

COURT-MANDATED EDUCATION REFORM: THE SAN FRANCISCO EXPERIENCE AND THE SHAPING OF EDUCATIONAL POLICY AFTER *SEATTLE-LOUISVILLE* AND *HO V. SFUSD*

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***160 Introduction**

The termination of the twenty-three-year San Francisco desegregation decree in 2005 and the issuing of the U.S. Supreme Court's Seattle-Louisville decision in 2007 were not isolated events, but were in fact the culmination of many years of efforts to implement the perceived mandate of Brown and to address the barriers to change that persisted. To the extent that they are being viewed as the functional equivalent of “exclamation points” by many people arguably means that we have reached the end of an era. Yet if these are in fact statements by courts and communities that “enough is enough,” what then? What is to be done about the inequities that persist and the substantial differences in educational quality that remain?

The legal and public policy disputes implicated by these court battles reflect not only the history of the times, but also the wide-ranging and highly publicized endeavors by legal activists, education researchers, public policy experts, and political leaders to come to terms with what continue to be among ***161** this nation's most shameful realities. Indeed, the failure of our institutions to eliminate the barriers to equal access and equal opportunity faced by children of poverty in racially isolated areas has contributed greatly to the marginalization and disenfranchisement of entire communities, making it extremely difficult for many low-income students of color to overcome an already challenging set of circumstances. [FN1]

On the other hand, it must be recognized that there are also success stories in this context. In certain places and at certain times, particularly when the courts have become involved and members of the legal community have been able to work together with members of the education community to effect change pursuant to common goals, barriers to equal access have been significantly lowered and the right to equal educational opportunity has been maximized for all students. That these successes have happened for many within the framework of desegregation court orders and decrees flies in the face of the conventional wisdom that race-conscious plans to assign students to schools and classrooms have not worked. As we go forward in the aftermath of recent legal and public policy developments, it is imperative that we acknowledge both the failures and the successes, and that we seek to learn from both.

In late 1996, I was recruited to monitor the court-supervised desegregation consent decree in San Francisco. The Decree required independent monitoring, and the first monitor had retired after thirteen years in that role. I began my work in January 1997 and served the community for nine years, heading a team that conducted close to 1000 school site visits. We went into every school in every neighborhood in San Francisco, returned often to many places, and met regularly with members of the community. I visited an average of two schools a week almost every week throughout the nine-year period. In addition, we met regularly with school district officials, attorneys for the respective parties, and ***162** the supervising federal judge. We also filed many reports on the progress of the District under the Decree. These reports were made available to the public online. [FN2]

Ironically, when I first began my work in San Francisco, I saw desegregation as a relic of another era. From my vantage point as a former classroom teacher and a former supervisor of student teachers in Los Angeles, I could not help but conclude that desegregation efforts had not worked. In my published writings on equal opportunity issues and in my Education Law classes at UCLA, I gave short shrift to the entire idea of desegregation. In a 1987 piece on campus safety issues, for example, I wrote that the “judicial tampering with the public schools” within the context of desegregation litigation “has not been successful.” I went on to state that not only had “[d]esegregation orders over the past thirty years . . . caused significant domestic turmoil,” but that they have “often . . . resulted in public school systems that are even less effective in providing quality education than they once had been.” [FN3]

Twenty years later, informed by my intimate familiarity with the impact of the complex and multifaceted desegregation decree in San Francisco, I arrived at a very different position. Without discounting the turmoil and the failures that clearly accompanied many desegregation efforts, our Monitoring Team reports from 1997-2005 document a much more complex and highly nuanced set of realities, setting

forth highlights of a twenty-three-year effort that at times worked quite poorly but at other times achieved substantial gains and produced lasting, positive change in the lives of several generations of young people.

This Article reflects back on the San Francisco Consent Decree two years after its termination. Informed by the findings and conclusions of our systematic monitoring over a nine-year period, it seeks to reassess both the efficacy of race-conscious reform strategies and the value of court supervision itself as vehicles for change in education settings. Part I begins with the legal parameters of the San Francisco and Seattle-Louisville decisions, examining the history of the Fourteenth Amendment litigation in the respective cities. Through an analysis of the court decisions in *San Francisco NAACP v. San Francisco Unified School District*, [FN4] *Ho v. San Francisco Unified School District*, [FN5] *Parents Involved in Community Schools v. Seattle School District No. 1*, and *Meredith v. Jefferson County Board of Education*, [FN6] Part I seeks to determine whether and to what extent *Brown v. Board of Education* has been overruled.

Part II presents the story of the implementation efforts in San Francisco as a case study, attempting to discern what aspects of the twenty-three-year experience can inform nationwide reform efforts in the future. After analyzing how and why it worked, how and why it did not work, and how and why it ultimately stalled, Part II concludes that the experience can indeed serve as an exemplar. Not only is there much that can be learned from the purposes of the Decree and its explicit focus on both desegregation and academic achievement, but also from the fact that while the Decree was clearly about race, it was always about more than race alone.

Part III then turns to the central question of whether and to what extent desegregation efforts still matter. After examining the extensive evidence of a direct relationship between desegregation and academic achievement, this Article concludes that desegregation matters greatly, but that ideally it should be re-conceptualized for the current era. Too often, desegregation plans focusing on desegregation alone were seen as viable and complete remedies, and too often they did not succeed in implementing the mandate of *Brown*. Yet, as the San Francisco experience has shown, when race-conscious strategies are part and parcel of a much larger and multi-faceted menu of reform efforts--developed by members of both the legal and the education communities, implemented by the parties, and supported by political leaders--everyone benefits and lasting change is the ultimate result.

Building on these findings, this Article highlights the potential of new efforts that could address the inequities that persist nationwide in low-income, *164 racially isolated areas. It sets forth the framework for a prospective litigation strategy in an urban setting based on a set of representative facts, and maps out the potential structure of a resulting Consent Decree that might offer the best chance of achieving broad and multifaceted goals.

I. Race-Conscious Student Assignment Plans and the Evolution of Fourteenth Amendment Equal Protection Clause Doctrine from 1995 to 2007

In many ways, the history of desegregation efforts in San Francisco parallels that of other major cit-

ies throughout the U.S. When it became clear that decades were passing and most public officials were taking few, if any, voluntary steps to implement the mandate of Brown, lawsuits were filed in federal courts and a large number of court-supervised programs were ultimately put in place. In San Francisco, after initial desegregation efforts not only met with a mixed reception from local residents but also achieved little or no concrete change, the San Francisco branch of the NAACP (SFNAACP) filed a Fourteenth Amendment lawsuit in 1978 against both the San Francisco Unified School District (SFUSD) and the California Department of Education. This litigation led to the high-profile and widely publicized Consent Decree that took effect in 1983.

From the outset, however, this Decree was unique. It contained not only an explicit focus on both desegregation and academic achievement, but also a menu of mandated reform strategies to further the interrelated goals of equal access, equal opportunity, increased diversity, the closing of the achievement gap, and an end to the racial isolation of low-income students of color. [FN7] Independent monitoring was required, and the monitoring team was responsible for filing an annual report with Supervising Judge William H. Orrick on the progress of the District toward the attainment of school-by-school desegregation, within-school desegregation, and increased academic achievement across all racial and ethnic groups. Desegregation was the overarching framework, but ultimately the Decree was about equal access to quality education for all students.

Philosophically, the entire thrust of the Decree was strikingly similar to that of the federal No Child Left Behind Act (NCLB), a bipartisan Congressional effort signed into law by the President in 2001. [FN8] NCLB is also ***165** race-conscious, seeks to close the achievement gap, and mandates the reporting of test scores by race/ethnicity, language minority status, and special education status. Low-performing schools can be “reconstituted” in the same way they had been in SFUSD, by replacing most, or even all, of the adults at the site. [FN9] And indeed, NCLB's Statement of Purpose recognizes as valid the very same principle that informed the Consent Decree in San Francisco: “[A]ll children [must] have a fair, equal, and significant opportunity to obtain a high-quality education.” [FN10]

In other important ways, of course, the San Francisco Decree and NCLB are quite different. The Decree relied to a significant extent on court-supervised desegregation, mandated in advance, as a strategy for helping to improve academic achievement. NCLB, on the other hand, sets forth no mandated strategies in advance, but instead requires a variety of steps pursuant to a menu of options if schools and school districts do not improve. These steps include--but are not limited to--the ramping up of parental choice and the increased privatization of public education.

A. Ho v. SFUSD

Much progress occurred under the Consent Decree, particularly in the beginning years (known as “Phase One”) and especially when the District leadership actively embraced the Decree's goals and worked collaboratively to implement them. [FN11]

***166** Yet over time various aspects of the Decree came to be viewed as highly troubling by members of the community. By the 1990s, for example, some were questioning the Court's decision to certify

the San Francisco Branch of the NAACP as the representative of all SFUSD students of every race and ethnicity for the duration of the Decree. [FN12] In 1993, the Multicultural Education Training and Advocacy group (on behalf of Latino plaintiffs) and a local organization known as Chinese for Affirmative Action filed motions to intervene in the case, seeking a voice in the ongoing process. Judge Orrick denied these motions, however, ruling in favor of the SFNAACP. [FN13]

Others objected strongly to the Decree's designated strategy for improving academic achievement, which relied heavily on "reconstituting" low-performing schools by removing most--if not all--of the adults and replacing them with new administrators, new faculty, and new staff. Classroom teachers in particular saw reconstitution as a top-down reform effort that sought little or no input from the very people who were to shoulder the entire blame if things did not go well. [FN14] The District's teachers' union (UESF) thus filed its own motion to intervene in 1993, but that motion, too, was denied. [FN15]

Perhaps the most troubling feature of the Consent Decree, however, for significant portions of the local community was its reliance on Paragraphs 12 and 13, which set forth racial and ethnic guidelines for the assignment of San Francisco schoolchildren to their public schools. Under Paragraph 13, no school could have fewer than four racial/ethnic groups represented in its student body, and no racial/ethnic group could constitute more than forty-five percent of the student enrollment at any regular school, or more than forty percent at any alternative school. [FN16] Under Paragraph 12, nine racial/ethnic groups were identified for the purpose of defining the racial/ethnic composition of each school: "Spanish-surname, Other White, African-American, Chinese, Japanese, Korean, Filipino, American Indian, and Other Non-White." [FN17]

***167** It was the dissatisfaction with these race-conscious desegregation mandates that led to the filing of the Brian Ho lawsuit in 1994, the removal of race from the student assignment plan in 1999, a failed experiment with race-neutral approaches to desegregation for the next six years, and the termination of the Decree in 2005.

The Ho lawsuit was filed on behalf of three Chinese-American students who were unable to attend schools that had reached their limits for the students' particular race. Two of the students were denied admission to the school designated for their neighborhood and one was denied admission to the District's prestigious Lowell High School. The suit was originally filed in 1994 against both the school district and the California Department of Education, but in 1995 the SFNAACP was also joined as a defendant. In 1996, the Court certified the action as "a class action on behalf of all children of Chinese descent of school age who are current residents of San Francisco and who are eligible to attend the public school system." The suit alleged that "[P]aragraph 13's student assignment plan constitutes race discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment"

The case reached the Ninth Circuit Court of Appeals while it was still at the procedural stage. Judge Orrick had denied the Ho plaintiffs' motion for summary judgment in May 1997, and plaintiffs chose to appeal rather than proceed with a full-blown trial at that point. In June 1998, the Ninth Circuit panel dismissed the appeal for lack of jurisdiction, but took the extra step of setting forth substantial guidance to the parties and the District Court on the issues remaining for trial and on the state of the law govern-

ing the use of race in this context. [FN18]

Affirming Judge Orrick's finding that the Consent Decree does indeed “subject [] the students to a race-based classification by a state actor” [FN19] and thus may be used by the government only if “necessary to correct the effects of government action of a racist character,” [FN20] the Ninth Circuit panel found that two issues remained to be addressed in a trial on the merits of the Ho case: (1) “Do vestiges remain of the racism that justified paragraph 13 of the consent decree in 1983?” and (2) “Is paragraph 13 necessary to remove the vestiges if they do remain?” [FN21]

The panel did not need to go this far. It could have left any discussion of the applicable law on the substantive legal issues for another day. But in so doing it became the first Court of Appeals to rule on the issue of whether race could be employed as a factor in K-12 student assignment plans after *Adarand *168 Constructors v. Pena*. [FN22] In its 1995 *Adarand* decision, the U.S. Supreme Court had issued a fractured set of opinions that together appeared to herald a turning point in the evolution of Fourteenth Amendment law regarding the classification of persons on the basis of race. [FN23]

Only a few months after the Ninth Circuit's decision in *Ho*, the First Circuit weighed in on the same issue in *Wessman v. Gittens*, a dispute over the use of race in the admissions policy of the prestigious Boston Latin School. Consistent with both *Adarand* and *Ho*, the First Circuit panel cast doubt on whether any use of race in the public sector during this era would be found constitutional. [FN24]

A trial on the merits of the *Ho* lawsuit was set for February 1999, but the parties could not ignore the apparent evolution in both Fourteenth Amendment law and the state of public opinion regarding the use of race to remedy the effects of past discrimination. While cases like *Ho* and *Wessman* were wending their way through the federal courts and coming down in favor of the plaintiffs every time, [FN25] the people of California were voting in favor of Proposition 209 (1996) and the people of Washington state were voting in favor of I-200 (1998). [FN26] These similar, high-profile ballot initiatives both sought to prohibit any use of race in “public employment, public education, and public contracting.” [FN27] The school district and the SFNAACP had been determined to **169* fight any attempt to remove race from the Decree's student assignment plan. But when it became apparent by the late 1990s that they were highly unlikely to prevail on this issue in a U.S. federal court, the defending parties became amenable to a settlement. And on the morning that the trial was scheduled to begin, a settlement agreement was concluded.

In the 1999 *Ho* settlement, the District agreed to no longer use race as a factor in student assignment, and a 2002 termination date was established for the San Francisco Consent Decree. Two years later, in a renegotiated 2001 settlement agreement, the parties agreed to embrace a new five-year blueprint for education reform set forth by the District pursuant to Consent Decree goals and mandates, and in so doing adopted a new, race-neutral student assignment plan (known as “the diversity index”). A new termination date was established for the Decree, and--after a highly tumultuous four-year period marked by severe resegregation and the dramatic failure of the race-neutral student assignment plan--the Decree did in fact sunset on December 31, 2005. [FN28]

The story of the final six years of the Decree (1999-2005) is central to the analysis in this Article. During these stormy years, a Decree that had worked to benefit a substantial number of students over a twenty-year period began to unravel. San Francisco became perhaps the only school district in the country that was required to continue desegregation efforts on the basis of race while not being allowed to use race as a factor in doing so. The District was not able to manage this burden, and it is questionable whether any District anywhere could have done better under the circumstances, especially when the political leaders at both the city and the state levels were not able to identify or generate the community support necessary to take the additional steps that might have changed the status quo.

B. The Seattle and Louisville Litigation

During the final years of the San Francisco Consent Decree, a great deal of activity was continuing on the Fourteenth Amendment front at both the K-12 and the higher education levels. Litigation challenging the voluntary desegregation plans in Seattle and Louisville was working its way through the federal courts, a similar challenge was brought against the Berkeley Unified School District under state law, and the U.S. Supreme Court had agreed to hear *170 the companion cases of *Grutter v. Bollinger* [FN29] and *Gratz v. Bollinger*, [FN30] both of which sought an end to race-based affirmative action plans at the University of Michigan.

Just as Adarand set the parameters for the cases that followed in the late 1990s, the Court's 2003 rulings in *Grutter* and *Gratz* cast a giant shadow on subsequent litigation and pending appeals. The companion cases focused on law school admissions and undergraduate admissions respectively, and decisions were announced for both on the same day. The two opinions relied on the same legal principles and conclusions, but the Court reached different results for two very different plans. The law school plan was upheld as constitutional, while the undergraduate plan was struck down.

Under current Fourteenth Amendment Equal Protection Clause law, intentional race-based classifications--whether for the purpose of desegregation or affirmative action--are subject to strict scrutiny. A compelling governmental interest for the classification must be identified, and the policy or practice must be narrowly tailored to further that interest. [FN31] The *Grutter* majority opinion thus contained two key parts, the first concluding that the interest in student body diversity articulated by the law school was indeed a compelling governmental interest [FN32] and the second setting forth for the first time detailed guidelines for determining whether an admissions plan employing race as a factor in an education setting was, in fact, narrowly tailored. [FN33]

In *Grutter*, the Court ruled in favor of the university after finding that the law school plan--with its holistic focus on admitting a critical mass of underrepresented students--met all of the narrow tailoring guidelines. In *Gratz*, however, the Court ruled against the university after finding that the undergraduate plan--which awarded precise numerical bonuses to any applicant from an underrepresented racial/ethnic group--did not comport with these guidelines.

*171 In the same way that Adarand had been followed by several circuit court of appeals decisions that appeared to significantly limit or even prohibit the use of race in K-12 student assignment plans, the

ruling in *Grutter* was followed by cases that allowed the use of race at the K-12 level. Three different circuits--two sitting en banc--determined that principles in *Grutter* were directly applicable to K-12 settings, and that under a *Grutter* analysis the use of race in a narrowly tailored fashion would be constitutional. The cases were *Comfort v. Lynn School Committee* (Boston suburbs), [FN34] *McFarland v. Jefferson County Public Schools* (Louisville), [FN35] and *Parents Involved in Community Schools v. Seattle School District*. [FN36] In all three cases the courts employed broad and unequivocal language regarding the importance of policies designed to further desegregation efforts. [FN37]

Defeated plaintiffs in the three cases appealed to the U.S. Supreme Court, but few expected certiorari to be granted, especially since all three circuits upheld the use of race as a factor in K-12 student assignment plans after *Grutter*. The petition of the Lynn plaintiffs reached the Court first, and certiorari was denied. But soon afterward Justice O'Connor retired and was replaced by Justice Alito. When the two other petitions were considered, certiorari was granted. [FN38] The Seattle and Louisville cases were consolidated, oral argument was heard simultaneously on the same day, and the Court issued one opinion for the two cases in June 2007.

While both the Seattle and the Louisville lawsuits focused on the constitutionality of employing race as a factor in desegregation plans that were neither court-ordered nor court-supervised, there were major differences in the facts of the two cases. Seattle's plan impacted only the ten high schools in the District, and race could only be considered as one of four "tiebreakers," with a *172 relatively small percentage of students apparently impacted in any given year. [FN39] The much broader Louisville plan--which provided extensive choice for all parents while requiring schools to seek an African American student enrollment of at least 15% and no more than 50%--was essentially a refinement of the plan that the District had developed and modified during its years of court-ordered desegregation. When the order was lifted in 2000, Louisville chose to continue the district-wide desegregation voluntarily. [FN40]

In a fractured set of five opinions that mirrored irresolvable differences between and among the justices, the Court ruled against the school districts. Chief Justice Roberts' opinion announcing the result garnered a bare majority (himself and four others) for its description of the facts and its articulation of the decision, but won the agreement of only a plurality (himself and three others) for what were arguably the boldest and most far-reaching aspects of the ruling. Justice Kennedy played a key role in this dynamic, signing on only to the portions that set forth the facts, announced the ruling in favor of the plaintiffs, and determined that *Grutter* only addressed higher education diversity and thus was not applicable in K-12 settings. Justice Kennedy then wrote his own opinion, concurring in part and concurring in the judgment, in which he took great issue with key components of what the plurality had said. [FN41]

Three other justices wrote their own opinions, most notably Justice Breyer, who objected strongly in a very lengthy dissent to the direction that the slim majority had adopted. [FN42] Justice Thomas wrote a substantial concurrence in which he not only affirmed his agreement with Chief Justice Roberts, but also explained that he wrote separately to express his strong disagreement with Justice Breyer's dissent. [FN43] Justice Stevens wrote separately to affirm his agreement with the dissent, and also to make several additional points, which included his widely publicized assertion that in his view "no Member of the

Court that [he] joined in 1975 would have agreed with [this] decision.” [FN44]

In circumstances such as these, commentators, jurists, and practitioners confront a significant challenge as they seek to identify what guidelines can be discerned from the combination of opinions. A principled approach in this context is to try to identify places where at least five justices can be deemed to be in agreement. Yet it must also be recognized that, as a general rule, the *173 plurality opinion announcing the ruling takes precedence. If common ground can be found between the plurality and at least one other justice, the legal principles that might then be discerned arguably trump any inconsistent principles that might be found by combining the dissenting opinion with the views of a justice or justices who did not join in the dissent.

Under these nebulous but longstanding approaches to interpreting Court decisions that contain numerous and often-conflicting opinions, it has been suggested that one way to look at Seattle-Louisville is to conclude that Justice Kennedy's opinion by itself should be viewed as embodying what the decision actually stands for. Indeed, at first glance, it can be argued that one can find at least four other justices--either from the plurality or the dissenting group--who would agree with any assertion and any conclusion that Kennedy has set forth. Yet it is also possible that some of what Justice Kennedy has concluded could be viewed as constituting his opinion alone. [FN45]

Informed by these preliminary conclusions regarding how the decision should be construed, two key interrelated questions can be identified that are arguably central to the question of what Seattle-Louisville stands for: (1) whether and to what extent *Brown v. Board of Education* has been overruled, and (2) whether and to what extent race conscious strategies of any kind can be employed in a K-12 education setting.

C. Has *Brown v. Board of Education* Been Overruled?

It may very well be the case that, taken together, the opinions of Chief Justice Roberts, Justice Kennedy, and Justice Thomas constitute an overruling of *Brown*, the landmark 1954 decision that is generally viewed as perhaps the crowning achievement of U.S. constitutional jurisprudence.

Certainly none of these justices would own up to the fact that they might have even considered overruling this venerable decision and consigning it to the dustbin of history. Indeed, they go out of their way to wrap themselves in the mantle of *Brown*, and their opinions exemplify the profound disagreement that has emerged in this nation about what *Brown* truly stands for.

*174 The Chief Justice, for example, joined by Justices Scalia, Thomas, and Alito, asserted that the decision of the Court in the Seattle-Louisville case was actually consistent with *Brown*. Roberts reproduced both a quote from the NAACP's brief in *Brown* and a statement from Robert L. Carter, a member of the NAACP's legal team, at the oral argument:

[T]he position of the plaintiffs in *Brown* was spelled out in their brief and could not have been clearer: “[T]he Fourteenth Amendment prevents states from according differential treatment to

American children on the basis of their color or race.” Brief for [NAACP] on Reargument in Brown I. What do the racial classifications at issue here do, if not accord differential treatment on the basis of race? As counsel who appeared before this Court for the plaintiffs in Brown put it: “We have one fundamental contention . . . that no State has any authority under the equal-protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens.” Tr. of Oral Arg. in Brown I, p. 7 (Robert L. Carter, Dec. 9, 1952). There is no ambiguity in that statement. . . . What do the racial classifications do in these cases, if not determine admission to a public school on a racial basis? [FN46]

Building on this analysis, Chief Justice Roberts concluded that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.” [FN47]

This portion of the Court's opinion, which only garnered a plurality, provoked widespread debate in the legal, educational, and public policy communities. While many lauded the conclusion as a vindication of their efforts to end “preferential treatment” on the basis of race in public education, others were outraged. Perhaps the most dramatic criticism of the Court's reasoning in Seattle-Louisville came from three key members of the NAACP legal team that had been headed by the late Justice Thurgood Marshall: Robert L. Carter, Jack Greenberg, and William T. Coleman, Jr. Carter, a 90-year-old senior federal judge in 2007, explained that in the 1950s “[a]ll that race was used for . . . was to deny equal opportunity to black people. It's to stand that argument on its head to use race the way they use is [sic] now.” [FN48] Jack Greenberg, a law professor at Columbia, called Roberts' interpretation *175 “preposterous.” “The plaintiffs in Brown were concerned with the marginalization and subjugation of black people,” Professor Greenberg added. “They said you can't consider race, but that's how race was being used.” [FN49] And William T. Coleman Jr., a Washington lawyer who served as Secretary of Transportation in the Ford administration, stated, “The majority opinion is 100 percent wrong.” He went on to assert, “It's dirty pool to say that the people Brown was supposed to protect are the people it's now not going to protect.” [FN50]

In his emotional dissent, Justice Breyer strongly disagreed with the conclusion that Brown --which mandated race-based desegregation--could now be used to support the argument that race-based desegregation was unconstitutional. Joined by Justices Stevens, Souter, and Ginsburg, he roundly criticized the plurality's reasoning. [FN51] Breyer then concluded with some of the strongest language employed by a dissenting justice in recent memory. “The last half-century,” he wrote, “has witnessed great strides toward racial equality, but we have not yet realized the promise of Brown. To invalidate the plans under review is to threaten the promise of Brown. The plurality's position, I fear, would break that promise. This is a decision that the Court and the Nation will come to regret.” [FN52]

Justice Kennedy also took issue with the plurality's reasoning in this context, albeit in more restrained language and by focusing more directly on a different aspect of the document. “The plurality opinion,” he wrote,

is too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race. The plurality's postulate that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race,” . . . is not sufficient to decide

these cases. [FN53] He continued by explaining his own perspective on Brown:

*176 Fifty years of experience since *Brown v. Board of Education* . . . 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 school authorities must accept the status quo of racial isolation in schools, it is, in my view, profoundly mistaken. [FN54] Yet while expressing strong disagreement with the Chief Justice on the applicability of *Brown* to the facts at hand, Justice Kennedy also rejected the school districts' arguments in defense of using race as a factor in the assignment of students to particular schools. He declared,

What the government is not permitted to do, absent a showing of necessity not made here, is to classify every student on the basis of race and to assign each of them to schools based on that classification. Crude measures of this sort threaten to reduce children to racial chits valued and traded according to one school's supply and another's demand. [FN55] In making this statement and concurring with the result, Justice Kennedy places himself squarely within the Chief Justice's camp on the question presented. [FN56]

Under the doctrine of *stare decisis*, of course, members of the U.S. legal community are supposed to show respect for precedent. Case law often reflects both foundational opinions and a series of subsequent decisions that build on the bedrock of the watershed rulings. Legal principles derived from this process are sometimes modified, sometimes extended, and often adjusted to account for changing realities. But very few Court decisions are overruled. This is especially true for the foundational decisions, and no one would contest the conclusion that *Brown v. Board of Education* qualifies as a foundational decision in this context.

Yet some cases are in fact overruled, most typically when a significant amount of time has passed and the jurisprudence has changed. Sometimes a *177 case is expressly overruled, as in the Establishment Clause decision of *Agostini v. Felton*, [FN57] citing both the passage of time and key changes in the evolution of First Amendment law over the previous twelve years. Other times a case is implicitly overruled by being cast aside, as the 1896 decision of *Plessy v. Ferguson* [FN58] was cast aside by the 1954 ruling in *Brown*, which found *Plessy*'s doctrine of separate but equal inapplicable in a K-12 education setting. [FN59]

At first glance, one could certainly argue that *Brown* was overruled by the combined opinions of Justices Roberts, Kennedy, and Thomas. Supreme Court documents made public over time reveal very clearly that the nine Justices who signed on to the unanimous decision of the Court in 1954 construed their vote for Chief Justice Warren's opinion as a "vote to desegregate." In *Seattle-Louisville*, however, the five Justices who signed on to the majority opinion of the Court in 2007 voted--in spite of the consistent mandate of *Brown* over time--not to desegregate. They voted, in fact, to prohibit school districts from desegregating, districts that--as Breyer pointed out in his dissent--were only choosing to follow in the direction that federal courts had mapped out for them under *Brown*. Moreover, in three separate opinions, the five Justices concluded unequivocally and in very strong language that the type of desegregation associated with *Brown* for decades was now to be viewed as unconstitutional for every school

district in every state under the same clause of the same amendment that had justified these very policies and practices. [FN60] In light of *178 these circumstances, one can certainly understand why Justice Breyer asked, “What has happened to stare decisis?” [FN61]

At the same time, however, one could make the case that *Brown* was not overruled. Certainly it was not expressly overruled, with every one of the five separate opinions showing great deference to *Brown* and seeking to present its conclusions as consistent with *Brown*. Notwithstanding the conclusions of the plurality, which rejected the defendants' argument (and the rulings of the First Circuit, [FN62] the Sixth Circuit, [FN63] and the Ninth Circuit [FN64]) that *Grutter* applied and that a compelling governmental interest in student body diversity existed at the K-12 level as well, five justices would find multiple compelling interests that separately or together justified the development and implementation of school desegregation plans. Justice Kennedy identified two compelling governmental interests in this context: “A compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue. Likewise, a district may consider it a compelling interest to achieve a diverse student population.” [FN65]

Justice Breyer, on behalf of the four dissenting justices, came at the question from a slightly different perspective, finding that three elements together constitute a compelling interest in an education context:

The compelling interest at issue here, then, includes an effort to eradicate the remnants, not of general ‘societal discrimination,’ . . . but of primary and secondary school segregation (citation omitted); it includes an effort to create school environments that provide better educational opportunities for all children; it includes an effort to help create citizens better prepared to know, to understand, and to work *179 with people of all races and backgrounds, thereby furthering the kind of democratic government our Constitution foresees. If an educational interest that combines these three elements is not ‘compelling,’ what is? [FN66]

It is arguably difficult to conclude that *Brown* has been overruled when five Justices--albeit in separate opinions that come at the issue from different directions--together determine that numerous interests exist that would justify race-conscious school desegregation under the Fourteenth Amendment.

In addition, the right to equal educational opportunity--recognized by the Court in *Brown* and long viewed as a central component of the case--is explicitly endorsed by the same five Justices in Justice Kennedy's concurrence and Justice Breyer's dissent. Justice Kennedy bemoans the fact that in his view the plurality is “too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race,” [FN67] and declares that “[t]his 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.” [FN68] He concludes that school districts can indeed “seek to reach *Brown*'s objective of equal educational opportunity.” [FN69] Justice Breyer reaches a similar conclusion regarding the continuing vitality of this right, reproducing key portions of Justice Kennedy's language on the subject, and also noting the strong validation of the equal opportunity mandate in other decisions of other courts. [FN70]

In light of the tenable arguments that can be made both for and against the conclusion that *Brown* has been overruled, a principled reading of the five combined opinions in *Seattle-Louisville* suggests that it has been overruled in part. By characterizing traditional desegregation practices mandated under *Brown* as unconstitutional racial balancing, the Chief Justice and the four others who joined him have eviscerated much of what the landmark case had come to represent. One cannot escape the conclusion that key features of *Brown* and its progeny have been overruled by being cast aside, with the desegregation mandate held inapplicable to K-12 education in 2007 in much the same fashion as the doctrine of separate but equal was held inapplicable to K-12 education in 1954.

At the same time, five votes still exist for a continued right to equal educational opportunity on at least some level, and school districts are obligated to act under a range of federal and state laws that often contain race conscious mandates--including but not limited to the No Child Left Behind Act, the IDEA, and the right to an education under state constitutional jurisprudence. K-12 officials thus face a major dilemma. Their obligations are ***180** immediate under the law and as a matter of policy, even as the extent to which *Brown* has been overruled may not be clarified until future cases have been decided.

D. The Future of Race-Conscious Remedies

Loosely defined, a race-conscious remedy is one that has, at least in part, the purpose of achieving a goal that may have an impact on persons differently depending upon their race/ethnicity. Typically, such remedies are not designed to negatively affect anyone, but rather focus more directly on what might be done to benefit members of particular racial/ethnic groups in specific circumstances and situations. Thus, for example, the Ho settlements of 1999 and 2001 retained the San Francisco Consent Decree's race-conscious mandate by preserving the language of Paragraph 12 that required the District to desegregate on the basis of race. In addition, NCLB, which on its face mandates only race-neutral efforts on behalf of all K-12 students, explicitly embraces as one of its central purposes the goal of closing the achievement gap on the basis of race/ethnicity. Such approaches recognize that certain students are still marginalized and disenfranchised on the basis of their race, and that extra efforts on their behalf are justified.

Indeed, the aforementioned identification of several compelling governmental interests in a K-12 race-based desegregation context by five of the nine justices in *Seattle-Louisville* provides an indication that narrowly tailored race-conscious remedies would still be constitutional under the current jurisprudence.

Of these five Justices, Justice Kennedy has set forth the most explicit articulation of the types of race-conscious strategies that a school district can adopt in this context. According to Kennedy, these would include:

[S]trategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race. [FN71]

While some of these strategies are clear and direct, others would certainly require further elucidation before implementation is possible. And in fact commentators have criticized Justice Kennedy and the Court for providing such limited guidance for school districts as to what they can and cannot do under the current ruling. If this is the only guidance to come out of all the opinions--and many have concluded that it is--then school boards and school superintendents seeking to avoid litigation may be wise not to pursue any *181 policies at the present time that even reference race/ethnicity. On the other hand, given the mandates that still exist in both federal and state statutes, case law, and regulations across the land, school districts that choose to do nothing to address the inequities that remain may find themselves vulnerable to litigation on other fronts. [FN72]

Thus the wisest course for all, and the most defensible in the end, is for school districts to move forward with their current obligations by implementing research-based, race-conscious strategies that have demonstrated proven value in other settings. *Brown* may have been overruled in part, but the Seattle-Louisville Court has not banned all race-conscious remedies. Indeed, were it to consider such a ban in the near future, it would have to contend with the argument that a broad, sweeping ruling of that nature would also invalidate key portions of major aforementioned statutes such as No Child Left Behind. It is thus unlikely that the Court would go that far, even if there were sufficient votes in favor of a ban.

San Francisco's twenty-three-year experience under the Consent Decree sheds a great deal of light on research-based strategies that can indeed work if done right. Parts II and III present an analysis of this Decree and its implications.

II. Implementing the San Francisco Desegregation Consent Decree: A Case Study

As discussed above, the San Francisco Decree was unique in that it did not rely on desegregation alone as its primary purpose. With its dual focus on both multi-faceted desegregation and increased academic achievement, and with its precise articulation of numerous interrelated strategies for achieving these two goals, the Decree ultimately stood for equal access to quality education for all students. [FN73] In this manner, and particularly when it was working, it can serve as *182 an exemplar for future efforts in this area, whether these efforts are launched through local initiatives or come about as a result of litigation or legislation.

Under the approach set forth by the Decree, desegregation (by school, program, and classroom [FN74]) was designed to be a vehicle to improve educational quality and increase academic achievement. But the desegregation plan outlined in Paragraphs 12 and 13 was only one of a menu of strategies adopted for this purpose. Others included:

- The creation of new, high-quality schools in low-income and racially isolated areas;
- Reconstitution or closing of low-performing schools;
- A special plan for Bayview-Hunters Point (perhaps the most racially isolated of all the neighborhoods in San Francisco at the time);
- An explicit focus on ending discriminatory discipline practices;
- Diversity goals for faculty and staff;

- New requirements for both teacher and school-site administrator professional development;
- The adoption of philosophical tenets designed to raise teacher expectations for all students;
- Independent monitoring. [FN75]

As conceptualized, none of these strategies were designed to operate in a vacuum. Instead, the drafters contemplated that the initiatives would work together on multiple levels, with efforts in one area fueling efforts in another, and with activities in one sector building upon the activities in other offices, neighborhoods, and school sites.

While some of these mandates were race-conscious, others were not. The Decree envisioned increased diversity, the closing of the achievement gap between and among racial/ethnic groups, and an end to the racial isolation of low-income students of color. [FN76] However, its broader goals focused on overall educational quality and embodied efforts on behalf of all students.

A. The Varied Success of the Decree Over Time

Looking back on the history of the San Francisco Unified School District from 1983 to 2005 under the terms and conditions of the Decree, it is clear from past Monitoring Team reports that progress varied significantly over time. *183 While lasting benefits were apparent for many young people throughout the duration of the Decree, the greatest successes arguably occurred during two periods, 1983-1985 and 1993-1995. However, there were also periods of regression, and the Decree was not always as successful as it could have been.

As documented in the Monitoring Team reports, the beginning years of the Decree--under Superintendent Robert Alioto--were marked by growing unity, as educators and community members worked together to implement an exciting set of reforms. The two years that followed saw the expansion of the Decree's scope and the continued reaping of benefits from the structure that had been put in place, but the new District leadership that came in after Alioto often demonstrated active resistance to the Decree's mandates. [FN77] By the early 1990s, much of the momentum from the early years had apparently dissipated.

In 1992, a Committee of Experts appointed by Judge Orrick released a report assessing the first decade of the Decree. The Committee--which included such noteworthy national figures as Gary Orfield, who was perhaps the most prominent education scholar working in the area at the time, and David Tatel, who was perhaps the most prominent attorney working in the area at the time [FN78]-- called the Decree "possibly one of the most extensive educational reform efforts that have been carried out in the last generation in an urban school district," and documented the lasting achievements of the period from 1983-1985. It concluded by calling for a new, expanded effort to replicate those achievements throughout the District in the 1990s. [FN79]

The release of the Expert's Report coincided with the hiring of Bill Rojas as the new superintendent. Rojas actively embraced the findings of the Report and became a vocal proponent of the Decree. During the first years of his administration, a range of initiatives was adopted pursuant to the Decree, and concrete progress on both the desegregation and the academic achievement fronts was evident. By the late

1990s, however, progress had slowed once again. The state of the District's leadership had become unsettled, the highly publicized Ho lawsuit and related legal developments were consuming a great ***184** deal of the District's time and energy, and events in Sacramento in the aftermath of Proposition 209 were casting a giant shadow on the District's attempts to continue its race-conscious programs. The rate of progress was also affected by a feud between the State Board of Education and the State Superintendent of Public Instruction, and by then-Governor Pete Wilson, who became actively involved and urged his appointees on the State Board (originally one of the named defendants in both the SFNAACP and the Ho lawsuits) to change sides and support the Ho plaintiffs.

Finally, with the removal of race as a factor in the student assignment plan and the severe resegregation that followed, the Decree began to unravel. In late 2005, even though all the parties (including the Ho plaintiffs) had asked then-Supervising Judge William H. Alsup for more time, the judge saw no reason to continue judicial supervision beyond the previously agreed-upon termination date of December 31, 2005. Alsup castigated the parties in open court for failing to make any effort to change the race-neutral diversity index plan, despite his repeated admonitions over a two-year period that the plan was not working and that something else needed to be done. He concluded that there was little or no progress under the Decree at the time, and because there was no evidence that anything would change in the immediate future, the Decree had in fact outlived its usefulness.

In retrospect, the uneven progression documented on these pages can be traced in part to the structural and procedural components of the Decree, and in particular to the nature of the collaboration mandated and the loopholes in the accountability mechanisms.

The collaborative nature of the Decree was both a strength and a weakness. Any changes in the Decree and even any decisions about steps that might be taken under the Decree required the agreement of all the parties. When the goals of the parties were in sync, much could be accomplished. But in practice such a structure meant that both the deliberations and many of the actual decisions were made by the attorneys representing the parties or by the attorneys in concert with District officials. At times, the attorneys for the parties would meet with District officials to gather information and discuss initiatives. At other times, the attorneys would meet with each other, and none of the actual parties would be at the table. The parties themselves do not appear to have ever met with each other in a formal setting. Consent Decree meetings were primarily legal in nature and thus one or more steps removed from what took place at local school sites and out in the community. [FN80]

***185** As a result of this structure, the Decree was criticized for creating a system in which a team of lawyers operated as an unelected “super school board” with a level of power over the District that thwarted the democratic process. Indeed, the exclusion of teachers, principals, and members of the community from much, if not all, of the Consent Decree decision-making process led to periods of anger, discontent, and resistance that might have been avoided had these stakeholders been consulted.

The accountability mechanisms of the Decree also left much to be desired. Too often, the District and other involved parties could ignore findings in the Monitoring Team reports, no matter how egregious and no matter how much they indicated a lack of compliance. Indeed, in most cases, nothing was

done to address these detailed and independent findings unless (a) the District wanted to address them, which it did from time to time, (b) negotiations were convened for the express purpose of concluding a settlement agreement, such as in 1999 and 2001, or (c) one of the attorneys filed a motion to compel the District to act, which did not happen at all during the last decade of the Decree. In practice, then, superintendents and school boards had at their disposal many ways to resist the mandates of the Decree through legal maneuvering and backroom negotiations when they chose to do so. It should be emphasized that none of these maneuverings and negotiations were at all illegal under the terms and conditions of the Decree. Rather, the Decree permitted them implicitly, by not setting forth guidelines that said otherwise.

B. Consent Decree Balance Sheet

Reflecting the developments in the related cases of *SFNAACP v. SFUSD* and *Ho v. SFUSD*, a balance sheet for the San Francisco Consent Decree helps document both its enduring achievements and the work that still remained to be done. [FN81]

***186** 1. Enduring Achievements Pursuant to the Requirements of the Decree

On the positive side, those who developed and implemented the Decree can point to the successes of the Phase One reforms, the value of the philosophical tenets, and the efficacy of the Special Plan for Bayview-Hunters Point. They can highlight the achievements of noteworthy schools that had been created under the Decree, point to the turning around of key low-performing schools over time, and reference the fact that by 1997 the District had complied with the mandate of Paragraph 13 and had for all practical purposes completely desegregated school-by-school. [FN82] They can also note that even during the turbulent unraveling of the final six years, certain schools were highly successful at closing the achievement gap. [FN83]

Indeed, in late 2005, the Monitoring Team devoted considerable space to the identification of thirteen schools that--pursuant to our findings--exemplified success under the mandates of the Decree. Located in every corner of the city, they embodied wide-ranging achievements that benefited students of every race, ethnicity, and socioeconomic status.

The noteworthy schools ranged from campuses in low-income areas such as Carver Elementary (a “Phase One” school in Bayview-Hunters Point that had maintained a solid academic record over two decades), Golden Gate Elementary (a reconstituted school in the Western Addition that showed record gains for its African American population in 2003 and 2004), and Marshall Elementary (a school in a low-SES, high-crime area of the Mission that developed an enriched curriculum pursuant to high standards for all its students) to facilities in middle and upper middle class neighborhoods such as Aptos Middle School (building on its successful reconstitution by retaining its young and highly motivated faculty), Claire Lillienthal (a dynamic K-8 school known for its academic programs), and Alice Fong Yu (a unique high-performing school, guided from the beginning by Consent Decree principles and offering an innovative and inclusive Cantonese immersion program for students of every ethnicity). The list also included both traditional schools such as Galileo High (which showed great gains in the last years of the

Decree) and alternative schools such as Harvey Milk Elementary (which maintained a civil rights focus that reflected both the mandates of the Decree and the work of the gay activist for whom the school is named). [FN84]

***187** Moreover, common factors can be identified that enabled schools such as these to achieve their successes. These factors include maintaining a diverse student body, awareness of the individual learning differences and personal needs of every student, a school-wide commitment to improving African American and Latino student performance, strong intervention programs, a school culture that promotes academic excellence for all students, qualified and caring faculty who understand the tenets of the Consent Decree, communication and collaboration between the administration and faculty, strong parent involvement in the school community, and effective site-based professional development programs that specifically address issues relating to the narrowing of the achievement gap. [FN85]

2. Key Unresolved Issues under the Terms and Conditions of the Decree

Among the most significant unresolved issues under the Decree were the severe resegregation that emerged after the Ho settlements of 1999 and 2001; the relentless within-school segregation exemplified by the disproportionate representation of African Americans in the separate special education classes; the workings of a school bus transportation system that remained impervious to change; and the persistence of the achievement gap between and among racial and ethnic groups, a gap that worsened in the final years of the Decree as resegregation percentages increased across the city.

a. Resegregation

After the racial preferences mandated by the original Decree were removed in 1999, the District experienced immediate resegregation, particularly at the elementary school level. The race-neutral “diversity index” experiment implemented pursuant to the 2001 settlement agreement not only failed to halt the resegregation trends, but in certain cases may have even accelerated the pace of the resegregation. [FN86] In our final Supplemental Report, we found that ***188** the resegregation had continued unabated, and that the number of SFUSD schools severely resegregated (60% or higher) at one or more grade levels had now reached approximately fifty schools out of 115 for the first time in this era. [FN87]

Table 1. Number of SFUSD Schools Severely Resegregated at One or More Grade Levels (12/05)

	01-02	02-03	03-04	04-05	05-06
Number of Severely Resegregated Schools Based on Final Fall Enrollment	30	34	41-43	43-45	49-52

In addition, the actual percentages of students of one race/ethnicity at these schools were higher overall than they had been at any time since the resegregation began. More than half of the resegregated schools now showed 70% or more of one race/ethnicity, and eleven of them showed 80% or more of one race/ethnicity at one or more grade levels. [FN88]

As discussed below, in Part III, we also found “a direct relationship between this resegregation and the disparities in academic achievement” that we had been documenting in many of our recent reports. [FN89] “The effect,” we *189 explained, “is corrosive and widespread, impacting not only the quality of the education at individual school sites, but also the culture of the community.” [FN90]

b. Within-School Segregation and Special Education

Throughout the period from 1997 to 2005, the Monitoring Team also documented “a recurring pattern of within-school segregation.” [FN91] We consistently found that large percentages of SFUSD students were “separated out from each other within individual schools, and that this separation too often result[ed] in students of certain races being segregated from students of other races at the program and classroom levels[,] a separation that reflect[ed] academic performance.” [FN92] In particular, we reported on the disproportionate representation of African American and Latino students in special education, and on the commensurate disproportionate under-representation of these students in GATE and advanced placement classes and programs. [FN93]

In April 2005, we found that African Americans in particular were disproportionately represented in special education in numerous ways. They comprised the largest number of students in SFUSD special education programs of any racial/ethnic group, the largest percentage of students within their own ethnicity to be placed in these programs, and the highest percentage of students to be placed in separate classes. [FN94]

*190 In addition, we found that a highly disproportionate percentage of the African American students in San Francisco were classified as “emotionally disturbed” (ED). [FN95] This category is often viewed as one of the most controversial because it is based in great part on school site determinations that are necessarily subjective, and because both researchers and practitioners have raised red flags regarding its use as a “dumping ground” for alleged “discipline problems.” [FN96]

The extent to which SFUSD African American students were placed in special education, classified as emotionally disturbed, and separated out into the “Special Day Classes” is very striking indeed when compared with the percentages for their counterparts in other racial/ethnic groups. This raises some very troubling questions that the Monitoring Team was not able to follow up on because the Decree sunsetted only eight months after we released these findings. [FN97]

c. Transportation

In San Francisco, “busing” was a reality for less than 20% of the students, and the District typically

provided transportation only for younger children and for those in special education. Older children who attended schools that were not within walking distance often took public transportation, benefiting from a relatively efficient system of buses, streetcars, and trains and from the fact that *191 San Francisco covers a very small geographical area--only forty-nine square miles in its entirety. [FN98]

Yet for many families, the availability of District-funded transportation necessarily played a big part in decisions regarding which schools to apply to and attend. And in our ongoing examination of whether and to what extent the District was providing equal access to its education programs, many school site administrators identified the transportation system as a key area that needed to be addressed.

Not only was information regarding the system remarkably difficult to comprehend in general, but it was never completely clear how bus routes were determined, why the particular routes that existed were set out in that way, why certain schools were accessible while many others were not, and why for all practical purposes the routes did not change. We asked these questions of District officials many times, in many ways, but rarely got direct answers. We did learn that routes changed when principals made requests for adjustments. Yet not every request was granted, and none of the principals we interviewed could explain why. Principals told of their frustration with this process and lamented the “significant hardships” that these realities caused their students. [FN99]

Transportation issues proved to be a “pressing concern” for both educators and parents, with “travel considerations” deemed “a barrier” to both school choice and diversity. School site administrators in all areas of the city described *192 the logistical difficulties of travel for students in the southeast quadrant who wished to attend schools outside their neighborhood. Principals also stated that there were not enough bus routes to allow students to access many of the schools they might wish to attend, and most reported that they did not actively seek out students from areas beyond those they had traditionally served because they knew that the students would not be able to get to their sites. [FN100]

Finally, bus routes negatively impacted “students' ability to participate in after-school programs and extracurricular activities.” [FN101] Students were often not able to take advantage of what in many cases were stellar programs because their buses would depart right at the close of the formal school day, and no late buses were available. [FN102]

In light of these findings, we urged the District to reassess its entire system of transportation. As the Decree drew near to its termination date, and as it became clear that there was no movement at all in this direction, we objected to “the lack of any effort to modify the process by . . . adjusting the anachronistic SFUSD transportation system.” [FN103] And when the Decree ended, there was no apparent commitment to change the system in the future.

d. The Persistence and Ultimate Worsening of the Achievement Gap

By 2004, the Monitoring Team had identified a substantial achievement gap between the African American and Latino students and the other students in the District. We found dramatic disparities within individual school sites, within the District as a whole, and between members of these ethnic

groups in San Francisco and their counterparts in other districts. Based on Monitoring Team reports from the earlier years of the Decree, it was clear that the achievement gap had been a persistent issue all along. But it also became clear that with the resegregation of 1999 to 2005, the gap was getting worse. Looking back to data from the 1980s and 1990s, we uncovered evidence of substantial progress toward closing the gap at various points in time. We also observed the quality of educational programs at representative school sites in the 1990s, before resegregation, and we reported on the striking differences between the positive realities that existed when the District had desegregated as compared with the realities that had developed by the end of the Decree. [FN104]

***193** In mid-2004, we identified data that clarified the realities of the achievement gap during the resegregation era. Comparing the recently released statewide academic performance index (API) for the seven major urban districts in California with the performance of the African American students in these same districts, we found that while SFUSD overall had the highest API rank, San Francisco's African American students scored the lowest when compared with their African American counterparts in the other districts.

Table 2: Comparison of Overall District Performance on the Academic Performance Index (API) with Performance of African American Students Within the Same Districts

	2003 API Base for All Races/Ethnicities	2003 API Base for Afr. Amer. Students
San Diego	697	628
Long Beach	682	618
Sacramento City	666	587
Los Angeles	622	573
Fresno	610	560
Oakland	592	552
SFUSD	706 (highest)	543 (lowest)

The above table showed that the achievement gap between African American students and their District as a whole was wider in San Francisco than in any of these other major California urban districts. [FN105] No other finding *194 of the Monitoring Team better exemplified the dimensions of the gap that had emerged and the challenges that remained. When we first uncovered this reality while reviewing new data that was available online pursuant to NCLB, the District was gaining widespread recognition and winning awards for its overall tests results. Indeed, after the release of this data, District officials, in their briefs and in open court, did not appear willing even to acknowledge the gap.

It must be noted in this context that throughout the nine years that our Monitoring Team reported on academic achievement pursuant to the terms and conditions of the Decree, we emphasized that test scores alone do not tell the whole story. Thus, when we uncovered this evidence of a worsening gap, we continued to look beyond the test scores, examining other objective indicators including, but not limited to, grade point average, GATE and advanced placement enrollment, attendance figures, suspension and expulsion figures, and graduation rates.

3. A Significant Lost Opportunity in the Final Years of the Decree

In addition to the dramatic evidence of both the great successes for many students over time and the tragic unresolved realities for many others, data posted online and disaggregated by race/ethnicity, pursuant to the requirements of NCLB, not only demonstrated in stark detail the parameters of an achievement gap that had widened in the aftermath of the resegregation, but *195 also brought into focus the extent to which African American students in San Francisco were a community in crisis. [FN106]

During the final years of the Decree, ironically, relations between the parties were arguably better than they had been at any other time in the history of the Decree. Supervising Judge Alsup had become engaged in the process in an unprecedented way, pushing the parties to hold meetings that would address the issues and calling them back into open court on a regular basis to report on their progress. All that was missing was leadership from relevant state and local officials that could set in motion new mandates--both under the Decree and ideally in its aftermath--to address this clear crisis. Instead, no one person stepped forward, stalemate ensued, and the opportunity was squandered.

At the very least, we had urged the Court to direct the parties to develop a transition plan for the end of the Decree. Circumstances were in flux, and there was no plan in place to transition from court supervision and independent monitoring to a new and very different set of realities in 2006 and beyond. [FN107] Yet the Court declined to direct the parties in this way. Thus, in the final *196 Supplemental Report of the Monitoring Team filed three days before the end of the Decree, we stated:

We share the Court's exasperation with the lack of movement in recent years, and we agree with the Court's determination that "the decree has drifted too far." However, we do not share the Court's conclusion that there is no longer a need for judicial supervision because relevant decisions are "better left in the hands of education professionals." The Consent Decree was necessary because these very professionals were not addressing central issues of equal access and equal op-

portunity to the extent practicable. And we have found that the same lack of movement that has so exasperated the Court, the Monitoring Team, and the community as a whole in recent years can be traced directly to the inability and/or unwillingness of these same professionals to take the bold steps necessary to tackle these problems head-on. [FN108]

III. Why Desegregation Still Matters

There is mounting evidence in the research literature of a direct relationship between desegregation and academic achievement. So many people continue to see desegregation as only about busing and moving children around for purposes of “political correctness” or “social engineering.” Yet researchers continue to find the benefits of successful desegregation programs to be real and palpable in the lives of young people. [FN109]

A. The Direct Relationship between Resegregation and Academic Achievement Patterns in SFUSD Schools

When the Monitoring Team set out to examine the impact of resegregation on the school district and the community in 2003, we began our analysis by highlighting the significant academic achievement gains that were realized under the Decree at the very same schools that were then resegregating.

Phase One introduced noticeable improvement in six schools targeted for radical transformation due to “concentrated failure, low expectations, minimal *197 resources, and depressed physical plants.” [FN110] Between the 1982-1983 school year and the 1984-1985 school year, California Assessment Program (CAP) scores for third graders at Carver improved by 61% in Reading, 70% in Written Expression, and 62% in Mathematics. At Horace Mann, the sixth grade scores improved by 72%, 41%, and 48% in the same subjects, respectively. In 1987, the U.S. Department of Education recognized Horace Mann as one of the outstanding secondary schools in the nation. That same year, the State recognized Malcolm X as a California Distinguished School; in 1989, Carver received the honor. [FN111]

In 1992, the court-appointed Committee of Experts applauded the successes of the Phase One schools and noted that these schools had achieved significant gains in student achievement. But the Committee also found that subsequent reform efforts failed to generate similar gains despite additional funding and the new “targeted” status. [FN112] Thus it urged the District to recommit itself to the Decree's original goals and vision by focusing on the low achievement levels of African American and Latino students and replicating Phase One. [FN113]

By 1997, we were able to report continued progress at the Phase One schools. Indeed, students at these desegregated schools were beginning to score consistently at or above the national average on the CTBS. From 1993 to 1996, African American and Latino students at Carver, Drew, Malcolm X, King, and Mann had posted consistent gains from year-to-year in reading scores. At King, Mann, and Burton, scores had increased to the point where they were above the national average. And African American students at Carver and Malcolm X, and Latino students at King, Mann, and Burton were scoring above the national average in math. [FN114]

1. Emerging Academic Achievement Patterns at Resegregating Schools

Two types of troubling patterns at resegregating schools became apparent in our 2003 analysis: (1) resegregating schools where academic performance ***198** was dropping and (2) resegregating schools where academic performance was already low but reform efforts did not result in improvement. [FN115]

The Monitoring Team found that the performance level at many severely resegregated schools dropped dramatically during the post-1999 resegregation. The following table identifies six campuses where, as the resegregation increased, academic performance decreased. [FN116] Three of the six Phase One Schools--Drew, Malcolm X, and Horace Mann--were among the most substantially impacted in this regard.

Table 3: Correlation Between Resegregation and Academic Achievement

School (Ethnicity)	Resegregation Pattern (1997-2003)*	Academic Achievement Pattern (1997-2003)
Drew (AA)	From Below 40% to 70% Projected	From the 49 th Percentile in Reading and the 52 nd Percentile in Math (NCE) in 1997, ranking in the upper third (#22) of 65 SF elementary schools in reading and in the top half (#32) of 65 SF elementary schools in math, it dropped to a rock-bottom 1 on the Statewide API ^{FN [FN117]} in February 2003.
Flynn (L)	From 45.9% to 76.4% Projected	From the 40 th Percentile in Reading and the 40 th Percentile in Math (NCE) in 1997, ranking #46 out of 65 SF elementary schools in reading, it dropped to a rock-bottom 1 on the Statewide API in February 2003.
Malcolm X (AA)	From 50.5% to 70.8% Projected	From the 40 th Percentile in Reading and the 48 th Percentile in Math (NCE) in 1997, ranking #49 out of 65 SF elementary schools in reading and #37 out of 65 SF elementary schools in math, it dropped to a very

low 2 on the Statewide API in February 2003.

Serra (L)	From Below 45 to at least 56/+LDS ^{FN[FN118]}	From the 46th Percentile in Reading and the 48th Percentile in Math (NCE) in 1997, ranking #34 out of 65 SF elementary schools in reading and #39 out of 65 SF elementary schools in math, it dropped to a low 3/2 on the Statewide API in February 2003.
James Lick (L)	From Below 45% to 63.1% Projected	From the 45th Percentile in Reading and the 46th Percentile in Math (NCE) in 1997, ranking #10 out of 17 SF middle schools in reading, it dropped to a very low 2 on the Statewide API in February 2003.
Horace Mann (L)	From Below 40% to 75.3% Projected	From the 50th Percentile in Reading and the 48th Percentile in Math (NCE) in 1997, ranking in the top half (#7) of 17 SF middle schools in reading and #10 out of 17 SF middle schools in math, it dropped to a low 3 on the Statewide API in February 2003.

* Compares Overall School Enrollment from 1997 with Projected Incoming Class for 2003, unless otherwise noted.

***199** In addition to the above schools, we found in 2003 that at nine other severely resegregated schools, academic performance “remained at the lowest levels, in spite of a variety of intensive reform efforts aimed at increasing achievement.” [FN119]

***200 2. Continuing Evidence of Links Between Resegregation and Lower Academic Achievement**

As school district resegregation continued to mount and as more data became available pursuant to NCLB, the Monitoring Team was able to gather additional evidence of links between desegregation and

academic achievement. In our March 2004 Supplemental Report, for example, we found that “the . . . resegregation [was] having a real, palpable, and adverse effect on the District's educational programs.”

This adverse effect was reflected not only in our ongoing findings regarding racially identifiable schools and the interface between resegregation and academic achievement, but in a new analysis of the most recent Academic Performance Index (API) rankings released by the State of California. The analysis revealed a direct connection between the higher resegregation numbers and a concurrent increase in the number of schools scoring at the lowest level on the API. In San Francisco, the number of schools scoring at the lowest possible ranking increased significantly in 2004, particularly at the elementary level, where the number doubled from five to ten. And of those ten schools, nine had either resegregated or had shown significant resegregation trends. [FN120]

B. Emerging Evidence of Links Between Desegregation and Higher Academic Achievement (2004-2005)

By contrast, we found in both March 2004 and April 2005 that SFUSD “schools which have been most successful at closing persistent achievement gaps are ones that have maintained substantially racially and ethnically diverse student populations.” [FN121] The following table highlights SFUSD schools that did a notable job of closing the achievement gap at their sites, comparing African American and Latino student performance at these schools with both school-wide and District-wide performance across all races and ethnicities. In a noteworthy development, we found that all of the schools listed in this table had racially and ethnically diverse enrollments in 2003-2004. [FN122]

Table 4: Schools Noteworthy for Closing the Achievement Gap at Their Site with Regard to Their Percentages of Students Scoring at Proficient or Above - California Standards Test (CST) English Language Arts (ELA) & Math (2003) [FN123]

Elementary Schools

Clarendon	Overall ELA - 72.1% Overall Math - 70.7%	Latino ELA - 73.8% (31/42) Latino Math - 71.4% (30/42)
Moscone	Overall ELA - 46.8%	Latino ELA - 38.5% (42/109)
McKinley	Overall ELA - 37.3% Overall Math - 37.5%	Afr. Am. ELA - 34.1% (14/41) Afr. Am. Math - 36.5% (15/41)

K-8 Schools

A.F. Yu K-8	Overall ELA - 74% Overall Math - 76.3%	Latino ELA - 69.5% (16/23) Latino Math - 78.2% (18/23)
Lillienthal K-8	Overall ELA - 65.5% Overall Math - 67%	Latino ELA - 61.5% (32/52) Latino Math - 61.5% (32/52)
Rooftop K-8	Overall ELA - 60%	Latino ELA - 51.8% (55/106)
High Schools		
Lincoln HS	Overall ELA - 57.4%	Latino ELA - 63.8% (23/36)
Gateway HS	Overall ELA - 62.8%	Afr. Am. ELA - 63.6% (7/11)
Washington HS	Overall ELA - 59.3%	Latino ELA - 58.8% (10/17)
Leadership HS	Overall ELA - 66.3%	Afr. Am. ELA - 57.8% (11/19)
Wallenberg HS	Overall ELA - 48%	Afr. Am. ELA - 42.3% (11/26)
Burton HS	Overall ELA - 45.5%	Afr. Am. ELA - 38.4% (25/65) Latino ELA - 37.2% (35/94)

***201 C. Building on the Findings of the Monitoring Team in San Francisco**

The Monitoring Team is not the first group of researchers and officials to have found a link between desegregation and academic achievement. Many recognize the lasting gains realized by students in successful desegregation programs and have documented the impediments to achievement that are often found in segregated and racially isolated schools, particularly those schools ***202** comprised of low-income students of color. [FN124] Still, findings such as these continue to engender skepticism and criticism. Two key points are often set forth in response to this type of evidence: (1) a direct causal link between segregation and academic achievement has not been firmly established, and (2) if we put our minds to it, we can establish top quality schools even in the most racially isolated, low-income areas where the enrollment is comprised entirely of children of color of one race in deep poverty.

It is true that our findings in San Francisco did not establish a direct causal link. We did not identify resegregation as the direct cause or even as a direct cause of lower academic achievement, and neither did we identify desegregation as a direct cause of higher academic achievement. However, for low-income African American and Latino children, the evidence of a link between segregation and academic performance was both dramatic and striking. The numbers are indisputable, and they tell a story that is impossible to ignore.

In addition, it is indeed true that successful “segregated” schools have been established for racially isolated children of color in their own neighborhoods. Yet these schools are few and far between. Indeed, the effort during the final years of the Decree to establish so-called “Dream Schools” in racially isolated areas of San Francisco exemplifies the difficulties inherent in such an *203 approach. [FN125] Of the ten schools, three performed so poorly that they had to be closed, one closed before it even opened, and almost all of the others continue to be among the lowest performing schools in the District. [FN126]

*204 1. Why the Race-Neutral Diversity Index Failed

In examining the San Francisco experience, and particularly in light of the Seattle-Louisville decision, many want to know why the race-neutral diversity index failed. After the Ho settlement of 1999, the District removed race from the equation, but otherwise continued with the same student assignment plan it had been using, a plan that had been based on a combination of parental choice, attendance areas for particular schools, alternative schools that anyone could attend, and a lottery system.

By 2000, aware of the resegregation that had already begun, District leaders put forth a plan for a computerized diversity index. Families would be given the choice of applying to any school in the District. They would be allowed to specify a certain number of schools, in rank order, and would answer questions that would lead to the assignment of a diversity index score for their child based on certain variables. A composite diversity index score based on the same variables would also be determined for each school site, comprised of the diversity index scores of all the students who had been admitted to the school at that point in time. Whether the applicant was admitted to a particular school would then be based on the extent to which he or she contributed to the diversity of the school, as determined by the diversity index factors.

The first version of the diversity index to be proposed was based on four factors, one of which was race. However, the Ho plaintiffs resisted the plan, and Judge Orrick ruled that it violated the 1999 settlement agreement. The second version of the diversity index was based on seven factors other than race, and was included in the District's 2001 proposal for a Comprehensive Five-Year Plan to meet the goals of the Decree. The index at that point included socioeconomic status, home language, and academic performance indicators. It also included geography as a factor. However, agreement could not be reached on either the inclusion or the parameters of the geography factor, and in the end it was dropped. The final version of the diversity index, then, included six factors.

We found that the race-neutral plan did not work for numerous reasons. First, the hoped-for correlation between socioeconomic status (SES) and race proved woefully imprecise, and in fact San Francisco proved to be a relatively low-SES district across all ethnicities. Any priority based on low-SES status was negated by the fact that students from the four major ethnic groups that comprised the largest percentage of the District enrollment--African Americans, Chinese Americans, Latinos, and Whites--were to a great extent from relatively low-SES families.

In addition, there were probably too few variables. Six were listed, but only a few categories were in fact implicated. Two of the factors addressed language background, two to three others addressed aspects of academic performance, and one addressed SES, albeit imprecisely. To determine SES, the District *205 relied on such data as free or reduced lunch, leaving itself vulnerable to the vagaries of self-reporting, since many low-income students do not even apply for the free or reduced lunch program because of the stigma that may be attached.

Also, the District's opaque bus transportation system probably contributed to the failure of the diversity index plan to stem the tide of resegregation. The Monitoring Team was never able to get precise answers from District officials as to why certain bus routes had been established from low-income, racially isolated areas to a very small number of high-performing schools west of Twin Peaks, while many other desirable schools remained inaccessible unless parents could car pool or drive their children to the sites themselves.

Finally, a key component of the new plan was the fact that the diversity index did not operate at all unless a school had more applicants than slots. Thus even if the diversity variables might have had an impact in certain instances, they were not operational at all in the less-desirable and typically low-performing schools. Indeed, by abandoning the undersubscribed schools in this manner, the District let them become "remainder schools" for those who could not get in anywhere else or arrived in the District too late to benefit from the process. The undersubscribed schools thus grew even more racially isolated.

The diversity index also proved highly unpopular, and not just because it was not working. It was terribly complicated, with unanticipated consequences that were difficult for even the most sophisticated statisticians to ascertain. And, for reasons that to this day remain unanswered, the District chose to remove the priority for neighborhood schools that most families were granted under the previous plan. The original Paragraph 13 of the Decree mandated racial caps, but parents were given priority for their "attendance area" school if space existed. In some cases, the "attendance area" school was in a different neighborhood, but in most cases--and especially for the more desirable, high-performing schools--the attendance area school was in fact the neighborhood school. It remains unclear why the District felt it necessary to remove this priority and in so doing generate such anger among large segments of the parent population.

2. The Prospective Benefits of Employing Geography as a Factor

In a break with past practices, the Monitoring Team in 2004 explicitly addressed--for the first time--the efficacy of using race as a factor in student assignment. It concluded, based on compelling evidence,

that putting race back in would optimize the chances of complying with the terms and conditions of the Decree. The Decree has now terminated, but the need for policies consistent with those agreed to by the parties and mandated by the Court in 1983 remains paramount. In a best-case scenario, a student assignment plan today would ***206** include race as a factor. Race matters, and taking race into account would maximize the chances of success. [FN127]

Yet given the fact that the Supreme Court appears to have overruled *Brown* in part, it may no longer be possible to provide a priority of any sort on the basis of race, even if it is one of many factors and part of a much larger set of reform strategies. Factors other than race will probably be necessary in a traditional student assignment plan that embraces desegregation as a goal.

In late 1998, as events moved toward a scheduled trial in the *Ho* litigation against the three defendants, I prepared an expert's report in anticipation of a possible court appearance as an expert witness on behalf of the California Department of Education. In the report, I concluded that if it were not possible to use race as a factor in a student assignment plan after recent court rulings, a viable race-neutral approach might still be identified . . . but only if the plan also included geography as a factor.

As documented above, the SFUSD diversity index adopted in 2001 was supposed to include geography as a seventh factor. Yet the parties were never able to agree on how a geography factor would work, and an approach that included some level of priority on the basis of residence was never adopted.

To this day, I am convinced that had geography been included, the results could have been very different. With five Justices in the *Seattle-Louisville* decision apparently agreeing that race-conscious approaches to student assignment that include a focus on geography would be constitutional under the Fourteenth Amendment, such a direction is likely viable both under the law and as a matter of policy.

The evidence is incontrovertible that desegregation by school, program, and classroom, if done right, can and does bring substantial benefits to both individual students and the larger community. Likewise, the evidence is overwhelming that segregated schools provide little if any benefit while potentially causing great harm. The San Francisco experience has shown that desegregation and neighborhood schools are not mutually exclusive, but that a creative and well thought-out plan can have both.

More than fifty years after the historic *Brown v. Board of Education* decision, desegregation is still vitally important. Despite unprecedented advances in communication and other technologies, research has shown that racially isolated schools in low-income neighborhoods are much more likely to be low performing. During the final six years of the San Francisco Consent Decree, we consistently found a direct relationship between resegregation and a decline in educational quality, a relationship that is too strong to be ignored.

***207** However, it is also clear that desegregation can operate most effectively if it is one of many reform strategies designed to equalize access, foster opportunity, accelerate educational quality, improve school climate, and increase academic achievement. History has shown that desegregation alone often accomplishes very little, but desegregation as part of a multi-faceted approach can maximize the chances

of success across the board.

Conclusion

Fact patterns such as the one in evidence in San Francisco at the end of the Consent Decree in 2005 are not atypical. Across the nation, low-income students of color are racially isolated in their communities and schools, where they are disproportionately disciplined and pushed out of regular classroom settings, disproportionately placed in special education and separated from others, rarely included in Advanced Placement classes, and--in general--marginalized and disenfranchised. [FN128] Ideally, in circumstances such as these, *208 school districts and states would take matters into their own hands and develop multiple, interrelated strategies to address these shameful and untenable realities. An entire panoply of boilerplate legal mechanisms are available for this purpose, including legislation, regulation, and major policy initiatives at the state and local levels.

However, if relevant leaders and officials fail to act and circumstances continue to worsen, this becomes an area that is particularly ripe for new litigation. A range of relevant legal principles under both federal and state law are available for this purpose, including, but not limited to, the following:

- The NCLB mandate that “all children [must] have a fair, equal, and significant opportunity to obtain a high-quality education.” The Act begins with the articulation of this central principle, and many have come to believe that by adopting this language and placing it front and center, Congress has in fact recognized education as a fundamental right. The potential applicability of this recognition in future settings--perhaps in a litigation context--is a story that is yet to be told.

- The compelling governmental interest(s) identified by a total of five Justices in the Seattle-Louisville decisions. As discussed above, while *Brown* may have been overruled in part, a majority of Justices would find a compelling governmental interest in “avoiding racial isolation” and would appear to support the conclusion that race-conscious remedies may be adopted for these purposes under the Fourteenth Amendment.

- The basic requirements of special education law under the Individuals with Disabilities Education Act (IDEA). Under the “least restrictive environment” mandate of IDEA, for example, students with disabilities must be educated with children who are not disabled “[t]o the maximum extent appropriate” and should be separated out “only when the nature or severity of the disability . . . is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.”

- The right to an education under state constitutional law. A significant number of state courts have identified strong education-related mandates under equal protection guarantees and/or education articles in their own constitutions. In California, for example, under the watershed decisions of *Serrano* and *T.K. Butt*, education is a fundamental right, wealth is a suspect classification, and plaintiffs can prevail without a showing of discriminatory intent. The potential for success in future litigation under this line of cases was evident in the recent *Williams v. State* settlement (2004). *209 A consent decree is a particularly appropriate strategy for a multi-faceted lawsuit addressing a range of interrelated circumstances and practices that negatively affect low-income students of color. The creation and enforcement of such a decree can be informed by the successes of the San

Francisco experience. As documented in Parts II and III, the highly effective combination of judicial supervision by Judge Orrick, bold leadership by Superintendent Alioto (1983-1985) and Superintendent Rojas (1993-1995), and widespread community support led to outstanding achievements. And the multidimensional requirements of the Decree, with independent monitoring, a precise menu of substantive strategies, and a broad set of goals that included an explicit focus on academic achievement and educational quality, represent a model for future success elsewhere in the country.

At the same time, those who draft and implement future decrees of this type can learn much from the structural and procedural weaknesses of the San Francisco Decree identified throughout this Article. As discussed above, the nature of the collaboration required by the Decree meant that attorneys for the parties-- rather than the parties themselves--typically played the central role, to the exclusion of those such as teachers, principals, and community leaders with a more direct knowledge of the realities at hand. Also, the lack of reliable accountability mechanisms in the face of an egregious lack of compliance led to the grievous failure of the Decree in many contexts.

Thus, at a minimum, the following safeguards would serve both the parties and the community in a wide-ranging consent decree focusing on equal access to quality education at the K-12 level:

1. A decision-making process that does not vest decision-making powers in the hands of the parties alone, and by implication in the hands of the attorneys for the parties alone, but requires the participation of relevant designated stakeholders at key procedural stages.

2. A clear accountability mechanism that requires more than just a written response when a school district is found to be out of compliance. There must be some procedural requirement in place requiring officials to act, even if no attorney chooses to file a motion to compel such action.

3. An implementation plan written into the Decree for every mandate. In San Francisco, for example, a detailed student assignment plan was set forth in the original Decree to effectuate school-by-school desegregation, and the plan did work over time. But no plans were ever included to address other mandates, such as the within-school desegregation requirement and the effort to limit discriminatory discipline practices, and little--if anything--changed in these areas over time.

4. A transition plan for the end of the Decree written into the document. While the Monitoring Team began addressing the issue of a transition plan for both the end of the Decree and its aftermath as far back as the Summer of 2000, and included a lengthy section in Report No. 17 *210 outlining the range of topics that arguably would need to be addressed, no transition plan for the end of independent monitoring and judicial supervision was ever put in place. The Decree ended abruptly, under very unsettled conditions, and much potential momentum was lost.

Consent decrees are no guarantee of success, and even decrees that include the best features of the San Francisco Decree and the requisite safeguards are not necessarily going to work. Much depends on time, place, circumstances, and the willingness of people to engage in the hard, day-to-day work of education reform.

As the Monitoring Team found in its detailed 2000 examination of SFUSD strategies under the Decree to address interrelated issues of equity and educational quality,

[T]here is no magic formula in the world of education reform. No one silver bullet has yet been found in this context. Research has shown that turning around a low performing school requires--among other things--the right combination of people, interpersonal communication, programs, funding, and relationships. It requires a great deal of hard, day-to-day work over time . . . establishing partnerships between and among the District's educators, the school's students, and the local community. Such efforts--even if successful--do not continue automatically. People change, students change, circumstances change, and new relationships must be built. Turning around a low performing school is thus an ongoing process, not a one-time operation that can then be expected to last indefinitely. [FN129]

Yet even though there are no guarantees, the pressing nature of the work demands our ongoing attention. Much can be gleaned from the San Francisco experience that can maximize the chances of success for educators, students, and their advocates in the legal and public policy arenas. Numerous dimensions of the complex litigation that accompanied the Decree can inform additional research, and reform strategies may be revealed that lead to bold new directions, with a potential for success that is greater than many might even dare to imagine.

*211 Appendix I: Resegregation of San Francisco Schools

At the end of the San Francisco Consent Decree, the following SFUSD schools had severely resegregated at one or more grade levels:

(* indicates entire school severely resegregated - overall school enrollment for all grades)

Elementary Schools (Showing Highest Severely Resegregated Grade)

Bryant - 89.7% Latino (5)*

Buena Vista - 70.8% Latino (4)*

Carver - 80% African American (2)*

Chavez - 88.5% Latino (2)*

Chin - 86.4% Chinese American (4)*

Cleveland - 65.2% Latino (1)

Cobb - 76.9% African American (5)*

Fairmount - 70.2% Latino (5)*

Flynn - 73.9% Latino (2)*

Garfield - 75% Chinese American(4)*

Jefferson - 61.3% Chinese American (1)

Key - 68.2% Chinese American (2)*

Lau - 82.5% Chinese American (K, 2)*

Malcolm X - 72.4% African American (1)*

Marshall - 84.8% Latino (4)*

McCoppin - 71.9% Chinese American (2)

Moscone - 63.8% Latino (3)

Muir - 69.3% Latino (3)

Parker - 97.5% Chinese American (K)*

Parks - 56.8% African American (1) (+8.1% DS)

Sanchez - 84.8% Latino (1)*

Serra - 66% Latino (1)

Sherman - 63.4% Chinese American (4)

Stevenson - 66.2% Chinese American (2)*

Sutro - 71.1% Chinese American (K)*

Ulloa - 59.7% Chinese American (1)

West Portal - 65.9% Chinese American (K)

Yick Wo - 70.5% Chinese American (4)*

Middle Schools (Showing Highest Severely Resegregated Grade)

Everett 6-8- 72% Latino (7)*

Lick 6-8- 67.7% Latino (6)*

Mann 6-8- 83.4% Latino (6)*

Marina 6-8- 64.8% Chinese American (6)*

Maxwell 6-8- 61.3% African American (6)

Aim High - 58.9% African American (6) (+1.4% DS)

***212** High Schools (Showing Highest Severely Resegregated Grade)

Five Keys Charter - 59.1% African American (10)

Lincoln - 64.4% Chinese American (12)

Newcomer - 71.1 Chinese American (10)

O'Connell - 77.4% Latino (9)*

Washington - 60.7% Chinese American (11)

Alternatively Configured Schools (Showing Highest Severely Resegregated Grade)

Brown - 81.8% African American (5)*

Carmichael - 68.5% Filipino (6)

Creative Arts - 62.5% White (6)

Davis - 73.8% African American (8)*

Drew - 79.7% African American (2)*

Kipp BV - 80% African American (7)*

Lawton - 63.1% Chinese American (2)

Treasure Island - 73.3% African American (5)

***213** Appendix II: Index of Major Topics Addressed in Monitoring Team Reports [FN130]

1. RESEGREGATION GENERALLY

- Report No. 17, at 82-91.
- Report No. 18, at 154-166.
- Report No. 20, at 3-9, 48-53.
- March 2004 Supplemental Report, at 15-18; Id. app. 4, at 10-12.
- April 2005 Supplemental Report, at 2-3; Id. app. 1, at 2-3.

2. THE 2001-2005 STUDENT ASSIGNMENT PLAN/DIVERSITY INDEX

- Report No. 19, at 79-100.
- Report No. 20, at 20-86.
- Report No. 21, at 4-6, 18-21.
- Report No. 22 app. 2, at 9-10.

3. WITHIN-SCHOOL SEGREGATION GENERALLY

- Report No. 15, at 28-47.
- Report No. 17, at 72-80.
- April 2005 Supplemental Report, at 3-10.
- Report No. 22 app. 2, at 4-8.

4. THE ONGOING PREVALENCE OF LOW EXPECTATIONS

- Report No. 16, at 37-40.
- June 2004 Response to Parties' Joint Response, at 10-12, 13 n. 11(c).
- Report No. 22 app. 2, at 4-8.

5. SPECIAL EDUCATION: ISSUES OF WITHIN-SCHOOL SEGREGATION AND EDUCATIONAL QUALITY

- Report No. 20, at 18, 54-56.
- Report No. 21, at 9-10.
- March 2004 Supplemental Report, at 15-16.
- *214 • April 2005 Supplemental Report, at 4-8.
- Report No. 22 app. 2, at 4-8.

6. PROGRAMS FOR ENGLISH LEARNERS IN SAN FRANCISCO

- Report No. 15, at 99-117.
- Report No. 18, at 105-36.

7. THE PARAMETERS OF THE ACHIEVEMENT GAP

- Report No. 19, at 23, 93, 126-29.
- Report No. 21, at 6-8.
- March 2004 Supplemental Report, at 9-15.
- June 2004 Response to Parties' Joint Response, at 8-10.
- July 2004 Response to District's Offer of Proof, at 4-12.

- April 2005 Supplemental Report, at 12-16.

8. RECONSTITUTION

- Report No. 14, at 90-107.
- Report No. 16, at 140-70.

9. CONSENT DECREE BUDGET ISSUES

- Report No. 15, at 127-34.
- Report No. 17, at 54-69.
- Report No. 18, at 66-76, 143-48.
- Report No. 19, at 5-12.

10. ADDRESSING PROBLEMS OF EQUITY AND EDUCATIONAL QUALITY “TO THE EXTENT PRACTICABLE”

- March 2004 Supplemental Report, at 19-21.
- July 2004 Response to District's Offer of Proof, at 13-14.

11. SPECIAL REPORTS

a. ATTENDANCE ISSUES AT SFUSD SECONDARY SCHOOLS

- Report No. 17, at 132-157.

*215 b. TRANSITIONING TO THE END OF THE CONSENT DECREE

- Report No. 17, at 19-69.

c. TARGETING LOW-PERFORMING SCHOOLS

- Report No. 18, at 29-148.

d. SFUSD MIDDLE SCHOOL REPORT

- Report No. 19, at 31-67.

e. ARTS EDUCATION AND ACADEMIC ACHIEVEMENT

- Report No. 20, at 143-82.

f. THIRTEEN SCHOOLS EXEMPLIFYING PROGRESS UNDER THE MANDATES OF THE CONSENT DECREE

- Report No. 22, at 4-6; Id. app. 1.

Notes

[FN1]. Education faculty and law faculty, University of California, Los Angeles. Director of Teacher Education at UCLA (1993-1995). Special Counsel, California Department of Education (1988-1996). Consent Decree Monitor for the federal court, S.F. NAACP v. S.F. Unified Sch. Dist. (1997-2005). Author of the casebook *Education and the Law* (1st ed. 2006) (2d ed. forthcoming 2009). The reflections and conclusions in this Article are completely my own, but I have benefited greatly from the insights and perspectives of The Honorable William H. Alsup, Lynn Beck, Gary Blasi, David Campos, Robert Cooper, Sandra Graham, Kris Gutierrez, Joel Handler, Robert Harrington, Michael Hersher, Jennifer Jellison Holme, Robin Johansen, Jerry Kang, Robert Kim, Tom Klitgaard, David Levine, Eric Mar, Patricia McDonough, Rick Mintrop, Jeannie Oakes, Gary Orfield, The Honorable William H. Orrick, John Rogers, Victor Saenz, Mark Sanchez, Danny Solorzano, Janeen Steel, Richard Steinberg, Gwen Stephens, Joseph R. Symkowick, Concepcion Valadez, Amy Stuart Wells, Kevin Welner, and Jonathan Zasloff. Special thanks to the following people for their substantial contributions to the Consent Decree Monitoring Team effort over time: Kelly Rozmus Barnes, Brendan Chan, Kristin Crosland, Amanda Datnow, John Dolan, Charles Forster, Daniel Javitch, Thuy Thi Nguyen, Octavio Pescador, Gerald Sequeira, Jason Snyder, Diane Steinberg, and Ryan Tacorda. Finally, I would like to express my enduring gratitude to Allan Keown and Hoover Liddell for their invaluable assistance, encouragement, and support throughout all the years of these endeavors.

[FN2]. There is widespread agreement within both the legal and the educational policy literature regarding the nature and extent of the challenges facing racially isolated, low-income youth of color in U.S. urban environments. Indeed, a multitude of sources are available to document the dimensions of the problems that remain. See, e.g., Douglas S. Massey & Mary J. Fischer, *How Segregation Concentrates Poverty*, 23 *Ethnic & Racial Stud.* 670 (2000); Pedro A. Noguera, *Racial Isolation, Poverty and the Limits of Local Control as a Means for Holding Public Schools Accountable*, In *Motion Mag.*, May 5, 2002; see also Deborah N. Archer, *Moving Beyond Strict Scrutiny: The Need for a More Nuanced Standard of Equal Protection Analysis for K through 12 Integration Programs*, 9 *U. Pa. J. Const. Law* 629 (2007); Michael Heise, *Symposium: High Poverty Schooling in America--Lessons in Second Class Citizenship: Litigated Learning, Law's Limits, and Urban School Reform Challenges*, 85 *N.C. L. Rev.* 1419 (2007); Goodwin Liu, *Seattle and Louisville*, 95 *Cal. L. Rev.* 277 (2007); Erica Frankenberg & Chungmei Lee, *The Civil Rights Project, Race in American Public Schools: Rapidly Resegregating School Districts* (2002), available at http://www.civilrightsproject.ucla.edu/research/deseg/Race_in_American_Public_Schools1.pdf. See generally Claude S. Fischer et al., *Inequality by Design: Cracking the Bell Curve Myth* (1996); Jonathan Kozol, *The Shame of the Nation: The Restoration of Apartheid Schooling in America* (2005).

[FN3]. The reports of the San Francisco Consent Decree Monitoring Team for the years 1997 through 2005 can be found at <http://www.gseis.ucla.edu/courses/edlaw/sfrepts.htm>.

[FN4]. Stuart Biegel, *The "Safe Schools" Provision: Can a Nebulous Constitutional Right Be a Vehicle for Change?*, 14 *Hastings Const. L.Q.* 789, 835 (1987) (citing J. Anthony Lukas, *Common Ground* (1985) ("describing the multitude of problems faced by the Boston schools after desegregation was or-

dered”)); William Trombley, *Public Schools in Pasadena Achieve Gains as Strife Ends*, L.A. Times, June 8, 1986, at A3 (explaining “the negative impact of the [Pasadena] desegregation order and the positive direction the school system ha[d] been able to take since the federal court order was lifted in 1980”).

[FN4]. See, e.g., *S.F. NAACP v. S.F. Unified Sch. Dist.*, 576 F. Supp. 34 (N.D. Cal. 1983) (setting forth the original Consent Decree). The S.F. NAACP desegregation and academic achievement lawsuit was filed in 1978 and resulted in a Consent Decree in 1983, while the Brian Ho lawsuit challenging the Decree was filed in 1994 and resulted in settlements in 1999 and 2001 that ultimately led to the termination of the Decree in 2005. See generally text accompanying notes 11-28.

[FN5]. The interrelated lawsuits filed against the District by the San Francisco branch of the NAACP in 1978 and the Ho plaintiffs in 1994 generated a number of decisions at both the U.S. District Court (Northern District) level and the Ninth Circuit Court of Appeals. In chronological order, they include *Ho v. S.F. Unified Sch. Dist.*, 147 F.3d 854 (9th Cir. 1998) (setting forth substantial guidance for the parties and the District Court on the issues remaining for trial); *S.F. NAACP v. S.F. Unified Sch. Dist.*, 59 F. Supp. 2d 1021 (N.D. Cal. 1999) (setting forth the 1999 settlement for the interrelated lawsuits); *S.F. NAACP v. S.F. Unified Sch. Dist.*, Nos. C-78-1445 WHO, C-94-2418 WHO, 2001 WL 1922333 (N.D. Cal. 2001) (setting forth the 2001 settlement for the interrelated lawsuits); and *S.F. NAACP v. S.F. Unified Sch. Dist.*, 413 F. Supp. 2d (N.D. Cal. 2005) (terminating the Decree on Dec. 31, 2005).

[FN6]. The Ninth Circuit's Seattle case, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162 (9th Cir. 2005), and the Sixth Circuit's Louisville case, *McFarland v. Jefferson County Pub. Sch.*, 416 F.3d 513 (6th Cir. 2005), were consolidated at the U.S. Supreme Court level in June 2007. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007).

[FN7]. See, e.g., *Desegregation and Educational Change in San Francisco: Findings and Recommendations on Consent Decree Implementation* (the 1992 report submitted to Judge William H. Orrick by the court-appointed Committee of Experts).

[FN8]. The No Child Left Behind Act (NCLB), 20 U.S.C. § 6301 (2006), represented a major shift in the role of federal officials regarding K-12 education governance. Individual states retain substantial autonomy and significant decision-making authority, but they no longer have the final say in shaping educational policy across the board. NCLB is a wide-ranging, bipartisan statutory framework with requirements that extend across a broad spectrum. While many of these provisions are controversial, none have generated more emotion than those relating to accountability. See, e.g., 20 U.S.C. § 6316(b) (basic school accountability provisions); 20 U.S.C. § 6316(c) (school district accountability provisions).

[FN9]. NCLB embraced reconstitution as a viable reform effort, and included it on its menu of options that districts were required to pick from when schools did not improve. Many believe that the first ever district-wide use of reconstitution--which involves the wholesale replacing of faculty and staff at low-performing schools--may have actually taken place in San Francisco under the terms and conditions of its desegregation decree. At different points in the Decree's history, reconstitution was seen as a primary vehicle for improving academic achievement. See, e.g., Andrew Spitzer, *School Reconstitution Under*

No Child Left Behind: Why School Officials Should Think Twice, 54 UCLA L. Rev. 1339 (2007); Kelly Rozmus, Education Reform and Educational Quality: Is Reconstitution the Answer?, 1998 BYU Educ. & L.J. 103 (1998). See generally San Francisco Unified School District Desegregation, Paragraph 44 Independent Review Report No. 14 at 90-107, S.F. NAACP v. S.F. Unified Sch. Dist., No. C-78 1445 WHO (N.D. Cal. Sept. 29, 1997), available at <http://www.gseis.ucla.edu/courses/edlaw/sfrept14.pdf>; San Francisco Unified School District Desegregation, Paragraph 44 Independent Review Report No. 16 at 140-170, S.F. NAACP, No. C-78 1445 WHO (N.D. Cal. July 29, 1999), available at <http://www.gseis.ucla.edu/courses/edlaw/sfrept16.htm>.

[FN10]. See 20 U.S.C. § 6301 (2002) (“The purpose of this subchapter is to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education”).

[FN11]. As discussed below, there was a direct relationship between the commitment of SFUSD school superintendents and school board members to the goals of the Decree and the progress that was ultimately attained under the Decree. See generally *infra* Part II.

[FN12]. In his 1983 opinion and order setting forth the original Decree, Judge Orrick certified the SFNAACP action as a class action representing all SFUSD students of every race and ethnicity. S.F. NAACP v. S.F. Unified Sch. Dist., 576 F. Supp. 34, 36 (N.D. Cal. 1983).

[FN13]. S.F. NAACP v. S.F. Unified Sch. Dist., No C-78-1445 WHO, 1993 WL 299365 (N.D. Cal., July 22, 1993).

[FN14]. Spitzer, *supra* note 9, at 1342.

[FN15]. S.F. NAACP, No. C-78-1445 WHO, 1993 WL at 29936 (N.D. Cal. 1993).

[FN16]. S.F. NAACP, 576 F. Supp. at 53-54. In San Francisco during the decades immediately prior to 2001, there were generally two types of schools: “attendance area” schools linked to particular neighborhoods (and in most cases located within that neighborhood), and “alternative schools,” which were not linked to any neighborhood. Families residing in an attendance area had priority at their attendance area school. In addition, any child residing in San Francisco could apply to either an alternative school or to any other attendance area school, space permitting.

[FN17]. *Id.* at 53.

[FN18]. *Ho v. S.F. Unified Sch. Dist.*, 147 F.3d 854, 861-65 (9th Cir. 1998).

[FN19]. *Id.* at 862.

[FN20]. *Id.* at 865.

[FN21]. *Id.* The Ninth Circuit also stressed that defendants' evidence must tie the current vestiges of seg-

regation to the “discriminating practices and policies that justified” the adoption of the Consent Decree in 1983.

[FN22]. 515 U.S. 200 (1995).

[FN23]. See generally *id.* Adarand was not an education case, but it was generally seen as a tipping point, the culmination of ongoing efforts to limit any use of “racial preferences” in the public sector. Thus, for example, in the late 1990s, several circuit court of appeals decisions limiting or even forbidding the use of race in K-12 student assignment plans relied on Adarand.

[FN24]. *Wessman v. Gittens*, 160 F.3d 790 (1st Cir. 1998). *Wessman*, which held in favor of the plaintiffs and reversed the lower court decision, was followed in 1999 by two Fourth Circuit opinions on K-12 student assignment issues that were also consistent with both Adarand and the Ninth Circuit's decision in *Ho: Eisenberg v. Montgomery County Public Sch.*, 197 F.3d 123, 133 (4th Cir. 1999); *Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698, 701 (4th Cir. 1999).

[FN25]. See also *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), which-- during the same era--found the race-based affirmative action program at the University of Texas Law School to be violative of the Fourteenth Amendment. *Hopwood* exemplified the series of lawsuits challenging racial preferences that were wending their way through the courts at the time.

[FN26]. Cal. Const. art. I § 31 (added by Proposition 209); Wash. Rev. Code § 49.60.400 (codifying I-200).

[FN27]. For an overview and a comparative analysis of California Proposition 209 and Washington Initiative I-200 in a desegregation context, see, for example, the Washington Supreme Court's consideration of the applicability of I-200 in *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist.*, No. 1, 72 P.3d 151, 159-61, 163-66 (Wash. 2003) (en banc). The Washington Supreme Court determined that I-200 bars only preferential treatment programs “where race or gender is used by government to select a less qualified applicant over a more qualified applicant” and not “[p]rograms which are racially neutral, such as the [district's] open choice plan” The state court returned the case to the Ninth Circuit for further proceedings. *Id.* at 167. See also *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2748-49 (2007).

[FN28]. See *S.F. NAACP v. S.F. Unified Sch. Dist.*, 413 F. Supp. 2d 1051 (N.D. Cal. 2005) (providing highlights of the litigation over time and confirming the termination of the Decree as set forth in the 2001 Settlement agreement). For a detailed and highly intimate overview of the *Ho* litigation, see David I. Levine, *The Chinese American Challenge to Court-Mandated Quotas in San Francisco's Public Schools: Notes from a (Partisan) Participant-Observer*, 16 *Harv. BlackLetter L.J.* 39 (2000) (authored by the law professor who also served as an attorney for the plaintiffs). See generally David I. Levine, *Public School Assignment Methods After Grutter and Gratz: The View from San Francisco*, 30 *Hastings Const. L.Q.* 511 (2003) (providing additional insights from the perspective of the *Ho* plaintiffs).

[FN29]. 539 U.S. 306 (2003).

[FN30]. 539 U.S. 244 (2003).

[FN31]. *Grutter*, 539 U.S. at 326.

[FN32]. See *id.* at 327-33.

[FN33]. See generally *id.* at 333-43. Under *Grutter*, when determining whether a university admissions policy that includes race as a factor is in fact narrowly tailored under Fourteenth Amendment Equal Protection Clause jurisprudence, the following questions must be asked: (a) Was it clear that the policy did not operate as a quota?; (b) Did the policy satisfy the requirement of “individualized consideration”?; (c) Did the university in good faith consider workable, race-neutral alternatives that would achieve the diversity it seeks?; (d) Did the race-conscious admissions program “not unduly burden individuals who are not members of the favored racial and ethnic groups”?; and (e) Was the admissions policy “limited in time”? *Id.* at 335-39. Finding that all the above factors were satisfied by the Michigan law school admissions policy, the *Grutter* Court upheld its constitutionality. The school desegregation cases decided two years after *Grutter* applied these same principles in ruling on behalf of the respective school districts, but the First Circuit, the Sixth Circuit, and the Ninth Circuit set forth slightly different versions of these rules in their respective decisions. See *infra* text accompanying notes 34-37.

[FN34]. 418 F.3d 1 (1st Cir. 2005).

[FN35]. 416 F.3d 513 (6th Cir. 2005).

[FN36]. 426 F.3d 1162 (9th Cir. 2005).

[FN37]. Cf. Stuart Biegel, *Education and the Law* 325-45 (1st ed. 2006). The Sixth Circuit panel in the Louisville case also took the unusual step of not even writing its own opinion but instead lauding the district court's ruling and adopting the ruling of the district court in its entirety. See *id.* at 333.

[FN38]. Justices, of course, are never required to give an explanation for their decisions to either grant or deny certiorari, but a widely recognized reason for hearing a case at the Supreme Court level is the existence of a split between different circuits on the issue at hand. Some have argued that a split in this area did in fact exist, pointing to the fact that the four post-*Adarand* school desegregation decisions all came down in favor of the plaintiffs, while the three post-*Grutter* decisions were all decided on behalf of the defendant school districts. In addition, while all three appellate courts held that *Grutter*, a higher education case, also applied at the K-12 level, the Supreme Court had not yet ruled on this question. For all these reasons, and/or perhaps others, four justices granted certiorari in the Seattle and Louisville cases. See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2754 (2007) (characterizing the differences among the circuits as a split).

[FN39]. *Id.* at 2746-47. As is always the case with student assignment plans of this nature, the lower

court opinions provide much greater detail regarding the facts at hand. See generally *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162, 1166-71 (2005) (en banc) (documenting the relatively small percentages of students who were actually impacted by the race-related tiebreaker).

[FN40]. *Parents Involved*, 127 S. Ct. at 2749-50.

[FN41]. *Id.* at 2646-54, 2759-62, 2788-97 (Kennedy, J., concurring in part and concurring in the judgment).

[FN42]. *Id.* at 2800-37 (Breyer, J., dissenting).

[FN43]. *Id.* at 2768-88 (Thomas, J., concurring).

[FN44]. *Id.* at 2797-828 (Stevens, J., dissenting).

[FN45]. In this manner, Justice Kennedy's opinion may be compared to the opinion of Justice Powell in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 269-320 (1978) (Powell, J., dissenting), which for twenty-five years came to be viewed as the one opinion among the many fractured opinions in that case that reflected what the case stood for. While other Justices joined in portions of Powell's opinion, the portion that was arguably the most central garnered only one vote--his own. In *Grutter*, Justice O'Connor's majority opinion finally recognized that Justice Powell's opinion reflected the controlling law. *Grutter v. Bollinger*, 539 U.S. 306, 307 (2003). In other ways, however, the Kennedy opinion in *Seattle-Louisville* and the Powell opinion in *Bakke* are quite different from each other. Justice Powell's opinion was the one that announced the decision of the Court, arguably giving it more precedential impact from the outset than the concurring opinion by Justice Kennedy. In addition, while some justices joined in some parts of the Powell opinion, no one joined in any part of the Kennedy opinion.

[FN46]. *Parents Involved*, 127 S. Ct. at 2767-68.

[FN47]. *Id.* at 2768. It should be noted that Chief Justice Roberts was not the first to put forward such a thought in this context. Indeed, it was Ninth Circuit Judge Carlos T. Bea, dissenting from the majority opinion in the Seattle rehearing en banc, who stated, "The way to end discrimination is to stop discriminating by race." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162, 1221 (2005) (en banc). Judge Raymond C. Fisher, however, in his opinion on behalf of the en banc majority, countered Judge Bea by stating, "The dissent urges, 'The way to end discrimination is to stop discriminating by race'.... More properly stated, the way to end segregation is to stop separation of the races. The Seattle school district is attempting to do precisely that." *Id.* at 1191 n.34.

[FN48]. Adam Liptak, *The Same Words, But Differing Views*, N.Y. Times, June 29, 2007, at A24.

[FN49]. *Id.*

[FN50]. *Id.*

[FN51]. See, e.g., *Parents Involved*, 127 S. Ct. at 2800-01:

[I]t distorts precedent, it misapplies the relevant constitutional principles, it announces legal rules that will obstruct efforts by state and local governments to deal effectively with the growing resegregation of public schools, it threatens to substitute for present calm a disruptive round of race-related litigation, and it undermines *Brown's* promise of integrated primary and secondary education that local communities have sought to make a reality. This cannot be justified in the name of the Equal Protection Clause.

Id. Justice Breyer also asserted:

[T]he consequences of the approach the Court takes today are serious. Yesterday, the plans under review were lawful. Today, they are not. Yesterday, the citizens of this Nation could look for guidance to this Court's unanimous pronouncements concerning desegregation. Today, they cannot. Yesterday, school boards had available to them a full range of means to combat segregated schools. Today, they do not.

Id. at 2835.

[FN52]. Id. at 2837.

[FN53]. Id. at 2791.

[FN54]. Id.

[FN55]. Id. at 2797.

[FN56]. It has been suggested that by including the qualifying language “absent a showing of necessity not made here,” Justice Kennedy has left the door open for the limited use of race as a factor in student assignment under a traditional desegregation approach. Id. Yet the “racial chits” language in the next sentence is inconsistent with such a conclusion. Id. Justice Kennedy would appear to reject traditional desegregation practices under the mandate of *Brown v. Board of Education*, 347 U.S. 483 (1954), no less forcefully than Chief Justice Roberts and Justice Thomas. See *infra* note 60. It must also be noted that the use of race by the school districts in question-- particularly in Seattle where it was only employed as one of four tiebreakers for high school admission and therefore only impacted a small percentage of students in any given year--was already quite limited. Id. at 2742. It is therefore difficult to imagine what type of direct use of race as a factor in student assignment would in fact survive constitutional scrutiny under this holding.

[FN57]. 521 U.S. 203 (1997).

[FN58]. 163 U.S. 537 (1896).

[FN59]. See *Brown*, 347 U.S. at 495 (“We conclude that in the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal.”)

[FN60]. While it is true that the three opinions addressed aspects of the case from different perspectives, with Justice Kennedy arguing that the Chief Justice's opinion went too far and Justice Thomas suggesting that it did not go far enough, all three opinions agreed that the Seattle and Louisville plans should be invalidated and all embraced the position that traditional desegregation practices mandated by many court orders and consent decrees pursuant to *Brown* in the decades that followed must now be found unconstitutional under the Fourteenth Amendment. Chief Justice Roberts wrote, for example, that

[H]owever closely related race-based assignments may be to achieving racial balance, that itself cannot be the goal, whether labeled “racial diversity” or anything else. To the extent the objective is sufficient diversity so that students see fellow students as individuals rather than solely as members of a racial group, using means that treat students solely as members of a racial group is fundamentally at cross-purposes with that end.

Parents Involved, 127 S. Ct. at 2759. And he asserted that “[a]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class.” *Id.* at 2757-58 (quoting *Miller v. Johnson*, 515 U.S. 900, 911 (1995)). Similarly, Justice Thomas wrote that “the school districts' attempts to further ‘integrate’ are properly thought of as little more than attempts to achieve a particular racial balance.” *Id.* at 2769 n.2. And Justice Kennedy, even though he did not join with the portion of the Chief Justice's opinion that contained the language equating traditional desegregation practices with “racial balancing,” included in his own opinion statements that mirrored the same basic position:

The idea that if race is the problem, race is the instrument with which to solve it cannot be accepted as an analytical leap forward Under our Constitution the individual, child or adult, can find his own identity, can define her own persona, without state intervention that classifies on the basis of his race or the color of her skin.

Id. at 2797. In addition, as referenced above, in the text accompanying notes 55-56, Justice Kennedy's language characterizing race-based desegregation as a “crude measure[]” that “threaten[s] to reduce children to racial chits valued and traded according to one school's supply and another's demand” is arguably no less critical of traditional practices mandated by the federal courts under *Brown* than anything that either Chief Justice Roberts or Justice Thomas wrote in their own respective opinions. *Id.*

[FN61]. *Id.* at 2835.

[FN62]. *Comfort v. Lynn Sch. Comm.*, 418 F.3d 1 (1st Cir. 2005).

[FN63]. *McFarland v. Jefferson County Pub. Sch.*, 416 F.3d 513 (6th Cir. 2005). The Sixth Circuit actually went even further, agreeing with the lower court that there was a compelling governmental interest in maintaining integrated schools. *Id.* at 514 (affirming *McFarland v. Jefferson County Pub. Sch.*, 330 F. Supp. 2d 834, 855 (W.D. Ky. 2004) (holding that there is a “a compelling interest in maintaining integrated schools”)).

[FN64]. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162 (9th Cir. 2005).

[FN65]. *Parents Involved*, 127 S. Ct. at 2797. (“Race may be one component of that diversity, but other demographic factors, plus special talents and needs, should also be considered.”)

[FN66]. *Id.* at 2823.

[FN67]. *Id.* at 2791.

[FN68]. *Id.* at 2797.

[FN69]. *Id.* at 2791.

[FN70]. *Id.* at 2800-37.

[FN71]. *Id.* at 2792. Such mechanisms, Justice Kennedy wrote, “are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible.” *Id.*

[FN72]. See, e.g., *infra* Conclusion.

[FN73]. See San Francisco Unified School District Desegregation, Paragraph 44 Independent Review Report No. 20 at 22, n.39, S.F. NAACP v. S.F. Unified Sch. Dist., No. C-78 1445 WHA (N.D. Cal. July 31, 2003), available at <http://www.gseis.ucla.edu/courses/edlaw/sfrept20.pdf> (“It has been recognized from the beginning that three primary and interrelated purposes underlie the desegregation requirements of this Consent Decree: increasing diversity, improving academic achievement, and maximizing equal educational opportunity. Thus the Consent Decree continues to reflect a dual focus on desegregation and educational quality.”). See, e.g., Stuart Biegel & Hoover Liddell, PowerPoint Presentation to School District Administrators: Overview of SFUSD Desegregation Obligations (March 26, 2003) (on file with Monitoring Team). See also San Francisco Unified School District Desegregation, Paragraph 44 Independent Review Report No. 15 at 57, S.F. NAACP, No. C-78 1445 WHO (N.D. Cal. July 31, 1998), available at <http://www.gseis.ucla.edu/courses/edlaw/sfrept15.pdf>; San Francisco Unified School District Desegregation, Paragraph 44 Independent Review Report No. 16, *supra* note 9, at 37; Paragraph 44 Independent Review Report No. 17 at 32, S.F. NAACP, No. C-78 1445 WHO (N.D. Cal. July 27, 2000), available at <http://www.gseis.ucla.edu/courses/edlaw/Report17-SFUSD.pdf>.

[FN74]. Under Paragraph 12, the Decree mandated efforts to address both school-by-school segregation and within-school segregation. Paragraph 13 set forth a mechanism to address the former, but no plan was ever agreed upon to address the latter.

[FN75]. See, e.g., S.F. NAACP v. S.F. Unified Sch. Dist., 576 F. Supp. 34, 54-58 (N.D. Cal. 1983).

[FN76]. See, e.g., Desegregation and Educational Change in San Francisco: Findings and Recommendations on Consent Decree Implementation, *supra* note 7.

[FN77]. As a general rule, the school district “leadership” in K-12 public education is composed of a school board and a superintendent. The governance structure does vary from city to city and state to

state, and sometimes other local officials play key roles as well. In San Francisco, for example, the school board members are elected officials who then choose the superintendent. However, if a board member leaves office before her term is completed, the mayor appoints a replacement. The mayor therefore has greater power over the schools in San Francisco than in other California cities, such as Los Angeles. But other mayors in other parts of the country have much greater control over their local districts than any mayors in California. Changes in district leadership are typically linked to changes in the superintendency, although a change in the school board president and/or the school board majority can have an even greater impact on the direction a district might pursue.

[FN78]. Dr. Gary Orfield, now a member of the faculty at UCLA, is Co-Director (along with Dr. Patricia Gandara) of the Civil Rights Project. The Honorable David S. Tatel, appointed to the federal judiciary by President Bill Clinton, is currently a D.C. Circuit judge.

[FN79]. See *Desegregation and Educational Change in San Francisco: Findings and Recommendations on Consent Decree Implementation*, *supra* note 7.

[FN80]. While the record is not completely clear on this matter, it appears to be the case that no officially sanctioned meetings ever took place between and among all of the actual parties to the Decree. Such a meeting would have necessarily included District officials, SFNAACP officials, the State Superintendent of Public Instruction and/or members of the State Board of Education, and-after the Ho lawsuit had been filed-the families of Brian Ho, Patrick Wong, and Hilary Chen.

When consent decrees contemplate meetings of the parties, it is generally understood that the attorneys for the parties will meet, or perhaps the attorneys for the plaintiffs will meet with the primary defendant (which in this case was the school district). Ideally, it would be advisable to build into such decrees a requirement that the actual parties (accompanied by their attorneys, if they so desire) must meet with each other. To do otherwise is to risk replicating situations such as the one that unfolded in San Francisco, in which the attorneys arguably ended up operating as a “super school board.”

In general, Ross Sandler and David Schoenbrod have raised provocative questions regarding both procedural and substantive aspects of federal consent decrees during this era. See, e.g., Ross Sandler and David Schoenbrod, *From Status to Contract and Back Again: Consent Decrees in Institutional Reform Litigation*, 27 *Rev. Litig.* 115 (2007); see generally Ross Sandler and David Schoenbrod, *Democracy by Decree: What Happens When Courts Run Government* (2003).

[FN81]. See, e.g., *San Francisco Unified School District Desegregation*, Paragraph 44 Independent Review Report No. 22 at 2-5, *S.F. NAACP v. San Francisco Unified Sch. Dist.*, No. C-78 1445 WHA (N.D. Cal. Aug. 1, 2005), available at <http://www.gseis.ucla.edu/courses/edlaw/sfrept22.pdf>.

[FN82]. See generally *id.*

[FN83]. See, e.g., *Supplemental Report of Consent Decree Monitor Regarding Desegregation and Academic Achievement* at 8, *S.F. NAACP*, No. C-78 1445 WHA (N.D. Cal. Apr. 11, 2005), available at <http://www.gseis.ucla.edu/courses/edlaw/405supp-rept.pdf> [hereinafter April 2005 Supplemental Report].

[FN84]. See generally, San Francisco Unified School District Desegregation, Paragraph 44 Independent Review Report No. 22, *supra* note 81, app. 1. In that section of the report, we emphasized that these were not the only schools achieving success in San Francisco, but that they best exemplified success under the terms and conditions of the Decree.

[FN85]. See *id.* at 5-8. In identifying these common factors, we also urged the District, as we had done many times in the past when we documented District successes, “to build on these successes and seek to publicize, disseminate, and replicate the noteworthy steps taken by these educators to achieve their goals.” Sadly, the District did none of this, and in fact even decided inexplicably to close one of these schools, Golden Gate Elementary.

[FN86]. As discussed below, *infra* Part III, the diversity index not only failed to halt the growing resegregation, but it did not operate at all at low-performing schools that were undersubscribed. As a result, those low-performing campuses were left to serve as “remainder schools” and often grew even more racially isolated. In addition, as it became increasingly clear that there were few, if any, things standing in the way of this growing resegregation, the pattern of balkanization so evident in the years before the Decree was re-institutionalized. See generally *infra* Appendix 2 (indexing the Monitoring Team Reports from 2003, 2004, and 2005). See also Jonathan D. Glater & Alan Finder, Diversity Plans Based on Income Leave Some Schools Segregated, *N.Y. Times*, July 15, 2007, at A24.

[FN87]. See *infra* Part III for a detailed analysis of why the diversity index plan did not work. See also *infra* Appendix 1, where we identify the 49-52 schools severely resegregated at one or more grade levels. This constitutes close to one half of all the schools in the district. The number is approximate because 7 of the 52 schools appear initially to be slightly below the “severe resegregation” benchmark of sixty percent, but the “decline to state” figures (whereby parents, pursuant to the Ho settlement, decline to state their child’s race or ethnicity) appear to indicate a strong likelihood that the actual enrollments reflect severe resegregation.

[FN88]. Final Supplemental Report of Consent Decree Monitor Regarding Desegregation and Academic Achievement at 3-6, S.F. NAACP, No. C-78 1445 WHA, available at <http://www.gseis.ucla.edu/courses/edlaw/Final%20SF%C20Supp%20Rept.pdf>.

Among the most egregious examples of this resegregation are the schools in Bayview-Hunters Point, where all the elementary schools (with the exception of Bret Harte) are severely resegregated across all grade levels.

In the Mission, all the comprehensive middle schools are severely resegregated across all grade levels. And the elementary schools are among the most highly resegregated of all the schools in the city, including Bryant (89.7% Latino at Grade 5), Chavez (88.5% Latino at Grade 2), Marshall Elementary (84.8% Latino at Grade 4), and Sanchez (84.8% Latino at Grade 1).

In Chinatown, Jean Parker is now 97.5% Chinese American at Kindergarten, and Chin is now 86.4% Chinese American at Grade 4, numbers that were unheard of just a few years ago

Finally, the two most popular comprehensive high schools in the city, Lincoln and Washington, are both severely resegregated at one or more grade levels. And Lowell, which is also resegregating, is not

far behind Lincoln and Washington.

Id.

[FN89]. See, e.g., San Francisco Unified School District Desegregation, Paragraph 44 Independent Review Report No. 20, *supra* note 73, at 48-53; Supplemental Report of Consent Decree Monitor Regarding the Achievement Gap and Related Issues at 17-18, S.F. NAACP, No. C-78 1445 WHA (N.D. Cal. March 12, 2004), available at <http://www.gseis.ucla.edu/courses/edlaw/304supp-rpt.pdf> [hereinafter March 2004 Supplemental Report]. See generally *infra* Part III.

[FN90]. Final Supplemental Report of Consent Decree Monitor Regarding Desegregation and Academic Achievement, *supra* note 88, at 5. See also *infra* Part III for an analysis of why the race-neutral “diversity index” did not succeed in reversing the tide of resegregation and restoring the school-by-school desegregation that had existed in the late 1990s. In the Monitoring Team’s 2003, 2004, and 2005 reports, we devoted over one hundred pages to this topic.

[FN91]. See, e.g., April 2005 Supplemental Report, *supra* note 83.

[FN92]. See *id.* at 28-47; San Francisco Unified School District Desegregation, Paragraph 44 Independent Review Report No. 17, *supra* note 73, at 72-80; San Francisco Unified School District Desegregation, Paragraph 44 Independent Review Report No. 22, *supra* note 81, app. 2, at 4-8.

[FN93]. See generally April 2005 Supplemental Report, *supra* note 83, at 3-10. We also found that this disproportionate representation was “not a new issue in San Francisco,” but that “public records document a major concern with these issues in this City at least as far back as the 1960s.” Indeed, extensive detail in this context is set forth by Judge Peckham in the two Larry P. decisions that came down in the 1970s. See *Larry P. v. Riles* 495 F. Supp. 926 (N.D. Cal. 1979); *Larry P. v. Riles*, 343 F. Supp. 1306 (N.D. Cal. 1972); see also *Larry P. v. Riles*, 793 F.2d 969 (9th Cir. 1984).

[FN94]. April 2005 Supplemental Report, *supra* note 83. We found that “[o]verwhelmingly, African American students in this District are more likely than their counterparts of other races/ethnicities to be separated out into [separate ‘special day classrooms’] for the entire school day. However ... this is not necessarily the case in every school or in every neighborhood. Indeed, we have found that a pattern of stark within-school segregation linked to special ed placement is much more prevalent at certain high-performing schools, predominantly on the Westside”

[FN95]. We found in 2005 that SFUSD African American students alone comprised more than half of all those classified as emotionally disturbed in the entire District, although they comprised only 14% of the District population as a whole. *Id.* at 5-6.

[FN96]. See, e.g., Nat’l Research Council, *Minority Students in Special and Gifted Education* (2002); Matthew Ladner & Christopher Hammons, *Special But Unequal: Race and Special Education*, in *Rethinking Special Education for a New Century* (Chester E. Finn, Jr. et al. eds., 2001); see also Daniel J. Losen & Gary Orfield, *Racial Inequity in Special Education* (2002); Gwendolyn Cartledge, *Minority*

Overidentification and Misidentification, <http://www.charityadvantage.com/aacl/cartledgepresentation.asp> (last visited June 8, 2008).

[FN97]. For example, studies show that the disproportionate placement of African American students in ED classes is not a new problem and that it is a national problem. Russell Skiba et al., *The Context of Minority Disproportionality: Practitioner Perspectives on Special Education Referral*, 108 *Tchrs. C. Rec.* 1424 (2006). However, San Francisco is much worse than the national average, as is the case with suspension and expulsion of African American students. For example, nationally African American students account for 25% of those labeled emotionally disturbed but over 50% in San Francisco. See April 2005 Supplemental Report, *supra* note 83, at 5-6. In this regard, it was especially relevant to note, “It must be emphasized, in this context, that students who are still in special education in high school face much more limited educational opportunities. Typically, they are not afforded the option of completing the A-G requirements, and their higher education options are limited at best. Students in the advanced placement courses, by contrast, typically have an inside track to the best colleges and universities nationwide.” *Id.* at 10.

[FN98]. See, e.g., San Francisco Unified School District, Paragraph 44 Independent Review Report No. 15, *supra* note 73, at 52:

Paragraphs 13 (e) and (f) require that the district avoid choosing sites for special programs and avoid transportation policies that disproportionately burden any racial/ethnic group.

We continue to find that the district has gone out of its way to link innovative programs to the surrounding communities, and to minimize busing as much as possible.

During 1997-1998, SFUSD has reported that its Transportation Department provided school bus service for approximately 9,994 students in Grades K-12, or just over 15% of the students in the district.

Based on an analysis of the assigned feeder patterns, the racial/ethnic percentages of students receiving transportation in 1997-1998 are as follows: Latino - 21.8%, White - 14.3%, African American - 19.8%, Chinese American - 23.4%, Japanese American - 0.85%, Korean American - 0.7%, Native American - 0.5%, Filipino - 5.9%, Other Non-White - 12.8%.

These numbers ... closely approximate the district-wide enrollment numbers for each of the nine racial/ethnic categories. For example, Latino students comprise 21.2% of the SFUSD enrollment, and 21.8% of the students transported by the district for desegregation purposes were Latino.

In this regard, it is important to note that San Francisco is a city that is very conducive to traditional desegregation programs. Among other things, it is a small geographical area, it has a relatively good municipal transportation system, and its student population reflects substantial numbers in four major racial/ethnic categories: African American, Asian American, Latino, and White.

[FN99]. See San Francisco Unified School District Desegregation, Paragraph 44 Independent Review Report No. 20, *supra* note 73, at 77-84. Many told us that bus routes established decades earlier--when the student assignment process was very different--were “unsuitable for current policies and practices.” *Id.*

[FN100]. *Id.* at 66-76.

[FN101]. *Id.* at 84.

[FN102]. See generally *id.* at 66-84.

[FN103]. Response of Consent Decree Monitor to the Parties' June 17, 2004 Joint Response Regarding the March 2004 Supplemental Report at 13, *S.F. NAACP v. San Francisco Unified Sch. Dist.*, No. C-78 1445 WHA (N.D. Cal. June 25, 2004), available at <http://www.gseis.ucla.edu/courses/edlaw/604resp-to-jr.pdf>.

[FN104]. While the objective indicators available to us were limited by the continual changes in both the test instruments used to evaluate academic achievement and the nature of the results that were mandated by federal and state law, we found incontrovertible evidence of the closing of the achievement gap between racial and ethnic groups in (a) the performance of the Phase One schools throughout the mid and late 1980s (as documented below in the text accompanying notes 105-108), (b) the increases in the scores (particularly in reading) of the African American and Latino students in the 1990s (*cf. infra* note 109), and (c) extensive qualitative data from our systematic school site visits in racially isolated, low-income neighborhoods comprised primarily--if not exclusively--of African American and Latino students. Indeed, we consistently found, based on the range of objective and subjective factors we employed to assess the quality of the education at all SFUSD sites, that the performance level of these schools was significantly higher in the 1990s than in the decade that followed. See generally *San Francisco Unified School District Desegregation*, Paragraph 44 Independent Review Report No. 14, *supra* note 9; *San Francisco Unified School District Desegregation*, Paragraph 44 Independent Review Report No. 15, *supra* note 73; and *San Francisco Unified School District*, Paragraph 44 Independent Review Report No. 16, *supra* note 9.

[FN105]. The gap between the overall scores of the African American students in San Francisco and the overall scores of every other racial/ethnic group combined was thus the largest achievement gap in the state, according to that measure: 706 overall on the API, but only 542 overall for the San Francisco African American students, a gap of 164 points. See Response of Consent Decree Monitor to the Parties' June 17, 2004 Joint Response Regarding the March 2004 Supplemental Report, *supra* note 103, at 8-9. Importantly, the API base incorporates a range of objective indicators and accounts for student performance at every level of the California Standards Test, including those scoring at "proficient or above" and those scoring at "basic." See generally California Department of Education, Academic Performance Index Databases, <http://api.cde.ca.gov/api2003> (last visited June 24, 2004).

It should also be noted that this comparative pattern of academic achievement, as reflected in the state's Academic Performance Index, continued over the final two years of the Decree. In our Final Supplemental Report, filed at the close of the Decree in December 2005, we reported that the most recent data obtained from the California Department of Education showed San Francisco's African Americans as performing lower than their counterparts in the other major urban districts, even as SFUSD overall continued to perform highest of all. Final Supplemental Report of Consent Decree Monitor Regarding Desegregation and Academic Achievement, *supra* note 88, at 5-7.

African American Student Performance on the California Standards Test (Spring 2005): Percentage of African American Students Scoring at Proficient or Above

English-Language Arts

Math

1. San Diego - 33.6%	1. San Diego - 31.7%
2. Long Beach - 31.1%	2. Long Beach - 31.4%
3. Sacramento - 27.3%	3. Sacramento - 27.6%
4. Los Angeles - 25.2%	4. Los Angeles - 24.4%
5. Oakland - 22.7%	5. Oakland - 21.9%
6. Fresno - 21.5%	6. Fresno - 20.6%
7. San Francisco - 20.7%	7. San Francisco - 20.1%

[FN106]. See, e.g., San Francisco Unified School District Desegregation, Paragraph 44 Independent Review Report No. 21 at 4-12, 39-47, S.F. NAACP, No. C-78 1445 WHA (N.D. Cal. Sept. 28, 2004); March 2004 Supplemental Report, supra note 89, at 2-18; April 2005 Supplemental Report, supra note 83, at 2-20. See generally March 2004 Supplemental Report, supra note 89, at 19-21 (putting forth for the first time the proposition that the District was not addressing the findings of the Monitoring Team to the extent practicable):

Indeed, there are many things that can be done which have not been done--with means at hand and circumstances as they are--to address the issues documented in these pages and in recent monitoring team reports We have found that in general most of [these] strategies ... require neither great expenditures of funds nor a wholesale restructuring of current systems and operations

If the District continues to only address certain key findings while not addressing others, or if it moves forward with dramatic interventions at some low-performing schools but not at others, the District will not be addressing the findings of the monitoring team, the parties, and the District's own internal monitors to the extent practicable. And we would emphasize that it is not sufficient for any of us--the monitoring team included--to fall back on the old saw that the achievement gap is a persistent national problem, and that San Francisco is not alone. A large number of students in this city are not succeeding, their very lives are on the line, and in too many instances their schools are failing them.)

[FN107]. Indeed, as far back as 2000, the Monitoring Team had urged the District to develop a transition plan for the end of the Decree, and had set forth in great detail a special section of Report No. 17 to address what such a plan might comprise. See San Francisco Unified School District Desegregation, Paragraph 44 Independent Review Report No. 17, *supra* note 73, at 19-69; see also Independent Statement of Consent Decree Monitor Regarding the Parties' August 25, 2005 Settlement Agreement at 4-5, S.F. NAACP, No. C-78 1445 WHA (N.D. Cal. September 22, 2005), available at <http://www.gseis.ucla.edu/courses/edlaw/92205%20Statement.pdf>:

We urge the Court to approve the Settlement Agreement but also require an enhanced transition plan We recommend that such a plan include ... [a] roadmap for site-based professional development that embodies a structured, ongoing, sharing process which would enable District educators to learn from and explicitly build on the achievements of fellow educators at other schools.

[FN108]. Final Supplemental Report of Consent Decree Monitor Regarding Desegregation and Academic Achievement, *supra* note 88, at 8 n.8; see also Heather Knight, SF Schools Are Resegregating, Monitor Charges, S.F. Chron., Jan. 4, 2006, at A1.

[FN109]. See, e.g., Brief of 19 Former Chancellors of the University of California As Amici Curiae in Support of Respondents at 16-20, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007) (Nos. 05-908, 05-915) (“Integrated public schools enhance minority access to higher education and cultivate diverse leaders for our diverse democracy”); see also Brief of Profs. Amy Stuart Wells, Jomills Henry Braddock II, et al. at 8-29, *Parents Involved*, 127 S. Ct. 2738 (Nos. 05-908, 05-915) (“Social science research overwhelmingly confirms the compelling benefits of racially integrated elementary and secondary schools”).

[FN110]. Waldemar Rojas, Benefits of the SFUSD Consent Decree 5 (1999).

[FN111]. *Id.* at 7-8.

[FN112]. In the earlier days of the Decree, particular schools were explicitly “targeted” in the Decree itself and provided with additional funding as a result. See *Desegregation and Educational Change in San Francisco: Findings and Recommendations on Consent Decree Implementation*, *supra* note 7.

[FN113]. Pursuant to these recommendations and the principles set forth by the parties in their Second Joint Report, the District sought to raise expectations and to increase accountability for the achievement of students throughout the city. Rojas, *supra* note 109.

[FN114]. See *id.* See generally San Francisco Unified School District Desegregation, Paragraph 44 Independent Review Report No. 14, *supra* note 9, at 10-19.

[FN115]. San Francisco Unified School District Desegregation, Paragraph 44 Independent Review Report No. 20, *supra* note 73, at 48-53. We focused in this analysis on schools that were either appearing on the severely resegregated lists or had begun to demonstrate significant enrollment shifts that included resegregation patterns and may have also included racial identifiability.

[FN116]. Id. at 51-52.

[FN117]. At the beginning of each calendar year, the state releases its Academic Performance Index (API) tables, which include comparative lists of schools based on a scale of 1-10, with 1 being the lowest possible score and 10 being the highest. This index was prepared pursuant to the California Public Schools Accountability Act. See Cal. Educ. Code § 52050 (1999).

[FN118]. Serra entered the severely resegregated list because of a large “Decline-to-State” (LDS) number at the K and 1 levels (15.6% for the previous year's entering class, and 12% for the current year's entering class), combined with 56.4% Latino at Grade 1 for the previous year and a projected 52% for K the coming fall.

[FN119]. See San Francisco Unified School District Desegregation, Paragraph 44 Independent Review Report No. 20, supra note 73, at 52-53:

School (Ethnicity)	Resegregation Pattern (1997-2003)	Current API
Bryant (L)	From 46.6% to 61.7% Projected	2
Chavez (L)	From Below 45% to 85.5% Projected	2
Fairmount (L)	From 46% to at least 59.6%/+LDS	2
Marshall ES (L)	From 46.8% to 73.2% Projected	2
Sanchez (L)	From Below 45% to 72.4% Projected	2
21st Century (AA)	From 42.5% to 57.6/87.1/69%	1
Davis (AA)	From 41.6% to 64.6% Projected	1

Everett (L)	From Below 45% to 59.7%	1
O'Connell (L)	From 41.5% to 69.1% Overall	2

The intensive reform efforts that failed to make an impact at these schools included, but were not limited to (a) their creation and designation as new “Consent Decree” schools, (b) CSIP/Reconstitution, (c) II/USP, and (d) the SFUSD STAR School Initiative.

[FN120]. March 2004 Supplemental Report, *supra* note 89, at 17-18.

[FN121]. *Id.* at 18. See also April 2005 Supplemental Report, *supra* note 83, app. 4.

[FN122]. McKinley's Fall 2003 enrollment, for example, was 33.7% African American, 11.1% White, 34.7% Latino, and 8.9% Other Non-White (ONW). Lillienthal's was 17.5% African American, 13.3% Korean American, 28.4% White, and 11.5% Latino. Rooftop was 15.1% African American, 12.7% Chinese American, 24.3% White, and 25.3% Latino. Gateway was 13.5% African American, 32.8% White, 23.5% Latino, and 13% ONW. Leadership was 16.5% African American, 14.9% Chinese American, 14.7% White, and 30.9% Latino. Burton was 19.8% African American, 23.8% Chinese American, 18.7% Filipino, and 24.4% Latino. March 2004 Supplemental Report, *supra* note 89, at 10-11.

[FN123]. Cal. Dept. of Educ., AYP Phase I Report (2003), available at <http://www.cde.ca.gov>.

[FN124]. Research has consistently documented the persistent inequities experienced by low-income students of color in racially isolated public schools and public school classrooms. See, e.g., Meredith Phillips & Tiffani Chin, *School Inequality: What Do We Know?*, in *Social Inequality* 467-519 (Kathryn Neckerman ed., 2004); John T. Yun & Jose F. Moreno, *College Access, K-12 Concentrated Disadvantage, and the Next 25 Years of Education Research*, 35 *Educ. Researcher* 12 (2006). See also Jeannie Oakes et al., *Curriculum Differentiation: Opportunities, Outcomes, and Meanings*, in *Handbook of Research on Curriculum* 570-608 (Philip W. Jackson ed., 1992). See generally Brief of 553 Social Scientists as Amici Curiae in Support of Respondents at 30-35, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007) (Nos. 05-908, 05-915).

Recent studies in California have also found that African American and Latino students who attend segregated schools have diminished access to the University of California (UC) system. See, e.g., Robert Teranishi et al., *Opportunity at the Crossroads: Racial Inequality, School Segregation, and Higher Education in California*, 106 *Tchrs. C. Rec.* 2224, 2234 tbl.3 (2004); see also Isaac Martin et al., *High School Segregation and Access to the University of California*, 19 *Educ. Pol'y* 308, 318, 319 tbl. 3 (2005). Other studies focusing on this area have found that segregated schools provide “inferior educational opportunities.” See Camille E. Esch et al., *Teaching and California's Future: The Status of the Teaching Profession 2005*, at 70-71 (2005) (documenting the low percentages of fully credentialed

teachers and the high teacher turnover rate in racially isolated schools attended by low-income students of color). See also John Rogers et al., California Educational Opportunity Report 2006: Roadblocks to College 6, 15-17 (2006) (examining “three roadblocks to college” in racially segregated schools: (a) more students per counselor than the national average, (b) more students per teacher than the national average, along with inadequate training of teachers in college prep courses, and (c) shortage of college prep courses in the curriculum). See generally Brief of 19 Former Chancellors of the University of California As Amici Curiae in Support of Respondents, *supra* note 109.

[FN125]. The “Dream School” initiative constituted the District's final round of reconstitution under the Decree, and was presented to the Court as its response to the Monitoring Team's findings in 2003 and 2004.

In the summer and fall of 2005, with the Consent Decree still in effect and the parties' request that the Decree be extended beyond 2005 still pending, the Monitoring Team continued to visit school sites and gather data. We focused extensively on the Dream Schools, given the District's assertions that this initiative exemplified its reform efforts under the mandate of the Decree.

We found, however, that in stark contrast to the Phase One reconstitutions mandated by the Decree in the 1980s and the 1990s era reconstitutions developed pursuant to the 1992 Committee of Expert's Report, the Dream Schools were implemented rapidly pursuant to mixed messages. While statements to the Court suggested that the District envisioned the Dream Schools as both desegregation and academic achievement vehicles, statements in District press releases and in speeches to community members presented the initiative as one which would focus on creating rigorous, high-quality programs for low-income students of color in racially isolated areas. The message in these communications-- sometimes explicit, but other times implicit--was that desegregation no longer mattered, because the best possible schools could be built in racially isolated areas without focusing on diversity goals at all.

The first three Dream Schools, in particular, were presented to the community in this manner. All were located in Bayview-Hunters Point, and all adopted a model put forth by Lorraine Monroe, former principal of the Frederick Douglass Academy in Central Harlem, N.Y. By the end of the Decree, they remained among the most severely resegregated of all the schools in the District, and there was no apparent effort to change that reality.

Seven other Dream Schools were added hastily during the final year of the Decree, accompanied by publicity touting the same message that desegregation did not matter.

Unlike Martin Luther King Middle School and Burton High--which were created in low-income and racially isolated areas of the community in earlier years of the Decree and achieved ongoing success both in a desegregation context and an academic achievement context--the Dream Schools achieved little or no success in either area. Academic achievement numbers remained low, and the schools remained highly segregated.

These findings were summarized by Dr. Charles Forster in an internal Monitoring Team document that would have become part of a future report had the Decree continued into 2006. See Charles Forster, *The SFUSD Dream Schools at the Close of the San Francisco Consent Decree (2005)* (independent study on file with the author). See generally *Academic Performance Index Rankings for SFUSD Schools (2004-2008)*, www.cde.ca.gov.

[FN126]. See generally Charles Forster, *The SFUSD Dream Schools*, *supra* note 124. Of the ten cam-

puses designated Dream Schools in the final years of the Decree, Davis Middle School (Bayview-Hunters Point), Maxwell Middle School (Potrero Hill), and Treasure Island (K-8) closed after doing poorly, and Franklin Middle School (Western Addition) closed before it even opened. Of the six that have remained open in 2008, Sanchez Elementary is arguably the only one that would not be considered low-performing, and it is located in the Castro, which is not in fact a racially isolated neighborhood at all. The others--Willie Brown and Charles Drew in Bayview-Hunters Point, Everett and O'Connell in the Mission, and Revere in Bernal Heights--remain among the lowest performing schools in the District. *Id.*

[FN127]. As referenced above, for example, the Monitoring Team found that the SFUSD schools most successful at closing the achievement gap within their own campuses were almost always ones that had maintained diverse student populations. See *supra* Table 4; see also Brief of Profs. Amy Stuart Wells et al., *supra* note 109. See generally notes 117-19.

[FN128]. In San Francisco, for example, in July 2004, the Monitoring Team reported the following:

[I]n spite of current efforts by dedicated educators of good faith and good will, resegregation continues unabated, the African American GPA over a four-year period has not improved, the balkanization of the District's high schools is only increasing, the attendance gap on the basis of race and ethnicity has widened, the number of schools at the lowest rank of "1" on the academic performance index (API) has increased, and SFUSD African American student performance--when compared with their counterparts in other cities--is worse than their counterparts in other cities on three major indicators ... the CAT-6, the CST, and the API base. In addition, SFUSD tests a lower percentage of its African Americans than any other of these major urban districts, and thus the actual parameters of the achievement gap may be even worse than is reflected in current scores.

Response of Consent Decree Monitor to the School District's July 23, 2004 Offer of Proof at 2, *S.F. NAACP v. S.F. Unified Sch. Dist.*, No. C-78 1445 WHA (N.D. Cal. July 28, 2004), available at http://www.gseis.ucla.edu/courses/edlaw/7-28-04_Response.pdf. Later in the same document, we reported on the persistent disproportionality in suspension and expulsion rates:

[I]n related data regarding school discipline disparities received from the District this morning pursuant to the Paragraph 38 requirements of the Decree, we have found that the suspension rate for African American students increased over the past year to the highest point since we began monitoring in 1997. Suspensions of African American students in SFUSD increased from 1253 to 1432, rising to 53.5% of the entire student population. African Americans comprise approximately 14.5% of the student population in the District, but comprise 53.5% of all the suspensions ... and over 66% of all suspensions at the elementary grades.

Id. at 6. And in April 2005, we reported new findings on the disproportionate representation of African American students in both the separate special education classes and in subjective areas such as "emotionally disturbed." April 2005 Supplemental Report, *supra* note 83. See generally *supra* Part II.

Many people, looking at these findings, concluded that--taken together--they were conclusive proof that the Consent Decree was not working and should be terminated. Yet such a conclusion ignores the compelling reality that many students avoided this type of marginalization and disenfranchisement because of the successes of the Decree at different points in time, when judicial supervision, strong leadership, and community support together led to action that arguably would have never happened otherwise.

[FN129]. See San Francisco Unified School District Desegregation, Paragraph 44 Independent Review Report No. 17, *supra* note 73, at 176.

[FN130]. This table originally appeared as Appendix 3 of Paragraph 44 Independent Review Report No. 22, *supra* note 81. As noted above, the reports of the San Francisco Consent Decree Monitoring Team for the years 1997-2005 can be found at <http://www.gseis.ucla.edu/courses/edlaw/sfrepts.htm>.

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