

FIGHTING “DEMOGRAPHIC DESTINY”:  
A LEGAL ANALYSIS OF ATTEMPTS OF THE STRATEGIES WHITE  
ENCLAVES MIGHT USE TO MAINTAIN SCHOOL SEGREGATION

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INTRODUCTION

In the last thirty years, public school enrollment of white students has declined from seventy-three percent in 1980 through 1981 to almost fifty-four percent in 2009 through 2010.<sup>1</sup> As a result, the growing number of students of color has coincided with deepening racial—and economic—segregation for black and Latino students.<sup>2</sup> On the other hand, the growing number of students of color has lessened the extent to which white students attend racially isolated white schools.<sup>3</sup> In 1988, at the height of school desegregation, more than half of white students—fifty-three percent—attended predominantly white schools.<sup>4</sup> From 2006 to 2007, the percentage of white students in such racially isolated white schools declined to thirty-six percent.<sup>5</sup>

As this type of demographic shift occurs, “white enclaves” employ creative strategies to maintain school segregation. White enclaves are schools—or neighborhoods—in which the enrollment of

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<sup>1</sup> GARY ORFIELD, ET AL. *E PLURIBUS . . . SEPARATION: DEEPENING DOUBLE SEGREGATION FOR MORE STUDENTS* 15 (The Civil Rights Project ed., 2012), available at [http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/mlk-national/e-pluribus...separation-deepening-double-segregation-for-more-students/orfield\\_epluribus\\_revised\\_omplete\\_2012.pdf](http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/mlk-national/e-pluribus...separation-deepening-double-segregation-for-more-students/orfield_epluribus_revised_omplete_2012.pdf).

<sup>2</sup> ORFIELD, *supra* note 1, at 9.

<sup>3</sup> GARY ORFIELD, *REVIVING THE GOAL OF AN INTEGRATED SOCIETY: A 21ST CENTURY CHALLENGE* 26 (The Civil Rights Project ed., 2009), available at <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/reviving-the-goal-of-an-integrated-society-a-21st-century-challenge/orfield-reviving-the-goal-mlk-2009.pdf>.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

white, affluent students is higher and disproportionate to the enrollment of white students in an entire school district or community.<sup>6</sup> Some white enclaves have fought to maintain or exacerbate racial fragmentation.<sup>7</sup> This Article analyzes the legality of three approaches that white enclaves have used to perpetuate racial segregation. Part I of this Article examines how white enclaves use Supreme Court precedent to mount legal challenges to deter voluntary school desegregation plans. The following two parts of this Article explains how white enclaves use non-litigation strategies to circumvent desegregation efforts. Part II explains how white enclaves manipulate school assignment policies to maintain school segregation. Part III discusses how white enclaves increase their power over school boards through at-large elections.

## I. LEGAL CHALLENGES TO VOLUNTARY DESEGREGATION PLANS

In *Brown v. Board of Education*, the Supreme Court held that de jure school segregation—segregation required by state and school district policies—violated the Equal Protection Clause.<sup>8</sup> After that landmark decision, the federal courts engaged in a forty-year period of court-enforced school segregation. This period ended with a series of decisions in which the Supreme Court signaled the federal judiciary’s disengagement from further federal oversight.<sup>9</sup> However, several school districts continued to implement desegregation policies on a voluntary basis.<sup>10</sup> In *Parents Involved in Community Schools v. Seattle School District No. 1*, the Supreme Court limited the options avail-

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<sup>6</sup> JEFFREY R. HENIG ET AL., *THE COLOR OF SCHOOL REFORM: RACE, POLITICS, AND THE CHALLENGE OF URBAN EDUCATION 198-201* (1999).

<sup>7</sup> See *id.* (discussing “the enclave phenomenon” and the efforts of enclave school communities to “improv[e] the relative position of their school versus others, rather than aiming for changes that might benefit the system at large”).

<sup>8</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

<sup>9</sup> See *Bd. of Educ. of Okla. City v. Dowell*, 498 U.S. 237, 250-51 (1990) (upholding neighborhood assignment plans that create racial segregation in a school district that was no longer under court-mandated desegregation plan); *Freeman v. Pitts*, 503 U.S. 467, 492 (1991) (holding that school districts can withdraw incrementally from school desegregation decrees); *Missouri v. Jenkins*, 515 U.S. 70, 98-99 (1995) (invalidating a metropolitan school desegregation plan designed to approve the “desegregative attractiveness” of predominantly black school district).

<sup>10</sup> See Kathryn McDermott et al., *How Does Parents Involved in Community Schools Matter? Legal and Political Influence in Education Politics and Policy*, 114 TCHRS C. REC. 1, 28-31 (2012) (discussing local school board responses to court decisions, including pursuit of voluntary desegregation plans).

able to school districts wanting to achieve racial integration through voluntary means.<sup>11</sup> *Parents Involved* enabled white enclaves to effectively limit the reaches of integration plans through legal challenges. The following Section summarizes the *Parents Involved* decision, and explains how white enclaves use *Parents Involved* to challenge existing or future voluntary desegregation plans.

#### A. *Parents Involved Case Summary*<sup>12</sup>

Parents Involved consolidated two cases involving race-based student assignment policies, with one case in Seattle, Washington, and the other in Louisville, Kentucky.<sup>13</sup> In the Seattle case, the school district employed a series of tiebreakers to determine school assignments to oversubscribed high schools.<sup>14</sup> Under the pertinent tiebreaker, the school district sought to ensure the schools were within ten percent of the district’s white and nonwhite composition, which amounted to forty-one percent white and fifty-nine percent nonwhite.<sup>15</sup> The district then used the tiebreaker to approve transfer requests from students whose race would serve to integrate the student body, rather than exacerbate any identified racial imbalance.<sup>16</sup>

Similarly, the Kentucky school district’s assignment plan was designed to make certain that each non-magnet school had between fifteen to fifty percent black enrollment.<sup>17</sup> The district’s racial composition was approximately thirty-four percent black and sixty-six percent white.<sup>18</sup> Under the Kentucky school district plan, students’ requests for school preference were approved based on availability and the racial integration guidelines.<sup>19</sup> A student was denied his enrollment choice if such enrollment threatened to place the school out of compliance with the racial balancing guidelines.<sup>20</sup> After a student was assigned to a school, he could apply to transfer to non-mag-

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<sup>11</sup> 551 U.S. 701, 747-48 (2007).

<sup>12</sup> This summary of *Parents Involved* is taken from Preston C. Green III et al., *Parents Involved, School Assignment Plans, and the Equal Protection Clause: The Case for Special Constitutional Rules*, 76 BROOK. L. REV. 503, 506-25 (2011).

<sup>13</sup> *Parents Involved*, 551 U.S. at 709-11.

<sup>14</sup> *Id.* at 711-12.

<sup>15</sup> *Id.* at 712.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 716.

<sup>18</sup> *Id.*

<sup>19</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 716 (2007).

<sup>20</sup> *Id.* at 717.

net schools in the same district.<sup>21</sup> However, the district could deny a transfer based on the racial guidelines.<sup>22</sup> From 1975 to 2000, the Kentucky school district had been under a desegregation decree and a similar plan had been instrumental in helping the district dismantle its previously segregated system.<sup>23</sup> The school district later adopted the voluntary assignment plan one year after the district court found that the district's policy adequately eliminated segregation and declared the school district unitary, thus, dissolving the desegregation decree.<sup>24</sup>

The Supreme Court held that both student assignment policies were unconstitutional.<sup>25</sup> Chief Justice Roberts wrote the Court's opinion, joined by Justices Thomas, Scalia, Alito, and Kennedy.<sup>26</sup> Justice Kennedy wrote an opinion concurring in the judgment but relying on analysis separate from the plurality of Roberts, Scalia, Alito, and Thomas.<sup>27</sup> In the Court's opinion,<sup>28</sup> the Chief Justice declared that all racial classifications are subject to strict scrutiny pursuant to the Equal Protection Clause.<sup>29</sup> He observed that the Court had identified two compelling interests in examining the use of race as a factor in the school context: (1) to remedy the vestiges of intentional discrimination,<sup>30</sup> and (2) to attain the beneficial educational effects of diversity at the university level.<sup>31</sup> The plurality opined that because the Seattle school district had never been subjected to a court-ordered desegregation decree nor had segregated its schools by law,<sup>32</sup> the school district did not have a compelling interest to remedy the present effect of past discrimination.<sup>33</sup> Although Louisville was subjected to a desegregation decree,<sup>34</sup> the dissolution of the decree meant that the district no

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<sup>21</sup> *Id.* at 716-17.

<sup>22</sup> *Id.* at 717.

<sup>23</sup> *Id.* at 715-16.

<sup>24</sup> *Id.* at 716.

<sup>25</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 710-11 (2007).

<sup>26</sup> *Id.* at 707.

<sup>27</sup> *Id.* at 782-83 (Kennedy, J., concurring).

<sup>28</sup> Hereafter, we use the term "Court's opinion" or "majority opinion" to refer to those portions of Roberts' opinion joined by the Court's majority which included Chief Justice Roberts, and Justices Kennedy, Scalia, Thomas, and Alito. Those sections are Parts I, II, III-A, *id.* at 709-25, and III-C, *id.* at 733-35.

<sup>29</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 722.

<sup>32</sup> *Id.* at 720.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

longer could claim a compelling interest in eliminating the vestiges of past discrimination.<sup>35</sup>

In addition, the Court concluded that the classifications were not narrowly tailored.<sup>36</sup> One reason for this conclusion was because both plans had minimal impact on the racial composition of schools’ student population.<sup>37</sup> This minimal impact on the schools’ racial composition “casts doubt on the necessity of using racial classifications.”<sup>38</sup> A second reason for the Court’s conclusion was that the school districts failed to give “serious, good faith consideration of workable race-neutral alternatives.”<sup>39</sup>

The plurality opinion<sup>40</sup> concluded that the school districts’ additional reasons for employing the race-based enrollment plans also violated the Equal Protection Clause. The school districts asserted two additional compelling interests: (1) to reduce racial concentration in their schools, and (2) to make sure that racially concentrated school patterns did not prevent nonwhite students from accessing the best schools.<sup>41</sup> The plurality found that the two plans were not narrowly tailored to achieve the educational and social benefits that would result from diversity.<sup>42</sup> The plurality maintained that the policies were not tied to a pedagogic concept determining the level of diversity needed to attain the asserted educational benefits of diversity; rather, the plans were linked to the racial demographics of each school district.<sup>43</sup>

In his concurrence, Justice Kennedy rejected the plurality’s suggestion that “the Constitution requires school districts to ignore the problem of de facto resegregation in schooling.”<sup>44</sup> Justice Kennedy also declared that “[d]iversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue.”<sup>45</sup>

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<sup>35</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 721 (2007).

<sup>36</sup> *Id.* at 727.

<sup>37</sup> *Id.* at 734.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 735 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003)).

<sup>40</sup> Hereafter, we refer to those portions of Roberts’ opinion joined by Justices Scalia, Thomas, and Alito as the “plurality opinion.” Those sections are Part III-B, *id.* at 725-33, and Part IV, *id.* at 735-48.

<sup>41</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 725 (2007) (citing Brief for Respondents at 19, *Parents Involved*, 551 U.S. 701 (No. 05-908)).

<sup>42</sup> *Id.* at 726.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 788 (Kennedy, J., concurring).

<sup>45</sup> *Id.* at 783.

Kennedy stated that diversity—an interest of K-12 schools—is furthered by “a diverse student body, one aspect of which is its racial composition.”<sup>46</sup> However, Justice Kennedy found that neither school district’s student assignment policy was narrowly tailored.<sup>47</sup> In the case of Louisville, Justice Kennedy found that school officials did not have a “thorough understanding” of how its plan worked.<sup>48</sup> He reached this conclusion because the officials described the plan in “broad and imprecise” terms.<sup>49</sup> Justice Kennedy also agreed with the Court’s opinion that the policy was not narrowly tailored because it had a minimal impact on the number of student assignments that would be affected by the policy.<sup>50</sup> The policy’s lack of effect suggested that the school districts could have used race-neutral policies to achieve their goals.<sup>51</sup>

Justice Kennedy provided guidance for school districts seeking to use race-conscious measures to provide equal educational opportunities. He declared:

“If school authorities are concerned that the student-body compositions of certain schools interfere with the objective of offering an equal educational opportunity to all of their students, they are free to devise race-conscious measures to address the problem in a general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race.”<sup>52</sup>

Justice Kennedy went on to provide examples of general, race-conscious approaches to achieve racial diversity that would not be subject to strict scrutiny. These possibilities included “strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race.”<sup>53</sup> By contrast, Justice Kennedy found that individualized classi-

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<sup>46</sup> *Id.* at 788.

<sup>47</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 786 (2007).

<sup>48</sup> *Id.* at 784.

<sup>49</sup> *Id.* at 784-85.

<sup>50</sup> *Id.* at 790.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 788-89.

<sup>53</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 789 (2007).

fications would be subject to strict scrutiny.<sup>54</sup> Although he determined that these two plans did not satisfy the rigors of strict scrutiny, he did hold out for the possibility a program serving a prospective, compelling goal could, at least in theory, survive judicial analysis.<sup>55</sup>

## B. *White Enclaves and Parents Involved*

The *Parents Involved* decision provides an alarmingly effective tool for white enclaves to fight voluntary school district desegregation plans through litigation. In accordance with Justice Kennedy’s concurrence, districts can successfully assert that their voluntary plans satisfy the compelling interests of attaining the educational benefits of diversity or addressing the effects of de facto segregation. However, districts have a difficult time with respect to the narrow tailoring requirement. Justice Kennedy suggests that voluntary desegregation plans can be constitutional if they consider race as one of many individual student factors used to pass muster.<sup>56</sup> School districts can also use the generalized approaches laid out by Justice Kennedy to achieve racial diversity to avoid legal challenges. While it is likely that voluntary desegregation and generalized approaches will create more diversity than a return to a student assignment policy relying on neighborhood schools—given the slowly declining, but still existing, residential segregation in many communities<sup>57</sup>—*Parents Involved* struck down the most popular and effective student assignment strategies for voluntarily achieving diverse schools.

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<sup>54</sup> *Id.* at 783.

<sup>55</sup> *See id.* at 789-90 (asserting that the race classifications at issue “may be considered legitimate only if they are a last resort to achieve a compelling interest,” and “that the schools could have achieved their stated ends through different means” including “facially race-neutral means” or “a more nuanced, individual evaluation of school needs and student characteristics that might include race as a component”).

<sup>56</sup> *See id.* at 793 (“If those students were considered for a whole range of their talents and school needs with race as just one consideration, *Grutter* would have some application.”).

<sup>57</sup> *See* Erica Frankenberg, *The Role of Residential Segregation in Contemporary School Segregation*, EDUC. & URB. SOC’Y (forthcoming 2013), available at <http://eus.sagepub.com/content/early/2013/05/08/0013124513486288> (“Although residential segregation has been declining for the last two decades, Black-White segregation remains higher than that of Hispanics and Whites.”); Brief of the Swann Fellowship et. al. as Amici Curiae in Support of Respondents at 17, *Parents Involved*, 551 U.S. 701 (Nos. 05-908, 05-915) (describing the prevalent residential segregation in Mecklenburg County, North Carolina where “predominantly white, middle- and upper-middle class schools quickly became effectively closed to non-white students” when the public school system was federally compelled to abandon its desegregation policy).

Even more, research suggests that Kennedy's approaches may not be as successful if implemented in fully integrated schools.<sup>58</sup> Specifically, research suggests that race-neutral approaches, such as those involving the use of some measure of household income, are usually most successful in creating *racially* diverse schools in communities where there is a high overlap between race and poverty.<sup>59</sup> Additionally, the most commonly used metric of income—student eligibility for free or reduced lunch status—is particularly less effective to achieve racial diversity.<sup>60</sup> As a result, there are unresolved questions about the extent to which income data can be used for student assignment purposes.<sup>61</sup> Therefore, using geography-based student assignment plans are likely to produce some integration. However, the most common approaches after *Parents Involved* were either multifactor or solely socioeconomically based, both of which are less likely to create racially diverse schools.<sup>62</sup>

After *Parents Involved*, a group of white parents filed to reopen a challenge against Lynn, Massachusetts' voluntary integration plan.<sup>63</sup> The Supreme Court denied the certiorari petition six months before accepting *Parents Involved*.<sup>64</sup> The district court judge, however, declined to reopen the case.<sup>65</sup> The First Circuit upheld the lower

<sup>58</sup> See ERICA FRANKENBERG, *Integration after Parents Involved: What Does Research Suggest about Available Options?*, in INTEGRATING SCHOOLS IN A CHANGING SOCIETY: NEW POLICIES AND LEGAL OPTIONS FOR A MULTIRACIAL GENERATION 53, 63 (Erica Frankenberg & Elizabeth DeBray eds., 2011) (discussing the limitations of the race-conscious approaches to school integration provided in Justice Kennedy's opinion).

<sup>59</sup> Brief of Amicus Curiae Walt Sherlin in Support of Respondents at 8, *Parents Involved*, 551 U.S. 701 (No.'s 05-908 & 05-915). See also Brief of Amicus Curiae American Civil Liberties Union in Support of Respondents, *Parents Involved*, 551 U.S. 701 (No.'s 05-908 & 05-915) (showing that magnet schools were less successful in reducing racial isolation when the Department of Education under President George W. Bush required that MSAP grantees switch to race-neutral admissions).

<sup>60</sup> Sean Reardon et al., *Implications of Income-Based School Assignment Policies for Racial School Segregation*, 28 EDUC. EVALUATION & POL'Y ANALYSIS 49, 67(2006).

<sup>61</sup> See Valerie Strauss, *Why is Obama's Agriculture Department Blocking School Integration?*, WASH. POST (Feb. 7, 2013, 5:00 AM), <http://www.washingtonpost.com/blogs/answer-sheet/wp/2013/02/07/why-is-obamas-agriculture-department-blocking-school-integration/> (discussing the raising of concerns by the Obama administration that the use of free and reduced price lunch data in integration policies could violate federal law).

<sup>62</sup> Meredith P. Richards et al., *Achieving Diversity in the Parents Involved Era: Evidence for Geographic Integration Plans in Metropolitan School Districts*, 14 BERKELEY J. AFR.-AM. L. & POL'Y 65, 95-96 (2012).

<sup>63</sup> *Comfort v. Lynn Sch. Comm.*, 541 F. Supp. 2d 429, 430 (D. Mass. 2008).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

court’s decision.<sup>66</sup> At the same time, other groups were more successful in challenging integration in Beaumont, Texas and New York City.<sup>67</sup> In Beaumont, an outside legal group supporting the Seattle plaintiffs in the *Parents Involved* case threatened to sue the school district if it did not end its consideration of students’ race and the racial composition in deciding whether to grant transfer requests.<sup>68</sup> The outside legal group did not move forward with its lawsuit; however, the district did end its use of race as a deciding factor and instead, replaced it with socioeconomic status.<sup>69</sup> In New York City, a group filed a lawsuit on behalf of an Asian student denied admission to an institute that helped prepare black and Latino students for the selective school admissions test in the district.<sup>70</sup> Black and Latino students are generally underrepresented in the city’s selective schools.<sup>71</sup> In the end, the district settled the case and ended its use of race when considering applicants for admission.<sup>72</sup> Finally, after Chicago’s long-running desegregation case ended,<sup>73</sup> this school district agreed to remove its thirty-five percent cap on seats allotted to white students in magnet or other selective schools.<sup>74</sup> Thus, in the first five years after *Parents Involved*, there have been a number of instances where court holdings were used to challenge student assignment policies that sought to limit the creation of white enclave schools.

## II. MANIPULATION OF SCHOOL ASSIGNMENT POLICIES

White enclaves also fight to maintain school segregation by altering school assignment policies. The Supreme Court case, *Keyes v. School District No. 1, Denver Colorado*, suggests tactics white

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<sup>66</sup> *Id.*

<sup>67</sup> McDermott et al., *supra* note 10, at 14-15.

<sup>68</sup> *Id.*

<sup>69</sup> Emily Guevara, *Race-Based Transfers are Eliminated – BISD Trustees Approve New Policy Based on Students’ Economic Status*, BEAUMONT ENTERPRISE, Feb. 3, 2008, at A1.

<sup>70</sup> McDermott et al., *supra* note 10, at 15.

<sup>71</sup> *Id.*

<sup>72</sup> Ng et al. v. N.Y.C. Dep’t of Educ., No. 1:07-cv-04805 (E.D.N.Y., Dec. 16, 2008) (Bloomberg Law, Dockets, U.S. District Court for the Eastern District of New York Dockets) (entering judgment for plaintiffs in accordance with settlement agreement filed by parties).

<sup>73</sup> *United States v. Bd. of Educ. of Chi.*, 663 F. Supp. 2d 649 (N.D. Ill., 2009) (holding that school district had achieved unitary status).

<sup>74</sup> Sarah Karp, *Chicago Schools New Admissions Policy: Will Magnet Schools Become Less Diverse?*, CATALYST CHI. (Nov. 10, 2009), <http://www.catalyst-chicago.org/notebook/2009/11/10/chicago-schools-new-admissions-policy-will-best-magnets-become-less-diverse>.

enclaves can use to achieve this goal.<sup>75</sup> The plaintiffs in *Keyes* alleged that the school board used several techniques to maintain racially and ethnically segregated schools, including manipulating student attendance zones and implementing a neighborhood school policy.<sup>76</sup> Ultimately, the Supreme Court found in favor of the plaintiffs.<sup>77</sup> Even though *Keyes* outlaws purposeful attempts to segregate schools through student assignment policies, more recent events in Rock Hill, South Carolina suggest that white enclaves can still attempt to maintain racially segregated schools through the strategies examined in *Keyes*. This Part provides an overview of the *Keyes* case and its application to a similar case arising from Rock Hill, South Carolina.

### A. *Keyes Case Summary*

In *Keyes*, the Denver Public Schools was comprised primarily of white, Latino and black students.<sup>78</sup> The school district created obstacles to integration through an elaborate scheme, which included purposefully choosing school sites that would result in sustained segregation due to the district's neighborhood schooling policy.<sup>79</sup> For instance, the district built small schools deep inside of segregated communities to rule out racial mixing because any effort at integration would place these schools over capacity.<sup>80</sup>

The Court in *Keyes* held that the district court did not apply the correct legal standard in determining whether the school district's policies constituted de jure segregation.<sup>81</sup> On remand, the Court required the district court to determine whether there was intentional segregation in a substantial portion of the Denver Public Schools and whether

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<sup>75</sup> 413 U.S. 189 (1973).

<sup>76</sup> See *id.* at 211-12 (discussing school board's defense at trial that its "neighborhood school policy" resulted in minority concentrations within city schools because of established residential patterns rather than purposeful segregation policies). See also *id.* at 232-33 (citing Brief for Petitioners at 80-83, *Keyes v. Sch. Dist. No. 1, Denver, Colo.*, 413 U.S. 189 (1973) (No. 71-507)) (acknowledging the plausibility of contending that the school district merged school attendance zones with segregated residential patterns to create de facto school segregation).

<sup>77</sup> As a result, the Denver Public Schools were required to prove that the segregationist strategies used in the challenged schools were not applicable to the entire school district. If the tactics were relevant to other schools in the district, then the district would be required to eliminate the illegal tactics "root and branch." *Id.* at 213.

<sup>78</sup> *Id.* at 195.

<sup>79</sup> *Id.* at 191.

<sup>80</sup> *Id.* at 192.

<sup>81</sup> *Keyes v. Sch. Dist. No. 1, Denver, Colo.*, 413 U.S. 189, 213 (1973).

such segregation rendered the entire district a dual system before placing the burden on the district to prove that similar segregated schools were not the result of deliberate segregative actions.<sup>82</sup> The Court rejected the district’s claim that the segregation was necessarily caused by de facto segregation, which occurs when private choices of citizens lead to segregative conditions.<sup>83</sup> In particular, the Court identified instances where the school district systematically denied students opportunities to learn in integrated communities.<sup>84</sup> For instance, the Denver Public Schools funneled black students into predominately black schools through a “feeder” school structure.<sup>85</sup> Also, the Denver Public Schools constructed schools that—through site selection and capacity caps—intentionally resulted in segregated schools.<sup>86</sup>

The Court’s distinction between de facto and de jure segregation sheds light on a key maneuver that white enclaves have at their disposal. White enclaves rely on de facto segregation in housing planning by creating neighborhood assignment plans that maintain racial segregation in the public schools. For example, white enclaves may advocate for new school buildings to be located closer to their neighborhoods.<sup>87</sup> To have strict scrutiny applied to the case—a standard that typically invalidates racial classifications in education<sup>88</sup>—the plaintiffs in a *Keyes*-like scenario would have to prove that the government held a racial animus when enacting the racial classification.<sup>89</sup> It is unlikely that white enclaves would openly state that a proposed

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<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 206-07.

<sup>84</sup> *Id.* at 201.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 201-02.

<sup>87</sup> See *infra* Part II.B for a discussion of how a white enclave in Rock Hill, South Carolina attempted to circumvent racial segregation efforts by influencing the location of a new high school.

<sup>88</sup> See Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 839 (2006) (finding that racial classifications used by educational institutions have survived 27% of the time in federal courts).

<sup>89</sup> See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (finding that plaintiffs would have to establish “a clear pattern, unexplainable on grounds other than race, [that] emerges from the effect of the state action even when the governing legislation appears neutral on its face.”); *Washington v. Davis*, 426 U.S. 229, 244-45 (1976) (rejecting the contention that “the substantially disproportionate racial impact of a statute or official practice standing alone and without regard to discriminatory purpose, suffices to prove racial discrimination violating the Equal Protection Clause”).

classification was based purely on racial motives.<sup>90</sup> Thus, to avoid the *Keyes* result, white enclaves must advance nonracial reasons that have racial impacts when proposing anti-diversity initiatives.

### B. *Recent Developments in Rock Hill, South Carolina*

The recent actions of a white enclave in Rock Hill, South Carolina show how a group can use *Keyes*-like approaches to manipulate school assignment policies. Some white families filed an unsuccessful federal lawsuit opposing a plan that would have moved more white students into a nearly all black elementary school.<sup>91</sup> When the school district proposed to build a new high school, wealthier whites who lived on the north side of town advocated for building the school closer to their residences.<sup>92</sup> This group provided a nonracial reason for placing the school on the north side of town: shorter bus rides for north-side students.<sup>93</sup> The reasons advanced by the white enclave in Rock Hill failed to account for the fact that transportation times would be more evenly distributed among all students in Rock Hill.<sup>94</sup>

Because of political alliances between less wealthy white families—and their school board representatives—and black families, the school building was built closer to the predominately black south side of the district.<sup>95</sup> Aside from the advantages of diminishing the travel time for black students participating in the district's desegregation plan, building the school on the south side helped further integrate the Rock Hill School District.<sup>96</sup> This desegregation occurred because even white families from the north side of town were willing to travel to the new high school on the south side of town, even if the willingness to travel was based on keeping certain populations out of the north side.<sup>97</sup>

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<sup>90</sup> See Preston C. Green, III et al., *Achieving Racial Equal Educational Opportunity through School Finance Litigation*, 4 STAN. J. C.R. & C.L. 283, 292-94 (2008) (explaining how white southern districts adopted ostensibly racially neutral salary schedules based on standardized tests to justify racially disparate teacher salaries).

<sup>91</sup> See Stephen Samuel Smith, *Still Swimming Against the Resegregation Tide? A Suburban Southern School District in the Aftermath of Parents Involved*, 88 N.C. L. REV. 1145, 1158-61 (2010).

<sup>92</sup> *Id.* at 1161.

<sup>93</sup> *Id.* at 1161-62.

<sup>94</sup> *Id.* at 1162.

<sup>95</sup> *Id.* at 1161.

<sup>96</sup> *Id.* at 1164.

<sup>97</sup> See Smith, *supra* note 91, at 1163.

The Rock Hill elementary school battle suggests that political coalitions can overcome the opposition of white enclaves to implement voluntary desegregation plans. In essence, the key to desegregation in Rock Hill was based on forming a political coalition as opposed to advancing a legal challenge. The coalition in Rock Hill developed when the interests of blacks and working class whites converged. In this particular coalition, blacks desired that the new school be placed closer to the southern area of Rock Hill while working class whites wanted a school site away from the northern area of Rock Hill.<sup>98</sup> Blacks and working class whites wanted to avoid increased commute times for their students.<sup>99</sup> The convergent interests in this scenario allowed for an unlikely coalition (blacks and whites) to form and to ultimately defeat the goals of wealthier, more affluent whites on the north side of Rock Hill. Even if Rock Hill’s fact pattern does not repeat itself, it is reasonable to conclude that other scenarios exist where groups, apparently divergent in interests, align themselves for unlikely outcomes that are advantageous for racial and ethnic minorities. Therefore, Rock Hill represents the reality that white enclaves can no longer rely on populist-like arguments of race to defeat efforts at integration. White enclaves must now seek alternatives that are more suitable for those with a minority voice.<sup>100</sup>

### III. AT-LARGE ELECTIONS

In Wake County, North Carolina, a white enclave has sought circumvention of voluntary desegregation plans by enhancing its voting power through the adoption of at-large school board elections.<sup>101</sup> This approach ironically builds upon Professor Lani Guinier’s critique of the Voting Rights Act of 1965, the key federal statute designed to protect minority voting rights.<sup>102</sup> This Section provides an overview of the Voting Rights Act as well as Professor Guinier’s critiques of the Act and her suggestions for increasing the voting power of minorities.

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<sup>98</sup> Stephen Samuel Smith et al., *Electoral Structures, Venue Selection, and the (New?) Politics of School Desegregation*, 2 PERSP. ON POL. 795, 797 (2004).

<sup>99</sup> *Id.*

<sup>100</sup> See generally Smith et al., *supra* note 98 (using two case studies to demonstrate that local political arenas now provide African Americans with better opportunities to redress grievances than they did fifty years ago).

<sup>101</sup> See Erica Frankenberg & Sarah Diem, *School Board Leadership and Policymaking in Changing Political Environments*, 45 URB. REV. 117, 130-31 (2013).

<sup>102</sup> See *infra* Part III.A.

This Section then examines how the white enclave in Wake County used Guinier's theories in an attempt to increase its power over the school board. Finally, this Section examines whether Wake County's at-large election approach is permissible under the Voting Rights Act.

### A. *Voting Rights Act of 1965 and Professor Guinier's Critique*

The Voting Rights Act of 1965 included key provisions that would aid in the prevention of disenfranchisement of minority voters. Section 5 specifically targeted jurisdictions with a history of voter disenfranchisement and increased federal oversight of these jurisdictions.<sup>103</sup> Section 2's prohibitions generally apply to any effort to limit the right to vote wherever the violation occurred.<sup>104</sup> In *Thornburg v. Gingles*, the Supreme Court explained that plaintiffs had to prove that some governmental action resulted in the dilution of minority voting power in order to establish a violation under Section 2.<sup>105</sup> In examining the dilutive effect of governmental actions on minority voting rights, courts have focused on the ability of minority voters to elect candidates who have a physical resemblance to the minority voter. In *Thornburg*, the Court stated that electoral proportionality does not foreclose a Section 2 violation although sustained proportionality may preclude such a claim.<sup>106</sup> In *Badillo v. City of Stockton*, the Ninth Circuit held that the election of minority candidates by nonminorities provided evidentiary proof that could defeat a Section 2 claim.<sup>107</sup>

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<sup>103</sup> See Voting Rights Act of 1965 § 5, 42 U.S.C. § 1973c (2006).

<sup>104</sup> See Voting Rights Act of 1965 § 2, 42 U.S.C. § 1973 (2006).

<sup>105</sup> 478 U.S. 30, 43 (1986).

<sup>106</sup> *Id.* at 76-77.

<sup>107</sup> 956 F.2d 884, 890-91 (9th Cir. 1992). In *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013), the United States Supreme Court effectively reset a key provision of the Voting Rights Act. The Court, in response to a facial challenge to §§ 4 and 5 of the Voting Rights Act, struck down § 4(b) and did not reach a decision on the other challenged section or subsections. The Court rationalized the § 4(b) ruling on the basis that Congress authorized the use of an outdated formula that violated principles of equal sovereignty. Effectively, Congress had relied on voting data that was over forty years old to reauthorize § 4(b). In fact, the Court found that Congress had made no substantive changes to the formula in § 4(b) in the reauthorizations of the Voting Rights Act. Instead, the jurisdictions originally covered under § 5 (through the formula in § 4(b)) were continuously covered despite any improvements in voting discrimination. The decision in *Shelby County*, although never reaching § 5, negated § 5 because § 4(b) is the formula that triggers § 5 coverage. Although the Supreme Court has reduced the reach of § 5, the *Shelby County* decision does not affect the Voting Rights Act analysis for Wake County. Wake County is not a § 5 jurisdiction, and as such, Wake County can only be held liable under other provisions of the Voting Rights Act, such as § 2.

Although Professor Guinier supports vigorous voting rights protections for minorities,<sup>108</sup> she opposes the federal courts’ focus on increasing the representation of minorities in elected positions through single member districts.<sup>109</sup> While the Supreme Court’s decisions have led to increased visual representation of minorities in elected positions, Professor Guinier faults these decisions as doing little to address the capacity of minorities to influence the political process.<sup>110</sup> According to Professor Guinier, electing minorities through a process using only single-member districts results in fewer legislative coalitions and fewer representatives representing minority interests.<sup>111</sup> While the concept of single-member districts dictates that the minority group might have a secure representative of the same race, Professor Guinier’s counterargument is that binding the bulk of minority voters into one voting district results in a guaranteed win in only one district. On the other hand, combining a conglomeration of minority voters in all other districts results in guaranteed losses because minority voters possess no political influence in those other districts.<sup>112</sup>

Professor Guinier divides voting school districts into three categories: (1) safe districts; (2) influence districts; and (3) non-influential districts.<sup>113</sup> By focusing on the creation of safe districts, Professor Guinier argues that the courts’ current construction of the Voting Rights Act merely assures that minorities will have a visible likeness representing them.<sup>114</sup> For example, a voting district that is seventy percent minority may elect one minority legislator, but that district’s population could be split in such a way that two districts that would otherwise be predominately white would now be both become “minority influence” districts. The resultant electoral landscape is that minorities would have influence in two districts instead of one.

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<sup>108</sup> See Lani Guinier, *The Representation of Minority Interests: The Question of Single-Member Districts*, 14 CARDOZO L. REV. 1135, 1135-38 (1993) [hereinafter Guinier, *Representation of Minority Interests*].

<sup>109</sup> *Id.* at 1156-71.

<sup>110</sup> See Lani Guinier, *Groups, Representation, and Race-Conscious Districting: A Case of the Emperor’s Clothes*, 71 TEX. L. REV. 1589, 1596-1601 (1993).

<sup>111</sup> See Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1116-18 (1991) [hereinafter Guinier, *Triumph of Tokenism*].

<sup>112</sup> See Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413, 1482-83 (1991) [hereinafter Guinier, *No Two Seats*].

<sup>113</sup> See Guinier, *Representation of Minority Interests*, *supra* note 108, at 1156-68.

<sup>114</sup> See Guinier, *Triumph of Tokenism*, *supra* note 111, at 1116-18.

While influence does not equate to perpetual wins, representatives elected in minority influence districts must be responsive to minority political needs or risk defeat in upcoming elections. Increasing the number of “minority-influence” districts increases the number of representatives that must answer to the minority group. Increasing the accountability of representatives precipitates increased political influence through moderated policies that account for the views of minorities.<sup>115</sup> Yet, focusing on the creation of “safe districts” merely assures that minorities will have a visible likeness representing them.<sup>116</sup>

Professor Guinier further maintains that while single-member school districts may address the discrimination that keeps minorities out of political office, these districts do not rid the political process of discrimination.<sup>117</sup> She believes that those hoping to quiet the political voice of minorities will consign their discriminatory views to the legislative process and away from the electoral process.<sup>118</sup> While the law prohibits electoral discrimination,<sup>119</sup> Professor Guinier notes that minorities are often not protected from perceived discriminatory acts at the legislative level.<sup>120</sup> Legislators who wish to defeat the political desires of minority voters can collaborate at the legislative level to achieve such an end.<sup>121</sup> Thus, minority voters living inside of the district can become frustrated with a system that denies the group political voice because there are no protections from legislative discrimination.<sup>122</sup> Further, single-member districts that include large swaths of the minority population can leave those minority voters living outside of the district hopelessly seeking political voice because they are unable to influence the electoral process.<sup>123</sup>

Professor Guinier recommends proportional representation, which she believes can be achieved through cumulative voting<sup>124</sup>—where voters cast multiple votes, up to the number of open seats in an election.<sup>125</sup> Cumulative voting, when used in combination with lower

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<sup>115</sup> See *id.* at 1130-34.

<sup>116</sup> See *id.*

<sup>117</sup> See *id.* at 1119-22.

<sup>118</sup> See *id.* at 1120-22.

<sup>119</sup> See Voting Rights Act of 1965 § 2, 42 U.S.C § 1973 (2006).

<sup>120</sup> Guinier, *Triumph of Tokenism*, *supra* note 111, at 1120-22.

<sup>121</sup> See *id.* at 1123-24.

<sup>122</sup> See *id.* at 1116-17.

<sup>123</sup> See *id.* at 1126.

<sup>124</sup> See Guinier, *Representation of Minority Interests*, *supra* note 108, at 1169-72.

<sup>125</sup> See *id.* at 1169.

electoral thresholds, results in higher influence for minority voters because individual minority voters are allowed to aggregate all of their votes for one candidate.<sup>126</sup> This assures that minority voters achieve, at least, minimal political influence.<sup>127</sup> When cumulative voting operates outside of single-member districts, minority voters achieve more political influence because minority voters can pool their multiple votes with other minority voters and sympathetic nonminority voters who are not included in their political district.<sup>128</sup>

In many localities, whites still maintain a significant advantage in the general population; as such, whites should enjoy comparable political advantage in these areas, particularly in racially polarized elections. There are, however, some locales where minority population growth is outpacing white population growth, which indicates that minority voters may be the majority or may quickly be approaching majority status.<sup>129</sup> In majority-minority school districts—districts in which a majority of the enrollment are students of color—whites, who in majority-majority districts are normally perpetual electoral winners due to their majority status, can become perpetual losers due to their minority status. Professor Guinier’s analysis suggests that the proliferation of majority-minority districts creates open hostility because the white constituents of majority-minority districts can, at times, feel animosity at the prospect of losing political votes.<sup>130</sup> One possible outcome is that white voters are likely to exit the district in an attempt to avoid the perpetual loser status inherent in majority-minority districts. As the following discussion of Wake County demonstrates, white enclaves alternatively can seek to increase their voting power in elections if they choose to remain in the majority-minority voting district.

## B. *Wake County, North Carolina*

The proposal to move to at-large elections in Wake County, North Carolina is an example of how white enclaves seek to extend

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<sup>126</sup> See *id.* at 1169-71.

<sup>127</sup> See *id.*

<sup>128</sup> See *id.*

<sup>129</sup> See Frankenberg & Diem, *supra* note 101, at 124 (indicating that between 2000 and 2010, Wake County, North Carolina saw a 24% increase of Whites, but a 33.6% increase of Blacks, a 56.2% increase of Asians, and a 61.3% increase of Hispanics or Latinos).

<sup>130</sup> See Guinier, *No Two Seats*, *supra* note 112, at 1474-75.

their voting power through cumulative voting principles. Since its merger as a city-county school district in the 1970's, Wake County has used single-member sub-districts to elect its school board.<sup>131</sup> For the past several decades, Wake County has elected its school board members from nine single-member districts.<sup>132</sup> Elections are staggered in odd-numbered years, and each term consists of four years.<sup>133</sup> All but one of the nine districts is majority white.<sup>134</sup> White citizens in Wake County have seen a dramatic decrease in their voting influence in the county.<sup>135</sup> The population shift in Raleigh, North Carolina, the state capital and seat of Wake County, has not been as subtle as the overall

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<sup>131</sup> See Frankenberg & Diem, *supra* note 101, at 125-26.

<sup>132</sup> *Id.* at 126.

<sup>133</sup> *Wake County Board of Education*, WAKE COUNTY PUB. SCH. SYS., <http://www.wcpss.net/about-us/our-leadership/board-of-education/> (last visited July 19, 2013).

<sup>134</sup> According to data from the United States Census Bureau, the percentage of white persons in each school board district is as follows: District 1, 72.26%; District 2, 66.48%; District 3, 71.55%; District 4, 29.12%; District 5, 65.56%; District 6, 69.99%; District 7, 70.34%; District 8, 78.57%; District 9, 71.95%. To obtain these percentages, the authors extracted population statistics from census files supplied by the Wake County Planning, Development and Inspections Division. The data supplied by Wake County was coded by precinct. The authors recoded the precinct-level data as school board district-level data using the "District Relations Report." The District Relations Report allowed the authors to align each precinct with its corresponding school board district. The percentages are the result of dividing the number of white citizens by the total number of persons in a given school board district and multiplying the result by 100. Precincts that could not be reconciled using the District Relations Report were grouped into the No District category. These spreadsheets are on file with the GEORGE MASON UNIVERSITY CIVIL RIGHTS LAW JOURNAL.

<sup>135</sup> See *Census 1990 Raleigh, Wake Co., North Carolina, United States Comparison Data*, CITY OF RALEIGH, <http://www.raleighnc.gov> (last visited July 19, 2013) [hereinafter 1990 Census]; *Census 2000 Raleigh, Wake Co., North Carolina, United States Comparison Data*, CITY OF RALEIGH, <http://www.raleighnc.gov> (last visited July 19, 2013) [hereinafter 2000 Census]; *Census 2010 Raleigh, Wake Co., North Carolina, United States Comparison Data*, CITY OF RALEIGH, <http://www.raleighnc.gov> (last visited July 19, 2013) [hereinafter 2010 Census]. While whites comprised more than three of every four persons in the 1990 population count in Wake County, they represented only seventy-two percent of the population in 2000, and just two-thirds of the population in 2010. As groups increase or decrease in the general population, their voting power should ideally fluctuate with those increases. For example, it logically follows that a group with a large majority in the general population should enjoy a comfortable voting margin during election season.

shift in the county.<sup>136</sup> Raleigh accounts for approximately half the voters in Wake County.<sup>137</sup>

From 2000 to 2010, while the district’s white enrollment has declined from 63.2% to 49.5%;<sup>138</sup> this period also saw rapid enrollment increase.<sup>139</sup> The number of white enclave schools—defined as those with a white percentage that was ten points or higher than the district average—grew from eight of forty-seven elementary schools to thirty of eighty-four elementary schools in 2010.<sup>140</sup> Nonwhite enclave schools, by contrast, increased only from fifteen to nineteen during the same time period.<sup>141</sup> Notably, the increase of white enclave schools occurred in board districts located in the county, not those encompassing the city of Raleigh, where more of the minority residents lived.<sup>142</sup>

Since its merger in the 1970’s, the school district voluntarily implemented a desegregation policy, albeit one that changed over time.<sup>143</sup> Until 2000, the district sought to have between fifteen and forty-five percent African American students within each school.<sup>144</sup> Enclaves of white citizens opposed the diversity policy, but those enclaves did not generally gain traction amongst the electorate until 2009.<sup>145</sup> As of 2007, only one opponent of the Wake County Public

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<sup>136</sup> For instance, while nonwhite residents totaled only thirty-one percent of residents in Raleigh in the 1990 Census that percentage had increased considerably by the 2000 Census. 1990 Census, *supra* note 135; 2000 Census, *supra* note 135. In 2000, nonwhites encompassed roughly thirty-seven percent of the total population in Raleigh city. The 2010 Census reflected an even greater population shift in Raleigh. 2010 Census, *supra* note 146. Currently, nonwhites account for almost forty-seven percent of the population in Raleigh city. *Raleigh Demographics*, CITY OF RALEIGH, <http://www.raleighnc.gov/home/content/PlanLongRange/Articles/RaleighDemographics.html> (last updated July 17, 2013).

<sup>137</sup> According to the United States Census Bureau, the voting age population for Wake County is estimated at 666,380 and the voting age population for Raleigh is 310,656. See *Wake County, North Carolina: State and County Quick Facts*, U.S. CENSUS BUREAU, [http://factfinder2.census.gov/bkmk/table/1.0/en/DEC/10\\_DP/DPDP1/0500000US37183](http://factfinder2.census.gov/bkmk/table/1.0/en/DEC/10_DP/DPDP1/0500000US37183) (last visited Aug. 1, 2013); *Raleigh (city), North Carolina: State and County Quick Facts*, U.S. CENSUS BUREAU, [http://factfinder2.census.gov/bkmk/table/1.0/en/DEC/10\\_DP/DPDP1/1600000US3755000](http://factfinder2.census.gov/bkmk/table/1.0/en/DEC/10_DP/DPDP1/1600000US3755000) (last updated June 27, 2013).

<sup>138</sup> Frankenberg & Diem, *supra* note 101, at 127.

<sup>139</sup> *Wake County Demographics: Growth and Diversity*, WAKE COUNTY PUB. SCH. SYS., <http://www.wcpss.net/about-us/our-students/demographics/reports/Growth2005.pdf>.

<sup>140</sup> Frankenberg & Diem, *supra* note 101, at 126-27.

<sup>141</sup> *Id.* at 127.

<sup>142</sup> *Id.* at 126-27.

<sup>143</sup> *Id.* at 125.

<sup>144</sup> *Id.* at 124-25.

<sup>145</sup> *Id.* at 127.

School System (“WCPSS”) diversity policy had been elected.<sup>146</sup> The Fall 2009 election cycle, however, converted the generally peaceful school board elections in Wake County into heated contests in which WCPSS’s diversity policy was attacked in a campaign that politicized the diversity policy.<sup>147</sup>

As a result of those elections, Wake County residents elected anti-diversity policy candidates to all of the four contested school board seats.<sup>148</sup> Combined with the previously elected anti-diversity policy board member, the newly elected members now constituted a majority of the Wake County School Board.<sup>149</sup> In 2011, Wake County residents returned to the polls to elect school board members. Democrats, needing to win elections in two heavily Republican school districts, managed to regain control of the Wake County School Board.<sup>150</sup> Most recently, the Wake County School Board has struggled to develop an alternative diversity policy, and remains in turmoil after firing the superintendent that the anti-diversity policy majority hired less than two years earlier.<sup>151</sup>

Members of white enclaves, particularly from a handful of suburban-Wake County cities, have sought alteration of the electoral process, particularly before the electoral success of anti-diversity policy candidates in 2009. Officials from Wake Forest, Holly Springs, Garner, and Apex have endorsed or encouraged the move to at-large elections for school board.<sup>152</sup> The mayors from Apex and Holly Springs first endorsed the proposal for at-large elections in 2006; each town is more than eighty percent white.<sup>153</sup> Two years later, two other towns that are more than seventy percent white, Rolesville and Garner, also supported the proposal to add at-large seats to the Wake County school board.<sup>154</sup> By contrast, several towns with lower per-

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<sup>146</sup> Frankenberg & Diem, *supra* note 101, at 127.

<sup>147</sup> *Id.* at 128.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 129-30.

<sup>151</sup> Amanda Lamb, *Wake County Leaders Concerned after Tata’s Dismissal*, WRAL.COM (Oct. 2, 2012), <http://www.wral.com/wake-county-leaders-concerned-after-tata-s-dismissal/11614220/>.

<sup>152</sup> *School Board Elections Could Change*, NEWS 14 CAROLINA, <http://triad.news14.com/content/headlines/594065/school-board-elections-could-change/> (last visited July 19, 2013).

<sup>153</sup> Frankenberg & Diem, *supra* note 101, at 131 n.2.

<sup>154</sup> *Id.*

centages of white residents opposed these proposals.<sup>155</sup> Under the proposal, the new school board could comprise of seven representatives elected from single-member districts and two representatives elected at-large.<sup>156</sup>

### C. *Applicability of the Wake County Strategy to Other Jurisdictions*

While the white enclave in Wake County has been unsuccessful in its attempt to enact an at-large school board election, white enclaves in other jurisdictions may consider pursuing this strategy. The implementation of at-large school board elections can result in the addition of white school board members in a disproportional manner. For example, in a jurisdiction that is comprised of forty percent white and sixty percent of cohesively voting minorities, the addition of at-large school board members could cost minority voters a chance at obtaining and maintaining the majority on the school board. This is especially true if voters seek to influence the political process, a task which requires obtaining a majority on the school board. This circumstance arises because housing segregation is prevalent in the United States;<sup>157</sup> as a result of the combination of housing segregation and single-member districts, two districts would likely be predominately white while three districts would be predominately minority. The at-large districts, because of electoral politics, would likely result in the election of white-sponsored candidates. In this case, white-sponsored candidates would hold a majority in this predominately minority jurisdiction.

Other jurisdictions can face Section 2 challenges if white enclaves are able to implement at-large electoral schemes. In *Thornburg v. Gingles*, the Supreme Court opined that it “has long recognized that . . . at-large voting schemes may operate to minimize or cancel out the voting strength of racial [minorities in] the voting population.”<sup>158</sup> The Court further explained that “[t]he theoretical basis for this type of impairment is that where minority and majority voters consistently

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<sup>155</sup> *Id.*

<sup>156</sup> David N. Bass, *Group Pushes At-Large School Elections: Wake County Group Spurred by Reassignment and Busing Schedules*, CAROLINA J. ONLINE (Apr. 1, 2008), [http://www.carolinajournal.com/articles/display\\_story.html?id=4682](http://www.carolinajournal.com/articles/display_story.html?id=4682).

<sup>157</sup> See Carol Morello, *Study: Income Does Not Explain Segregation Patterns in Housing*, WASH. POST (Aug. 2, 2011), [http://articles.washingtonpost.com/2011-08-02/local/35270021\\_1\\_segregation-patterns-median-income-poor-white-neighborhoods](http://articles.washingtonpost.com/2011-08-02/local/35270021_1_segregation-patterns-median-income-poor-white-neighborhoods).

<sup>158</sup> 478 U.S. 30, 47 (1986) (citations omitted).

prefer different candidates, the majority, by virtue of its numerical superiority, will regularly defeat the choices of minority voters.”<sup>159</sup> While at-large election schemes are not per se violations of Section 2, minorities can establish a violation of that section by proving that the election schemes “minimize or cancel out their ability to elect their preferred candidates.”<sup>160</sup> Under *Thornburg*, plaintiffs must prove that the minority group in question is sufficiently populous and geographically concentrated as to constitute a significant population within a single-member district.<sup>161</sup> Plaintiffs must also prove that the minority group is politically cohesive. In addition, plaintiffs must demonstrate that the majority population can and usually does vote in a bloc to defeat minority efforts, therefore electing candidates of their choice in the absence of special circumstances.<sup>162</sup>

## CONCLUSION

This Article asserts that as white enrollment in public schools decrease, white enclaves may attempt to develop creative ways to maintain racially segregated schools. These strategies include legal challenges to school desegregations plans,<sup>163</sup> manipulation of school assignment policies,<sup>164</sup> and at-large elections.<sup>165</sup> This Article points out that coalitions consisting of racial minorities and other interested groups might prevent the use of school assignment manipulation strategies as a means for maintaining segregated schools.<sup>166</sup> This Article also explains that the advent of at-large school board elections is ironically based on Professor Guinier’s arguments for cumulative voting, which increases the voting power of racial minorities.<sup>167</sup> Lastly, this Article argues that racial minorities should argue that at-large school board elections can violate Section 2 of the Voting Rights Act.

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<sup>159</sup> *Id.* at 48.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 50.

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

<sup>163</sup> *See supra* Part I.

<sup>164</sup> *See supra* Part II.

<sup>165</sup> *See supra* Part III.

<sup>166</sup> *See supra* Part II.B.

<sup>167</sup> *See supra* Part III.A.