules: Unless Citizens Object Soon, There Won’t be a Public Hearing*, MINNEAPOLIS STAR TRIB. 17A (Oct. 15, 1997). She claimed that the rules would do little to assist Minnesota’s poor, minority students and would instead put “numbers-juggling ahead of kids’ needs.” *Id.* She said that the rules would actually hamper academic progress and that the “sprawling, politicized curriculum” would “leave little time for the 3 Rs.” *Id.* For a discussion of Kersten’s article and its impact on the rules and the State Board, see Karen Evans Stout & Byron Stevens, *The Case of the Failed Diversity Rule: A Multiple Stream Analysis*, 22 EDUC. EVALUATION & POL’Y ANALYSIS 341, 346 (Winter 2000).

<sup>111</sup> Karen Evans Stout & Byron Stevens, *The Case of the Failed Diversity Rule: A Multiple Stream Analysis*, 22 EDUC. EVALUATION & POL’Y ANALYSIS 341, 346 (Winter 2000) [hereinafter Stout & Stevens, *The Case of the Failed Diversity Rule*].

<sup>112</sup> *Id.* at 346. Although it was originally intended that the Board be insulated from partisan politics, that certainly changed over time. For example, Fridge served simultaneously as Board President and the Commissioner of Human Rights, which was a position she held “at the pleasure of the Governor.” Stout & Stevens, at 349. Fridge followed the Governor’s directions and did not publicly respond to Kersten’s attack. *Id.* at 349.

<sup>113</sup> Stout & Stevens, *The Case of the Failed Diversity Rule* at 346.

<sup>114</sup> *Id.* at 346; Interview with Robert Brown, State Board Member 1993-1997, in Roseville, Minn. (Oct. 11, 2007).

<sup>115</sup> Stout & Stevens, *The Case of the Failed Diversity Rule* at 341, 347.

<sup>116</sup> Minnesota and Wisconsin continue to be the only two states without a board of education. Michele McNeil, *Authority Grad Eroding Stature of State Boards*, EDUC. WEEK (March 18, 2008). In 2003, New Mexico essentially followed Minnesota’s example by stripping its board of authority and making it advisory-only. Nationwide, there has been a recent trend of eroding school boards’ power “as lawmakers and governors seek to expand their authority over K-12 education and, in some cases, reverse education policy set in motion by elected or appointed boards.” *Id.*

With this political backdrop and during the ongoing controversy over the diversity rules, the desegregation rules transformed dramatically under the direction of the Office of the State Attorney General from 1995 until they were passed in 1999.<sup>117</sup> The attorney general's legal advice greatly influenced the direction of the new desegregation rules in at least two significant ways: 1) limiting the definition of "segregation" to include only racial imbalance caused by intentional discrimination and 2) relying heavily on voluntary integration efforts by districts, schools, and parents. Both of these changes were premised on a legal opinion that a rule that affirmatively required racial balance without a showing of intentional discrimination would not survive an equal protection challenge. The Assistant Attorney General concluded that diversity in K-12 education would not be considered a compelling interest under a strict-scrutiny analysis.<sup>118</sup>

Based on the state's analysis, the new rules limit segregation to only racial separation caused by a discriminatory purpose.<sup>119</sup> The state's legal analysis began by rejecting the Roundtable Draft's invocation of *Brown* and its legacy as an underlying rationale for the new rules and limiting *Brown's* holding to its facts: the state only has an affirmative duty to correct

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<sup>117</sup> Although the Board had been working on drafts of these rules for many years, it was not until it formally began the rulemaking process that it consulted with the attorney general's office. SONAR, at 4. Then assistant attorney general, Cindy Lavorato, took over the primary responsibility of drafting the rules, developing the Statement of Need and Reasonableness for the administrative hearings, and ultimately ushering the rules through the administrative process. Interview with Cindy L. Lavorato, former Assistant Attorney General, in Minneapolis, Minn. (Sept. 13, 2007). Lavorato recalls working independently on these rules, with some research assistance from a legal assistant. *Id.* She claims to not have been influenced by, or even aware of, Kersten's critique of the rules. *Id.* She also says that the NAACP litigation did not affect the legal advice she gave on these rules. *Id.*

<sup>118</sup> SONAR, at 5-8, 12-21. Ironically, the legal challenge the state was facing at the time did not challenge the constitutionality of the state's affirmative policies, which had been in place since the late 1970s, but rather the state's failure to adequately address racial segregation under the state constitution. *See* Complaint, *NAACP v. State*, No. 95-14800 (Minn. Dist. Ct. 1995). Nonetheless, the state seemed to be most concerned about an Equal Protection challenge brought by parents or students alleging "reverse discrimination." SONAR at 19 ("The concern with using racial quotas is not only that lawsuits will be brought, but more importantly that it is highly doubtful that such suits can be won.")

<sup>119</sup> The state interpreted the caselaw as "call[ing] into serious question whether it is permissible to have a rule which requires or even encourages race-based student assignments . . . absent a finding of intentional discrimination." SONAR, at 14.

“government-imposed, intentional segregation of students based on their race,” not racial imbalance.<sup>120</sup> The state argued that because it was an open question whether racial diversity in K-12 schools constituted a “compelling interest,” any affirmative, race-conscious policy in this context would not likely withstand strict scrutiny.<sup>121</sup> To support its analysis, the state summarized the Supreme Court’s decision in *Bakke* and its decisions on affirmative-action policies in other government contexts.<sup>122</sup> It also highlighted opinions from several circuit courts that it characterized as “severely limiting the use of race-based measures in several different contexts”<sup>123</sup> and cited to several other then-recent decisions that held that the use of racial quotas to maintain racial balance in the K-12 setting, absent a remedial obligation, “will not likely be constitutional.”<sup>124</sup> The state thus defended the limited definition of segregation—that it must be the product of intentional, discriminatory conduct—as “consistent with judicial definitions.”<sup>125</sup>

But the state’s legal opinion was not necessitated by the case law existing at the time.

Even today, a majority of the Supreme Court justices recognize that states have a compelling

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<sup>120</sup> SONAR at 6, 15, B1.

<sup>121</sup> SONAR, at 14-17.

<sup>122</sup> SONAR, at 14 (citing *Regents of University of California v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733 (1978)). The SONAR also cites to several affirmative action cases in the employment context. *Id.* at 14-15 (citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 283-84, 106 S.Ct. 1842, 1852 (1986); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S. Ct. 706 (1989)).

<sup>123</sup> SONAR, at 15-16 (citing *Hopwood v. Texas*, 78 F.3d 932 (5<sup>th</sup> Cir. 1996); *Podberesky v. Kirwan*, 38 F.3d 147 (4<sup>th</sup> Cir. 1994); *Coalition for Economic Equity v. Wilson*, 110 F.3d 1431 (9<sup>th</sup> Cir. 1997); *People Who Care v. Rockford Bd. of Educ.*, 111 F.3d 528 (7<sup>th</sup> Cir. 1997); *Taxman v. Bd of Educ.*, 91 F.3d 1547 (3d Cir. 1996)).

<sup>124</sup> SONAR, at 18-20 (citing *Equal Open Enrollment Ass’n v. Bd. of Educ.*, 937 F. Supp. 700 (N.D. Ohio 1996); *Wessman v. Gittens*, 160 F.3d 790 (1<sup>st</sup> Cr. 1998) and other contemporaneous litigation and settlements relating to this issue).

<sup>125</sup> SONAR, at 31-32 (citing *Swann v. Charlotte-Mecklenburg Bd of Educ.*, 402 U.S. 1 (1971); *Milliken v. Bradley*, 418 U.S. 717 (1974)). Lavorato later characterized the rules as striking a balance in not permitting the use of race-based quotas, but also not prohibiting the use of *any* consideration of race in admissions. See Cindy Lavorato, *Keeping the Commitment to Integration While Walking the Tightrope of Strict Scrutiny: Minnesota’s New Desegregation/Integration Rule* (2001) (on file with the author). In response to public comments to the proposed rules, the Commissioner of Children, Families & Learning similarly characterized the underlying approach. Letter from Christine Jax, Commissioner, to Phyllis A. Reha, Administrative Law Judge 6 (Feb. 9, 1999) (on file with the author).

interest in seeking to prevent racial isolation and increasing racial diversity in their schools.<sup>126</sup> Even assuming, for the sake of argument, that the state's advice was sound, the rules define intentional discrimination so narrowly that they effectively make it impossible to make such a finding. Before any mandated integration, the Commissioner must find that racial imbalance in the schools "results from acts motivated at least in part by a discriminatory purpose."<sup>127</sup> Three of the five factors the Commissioner is to consider during this inquiry require a showing of "discriminatory purpose."<sup>128</sup> The rule mandates that the two other factors, which consider the impact of official decisions rather than their underlying motives, cannot alone support a finding of discriminatory purpose.<sup>129</sup>

Controlling Eighth Circuit law at the time recognized a much broader definition of intentional discrimination than the rules do. In *United States v. School District of Omaha*, the Eighth Circuit announced a *presumption* of segregative intent when "school authorities have engaged in acts or omissions, the natural, probable and foreseeable consequence of which is to

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<sup>126</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. \_\_\_\_, 127 S.Ct. 2738, 2797 (Kennedy, J., concurring); *Id.* at 2800-01 (Breyer, J., dissenting) (joined by Stevens, Souter, and Ginsburg).

<sup>127</sup> MINN. R. 3535.0130 subp. 1 (2007).

<sup>128</sup> The first three factors are:

- A. the historical background of the acts which led to the racial composition of the school, including whether the acts reveal a series of official actions taken for discriminatory purposes;
- B. whether the specific sequence of events resulting in the school's racial composition reveals a discriminatory purpose;
- C. departures from the normal substantive or procedural sequence of decision making, as evidenced, for example, by the legislative or administrative history of the acts in question, especially if there are contemporary statements by district officials, or minutes or reports of meetings that demonstrate a discriminatory purpose.

. MINN. R. 3535.0130, subp 1(A-C)(2007).

<sup>129</sup> MINN. R. 3535.0130, subp. 1 (2007). These two factors are:

- D. whether the racial composition of the school is the result of acts which disadvantage one race more than another, as evidenced, for example, when protected students are bused further or more frequently than White students; and
- E. whether the racially identifiable composition of the school was predictable given the policies or practices of the district.

*Id.* at (D-E).

bring about or maintain segregation.”<sup>130</sup> Quoting from the Second Circuit, which recognized a similar presumption, the court explained the underlying rationale for the rule:

To say that foreseeable must be shown to have been actually foreseen would invite a standard almost impossible of proof save by admissions. When we consider the motivation of people constituting a school board, the task would be even harder, for we are dealing with a collective will. It is difficult enough to find the collective mind of a group of legislators. . . . It is even harder to find the motivation of local citizens, many of whom would be as reluctant to admit that they have racial prejudice as to admit that they have no sense of humor.

Speaking in de jure terms does not require us, then, to limit the state activity which effectively spells segregation only to acts which are provably motivated by a desire to discriminate. . . . Aside from the difficulties of ferreting out a collective motive and conversely the injustice of ascribing collective will to articulate remarks of particular bigots, the nature of the “state action” takes its quality from its foreseeable effect.<sup>131</sup>

Not only was the *Omaha* decision controlling precedent, it also arose in a context particularly relevant to Minnesota: It was a school desegregation case in a northern state that had never engaged in slavery or had state-mandated segregation. The court still found intentional discrimination based on the foreseeable effects of the state’s decisions.<sup>132</sup> Minnesota’s explanation for its definition of intentional segregation ignores *Omaha* altogether.

The state’s analysis also effectively ignores the then-recent decision of the Connecticut Supreme Court, *Sheff v. O’Neil*, which held that, under its state constitution the state had an affirmative obligation to address the racial and ethnic isolation in the Hartford public schools

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<sup>130</sup> *United States v. School Dist. of Omaha*, 521 F.2d 530, 535-36 (8<sup>th</sup> Cir.), *cert. denied*, 423 U.S. 946 (1975). The court acknowledged that two other circuits recognized a similar presumption. *Id.* at 536 (citing *Hart v. Community School Bd. of Ed.*, N.Y. Sch. Dist. #21, 512 F.2d 37, 50-51 (2d Cir. 1975); *Oliver v. Michigan State Bd of Educ.*, 508 F.2d 178, 182 (6<sup>th</sup> Cir. 1974)).

<sup>131</sup> *Id.* at 536 (quoting *Hart v. Community School Bd. of Ed.*, N.Y. Sch. Dist. #21, 512 F.2d 37, 50 (2d Cir. 1975) (citations omitted)).

<sup>132</sup> In light of Supreme Court developments, including *Washington v. Davis*, 426 U.S. 229 (1976), *Pasadena City Bd of Educ. v. Spangler*, 427 U.S. 424 (1976), and *Arlington Heights v. Metro. Housing Devel. Corp.*, 429 U.S. 252 (1977), the Eighth Circuit twice reconsidered the *Omaha* decision. Both times it affirmed its finding of intentional segregation based on the foreseeable effects of the state action. *United States v. School Dist. of Omaha*, 541 F.2d 708 (8<sup>th</sup> Cir. 1976) (*Omaha II*); *United States v. School Dist. of Omaha*, 565 F.2d 127, 128 (8<sup>th</sup> Cir. 1977) (*Omaha III*) (en banc), *cert. denied*, 434 U.S. 1064 (1978).

even when such isolation was not caused by intentional state action.<sup>133</sup> The *Sheff* court acknowledged that to seek relief under the federal equal protection clause, claimants must prove intentional governmental discrimination against a suspect class.<sup>134</sup> But the court distinguished the federal constitutional precedents, under which no fundamental right to education exists,<sup>135</sup> because the Connecticut state constitution “contains a fundamental right to education and corresponding affirmative state obligation to implement and maintain that right.”<sup>136</sup> Similarly, the Minnesota Supreme Court recognized in 1993 that under our state constitution, education is a fundamental right.<sup>137</sup> The *Sheff* decision was not without its critics,<sup>138</sup> and Minnesota certainly had the option to ignore its holding, but it made a choice to do so at a time when the Board had been inclined to go in that direction and when there was ongoing litigation against the State that had *Sheff*-like allegations.<sup>139</sup>

Ultimately, Minnesota adopted the rules in 1999. In the process, it drew national attention on the question of choice-based integration. Opponents of mandatory racial integration rules looked to the work of David Armor and Christine Rossell in support of their claims that

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<sup>133</sup> 678 A.2d 1267 (Conn. 1996). The court also proclaimed that, consistent with public policy, the state’s constitutional responsibility “encompasses responsibility for segregation to which the legislature has contributed, even unintentionally. *Id.* at 1285.

<sup>134</sup> *Id.* at 1278-79.

<sup>135</sup> *Id.* at 1279 (citing *San Antonio Ind. School District v. Rodriguez*, 411 U.S. 1 (1973)).

<sup>136</sup> *Id.* at 1279 (citing *Moore v. Ganim*, 660 A.2d 742; *Broadley v. Bd. of Educ.*, 639 A.2d 502 (1994); *Horton v. Meskill*, 376 A.2d 359 (1977)). The court compared cases involving the fundamental right to vote, in which the United States Supreme Court recognized state action where legislatures failed to take proper steps to implement their constitutional duty. *Sheff*, 678 A.2d at 1279 (citing *Reynolds v. Sims*, 377 U.S. 533, 561-63 (1964)). Crucial to its decision, the *Sheff* court observed that the districting statute, which “established town boundaries as the dividing line between all school districts in the state,” was “the single most important factor contributing to the present concentration of racial and ethnic minorities in the Hartford public school system.” *Id.* at 1267.

<sup>137</sup> *Skeen v. State*, 505 N.W.2d 299, 313 (Minn. 1993).

<sup>138</sup> In fact, one of the experts Minnesota relied upon in the administrative hearings on the proposed desegregation rules, Christine Rossell, soundly criticized the Connecticut Supreme Court’s holding. Christine H. Rossell, *An Analysis of the Court Decisions in Sheff v. O’Neil and Possible Remedies for Racial Isolation*, 29 CONN. L. REV. 1187, 1200 (1997) (arguing that “any individual or state agency could bring suit in federal district court and have the Connecticut Supreme Court’s finding reversed . . . [because] a race based remedy would not be allowed in a situation where there has been no intentional racial violation.”)

<sup>139</sup> See *NAACP v. Met. Council*, 125 F.3d 1171 (8th Cir. 1997), *vacated*, 522 U.S. 1145 (1998), *aff’d on reh’g*, 144 F.3d 1168 (8th Cir. 1998), *cert. denied*, 525 U.S. 826 (1998); *Xiong v. State*, 195 F.3d 424 (8th Cir. 1999).

integrated education does not lead to improved academic achievement<sup>140</sup> and that mandatory integration does not work.<sup>141</sup> Gary Orfield served both as a consultant to the Roundtable<sup>142</sup> and later testified against the proposed rules, predicting that they would take “huge steps backward” in Minnesota’s efforts to desegregate its schools.<sup>143</sup>

#### IV. Minnesota’s Rules Permit Segregative School-Attendance Decisions

Minnesota’s decision to implement the current rules, whether based on a good-faith legal and social-science analysis or motivated by the political winds of the time, has had very real consequences for its schools. Minnesota’s rules, while certainly *permitting* districts to make pro-

<sup>140</sup> Armor visited Minnesota in June 1994 to address a Center of the American Experiment Luncheon Forum and Speak at a roundtable with legislators, school superintendents, and members of the State Board of Education. KATHERINE A. KERSTEN, CENTER OF THE AMERICAN EXPERIMENT, GOOD INTENTIONS ARE NOT ENOUGH: THE PERIL IMPOSED BY MINNESOTA’S NEW DESEGREGATION PLAN Ch. 4 at 8. Kersten claims Armor’s visit “first alerted many Minnesotans to the shortcomings of the . . . failure of race-based busing as a vehicle for improving minority academic performance.” She relies on his then-forthcoming book, *Forced Justice: School Desegregation and the Law* extensively in her critique of the Roundtable’s work. *Good Intentions*, Ch. 4, at 5 (discussing Armor’s review of social science research as casting “serious doubt on whether busing actually produces significant gains for minority children.”). These same experts were cited as part of the most recent Supreme Court debate, at least in the back-and-forth between Justices Thomas and Breyer in their *Parents Involved* opinions. Thomas notes the scholarly debate about the educational benefits of racial balancing and cites to Armor and Rossell’s work as an example of some who conclude that there are “no demonstrable educational benefits.” *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. \_\_\_\_, 127 S.Ct. 2738, at 2777-78 (J. Thomas, concurring) (citing Armor & Rossell, *Desegregation and Resegregation in the Public Schools*, in BEYOND THE COLOR LINE: NEW PERSPECTIVES ON RACE AND ETHNICITY IN AMERICA 239, 251 (A. Thernstrom & S. Thernstrom eds. 2002)). Breyer cites to Armor’s *Forced Justice* as a counter-example to the studies that find a positive correlation. *Id.* at 2821.

<sup>141</sup> The SONAR relies on Rossell’s and Armor’s combined work to support adopting a voluntary approach. SONAR at 54 (citing Christing Rossell and David Armor, *The Effectiveness of School Desegregation Plans, 1968-1991*, AM. POL. Q., 267 (July 1996)). The SONAR also cites to Rossell and other social scientists for the opinion that “massive bussing and similar mandatory forms of desegregation can lead to significant White flight, which lessens the opportunity to maximize the benefits associated with desegregation. SONAR at 6, n. 5. Rossell served as a consultant to the state agency and testified at the administrative hearing in support of Minnesota’s new rules. Testimony of Christine Rossell, Hearing Transcript *In re Proposed Adoption of Rules Relating to Desegregation* 50-59 (Jan. 20, 1999). She testified that the rules’ reliance on voluntary techniques “are more likely to achieve greater, and ultimately more lasting, school integration than the previous rule was able to obtain.” *Id.* at 52 (Jan. 20, 1999).

<sup>142</sup> ROUNDTABLE DISCUSSION GROUP ON DESEGREGATION/INTEGRATION AND INCLUSIVE EDUCATION FINAL REPORT TO: STATE BOARD OF EDUCATION AND STATE LEGISLATURE (Feb. 1994).

<sup>143</sup> Testimony of Gary Orfield, at 145. Orfield describes the rules as “swiss cheese of obfuscation that really [have] no goals, that have no means of getting there, no resources, and . . . ludicrous definitions of desegregation and a shift from looking at segregation as a problem per se to looking at only provable intentional segregation [as] something that can be regulated.” *Id.* In particular, he critiqued the rules’ definition of segregation because of its reliance on district and adjacent district populations, as opposed to the metropolitan-wide school populations, as the relative comparison. *Id.* at 145-46, 150. He further critiqued Minnesota’s requirement of a finding of intentional discrimination before triggering any kind of mandatory action and predicted that there’s “unlikely to be any kind of action since it requires large resources to prove intent in the school segregation context.” *Id.* at 146-47.

integrative decisions, do not affirmatively support such decision-making. Nor do they explicitly prohibit districts from making decisions about school-attendance boundaries or school closings that, in effect, create racially isolated schools. Instead, Minnesota's rules leave the desegregation of racially isolated schools up to the will of local school boards, which face immense political pressure to maintain racial boundaries. Likewise, the rules do not give the Minnesota Department of Education the tools to force school districts to desegregate schools unless the state can prove that the district intended to discriminate against students of color.<sup>144</sup> The rules effectively make the Department a perfunctory bureaucracy, dutifully collecting data and noting whether schools and districts are racially isolated. The rules do not provide the Department with any mechanism for supporting positive, integrative action by school boards and they do not give the Department any power to prevent segregative decisions.

The Department's inability to act, while not solely responsible for the growing racial isolation of students of color in Minnesota's schools, has at least permitted this regressive trend. Two school districts' recent experiences illustrate just how ineffective the current rules are in promoting and enforcing pro-integrative decisions. Hopkins, a Twin Cities suburban school district, attempted to desegregate its elementary schools, but because the rules provided no specific guidance and did not trigger the Department's involvement whatsoever, it ultimately adopted attendance boundaries that further segregated its schools. In Apple Valley, another Twin Cities suburban district, the rules did nothing to remedy a racially segregative attendance boundary that caused children of color to be bussed from a trailer park past several White elementary schools to a racially isolated elementary school.

**A. Rules Provide No Support for Integrative Boundaries: The Hopkins Experience**

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<sup>144</sup> MINN. R. 3535.0130, subp. 1 (2007).

School boards that choose to draw integrative school attendance boundaries find little support from the Department. In fact, until recently, based on its reading of the rules, the Department “strongly discouraged” school districts from using racial measures in their desegregation plans and warned districts that “race-based measures have been successfully challenged in several other states.”<sup>145</sup> Without a state mandate to integrate, school districts have largely chosen to pay lip-service to integration, while maintaining separate schools.<sup>146</sup> School boards that have chosen to integrate schools have faced immense opposition from communities that believe that integrated schools will lower property values, subject White students to inferior educations, and drive White families out of the school district.<sup>147</sup> Historically, school boards that have supported desegregation in the face of vocal community opposition have often not been reelected, a strong disincentive for board members to undertake non-mandated desegregation efforts.<sup>148</sup> The lack of any mandate in Minnesota’s rules is most obvious when school districts need to close or open its schools. The rules do not give the Department the power to prevent segregative or non-integrative, attendance-boundary decisions.<sup>149</sup> Without a mandate to integrate schools, and with parental pressure to maintain separate schools, most school boards choose the

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<sup>145</sup> Letter from Mary Ann Nelson, Assistant Commissioner, to John Currie, Superintendent of District 196 (June 11, 2004); Letter from Cindy Lavarato, Assistant Commissioner, to L. Chris Richardson, superintendent of Osseo School District (Feb. 4th, 2000); Letter from Cindy Lavarato, Assistant Commissioner, to Carol Johnson, Superintendent of Minneapolis Public Schools (Jan 14, 200) (on file with the Minnesota Department of Education and the Institute on Race and Poverty). During the early years of the rules’ enforcement, Cindy Lavarato was at the helm of the Department and gave this advice, consistent with what she had explained in the SONAR. Lavarato left the Attorney General’s office just after the rules were implemented and served as the Assistant Commissioner of Education for one-and-a-half years. Interview with Cindy L. Lavarato, former Assistant Attorney General, in Minneapolis, Minn. (Sept. 13, 2007).

<sup>146</sup> See e.g. Thandiwe Peebles, Minneapolis Public Schools, Comprehensive Desegregation/ Integration Plan and Budget (Dec. 15 2004) (stating that the district is committed to racial integration, but refusing to consider North-South bussing of students—even though the overwhelmingly majority Black and Latino schools on the Northside of the city could easily be integrated with the very White schools directly to their South).

<sup>147</sup> See E. J. K. III, *White Flight as a Factor in Desegregation Remedies: A Judicial Recognition of Reality*, 66 VA. L. REV. 961 (1980).

<sup>148</sup> M. Stephen Weatherford, *The Politics of School Bussing: Contextual Effects and Community Polarization*, 42 J. OF POLITICS 747 (1980).

<sup>149</sup> See MINN. R. 3535 (2007).

path of least resistance and redraw school boundaries in ways that increase segregation. The story of the Hopkins School District illustrates how school districts can create racial segregation by bowing to public pressure and why mandatory integration rules are necessary to prevent continuing racially segregative school-boundary decisions.

The Hopkins School District is a medium-sized, relatively affluent district, located west of Minneapolis. Like most Twin Cities districts, Hopkins encompasses parts of several suburbs, ranging from middle-income Golden Valley to wealthier Edina and Minnetonka. Like many suburban districts, Hopkins has an increasing population of students of color, and these students are concentrated in subsidized housing units.<sup>150</sup> In 2005, Hopkins's Katherine Curren elementary school qualified as racially isolated under Minnesota's rules. Katherine Curren had a student-of-color enrollment of 46%, twenty percent higher than the district elementary school average, due in part to the district's earlier decision to assign students living in a new public-housing development to this school.<sup>151</sup> In early 2006, facing a continued decline in enrollment and severe budget constraints, Hopkins decided to close Katherine Curren and to redistribute the Curren students to the two other elementary schools.<sup>152</sup> In the wake of the school closing, Hopkins

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<sup>150</sup> One of the reasons student of color populations are increasing in districts like Hopkins is that the Twin Cities regional government, the Metropolitan Council has done a fairly good job of locating new subsidized housing units in higher-income suburbs.

<sup>151</sup> Letter from Diane Crowley, Administrator of Hopkins office of equity in Education, to Cindy Jackson, Minnesota Department of Education, (June 20, 2005). In 1997, Minnetonka Mills, a public housing development was built in the attendance area of Eisenhower school in the Hopkins school district. Before families moved into the complex, the school district decided that these students would be bussed out of their local elementary school zone and attend Katherine Curren elementary school, a decision that resulted in an influx of students of color into the small elementary school. *Id.* In explaining its decision, Hopkins stated, "[w]e believe the answer to the achievement gap lies not in the counting and moving of students from one school to another, but rather, in creating the conditions for equality and excellence in every school." *Id.* The school district asserted that it made the decision to bus the low-income students across attendance zones because of concerns that the incoming families would "over-crowd" the Eisenhower elementary school. *Id.*

<sup>152</sup> Sue Scharebroich, *Hopkins Public Schools are Serious about Restoring the District's Financial Stability*, Star TRIB., Dec. 20, 2006; Jason McGrew-King, *Enrollment Decline Means Less Revenue for Hopkins Schools*, LAKESHORE WEEKLY NEWS, Nov. 7, 2005. Hopkins discovered a \$600,000 shortfall in its budget in addition to a pre-existing negative general fund balance of \$3,387,738.. *Id.* Hopkins School Board, Meeting Minutes, Nov. 16, 2007.

considered four options for redrawing school attendance boundaries, the most integrative of which would have dramatically increased the number of students of color at Glen Lake Elementary, the Whitest and lowest poverty school in the district.<sup>153</sup> The most segregative option, the Blue Plan, assigned most of the students from Curren to Eisenhower Elementary, the second most racially diverse school in Hopkins.<sup>154</sup>

Both Glen Lake parents, who opposed an influx of minority students into their school, and Katherine Curren parents, who hoped to save their school, opposed the most integrative option.<sup>155</sup> For example, one Hopkins parent warned the school district that it would experience a “financial loss” due to losing students to open enrollment if it chose the most integrative option—a thinly veiled threat to remove students from Hopkins schools if the board sent students of color to Glen Lake.<sup>156</sup> Further, although the Hopkins school board was aware that intentionally segregating students might violate federal civil rights law, the most immediate concern they had was a potential lawsuit from parents who indicated they would sue the district if it chose integrative attendance boundaries.<sup>157</sup> The integration rules did not mandate that the board choose an integrative option.<sup>158</sup> The school board ultimately chose the school attendance boundary that produced the least integration.<sup>159</sup> Today, forty-six percent of Eisenhower’s students are children of color, while Glen Lake, which is adjacent to Eisenhower, is 91 percent

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<sup>153</sup> HOPKINS SCHOOL DISTRICT BOUNDARY TASK FORCE, BOUNDARY OPTIONS FOR BOARD OF EDUCATION CONSIDERATION (Feb. 2007).

<sup>154</sup> *Id.* Each of the four proposals, however, assigned students who lived in the Minnetonka Mills public housing development to Eisenhower. *Id.* Concerns about hazardous traffic between the school and subsidized housing, which had justified the discontinuous attendance boundary in 1997, were not even raised. *Id.*

<sup>155</sup> Transcript of Hopkins School Board Meeting of February 15, 2007 (statements of Danny Kaplan and Brain Beek, parents) (on file with authors). Interview by Sarah Crangle with Emily Wallace Jackson, Katherine Curren parent, (March 2007.)

<sup>156</sup> Transcript of Hopkins School Board Meeting of February 15, 2007 (statements of Danny Kaplan).

<sup>157</sup> Geneva Finn interview with Nik Lightfoot, Hopkins Assistant Superintendent, September 25, 2007.

<sup>158</sup> See MINN. R. 3535.0120 (2007).

<sup>159</sup> Patricia Releford, *Hopkins New District Map Will Relocate the Fewest Students*, STAR TRIB. (Feb. 20, 2007).

White.<sup>160</sup> Likewise, 43 percent of Eisenhower's students receive free or reduced lunches as compared to only six percent of Glen Lake's students.<sup>161</sup> With this concentration of low-income students of color, Eisenhower's AYP passage scores are also about ten points lower than Glen Lake's in both math and reading.<sup>162</sup>

The Minnesota Department of Education's office of integration/desegregation did not officially weigh in on the battle. In fact, there is no reason why the Department should have been aware of the boundary change: While Hopkins was required to report its schools' student-of-color population, it was not required to report on potential attendance-boundary changes.<sup>163</sup> Even if the Department had been aware of the boundary changes, the rules do not give the Department the power to prevent the drawing of segregative boundaries. The rules only permit an after-the-fact review of the redistricting decision and, even then, the Department can only step in when there is proof that the school district's boundaries were motivated by a discriminatory purpose.<sup>164</sup> The possibility of an after-the-fact review of attendance-boundary decisions does not provide a sufficient counter-balance to community resistance to integration—even when school boards are generally supportive of integration.

#### **B. Rules Do Not Prohibit Segregative Boundaries: The Apple Valley experience**

The rules' requirement of a finding of discriminatory intent has effectively tied the Department's hands. The Department has never mandated that a school district end a segregative

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<sup>160</sup> Minnesota Department of Education Report Cards for Eisenhower and Glen Lake Elementary Schools for the 2006-2007 School Year, <http://education.state.mn.us/ReportCard2005>.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> See MINN. R. 3535.0120 (2007).

<sup>164</sup> MINN. R. 3535.0130 (2007). There is no evidence that Hopkins's administrators intended to discriminate against students of color. And even if they did, proving such discriminatory intent, which is usually an unspoken and socially-unacceptable, would be nearly impossible. The Supreme Court has recognized that proving a school district's intent may be an insurmountable task: In *Keyes*, the seminal Northern school desegregation case, the Supreme Court set the standard for intentional segregation in northern schools, it allowed the plaintiffs to present a *prima facie* case of segregative intent, which the defendant school district was then required to rebut with proof that segregative intent did not motivate its decision-making. *Keyes v. School District No. 1*, 413 U.S. 189, 206 (1972).

practice, even when the segregative practice is obvious and the solution readily apparent. In the Apple Valley School District (District 196), a wealthy suburban district south of Minneapolis and St. Paul, the rules did not authorize the state to intervene even when the school district was bussing elementary school children in a racially segregative manner. Until 2007, the Apple Valley school district chose to bus students from the Cedar Grove Manufactured Housing Park, a high-poverty neighborhood in Apple Valley with a disproportionate number of families of color, across the school district to Cedar Grove elementary school, the school with the highest student of color population in the district.<sup>165</sup> Cedar Grove students were bussed past several largely White, high-income schools to the low-income and increasingly segregated Cedar Grove.<sup>166</sup> Although the Department recognized that the attendance boundary was glaringly segregative and pushed the district to remedy the attendance boundary, the Department was unable to force the school district to act.<sup>167</sup>

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<sup>165</sup> See Letter from Mary Ann Nelson and Morgan Brown, the Minnesota Department of Education to John Currie, Superintendent of District 196, Sept. 24, 2004. (Notifying the district that the Minnesota Department of Education was concerned about violation of state laws and demanding information about the decision to draw the current attendance boundaries and the racial impact of the discontinuous attendance boundary) (on file with authors); Letter from Morgan Brown, Director of School Choice, Minnesota Department of Education, to Don Brundage, Director of Diversity, District 196, Nov. 18, 2004 (requesting the same information) (on file with authors).

<sup>166</sup> Maps showing the racial composition and the percentage of students receiving free and reduced lunch at District 196 on file at the Institute on Race and Poverty. See also Letter from Alice, Seagren, Commissioner of Education, to John Currie, Superintendent of District 196, April 25, 2005 (stating that children from the Cedar Grove trailer park, which were mostly children of color, were bussed to Cedar Park, despite the fact that MDE found six closer elementary schools.)

<sup>167</sup> See e-mail from Marceline Dubose to Cindy Jackson and Morgan Brown, Nov. 17, 2004, (stating that the school districts were in the process of “thinking about” attendance boundaries and that “their [the school district’s] background analysis of the causes of the racial isolation is insufficient to say the least.”); Letter from Morgan Brown, the Minnesota Department of Education, to Don Brundage and Jane Berenz, Independent District 196, Nov. 18, 2004 (stating that the Minnesota Department of Education had “additional concerns” about the Cedar Grove attendance boundary); email from Sharon Peck to Cindy Jackson, May 18, 2005 (containing District 196’s unofficial school board update stating that the school district would begin the process of reviewing Cedar Park’s attendance boundary next year and stating that “[w]e rarely get this sort of ‘meaty’ information in this type of email. (i.e. review of attendance boundaries).”)

The Department notified the district that Cedar Park elementary school qualified as racially isolated under Minnesota's rules in the spring of 2004.<sup>168</sup> The state required the school district to develop an integration plan that "increased interracial contact" between students.<sup>169</sup> The state, as usual, warned the district against remedying segregation by using "race-based measures" because such measures had been "successfully challenged in many other states."<sup>170</sup> The Department requested information from the district about the causes of the school's racial isolation, including information on the discontinuous attendance boundary, but it did not find discriminatory purpose on the part of the district.<sup>171</sup> In fact, the rules explicitly prohibit the Department from finding intentional segregation based solely on the "bus[sing] of protected students further or more frequently than White students."<sup>172</sup> The school district's rule-mandated integration plan did not promise to remedy the Cedar Grove/Cedar Park discontinuous boundary.<sup>173</sup> And the district continued to bus students of color past several largely White, low-poverty, high-performing schools to Cedar Park. Nonetheless, the Department approved the district's integration plans for

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<sup>168</sup>In 2004, the Board set up a community collaboration council, and conducted focus groups on increasing "cultural diversity" and closing the achievement gap. The collaboration council minutes do not discuss the Cedar Grove attendance boundaries. Independent School District 196, Community Collaboration Council Minutes, July 22, 2004-Oct. 14, 2004, (on file with the Minnesota Department of Education).

<sup>169</sup> Letter from Mary Ann Nelson to John Currie, Superintendent of District 196, (June 11, 2004) (on file with authors).

<sup>170</sup> *Id.*

<sup>171</sup> Letter from Mary Ann Nelson and Morgan Brown, Minnesota Department of Education to John Currie, Superintendent of District 196, Sept. 24, 2004 (on file with authors); Letter from Morgan Brown, Minnesota Department of Education, to Dan Brungug & Jan Borenz (Nov. 18th, 2004)(on file with authors); Independent School District 196, School Board Meeting Minutes (June 13, 2005) (stating that the Minnesota Department of Education had not found intentional discrimination on the part of the district).

<sup>172</sup> MINN. R. 3535.0130 (2007).

<sup>173</sup> The whole of the district plan was to establish a task force that would address boundaries over the next two years: School Boundaries: Explore all options, Engage all segments of the community in a dialogue, determine solutions that are strategic, fair and equitable, establish a task force to begin the 2005-2006 school year to evaluate existing elementary school attendance boundaries to include but not limited to integration. Task force will make recommendations to Superintendent in March or April of 2006. Approved recommendation to be implemented for the 2006-2007 school year. Evaluation of implementation of recommendation and adjustment made as needed for the 2007-2008. Independent School district 196, Integration/ Education Equity Plan for 2004-2006 (on file with authors)

the next three years<sup>174</sup> In short, while the Department would not (and functionally could not) require White students to be bussed to integrate schools, the rules also did not allow the Department to prevent segregative bussing unless there had been other evidence to support that such bussing was the result of the school district's racially discriminatory intent.<sup>175</sup>

District 196 eventually adopted new attendance boundaries, which allow newly entering Cedar Grove students to attend schools other than Cedar Park, but there is no indication that the Department was able to leverage anything other than public opinion to pressure the district to desegregate the Cedar Gove School, and, in the meantime, awarded the district 2.8 million dollars of integration aid.<sup>176</sup>

The rules' requirement that the Department find proof that the school district intentionally, discriminatorily segregated students—which would be a clear-cut constitutional violation—prior to mandating district action means that the state can functionally do nothing about non-discriminatory segregation. Racial segregation and its inevitable companion, economic segregation, are harmful whether they result from the intentional, pernicious, well-documented acts of school administrators or by accident. Limiting the state's remedial action to situations where the state and the district are liable for a violation of the Fourteenth Amendment does nothing to enhance the rights of Minnesota's students to an equal and equitable education. In the end, a voluntary desegregation rule is only as strong as the state's commitment to equality

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<sup>174</sup>Letter from Mary Ann Nelson, assistant commissioner, to John Currie, Superintendent of District 196 (Aug. 29, 2005) (approval for full integration funding for the 2005-2006 year) (on file with authors); Letter from Alice Seagram, Commissioner, to John Currie, Superintendent of District 196 (April 25, 2005)(stating approval for 2005 integration revenue funding)(on file with authors); Independent School District 196, School Board Meeting Minutes (June 13, 2006) (stating approval of 2004 plan) (on file with authors)

<sup>175</sup> *See id.*

<sup>176</sup> OFFICE OF THE LEGISLATIVE AUDITOR, STATE OF MINNESOTA, EVALUATION REPORT: SCHOOL DISTRICT INTEGRATION REVENUE, 32 (Nov. 2005).

and desegregation, and the initial drive to desegregate schools often dries up in the face of concerted public opposition. To have any real impact on the racial composition of public schools, states must implement comprehensive, mandatory integration rules that proactively require schools to prevent racial imbalance and promote racial diversity in their schools.

**V. States Should Mandate Metro-wide Desegregation Consistent with Kennedy's Guidance in *Parents Involved*.**

A strong state policy mandating integration is still possible after *Parents Involved*.

Although Kennedy joined in the Court's disapproval of the particular integration plans challenged in *Parents Involved*, his concurring opinion provides specific guidance to states seeking to address the growing racial and economic isolation in their schools. Kennedy determined that both plans were constitutionally deficient primarily because the districts made student-assignment decisions on the basis of individual racial classifications and could not establish that these plans were narrowly tailored to further any state interest.<sup>177</sup> But he explicitly endorsed states' adoption of general policies to encourage a diverse student body and explained that states are "free to devise race-conscious measures to address the problem in a general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race."<sup>178</sup> Specifically, he suggested several mechanisms school boards may pursue, including "strategic site selection of new schools" and "drawing attendance zones with general recognition of the demographics of neighborhoods."<sup>179</sup> He stated that although these mechanisms are race-conscious, they would not prompt a strict-scrutiny review because "they do not lead to different treatment based on a classification that tells each student he or she is to be

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<sup>177</sup> *Id.* at 2790-91.

<sup>178</sup> *Id.* at 2792.

<sup>179</sup> *Id.* at 2792.

defined by race.”<sup>180</sup> Rather, they allow decision-makers to “consider the impact a given approach might have on students of different races.”<sup>181</sup> Although many cases, like *Milliken*,<sup>182</sup> limit the scope of remedies courts may impose upon a state, these decisions do not address what a state, in its own initiative, may do to address racial isolation in its schools, even that caused by “*de facto* segregation.” In fact, Kennedy’s endorsement of states’ creatively addressing racial isolation is consistent with *Milliken*’s concern for local autonomy.<sup>183</sup>

With these specific suggestions in mind, and its historic commitment to progressive policies, Minnesota should move in a new, more effective, direction at least with respect to the racial and socioeconomic composition of its public schools. And there is no reason why other states should not move in that direction as well. In particular, the rules should address all racial imbalance, or segregation by race, no matter what its cause because, as Kennedy’s opinion confirms, states have a compelling interest in doing so and because, as a practical matter, proving the subjective intent of collective decision-making is nearly impossible and a waste of time and resources. Minnesota would also benefit from reinstating its State Board of Education to set more enduring, less politically impacted, educational policy. But even with such an entity back in place, the legislature could—as the Roundtable Draft did—require coordination and cooperation between various administrative agencies, including those that deal with housing, employment, and transportation.

While many of the Minnesota Roundtable’s proposals are worth revisiting, including the proposal to reduce state funding to segregated school districts, the proposal to create a special

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<sup>180</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. \_\_\_\_, 127 S.Ct. 2738, 2792 (2007) (Kennedy, J., concurring).

<sup>181</sup> *Id.* at 127 S.Ct. 2738, 2792 (2007) (Kennedy, J., concurring).

<sup>182</sup> *Milliken v. Bradley*, 418 U.S. 717, 745 (1974) (barring metropolitan-wide, court-ordered desegregation).

<sup>183</sup> *See id.* at 741-42.

integration district for the Twin Cities Metropolitan area shows the most promise.<sup>184</sup> In Minnesota, like many states, segregation exists within and between school districts. And school districts with low concentrations of students of color are often very close to school districts with high concentrations of students of color.<sup>185</sup> The reality of open enrollment means that White students often “flee” school districts with high numbers of students of color to whiter school districts, compounding segregation. Moreover, when school districts attempt to integrate schools, White families often threaten to open-enroll their children outside of the school district. After *Parents Involved*, it is an open question whether states can limit students’ ability to participate in open enrollment programs to prevent the programs from having a segregative effect.<sup>186</sup> As the Roundtable recognized fifteen years ago, any effective desegregation plan will have to encompass the metropolitan region. Integrated schools are possible, even after *Parents Involved*, if states require metropolitan school and school district attendance boundaries to be adjusted to create integrated school-attendance zones. Likewise, school districts can be required to coordinate in the sharing of students, buildings, and transportation resources to minimize costs and maximize integration.

Minnesota’s experiment with integration as an educational choice has resulted in countless missed opportunities to improve educational opportunities for all Minnesota children. The state has sat back and watched more and more schools become segregated, high poverty

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<sup>184</sup> MINNESOTA STATE BOARD OF EDUCATION, HISTORICAL OVERVIEW, STATE BOARD OF EDUCATION DESEGREGATION ACTIVITIES, 1 (1995).

<sup>185</sup> This between-district segregation is highly related to residential segregation. Kendra Bischoff, *School District Fragmentation and Racial Residential Segregation: How do Boundaries Matter?* 20 URBAN AFFAIRS R. Vol 10, 1 (2008).

<sup>186</sup> See *Fisher v. United States*, 2007 WL 2410351, 11 (D. Ariz. 2007). Minnesota’s current open enrollment statute actually makes it easier for student to transfer out of racially isolated school districts by lifting application deadlines for student applying to transfer into or out of racially isolated school districts. MINN. STAT. § 124D.03, subd. 4.

schools and then chastened these schools for their “achievement gap.”<sup>187</sup> Segregated schooling has and will continue to lead to a divided future of “haves” and “have-nots” as more low-income children and children of color never have the opportunity to make the social connections necessary to attain a middle-class future. The state’s rationale for inaction in the face of glaring racial disparities has been that only intentional discrimination is actionable. In reality, segregation harms children regardless of the administrators’ intent. To ensure an equitable future for all Minnesota’s children, the state’s mission must be to prevent foreseeable segregation and remedy existing racial imbalances, regardless of the school district’s intentions.

As the Supreme Court recognized nearly forty years ago, desegregation cannot be considered merely a “choice,” left up to the individual inclinations of families and school districts.<sup>188</sup> Minnesota’s experience shows that the failure to mandate integration leads to growing numbers of segregated schools. There is no real question that integration in education constitutes a compelling interest. As our society has grown more multiracial and multicultural, the need for integrated schools has only grown. At a minimum, students need to sit next to students from other racial backgrounds in the classroom in order to understand each other—a necessary step in building a fair and equitable future.

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<sup>187</sup> See Emily Johns & James Walsh, *School Test Scores Improve Slightly*, STAR TRIBUNE (June 30, 2008) (Quoting Alice Seagram who stated that she was not satisfied with the achievement gap). Alice Seagram, the current commission of education, was the head of the GOP task force that called for the rejection of the Roundtable rule on the claim that desegregation is based on ideas that haven’t worked elsewhere and won’t work here. Debra O’Connor *GOP Task Force Rejects Desegregation Plan//Parents Want Kids In Nearby Schools, House Group Says*, ST. PAUL PIONEER PRESS, 3B (Nov. 8, 1995).

<sup>188</sup> Swann v. Charlotte Mecklenburg Board of Education, 402 U.S. 1, 21 (1971); Green v. County School Board, 391 U.S. 430, 441 (1968).