The Commonwealth's METCO Program as a Blueprint for Expanding School Integration Across District Lines

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"Prejudice is the child of ignorance. It is sure to prevail, where people do not know each other."[1]

I. INTRODUCTION

By 2045, for the first time in its history, the United States of America will no longer be comprised of a white majority.[2] American public schools already reflect this shift: In 2016, nonwhite students outnumbered white students for the first time.[3] Yet public schools are resegregating.[4] Students in poverty, who are disproportionately nonwhite, attend underresourced and understaffed schools and, unsurprisingly, test well below white peers in more affluent school districts.[5]

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1. 2 CHARLES SUMNER, *Equality Before the Law: Unconstitutionality of Separate Colored Schools in Massachusetts*, *in* THE WORKS OF CHARLES SUMNER 327, 372 (1875) (grounding theological legal equality framework in natural law theory espousing interracial communication, collaboration, and compassion).

2. *See* William H. Frey, *The U.S. Will Become 'Minority White' in 2045, Census Projects*, BROOKINGS INST. (Sept. 10, 2018), https://www.brookings.edu/blog/the-avenue/2018/03/14/the-us-will-become-minority-white-in-2045-census-projects [https://perma.cc/3JZF-9VCN] (discussing upcoming seismic shift in American demographics).

3. *See* ERICA FRANKENBERG ET AL., THE C.R. PROJECT, HARMING OUR COMMON FUTURE: AMERICA'S SEGREGATED SCHOOLS 65 YEARS AFTER BROWN 15 (2019), https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/harming-our-common-future-americas-segregated-schools-65-years-after-brown/Brown-65-050919v4-final.pdf [https://perma.cc/H8BP-RKDF] (discussing increasingly multiracial nature of public schools). The Civil Rights Project report describes school demographic trends—nationally, regionally, and by state—based on myriad factors including race and class, finding that although the nation's students are becoming dramatically more diverse, many schools are resegregating. *See id.* at 4-5, 18 tbl.2, 19 tbl.3. White students are the most isolated racial subgroup: On average, white students attend schools where 69% of peers are also white. *See id.* at 4.

4. *See id.* at 4-6 (highlighting resegregation and white isolation increasing in rural and suburban areas nationwide).

5. *See id.* at 4, 25 (highlighting resegregation's adverse effects on nonwhite students' "achievement, college success, long-term employment and income"); EMMA GARCÍA, ECON. POL'Y INST., SCHOOLS ARE STILL SEGREGATED, AND BLACK CHILDREN ARE PAYING A PRICE 3-4 (2020), https://files.epi.org/pdf/185814.pdf [https://perma.cc/248X-V5QJ] (analyzing differences in standardized test performance in schools based on race and poverty level).

In the Commonwealth of Massachusetts, statewide racial diversity increased substantially between 2008 and 2020, and many of the state's school districts reflect this trend.[6] Neither policy, nor any new push to implement the state's civil-rights-era Racial Imbalance Act (RIA), have intentionally steered this trend.[7] While it is true that racial diversity has increased in many districts, in the state's three largest cities—Boston, Springfield, and Worcester—students of color are increasingly concentrated in some of the state's lowest-performing schools.[8] In a majority of the state's cities, the number of intensely segregated nonwhite schools spiked between 2010 and 2020, despite the concurrent rise in diversity statewide.[9]

The legal scholarship on school segregation is vast, increasingly so since *Brown v. Board of Education* (*Brown I*),[10] when the Supreme Court effectuated what "may be the most important political, social, and legal event in America's twentieth-century history."[11] A more recent spark for school segregation

6. *See* JACK SCHNEIDER ET AL., CTR. FOR EDUC. & C.R., SCHOOL INTEGRATION IN MASSACHUSETTS: RACIAL DIVERSITY AND STATE ACCOUNTABILITY 9 (2020), https://cecr.ed.psu.edu/sites/default/files/Demography_Report_FINAL_7.24.20.pdf [https://perma.cc/GK7K-GN7J] (summarizing demographic trends at schools across Massachusetts between 2008 and 2020). Over the past decade, the number of racially diverse schools increased substantially statewide. *See id.* In 2008, only 384 of 1,850 Massachusetts schools were racially diverse; by 2020, 610 of 1,842 were. *See id.* The report defined "racially diverse" schools as those where the majority group is no more than 70%, and white students no less than 25% of the student body overall. *See id.* Despite the decline in white students' share of the overall population statewide since 2010, the highest performing schools in the Commonwealth are still predominantly white and located in the wealthiest zip codes. *See id.* at 7, 8, 20 (analyzing past decade in racial demographics across state's schools). The highest-poverty neighborhoods in Massachusetts still skew overwhelmingly toward people of color and have the state's most underresourced, lowest-performing schools. *See id.* at 4, 19 (indicating "existing accountability system may be promoting segregation by steering" higher incomes toward whitest schools).

7. *See id.* at 11; Racial Imbalance Act § 1, MASS. GEN. LAWS ch. 71, § 37D (2020) (codifying fundamental provisions around tracking of racial enrollment data and student transfer options); *see also* JENNIFER B. AYSCUE ET AL., THE C.R. PROJECT, LOSING GROUND: SCHOOL SEGREGATION IN MASSACHUSETTS 3-4 (2013), https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/losing-ground-school-segregation-in-massachusetts/ayscue-greenberg-losing-ground-segregation-mass.pdf [https://perma.cc/G2BD-WSGS] (reviewing trajectory of Massachusetts education reforms toward privatization and more charters since 1970s); SCHNEIDER ET AL., *supra* note 6, at 25 (noting dozen-plus districts with active integration plans under RIA).

8. *See* SCHNEIDER ET AL., *supra* note 6, at 17-19 (discussing complexities of data from past decade). While some schools in Boston, Springfield, Worcester, and other cities did become more racially diverse, that does not necessarily mean they became more balanced in terms of white and nonwhite students. *See id.* at 17 (detailing numbers from Springfield). Moreover, as fewer white students go to school in urban public schools, the number of low-performing, intensely segregated nonwhite schools rises in the state's cities. *See id.* at 18 (discussing disproportionate rates of poverty and attendance for students of color at low-performing schools).

9. *See id.* at 15 tbl.5 (depicting statistics for state's major cities). The number of intensely segregated schools has increased since 2010 in six of the Commonwealth's nine cities with intensely segregated, nonwhite schools. *See id.* (showing resegregation trends in urban centers). In 2019–2020, Boston, Worcester, and Springfield accounted for only 47 of the 610 racially diverse schools statewide. *See id.* at 11 (explaining three biggest cities have strikingly few diverse schools despite having more diversity).

10. 347 U.S. 483 (1954).

11. J. HARVIE WILKINSON III, FROM *BROWN* TO *BAKKE*: THE SUPREME COURT AND SCHOOL INTEGRATION 1954–1978, at 6 (1979) (contextualizing paradigm-shattering impact of *Brown* ruling in 1954); *see Brown I*, 347 U.S. at 495 (overturning long-established norm and legally sanctioned apartheid of racially segregated schools);

scholarship came following the Court's 2007 ruling in *Parents Involved in Community Schools v. Seattle School District No. 1*,[12] which had significant implications for K–12 school integration both nationally and for Massachusetts.[13] In all the legal scholarship on school segregation, however, emphasis on METCO—one of the oldest and most successful integration programs in the country—has been relatively scant.[14] This Note attempts to provide the central legal and policy focus METCO deserves because the program offers a proven solution not only to educational inequity but also, in less quantifiable ways, to social polarization.[15]

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see also Robert A. Garda, Jr., *The White Interest in School Integration*, 63 FLA. L. REV. 599, 651 (2011) (arguing white students, often overlooked in segregation literature, also need integration).

12. 551 U.S. 701, 748 (2007) (plurality opinion) (suggesting schools have no constitutional basis to adopt race-determinative K–12 admission policies).

13. *See, e.g.*, Osamudia R. James, *Closing the Door on Public School Integration:* Parents Involved *and the Supreme Court's Continued Neglect of Adequacy Concerns*, *in* OUR PROMISE: ACHIEVING EDUCATIONAL EQUALITY FOR AMERICA'S CHILDREN 215, 216 (Maurice R. Dyson & Daniel B. Weddle eds., 2009) (advocating for return to integrative education reform measure after *Parents Involved*); Maurice R. Dyson, *When Government Is a Passive Participant in Private Discrimination: A Critical Look at White Privilege and the Tacit Return to Interposition in* PICS v. Seattle School District, *in* OUR PROMISE: ACHIEVING EDUCATIONAL EQUALITY FOR AMERICA'S CHILDREN, *supra*, at 25, 28-29 (arguing *Parents Involved* reflects judicial perpetuation of white privilege in strict scrutiny era); *see also* L. Darnell Weeden, *Income Integration as a Race-Neutral Pursuit of Equality and Diversity in Education After the* Parents Involved in Community Schools *Decision*, 21 U. FLA. J.L. & PUB. POL'Y 365, 391-92, 397 (2010) (recommending national effort to expand socioeconomic integration); Richard D. Kahlenberg, Opinion, *How to Save METCO*, BOS. GLOBE, Nov. 13, 2007, at A15 (raising concern Metropolitan Council for Educational Opportunity (METCO) could face *Parents Involved*-style challenge); James E. Ryan, *The Supreme Court and Voluntary Integration*, 121 HARV. L. REV. 131, 132-33 (2007) (arguing *Parents Involved* would not ultimately impact many school policies but could affect future integration); Randall L. Jackson, Recent Development, Comfort v. Lynn School Committee*: Illustrating the Untapped Potential of an Explicit Link Between Voluntary Desegregation and Local Constitutionalism*, 41 HARV. C.R.–C.L. L. REV. 553, 556 (2006) (suggesting states and districts take closer look at Lynn, Massachusetts model for intradistrict K–12 integration); Dennis Ford Eagan, Note, *The Past, Present, and Future of School Desegregation Law in Massachusetts*, 34 SUFFOLK U. L. REV. 541, 542-43 (2001) (assessing Massachusetts's resegregation and RIA's constitutionality in 2000, seven years prior to *Parents Involved*).

14. *See, e.g.*, Erika K. Wilson, *Toward a Theory of Equitable Federated Regionalism in Public Education*, 61 UCLA L. REV. 1416, 1465 n.279 (2014) (paying peripheral attention to METCO in detailing cross section of voluntary integration program models); Weeden, *supra* note 13, at 391-92 (suggesting METCO potentially vulnerable to constitutional challenge after *Parents Involved*); Eagan, *supra* note 13, at 556-58 (comprehensively assessing RIA's constitutionality without mentioning METCO); *see also* Ryan, *supra* note 13, at 144, 148-49 (arguing slight short-term impacts of *Parents Involved*, but reticence to pursue integration possible long-term consequence).

15. *See, e.g.*, KATHERINE APFELBAUM & KEN ARDON, PIONEER INST., WHITE PAPER NO. 129, EXPANDING METCO AND CLOSING ACHIEVEMENT GAPS 10-11, 17 (2015), https://files.eric.ed.gov/*fulltext*/ED565731.pdf [https://perma.cc/3DZU-QAZR] (highlighting social mission behind METCO and ongoing social impact); Marcell Cooper-Teleau et al., *Where Racism Dissipates: 14 WHS Alumni on Why Expanding METCO Is the Right Thing to Do*, WICKED LOC. (June 29, 2020, 2:33 PM), https://www.wickedlocal.com/story/wellesley-townsman/2020/06/29/where-racism-dissipates-14-wellesley-high-school-alumni-on-why-expanding-metco-is-right-thing-to-do/42989073/ [https://perma.cc/LFU4-SSYL] (writing on friendships built through METCO, profound impact into adulthood, and advocating program's expansion); RUCKER C. JOHNSON WITH ALEXANDER NAZARYAN, CHILDREN OF THE DREAM: WHY SCHOOL INTEGRATION WORKS 157, 253 (2019) (noting METCO's founding after RIA's passage and generally advocating for integration policy).

Section II.A of this Note contextualizes the outsized role Massachusetts has long played in the legal, social, and political history of school segregation and how the RIA has quietly been the basis for the METCO program since the 1960s.[16] Section II.B then chronologizes the federal jurisprudence on school segregation, against which the constitutionality of the RIA and the METCO program this Note's final analysis weighs.[17] Section III.A synthesizes a case for why K–12 schools absolutely have a compelling interest in making policy that promotes integration and why METCO falls constitutionally within that compelling interest paradigm.[18] Section III.B then offers a narrow-tailoring analysis of the RIA generally and, with more depth, of METCO's two-tiered admissions process.[19] This Note concludes that both the RIA and the METCO admissions process would likely survive strict scrutiny if challenged on equal protection grounds and that METCO deserves expansion based on its track record of success.[20]

II. HISTORY

A. Massachusetts: An Outsized Legacy in the History of School Segregation

1. Birthplace of Separate but Equal and the Nation's First Desegregation Law

The doctrine of "separate but equal" is best known, if by one single case, from *Plessy v. Ferguson*.[21] Yet the doctrine originated in Massachusetts almost fifty years before *Plessy* in *Roberts v. City of Boston*.[22] Charles Sumner represented

16. *See infra* Section II.A.1 (contextualizing historical segregation in K–12 schools, nationally and in Massachusetts); *infra* Sections II.A.2-3 (providing overview of METCO's history and enabling legislation).

17. *See infra* Section II.B.1 (reviewing jurisprudential history from Thurgood Marshall's days heading NAACP); *infra* Section II.B.2 (discussing retrenchment from *Brown I* and curtailing of judiciary's support for integration and strict scrutiny); *infra* Section II.B.3 (noting significance of most recent federal litigation over race-based K–12 admissions in Massachusetts); *infra* Section II.B.4 (laying out legal rules from *Parents Involved* which would govern equal protection challenge to METCO).

18. *See infra* Section III.A (suggesting overwhelming legal authority and social science evidence of compelling interest in diverse schools).

19. *See infra* Section III.B (weighing METCO's constitutionality through RIA post-*Parents Involved*).

20. *See infra* Section III.C (concluding METCO likely constitutional and recommending renewed call for program's expansion).

21. *See* 163 U.S. 537, 551-52 (1896) (reasoning Constitution permitted Louisiana to dictate where Black people sit on trains); *see also* Leonard W. Levy & Harlan B. Philips, *The* Roberts *Case: Source of the "Separate but Equal" Doctrine*, 56 AM. HIST. REV. 510, 518 (1951) (noting *Plessy* better known even though it came well after *Roberts v. City of Boston*).

22. *See* 59 Mass. (5 Cush.) 198, 209-10 (1849) (upholding Boston's segregationist policy and finding any harm done to Sarah Roberts insignificant). The court explained Roberts's challenge fell under the state statute allowing damages for any child "unlawfully excluded from public school instruction." *See id.* at 204 (describing statutory basis for claims). Nevertheless, the court saw no unlawfulness in Roberts's exclusion from her school of choice because of her skin color. *See id.* at 210 (denying relief). Massachusetts was the first state to jurisprudentially permit school segregation by race. *See id.* at 209 (rejecting Roberts's case for admission to white school); *Brown I*, 347 U.S. 483, 491 n.6 (1954) (noting first reported appearance of separate but equal doctrine in *Roberts*).

five-year-old Sarah C. Roberts, whose father brought suit after Boston denied Sarah admission to the all-white school she wanted to attend because it was closer to home than the all-Black school she was forced to attend.[23] The famed Chief Justice Lemuel Shaw, however, upheld Boston's policy to segregate its schools based on skin color.[24] In "an inversion of the order of logic," Shaw framed the legal question "in such a way as to make possible by his answer the 'separate but equal' doctrine," reasoning that while Black citizens were equal under the Commonwealth's constitution, constitutional equality did not mean Black kids had a right to go to school with their peers.[25]

Perhaps because he lost the day, Sumner's oral argument from *Roberts* is not well-known, but it "deserves to be included in a volume of great documents on American democracy."[26] Sumner framed the issue of segregated schooling in biblical terms to illustrate the injury segregation inflicted on children, both Black and white:

> [W]hites themselves are injured by the separation. Who can doubt this? With the Law as their monitor, they are taught . . . practically to deny that grand revelation of Christianity, the Brotherhood of Man. Hearts, while yet tender with childhood, are hardened . . . . Nursed in the sentiments of Caste . . . they are unable to eradicate it from their natures.[27]

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23. *See Roberts*, 59 Mass. (5 Cush.) at 198-200 (outlining details of Boston's plan and impact on traveling distance for Roberts); Levy & Phillips, *supra* note 21, at 512 (stating Sumner represented Roberts).

24. *See Roberts*, 59 Mass. (5 Cush.) at 210 (ruling increased distance to school not material to constitutional question). In *Roberts*, Chief Justice Shaw held that it was within the school board's "honest judgment" to forbid Roberts and all Black peers from attending any white school, and that it was neither unduly burdensome, nor did it unlawfully deny Sarah her right to public school instruction under the Massachusetts Constitution or statutory law. *See id.* at 206, 209-10 (rejecting, while praising, Sumner's "learned and eloquent" arguments). The court took time to emphasize that local schools, in its view, are in the best position to say what "honest judgment" means, and how to exert it. *See id.* at 209 (affirming racial exclusions, but somehow reasoning Black students still legally equal).

25. *See* Levy & Phillips, *supra* note 21, at 516-17 (reviewing *Roberts* and Chief Justice Shaw's flawed logic to uphold segregation).

26. *See id.* at 512-13 (arguing Sumner's oral advocacy in *Roberts* deserves more prominent place in American history).

27. SUMNER, *supra* note 1, at 369-70 (teaching new conception of racial and moral equality in context of common schools). Sumner implored Chief Justice Shaw to see the conflict between Boston's racially exclusive schools and what, in Sumner's view, were fundamental principles of equality. *See id.* at 370-71 (expanding his application of moral argument to school context). Sumner suggested that "[if] colored people are ignorant, degraded, and unhappy, then should they be the especial objects of [white citizens'] care." *Id.* at 376. Sumner went on:

> [Sarah Roberts] calls upon you to decide a question which concerns the personal rights of other colored children,—which concerns the Constitution and Laws of the Commonwealth,—which concerns that *peculiar institution* of New England, the Common Schools,—which concerns the fundamental principles of human rights,—which concerns the Christian character of this community.

Id. at 329. Sumner concluded his oral argument as such:

Though Massachusetts would become the first state to desegregate its schools by statute six years after *Roberts* in 1855, Shaw's doctrine time and again won out during Reconstruction, as state courts across the country relied on *Roberts*'s separate but equal reasoning to maintain segregation in schools and other public accommodations.[28] By the end of the nineteenth century, the Supreme Court relied on Shaw's logic in *Roberts* to uphold Louisiana's racist rail law in *Plessy*.[29]

2. The Boston Busing Crisis and the RIA

In the twentieth century, Massachusetts is best known in the context of school segregation for Boston's 1974 busing riots, but a decade before that crisis, the legislature actively sought to integrate schools by passing the RIA.[30] In the early 1960s, a state advisory committee urged passage because school segregation had become an emergency.[31] The RIA would focus not only on extending educational opportunities to students of color in underresourced, inferior schools, but also on white students, about whom the RIA's drafters worried were

> The school is the little world where the child is trained for the larger world of life. . . . [I]t must cherish and develop the virtues and the sympathies in the larger world. . . . Society and intercourse are means established by Providence for human improvement. They remove antipathies, promote mutual adaptation and conciliation, and establish relations of reciprocal regard. Whoso sets up barriers to these thwarts the ways of Providence, crosses the tendencies of human nature, and directly interferes with the laws of God.

Id. at 371-72.

28. *See* Act effective Apr. 28, 1855, ch. 256, §§ 1–2, 1855 Mass. Acts 674, 674-75 (prohibiting exclusion of any student from public school admission on account of race or religion); APFELBAUM & ARDON, *supra* note 15, at 10 (noting Massachusetts desegregation law first in country); *e.g.*, Lehew v. Brummell, 15 S.W. 765, 767 (Mo. 1891) (relying on *Roberts*); Martin v. Bd. of Educ., 26 S.E. 348, 349 (W. Va. 1896) (relying on *Roberts*); People *ex rel.* King v. Gallagher, 93 N.Y. 438, 448, 453 (1883) (relying heavily on *Roberts* and praising Shaw's balance).

29. *See* Plessy v. Ferguson, 163 U.S. 537, 544-45 (1896) (pointing directly to Chief Justice Shaw's *Roberts* reasoning to justify Supreme Court's racist ruling).

30. *See* APFELBAUM & ARDON, *supra* note 15, at 8 (juxtaposing busing crisis of 1970s and success of METCO program); (Racial Imbalance) Act of Aug. 18, 1965, ch. 641, 1965 Mass. Acts 414 (codified as amended at MASS. GEN. LAWS ch. 15, §§ 1I–1J, ch. 71, §§ 37C–37D) (encouraging elimination of racial imbalance in schools); Eagan, *supra* note 13, at 553-54 (discussing busing riots stemming from desegregation order). Eagan contextualized the adoption of the RIA at the height of the civil rights movement and noted then-contemporary equal protection challenges to the RIA. *See* Eagan, *supra* note 13, at 556-62 (analyzing RIA's constitutionality before major case law discussed in this Note).

31. *See* ADVISORY COMM. ON RACIAL IMBALANCE & EDUC., MASS. STATE BD. OF EDUC., BECAUSE IT IS RIGHT—EDUCATIONALLY: A SUMMARY OF THE REPORT OF THE ADVISORY COMMITTEE ON RACIAL IMBALANCE AND EDUCATION 3 (1965), https://dsgsites.neu.edu/desegregation/wp-content/uploads/2015/04/neu_rx914162k.pdf [https://perma.cc/U37U-R8MV] [hereinafter BECAUSE IT IS RIGHT—EDUCATIONALLY] (diagnosing harm of racial segregation in Massachusetts public schools). The preliminary report summarized the risks of segregation by race in school: "Racial imbalance represents a serious conflict with the American creed of equal opportunity." *Id.* at 1 (assessing risks of harm). The report found the overwhelming majority of minority students attended predominately minority-race schools. *See id.* (prioritizing students of color in RIA's purpose). At the same time, the drafters noted that "the overwhelming majority of white children attend schools that are either all white or have fewer than five nonwhite children enrolled." *Id.* (expressing concerns about impact on white students).

developing "fear and prejudice crippl[ing] the[ir] creativity and productivity."[32] The RIA was the Commonwealth's attempt to heal the wounds inflicted by segregation on both Black and white students through school integration.[33]

The RIA requires that all public school districts track enrollment data by race to identify any schools that lack "racial balance."[34] The RIA generally defines a racially balanced school as one where nonwhite students make up 30%–50% of the student body.[35] A racially imbalanced school is one where the student body is over 50% nonwhite.[36] The RIA considers a school racially "isolated" if it is less than 30% nonwhite.[37] If by a district's enrollment data, however, the Massachusetts Department of Elementary and Secondary Education (DESE) identifies a lack of racial balance in some or all of a district's schools, the RIA's 30%–50% target for achieving racial balance is not strictly enforced.[38] Moreover, demographic realities often make attaining that target ratio impossible.[39]

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32. *Id.* at 1-2 (listing harms "detrimental to sound education" and consequences of racial segregation).

33. *See id.* at 1 (noting injuries caused by segregation and urging action to desegregate); APFELBAUM & ARDON, *supra* note 15, at 10 (explaining policy rationales of RIA).

34. *See* Act Amending the Racial Imbalance Law, ch. 636, sec. 5, § 37D, 1974 Mass. Acts 609, 611-14 (codified as amended at MASS. GEN. LAWS ch. 71, § 37D).

35. *See id.* (defining racially balanced schools).

36. *See id.* (defining when schools considered racially imbalanced).

37. *See id.* (defining schools with "racial isolation"). To help determine racial isolation, Massachusetts requires:

> The school committee of each city, town, and regional school district shall annually, at such time and in such form as the commissioner shall determine, submit to the commissioner statistics sufficient to enable a determination to be made of the percent of white and non-white pupils attending all public schools and attending each public school under the jurisdiction of each such committee.

Id. (requiring districts to track racial data).

38. *See* Act Amending the Racial Imbalance Law sec. 5, § 37D (requiring all schools track data, but plan to reduce or eliminate only if imbalance identified); *see also* Comfort v. Lynn Sch. Comm., 283 F. Supp. 2d 328, 348 (D. Mass. 2003) (describing details of Lynn's DESE-approved plan, which set balancing metrics outside 30%–50% target), *aff'd*, 418 F.3d 1 (1st Cir. 2005). Section 37D requires only that DESE notify the school district of the identification of imbalance but not necessarily remedy the imbalance. *See* Act Amending the Racial Imbalance Law sec. 5, § 37D (requiring data, but not expressly mandating specific remedy for imbalance); *see also id.* at sec. 1, § 1I (giving DESE power to require integration remedies from districts but allowing "reasonable time" for implementation); Sch. Comm. of Springfield v. Bd. of Educ. (*Springfield III*), 319 N.E.2d 427, 432-33 (Mass. 1974) (affirming state's authority to implement Springfield busing plan despite amendments barring redistricting and busing). *Springfield III* followed the RIA's 1974 amendments, which did not alter the data-tracking requirement, but gave districts the "reasonable time" to work flexibly with DESE to shape a remedy. *See Springfield III*, 319 N.E.2d at 432; Act Amending the Racial Imbalance Law sec. 1, § 1I (reducing state's authority to require districts to actively eliminate racial imbalance or isolation). The 1974 amendments also severely restricted means by which DESE or any of its task forces could enforce desegregation plans: Busing was barred, and construction incentives became effectively the only available tool to gain state funding for districts to build new facilities for the purpose of reducing imbalance or isolation. *See* Act Amending the Racial Imbalance Law sec. 1, § 1I (amending RIA to restrict DESE's authority).

39. *See* SCHNEIDER ET AL., *supra* note 6, at 25 (calling for expansion of METCO because demographic realities make intradistrict integration impracticable); David Scharfenberg, *Massachusetts' Public Schools Are Highly Segregated. It's Time We Treated That like the Crisis It Is*, BOS. GLOBE (Dec. 11, 2020, 8:05 AM),

The RIA's intradistrict transfer provision grants nonwhite students attending racially imbalanced schools a statutory right to transfer to any isolated school within their own district.[40] The intradistrict provision also grants white students the same right in the inverse scenario: If a white student at a racially isolated school wants to transfer to an imbalanced school within their home district, that student is entitled to a transfer.[41] Space permitting, districts must honor these transfer requests whether from a white or nonwhite student, so long as the requested transfer would serve to maintain or move the receiving school closer to racial balance.[42] In most Massachusetts cities, however, there are not nearly enough white students for schools to achieve the RIA's 30%–50% target for balance.[43]

Acknowledging that integration is more feasible across school district lines, the RIA's voluntary interdistrict integration provision allows any district to "adopt a plan for attendance at its schools by any child who resides in another city, town, or regional school district in which racial imbalance" exists.[44] Correspondingly, the RIA's interdistrict transfer provision allows students attending racially imbalanced schools to transfer to districts where they do not live that have proposed a voluntary interdistrict transfer plan and received DESE's approval under the RIA's voluntary integration provision.[45]

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https://www.bostonglobe.com/2020/12/11/opinion/massachusetts-public-schools-are-highly-segregated-its-time-we-treated-that-like-crisis-it-is/ [https://perma.cc/2KSN-8H58] (pointing out impossibility of intradistrict integration to any practical, tangible end). As Scharfenberg writes, "it's difficult for the Boston Public Schools to integrate when just 15 percent of their students are white." Scharfenberg, *supra* (highlighting impracticability of intradistrict integration to extent needed for balance).

40. *See* Act Amending the Racial Imbalance Law sec. 5, § 37D (providing intradistrict transfer right within students' home district if current school racially imbalanced).

41. *See id.* (granting symmetric transfer right to white students attending racially isolated schools).

42. *See id.* (stating districts must honor transfer requests permitting availability, otherwise districts have "reasonable time" to fix). Where more students request a transfer than an individual school has available space, districts are to "reasonably provide for priority for non-white pupils attending schools in which more than seventy percent of the pupils are non-white," that is, if transferring from a racially imbalanced school. *See id.* (codifying RIA's definitions and intradistrict transfers).

43. *See* SCHNEIDER ET AL., *supra* note 6, at 25 (emphasizing demographics make intradistrict remedies impracticable); Scharfenberg, *supra* note 39 (criticizing state for not showing any "real urgency" in decades on segregation).

44. *See* Act Amending the Racial Imbalance Law sec. 7, § 12A (permitting interdistrict transfers to localities voluntarily willing to accept nonresident students). Section 12A, however, *only* provides the interdistrict transfer right to students attending a racially imbalanced school, which generally applies to nonwhite students. *See id.* (granting interdistrict transfer right to students at imbalanced schools). Though white students can and do attend schools with more than 70% nonwhite peers, it is much more likely—just by the numbers—that nonwhite students will avail themselves of section 12A's transfer provision. *See id.* (aiming provision at districts with high number of imbalanced schools).

45. *See id.* (allowing nonwhite students at imbalanced schools to transfer to districts with DESE-approved plans).

3. The METCO Program

The RIA's corresponding interdistrict provisions are the basis for the second-oldest voluntary school integration program in the country: METCO.[46] METCO evolved from "Operation Exodus," where a group of Black Boston parents, fed up with the educational apartheid in the city, organized with empathetic white school leaders to enroll Black students at all-white schools.[47] In 1966, based on the Exodus model, Boston parents established METCO, Inc., a private 501(c)(3) nonprofit organization, which was given statutory authority to facilitate the integration of Boston students of color into seven original suburban school districts.[48] As authorized under the RIA, METCO, Inc. supports all of the program's thirty-three suburban districts, providing various school-year and summer services for students and families.[49] METCO, Inc.'s primary role is to manage the admissions process for Boston-resident applicants seeking enrollment through the program in a suburban school.[50]

In 2019, METCO, Inc. changed its admissions policy from a long-used "waiting list" process—which included around 15,000 students—to an admission lottery.[51] The new METCO lottery randomly selects applicants who are then placed on a referral list.[52] The only eligibility requirement is that the

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46. *See* APFELBAUM & ARDON, *supra* note 15, at 6, 10 (chronicling METCO's history and calling program "starting point for [RIA's] implementation"). METCO is the "longest-running desegregation program in the country." *Id.* at 10 (highlighting legacy of success).

47. *See id.* at 10-11 (distinguishing voluntary nature of METCO from "forced busing of the 1970s"); JOHNSON, *supra* note 15, at 156-58 (explaining history of Operation Exodus, led by parent–activist Ruth Batson).

48. *METCO's History*, METCO, INC. (2022), https://metcoinc.org/about/metco-history/ [https://perma.cc/W3UN-DGZS] (providing timeline for METCO's establishment, statutory authority under RIA, and discussing original districts). For clarity's sake, the program in its entirety is commonly referred to as METCO, but the nonprofit which manages the program is herein referred to as "METCO, Inc." *See* APFELBAUM & ARDON, *supra* note 15, at 10 (describing management and administration of program at nonprofit and district levels).

49. *See* Act Amending the Racial Imbalance Law sec. 7, § 12A (codifying all districts' authority to accept nonresident transfers if transfer applicants will increase racial balance); *METCO's Structure*, METCO, INC. (2022), https://metcoinc.org/home/structure/ [https://perma.cc/2P2Z-U4MS] (noting METCO, Inc.'s nonprofit status and explaining supportive functions for all districts); *see also* AYSCUE ET AL., *supra* note 7, at 1 (explaining RIA's 1974 amendments forbade forced busing, but expanded incentives to cover construction costs). In the 1980s and 1990s, twenty-two districts took advantage of the incentives, promised to join METCO and accept Boston students, and received state monies to build new school buildings. *See* AYSCUE ET AL., *supra* note 7, at 1-2 (noting success of construction incentive until 2001 elimination of statutory integration tool).

50. *See METCO's Structure*, *supra* note 49 (outlining basic organizational structure in relation to suburban "METCO Districts").

51. *See* James Vaznis, *Metco Will Move to a Lottery System to Choose Students*, BOS. GLOBE (May 6, 2019, 10:51 PM), https://www.bostonglobe.com/metro/2019/05/06/state-approves-new-rules-for-metco-admissions/ [https://perma.cc/72E9-XJK9] (detailing policy change, with significant pushback from parents already on waiting list).

52. *See* JEFFREY C. RILEY, MASS. DEP'T OF ELEMENTARY & SECONDARY EDUC., BOSTON METCO ADMISSIONS POLICY 2-3 (2020), https://metcoinc.org/apply/policy/ [https://perma.cc/AP54-ZNRB] (releasing guidance on METCO admissions lottery and phase-out of previous "waiting list" system). For the 2020–2021 school year, students on the waiting list before the organization's change to a lottery were given preference to be referred to participating districts for possible admission at second tier. *See id.* at 2 (stipulating waiting list phase-out).

applicant–child be a resident of Boston.[53] Race is not used in any way respecting lottery selections or the order in which selected applicants are placed on the referral list.[54]

There are two gates of entry to METCO; this Note thus refers to the entire admissions process as "two-tiered."[55] METCO, Inc.'s lottery is the first tier, wherein the nonprofit receives applications from students residing in Boston and accepts a number of applicants ranging from 100% to 200% of the seats that districts forecast having available for the following school year.[56] At the second tier, METCO, Inc. then refers chosen applicants in order of participating district requests for a final decision at the district level.[57] On this second tier, participating suburban districts retain some additional authority: They cannot ask about race or otherwise discriminate against any protected class, but they may interview referred applicants and "holistically consider information provided on the common application form and . . . local district goals related to the purpose of METCO."[58] For most, if not all, METCO districts, these goals include creating more racial diversity.[59]

4. The Success of METCO

METCO enrolls over 3,000 students in thirty-three participating districts each year, and these students carry on the program's remarkable legacy of success.[60] Academically, students in third, sixth, and tenth grades in Boston Public Schools (BPS) score at least fifteen points below the statewide average on the Massachusetts Comprehensive Assessment System (MCAS) in English and math.[61] METCO students regularly perform almost exactly on par with state

53. *See id.* at 1 (mentioning residency requirement).

54. *See id.* at 3 (stressing racial identifiers not used in deciding whether to refer applicant); *see also* Vaznis, *supra* note 51 (describing lottery system).

55. *See* RILEY, *supra* note 52, at 2-3 (noting METCO, Inc.'s referral role and participating districts' final say); *see also* Vaznis, supra note 51 (detailing new admissions lottery on first tier).

56. *See* RILEY, *supra* note 52, at 1-3 (releasing guidance on METCO admissions lottery and phase-out of previous waiting list system).

57. *See id.* at 2-3 (explaining all METCO districts use same application to assess referred applicants); Act Amending the Racial Imbalance Law, ch. 636, sec. 7, § 12A, 1974 Mass. Acts 614-15 (codified as amended at MASS. GEN. LAWS ch. 76, § 12A) (requiring approval of interdistrict plan before district can accept nonresident transfers); *see also* Vaznis, *supra* note 51 (explaining previous "first come, first serve" waiting list policy eliminated with new lottery).

58. *See* RILEY, *supra* note 52, at 3 (outlining possible holistic factors districts might consider at second tier of METCO admissions process).

59. *See id.* at 1-3 (updating DESE's stance on how METCO districts should devise admission policies for referred applicants).

60. *See METCO's Structure*, *supra* note 49 (outlining basic structure of program, including thirty-three suburban partners); APFELBAUM & ARDON, *supra* note 15, at 20 (emphasizing program's successful track record of academic achievement). Between 2005 and 2015, METCO's enrollment consistently hovered between 3,269 and 3,338. *See* APFELBAUM & ARDON, *supra* note 15, at 23 (noting disconnect between program success and lack of expansion).

61. *See* APFELBAUM & ARDON, *supra* note 15, at 21-22 figs.15-16 (depicting higher scores on state standardized tests for METCO students); *see also* JOSHUA D. ANGRIST & KEVIN LANG, INST. FOR THE STUDY OF

MCAS averages, far above their BPS peers.[62] In 2008, only 64.4% of "urban" students in Massachusetts graduated from a public or charter high school in four years, compared to 94.8% of METCO students.[63] College enrollment rates for METCO students are 30% above their BPS peers, and 7% higher than students statewide.[64]

But METCO's success goes beyond what academic data can measure.[65] METCO owes its social, cultural, and political legacy not only to the Civil Rights Movement and local affiliates like Ruth Batson, Ellen Jackson, and Jean McGuire, but also to white suburban administrators, school board members, and parents, who felt an obligation to take direct action—and did so—even when unpopular.[66] In the 1960s, school leaders in METCO towns joined the program because they worried their white students were ill-prepared to live and work in a multiracial society and at risk of developing prejudicial views of the world outside the suburban bubble.[67] These suburban administrators further realized that attaining the social and civic benefits of integration for their students would be impossible unless they worked across district lines because Boston's nearby suburbs were nearly all-white.[68] METCO thus emerged from a feeling of

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LAB., DOES SCHOOL INTEGRATION GENERATE PEER EFFECTS? EVIDENCE FROM BOSTON'S METCO PROGRAM 2 (2004), https://ftp.iza.org/dp976.pdf [https://perma.cc/MBQ3-DVQV] (finding METCO enrollment in participating schools bears no negative impact on white students).

62. *See* APFELBAUM & ARDON, *supra* note 15, at 21-22 figs.15-16 (comparing METCO students' MCAS scores to state and Boston averages).

63. *See id.* at 20 fig.14 (noting METCO's higher graduation rates compared to Boston, Springfield, and charter school peers).

64. *See id.* at 20 (stipulating MCAS data "sporadic," but METCO success on college attainment clearly superior to peers).

65. *See id.* at 6, 11, 17 (noting social mission, benefits, impact, of integration for students of color and white peers); *see also Elementary & Secondary Education Act of 1966: Hearings on S. 3046, S. 2928, and S. 3012 Before the Subcomm. on Educ. of the S. Comm. on Lab. & Pub. Welfare*, 89th Cong. 2207 (1966) [hereinafter *Hearings*] (statement of Rudolph J. Fobert, Superintendent of Schools, Lexington School Committee) (stating Lexington's willingness to participate in METCO). Even sixty years ago, suburban administrators pointed to the impracticability of truly realizing integration without willingness to work across district lines. *See Hearings*, *supra* (testifying on METCO).

66. *See Hearings*, *supra* note 65, at 2207 (advocating for federal funding supporting METCO at congressional hearing); APFELBAUM & ARDON, *supra* note 15, at 10 (noting Batson and Jackson parent organizers and catalysts behind Operation Exodus in 1965); *Jean McGuire*, JOHN D. O'BRYANT AFR. AM. INST., https://www.northeastern.edu/aai/services/special-collections/jean-mcguire/ [https://perma.cc/Y8H2-BY3K] (recognizing Jean McGuire helped to found and then directed METCO for forty-three years); U.S. COMM'N ON C.R., A TIME TO LISTEN . . . A TIME TO ACT: VOICES FROM THE GHETTOS OF THE NATION'S CITIES 72 (1967) (discussing concerns racial isolation caused white students' narrow mindedness).

67. *See, e.g.*, SUMNER, *supra* note 1, at 369-71 (setting out argument on segregation's lasting damage); *Brown I*, 347 U.S. 483, 494 (1954) (holding harm "unlikely ever to be undone"); BECAUSE IT IS RIGHT—EDUCATIONALLY, *supra* note 31, at 3 (using *Brown I* language in making call to arms for Commonwealth).

68. *See Hearings*, *supra* note 65, at 2207 (statement of Rudolph J. Fobert, Superintendent of Schools, Lexington School Committee) (recognizing "responsibility of the suburbs toward the Metropolitan community"). The congressional papers on the 1966 hearings included statements from several suburban superintendents from original METCO towns. *See id.* (containing statements by Fobert (Lexington), John B. Chaffee (Wellesley), and others).

suburban responsibility toward Greater Boston.[69] In the words of METCO's current Chief Executive Officer, participating districts "opened the door to METCO because they value diversity."[70]

All success notwithstanding, the METCO experience for students from Boston is often riddled with hardship: They wake up earlier than their suburban peers each morning for school buses that depart as early as 6:30 a.m. to get to the suburbs.[71] Far worse, METCO students often face discrimination at their suburban schools.[72] These persisting challenges METCO students face can be understood in the context of the broader school integration movement, which peaked in the 1950s and 1960s but had become disfavored in Boston and across the country by the late 1970s when busing became a hot-button issue.[73] Paradoxically, Boston's 1974 busing riots overlapped with METCO's first decade (1966–1975), during which both METCO student enrollment and district participation significantly increased.[74]

By the 1990s, however, integration had largely grown out of fashion with national education reformers, and the Commonwealth allocated funds for the state's first charter schools while several METCO districts simultaneously cut

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69. *See id.* (describing sense of suburban "responsibility" for equalizing educational opportunities with nonwhite Boston students).

70. Editorial, *Time to Equalize and Modernize Metco*, BOS. GLOBE (Mar. 1, 2019, 5:19 PM), https://www.bostonglobe.com/opinion/editorials/2019/03/01/time-equalize-and-modernize-metco/FDeC4usLaQDoEuQGsYryDJ/story.html [https://perma.cc/ZX6E-5R8C] (interviewing METCO CEO Milagros Arbaje-Thomas on new admissions process and organizational goals).

71. *METCO History*, SCITUATE PUB. SCHS., https://www.scituate.k12.ma.us/district_info/metco/m_e_t_c_o_history [https://perma.cc/V8S6-6UMB] (providing timeline of METCO's history generally and in Scituate).

72. *See* Gal Tziperman Lotan, *In Exploring the History of Educational Inequity, METCO Students Find Echos of the Present*, BOS. GLOBE (Mar. 13, 2021, 3:58 PM), https://www.bostonglobe.com/2021/03/13/metro/exploring-history-educational-inequity-metco-students-find-echos-present/ [https://perma.cc/D5B8-7EEM] (illustrating many challenges METCO students faced in suburban schools). METCO recently organized an initiative, open to students in all participating districts, called the Boston Equity Action Teams (BEAT). *See id.* For Samone Lumley, a Dorchester resident who goes to Wellesley High School and participates in BEAT, her father explained to her firsthand the discrimination METCO students can face from his own days as a METCO student and alumnus of nearby Belmont High School: The school board received letters opposing METCO entirely, and on his first day decades ago, he saw "a sign with a racial slur telling him and other students from Boston to go back home." *See id.* Lumley and students from several other districts have taken part as interns and youth educators in their schools. *See id.*

73. *See* MICHAEL J. GRAETZ & LINDA GREENHOUSE, THE BURGER COURT AND THE RISE OF THE JUDICIAL RIGHT 4 (2016) (noting prominence of Nixon's promise to appoint "strict constructionists" to oppose desegregation); JOHNSON, *supra* note 15, at 195 (noting Boston's backlash following court-ordered desegregation and subsequent white flight); *see also* KEVIN M. KRUSE, WHITE FLIGHT: ATLANTA AND THE MAKING OF MODERN CONSERVATISM 114 (2005) (noting backlash to integration far from contained to "Old South").

74. *Compare* KRUSE, *supra* note 73, at 13 (noting impact of busing riots in northern cities on national sentiment), *with* Steven J. Cohen, *Education Law: Racial Imbalance*, 15 ANN. SURV. MASS. L. 423, 425 (1968) (highlighting early federal and state funding consequently encouraged METCO expansion). For 1968–1969, METCO received "$367,500.50 in state aid and $447,928.00 in federal aid . . . [and] placed 918 students" in suburban schools. *See* Cohen, *supra*, at 425 n.8 (memorializing early federal funding for integration in Massachusetts).

funding or dropped the program altogether.[75] Without the federal funding that helped start the program—and with state METCO funding not keeping up with inflationary pressures—the numbers of METCO students and participating districts have been stagnant for decades.[76]

B. Federal Precedents and Current Controlling Standards

1. Integration's Golden Era: Marshall's Focus on Moral and Psychological Harm

Leading the NAACP during its most heralded litigatory era, without which neither the RIA nor the METCO program would have been possible, Thurgood Marshall pursued more than legal precedent in the school segregation cases.[77] Marshall's deeper motivation was social change: to convince white Americans—primarily the nine sitting atop the nation's highest court—to embrace a new sense of racial morality.[78] At oral arguments in *Brown I*, Marshall juxtaposed American segregation with policies of Nazi Germany and dared the

75. *See* Tom Coakley, *Metco Program Facing Woes*, BOS. GLOBE, May 27, 1992, at 1, 14 (discussing diminishing enrollment, funding plateau, and funding increase freezes beginning in 1990); AYSCUE ET AL., *supra* note 7, at 2-3 (highlighting eliminated funding incentives, METCO's consequently stagnant budget, and lack of enrollment growth); Molly Townes O'Brien, *Desegregation and the Struggle for Equal Schooling: Rolling the Rock of Sisyphus*, *in* OUR PROMISE: ACHIEVING EDUCATIONAL EQUALITY FOR AMERICA'S CHILDREN, *supra* note 13, at 3, 16 (pinpointing peak of integration movement in 1988 and political difficulties of showing demonstrable success); *Massachusetts Charter Schools*, MASS. DEP'T OF ELEMENTARY & SECONDARY EDUC. (Mar. 23, 2022), https://www.doe.mass.edu/charter/ [https://perma.cc/JQ83-UY6X] (explaining charter schools established and funded in Massachusetts in 1993).

76. *See METCO's History*, *supra* note 48 (discussing 1986 funding cuts after program had reached thirty-seven districts in 1976); APFELBAUM & ARDON, *supra* note 15, at 5, 7 (noting consistent support for program but legislative neglect toward expansion); Colin A. Young, *In METCO Budget*, *Natick's Linsky Pushes Money for Afterschool Programs*, METROWEST DAILY NEWS (Mar. 19, 2019, 3:48 PM), https://amp.wickedlocal.com/amp/5674375007 [https://perma.cc/TAZ8-9BAD] (noting shortages in transportation funding and buses enabling participation in extracurriculars, sports, tutoring); Alana Semuels, *The Utter Inadequacy of America's Efforts to Desegregate Schools*, ATLANTIC (Apr. 11, 2019), https://www.theatlantic.com/education/archive/2019/04/boston-metco-program-school-desegregation/584224/ [https://perma.cc/687E-9H9E] (noting generational "pride" in program despite stagnant funding and persisting challenges); *cf. Grants and Other Financial Assistance Programs: FY2020: METCO*, MASS. DEP'T OF ELEMENTARY & SECONDARY EDUC., https://www.doe.mass.edu/grants/2020/317/ [https://perma.cc/5LQB-N43X] [hereinafter *Grants FY2020*] (exemplifying METCO districts must apply for additional funding to afford participation in program).

77. *See* O'Brien, *supra* note 75, at 9-10 (chronicling NAACP's vision of strategic, methodical litigatory attack to overturn *Plessy*); *see also Brown I*, 347 U.S. 483, 493 (1954) (framing importance of education with civil and moral stakes); Sweatt v. Painter, 339 U.S. 629, 634-35 (1950) (ruling University of Texas Law School admission policy unconstitutional for excluding applicants of color); *supra* note 11 (contextualizing importance of *Brown* to school desegregation efforts in mid- to late-twentieth century). The Court turned aside arguments from counsel for the law school, to wit, "that excluding petitioner from that school is no different from excluding white students from the new law school. This contention overlooks realities." *See Sweatt*, 339 U.S. at 634 (dispelling suggestion separate somehow equal).

78. *See* O'Brien, *supra* note 75, at 8-10 (describing evolution of NAACP under Charles Hamilton Houston and Marshall's leadership). O'Brien points out the NAACP's goals were not merely litigatory, but more broadly cultural and societal. *See id.* at 9 (explaining how for Marshall, changing public conscience long-term goal).

Court to deny the hypocrisy therein.[79] Perhaps most of all, Marshall's team focused intensely on the material harm—academic, economic, and especially psychological—that segregation inflicts on children.[80]

Though the evidentiary use of social science was jurisprudentially controversial, segregation's *psychological* impact was crucial to Marshall's winning argument in *Brown I*.[81] In Chief Justice Warren's words, children in segregated schools develop "a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[82] To remedy that harm, integration was the Warren Court's answer.[83]

In the three decades following *Brown I*, America's schools became dramatically more integrated by both race and socioeconomic status.[84] But Marshall's prediction that school segregation would be eradicated by 1960 was, sadly, far off the mark.[85] Though *Brown I* deserves its place as a milestone in the quest for racial progress, the Court did not answer how quickly schools needed to implement the ruling—a year later in *Brown v. Board of Education*

79. *See* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 693-94 (1976) (offering comparison Marshall posed at oral arguments in shadow of World War II).

80. *See id.* at 314-15 (discussing Marshall's use of social scientist's doll study to illustrate psychological harm); Kenneth B. Clark & Mamie P. Clark, *Emotional Factors in Racial Identification and Preference in Negro Children*, 19 J. NEGRO EDUC. 341, 343, 350 (1950) (studying detrimental impact of America's legalized apartheid system on child's mental health, confidence, and self-image).

81. *See Brown I*, 347 U.S. at 494 (reasoning Equal Protection Clause forbids segregated schooling, with "added force" at K–12 level); *see also* Clark & Clark, *supra* note 80, at 343, 350 (detailing results from famous "doll test," showing perceptions of inferiority resultant among Black children); KLUGER, *supra* note 79, at 319 (noting challenges proving cause-and-effect link between segregation and constitutionally remediable harm).

82. *See Brown I*, 347 U.S. at 494 (characterizing lifelong harm of segregation and refusing to keep Court ignorant of psychological science).

83. *See Brown I*, 347 U.S. 483, 495 (1954) (deciding case without expressly mentioning Fourteenth Amendment's Due Process Clause). The Court's ruling stopped far short of declaring education on par with other fundamental rights emerging during this jurisprudential era. *See id.* at 495-96 (inviting attorneys general to file amicus briefs to determine remedy); *see also* O'Brien, *supra* note 75, at 9 (describing how Houston and Marshall predicted white backlash from integration well before *Brown I*). *But see* J. HARVIE WILKINSON III, *supra* note 11, at 81 (analogizing order to desegregate without proper enforcement to infantry assault without proper artillery support).

84. *See* O'Brien, *supra* note 75, at 11 (calling *Brown I* "watershed victory" for integration movement); FRANKENBERG ET AL., *supra* note 3, at 4 (noting progression of school desegregation after *Brown* rulings). In the immediate aftermath of the *Brown* rulings, legal scholars sensed that a "new era of public schooling might be in reach." *See* O'Brien, *supra* note 75, at 11 (analogizing to Sisyphus gaining momentum pushing rock). *But see* FRANKENBERG ET AL., *supra* note 3, at 4 (stating segregation rates on rise after string of judicial decisions ended desegregation measures); O'Brien, *supra* note 75, at 16 (pointing to 1988 "high-water mark" for integration nationally, before more recent resegregation trends).

85. *See* KLUGER, *supra* note 79, at 717 (reflecting on Marshall's inaccurate prediction of segregation's end in public schools); *see also* O'Brien, *supra* note 75, at 11 (describing optimism felt among integrationists right after *Brown I*). O'Brien explains that integration's peak was especially high, perhaps counterintuitively, in the South, where the number of Black students attending majority-white schools increased from just 2.3% in 1964 to 37.6% by 1976. *See* O'Brien, *supra* note 75, at 15 (noting measurable progress in southern public schools post-*Brown* rulings).

(*Brown II*),[86] the now-infamous "all deliberate speed" sequel left the questions of implementation and remedy vague and vulnerable to an impending white backlash.[87]

2. Backlash to Brown *and the Strict Scrutiny Era*

Brown II kept responsibility on mostly white school leaders to make integration work, while a white backlash to integration rapidly took political and cultural root on both a local and national scale.[88] The four Supreme Court Justices appointed by President Nixon often seemed to heed the white backlash to integration.[89] After Chief Justice Warren's 1969 retirement, the dawn of Chief Justice Burger's tenure marked a clear paradigm shift; federal courts have since worried more about whether remedies are unduly burdensome on nonbeneficiaries—in plainer terms, white people—rather than focusing on the harm segregation does to children of all races.[90] Meanwhile, Judge Garrity's 1974 desegregation order in *Morgan v. Hennigan*[91] led to Boston's busing riots that brought nationally televised violence—waged by white residents with rocks,

86. 349 U.S. 294 (1955).

87. *See id.* at 301 (ordering lower courts to oversee desegregation with "all deliberate speed"); Dyson, *supra* note 13, at 26-27 (arguing strict scrutiny era precipitated resegregation, ensured educational inequity, and protected privilege). Dyson characterizes the standard as a threshold for constitutional violations that courts seem to find in any policy that is perceived as too "burdensome on nonbeneficiaries." *See* Dyson, *supra* note 13, at 29-30 (positing strict scrutiny standard functions like veil for white privilege in federal jurisprudence).

88. *See, e.g.*, KRUSE, *supra* note 73, at 161 (explaining state and local school boards led backlash to integration); DERRICK BELL, SILENT COVENANTS: *BROWN V. BOARD OF EDUCATION* AND THE UNFULFILLED HOPES FOR RACIAL REFORM 18, 133 (2004) (highlighting what in Bell's view inevitably followed *Brown*: white backlash and lacking government enforcement). Reflective of this rising tide against integration were President Nixon's two successful presidential campaigns in 1968 and 1972 using the Southern Strategy, in which he adamantly opposed busing and tacitly promised to stop it through legal means alongside his tough-on-crime platform. *See* GRAETZ & GREENHOUSE, *supra* note 73, at 12, 87 (describing significance of judiciary, crime, and busing in President Nixon's two successful presidential campaigns); see also KRUSE, *supra* note 73, at 9 (highlighting influence of segregationist ideology on "New Right" conservatives of 1960s–1980s).

89. *See infra* note 90 and accompanying text (noting impact of Nixon's nominees on Court's approach to desegregation); GRAETZ & GREENHOUSE, *supra* note 73, at 81, 98 (highlighting Warren Court's waning patience after Dr. King's death in 1968); *see also* O'Brien, *supra* note 75, at 16 (describing public's declining support for integration and Court's increased scrutiny after Chief Justice Warren's retirement).

90. *See* Dyson, *supra* note 13, at 28-29 (equating paradigm shift to "legal enshrinement of the protection of white privilege"); O'Brien, *supra* note 75, at 16 (highlighting significance of Chief Justice Warren's 1969 retirement in tracing ups and downs of integration history); Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 206, 213 (1973) (holding unconstitutional district policy which intentionally created and maintained segregated character of schools for years); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 25-26 (1971) (upholding district court's racial quota because it represented "starting point" rather than rigid threshold); Green v. Cnty. Sch. Bd., 391 U.S. 430, 441 (1968) (holding facially neutral "freedom-of-choice" policy unconstitutional given superficiality of district's effort to integrate); *see also* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 798-99 (2007) (Stevens, J., dissenting) (decrying "cruel irony" of citing *Brown I* while dismantling attempt to increase school diversity). At the end of the Warren era, *Green v. County School Board* reflected a brighter moment of jurisprudential willingness to enforce *Brown I*'s mandate: The Court declared segregation unlawful until eliminated "root and branch." *See Green*, 391 U.S. at 437-38 (demanding school leaders to integrate with more alacrity).

91. 379 F. Supp. 410 (D. Mass.), *aff'd sub nom.* Morgan v. Kerrigan, 509 F.2d 580 (1st Cir. 1974).

bricks, and metal fragments—on school buses carrying Black students home from white areas.[92] Alongside the white resistance to integration evolving nationwide, the psychological risk segregated education poses to children became a secondary issue in federal courts.[93]

For this legal paradigm shift, segregationists owe much of their thanks to *Milliken v. Bradley*.[94] When a group of Black plaintiffs brought equal protection claims alleging segregated and inferior schools in Detroit, the District Court for the Eastern District of Michigan gave city and state officials several months to propose both intradistrict and interdistrict remedies.[95] Comparing the two remedies, the district court found that integrated schools of equal quality would have been impossible to achieve under a "Detroit-only" plan and ordered an interdistrict remedy incorporating metropolitan Detroit's mostly white suburbs.[96] The district court acknowledged residential segregation as a necessary consideration in shaping any effective solution to school segregation, even if those suburbs had not played a direct role in the harm done to students of color in Detroit's inferior schools.[97]

The Burger Court flatly rejected that argument.[98] White children from suburban towns bused to schools inside Detroit—where, more often than not,

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92. *See id.* at 420, 432-33 (holding Boston violated RIA via "feeder pattern" policy which increased school segregation in late 1960s); JOHNSON, *supra* note 15, at 154-55 (contextualizing Garrity's ruling and violent white backlash directed against Black residents). Johnson illustrates that white-on-Black violence in Boston expanded because tacit political support made white residents believe they had the right to do so because opposing integration was merely "fighting for neighborhoods." JOHNSON, *supra* note 15, at 155 (chronologizing leadup to busing riots, including involvement of local neo-Nazi groups).

93. *See* Dyson, *supra* note 13, at 27 (explaining disproportionately white-friendly outcomes in K–12 strict scrutiny cases); *supra* note 90 (noting Burger Court's shift to primary consideration of burden to nonbeneficiaries); *see also* BELL, *supra* note 88, at 18, 132-33 (criticizing Court for retrenching from *Brown I*'s promise, but withholding surprise regarding white unwillingness to change).

94. 418 U.S. 717, 735-36 (1974) (holding no remedy absent evidence of intent to discriminate among officials in suburban districts); *see* GRAETZ & GREENHOUSE, *supra* note 73, at 98 (highlighting majority's ignorance of "inconvenient fact" state had purposefully acted to worsen segregation).

95. *See* Bradley v. Milliken, 338 F. Supp. 582, 588-89, 593 (E.D. Mich. 1971) (finding injurious conduct violated Equal Protection Clause and had scope beyond city), *aff'd*, 484 F.2d 215 (6th Cir. 1973), *rev'd*, 418 U.S. 717 (1974); O'Brien, *supra* note 75, at 16 (explaining district court's remedy encompassed other districts because Detroit-only plan would not right constitutional wrong).

96. *See Milliken*, 338 F. Supp. at 593 (finding passive denial of equal education can violate Fourteenth Amendment when segregation persists); Bradley v. Milliken, 345 F. Supp. 914, 928 (E.D. Mich. 1972) (deciding appropriate desegregation area encompassed many school districts in Detroit area), *aff'd*, 484 F.2d 215 (6th Cir. 1973), *rev'd*, 418 U.S. 717 (1974). The district court's findings made clear Detroit had been purposely segregated for years; both city and state officials played a deliberate, if at times tacit, role therein; under a "Detroit-only" remedy, the state's duty to provide schools that were not racially identifiable would be demographically impossible. *See Milliken*, 338 F. Supp. at 594-95 (recognizing role of state officials and undeniable connection to white suburban segregation).

97. *See Milliken*, 338 F. Supp. at 593 (emphasizing impracticability of any remedy not cutting across school districts).

98. *See Milliken*, 418 U.S. at 746 (limiting scope of injury to Detroit's Black students). *But see id.* at 782 (Marshall, J., dissenting) (lamenting "giant step backward" from *Brown*'s promise to remove stigmas of racially identifiable schools). Justice Marshall chastised the majority for abhorring the notion that some "school districts

Black students would outnumber white students—went too far.[99] The *Milliken* Court reasoned the scope of the remedy for any denial of equal protection for the Detroit students could not extend beyond the jurisdiction where the injury occurred: within Detroit, to the students attending the city's schools—not to white kids who attended suburban schools.[100] *Milliken* further held the argument that white suburban districts might share some constitutional obligation to take part in the remedy had no legal merit.[101] The Court did not acknowledge that racial isolation might also damage white suburban students, notwithstanding the injury Detroit students endured, which the Court did acknowledge.[102] *Milliken*'s implications have been lasting: Any solution to school segregation attempting to cut across school district lines cannot *require* white suburbanites to take part or obligate them to help make the public school system more equitable.[103]

3. Constitutional Challenges to the RIA in the Strict Scrutiny Era

Since early in the Rehnquist era, strict scrutiny has been the standard of review for most equal protection challenges to government programs—including school admission policies—that determine the allocation of a benefit based somehow on the racial classification of possible recipients.[104] As the Court explained in

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are willing to engage in interdistrict programs." *Id.* at 811-12 (suggesting Court should have asked more from white suburbs).

99. *See id.* at 748-49 (majority opinion) (finding no reason to hold white suburbanites accountable for conscious decision to move outside Detroit); Garda, *supra* note 11, at 609 (determining *Milliken*'s decision not to allow interdistrict remedies meant to appease white interests); *see also* O'Brien, *supra* note 75, at 16 (explaining how *Milliken* rolled back *Brown* and eliminated chance for desegregation in cities outside South).

100. *See* Milliken v. Bradley, 418 U.S. 717, 748-49 (1974) (explaining because suburbs did not participate in de jure segregation, no remedy enforceable on them).

101. *See id.* at 746 (rationalizing refusal to include suburban students in remedy); O'Brien, *supra* note 75, at 16 (stressing how constitution effectively permits and protects white flight post-*Milliken*). As O'Brien articulates, the *Milliken* decision left it exceedingly difficult for states to make policy including suburbs in solutions to school segregation. *See* O'Brien, *supra* note 75, at 16 (tracing ups and downs of school integration movement).

102. *See Milliken*, 418 U.S. at 746 (limiting scope of remedy to Black Detroit students and ignoring any possible harm to white students); *see also* Brief of the City of Boston, Massachusetts as Amicus Curiae, at 9, *Milliken*, 418 U.S. 717 (1974) (No. 73-434) (advocating Michigan Legislature adopt METCO-like approach to voluntary interdistrict integration).

103. *See Milliken*, 418 U.S. at 783 (Marshall, J., dissenting) (noting arbitrariness of determining constitutional violation based on school district boundaries); *see also* GRAETZ & GREENHOUSE, *supra* note 73, at 97 (emphasizing Justice Marshall's "anguished cry of despair" at Court's about-face on *Brown*); Dyson, *supra* note 13, at 35 (arguing Burger, Rehnquist, and Roberts Courts inclined to "limit, undermine, narrow" remedies for school segregation). Dyson explains the legal evolution since *Brown* decisions, highlighting the emerging judicial tendency to perpetuate white privilege. *See* Dyson, *supra* note 13, at 35-37 (arguing over past five decades Court has curtailed policies giving express preference to nonwhite students).

104. *See* U.S. CONST. amend. XIV, § 1 (requiring each state to guarantee each person "equal protection of the law"); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (applying strict review of policy requiring floor metric for minority-run business in subcontracting allocations); Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 224 (1995) (establishing absolute standard of strict scrutiny review for challenges to any racially reliant policy); Grutter v. Bollinger, 539 U.S. 306, 326-27 (2003) (laying out use of strict scrutiny for review of school admission and assignment policies); *see also* Wessmann v. Gittens, 160 F.3d 790, 794, 800 (1st

Grutter v. Bollinger, strict scrutiny generally requires that policies survive two prongs.[105] First, a policy's goals must support a "compelling" state interest.[106] If they do, then second, the means used to achieve policy goals must be "narrowly tailored" to meet those compelling interests.[107]

The METCO program itself has never faced a direct equal protection challenge, but the RIA has many times.[108] Most recently, in 2003, parents of white and mixed-race students brought an equal protection challenge against the city of Lynn's intradistrict integration plan in *Comfort v. Lynn School Committee*.[109] After years of increasing segregation in Lynn's schools, DESE mandated that the city develop a new student assignment policy in order to access state-provided funds.[110] The parents of a student denied admission on racial-tiebreaker grounds argued that Lynn violated the Fourteenth Amendment and that the RIA, the basis for Lynn's plan, also conflicted with the Fourteenth Amendment.[111] Despite Lynn's express use of race as a tiebreaker in rare instances to decide admission at schools with more applicants than seats, the First Circuit upheld the plan under strict scrutiny.[112] Use of the tiebreaker only occurred if a particular school had less space available than the number of transfer applicants, and in these rare instances, the plan required the school to

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Cir. 1998) (using strict standard to hold Boston Latin's proposed policy to boost diversity overly broad); Dyson, *supra* note 13, at 29-30 (summarizing *Grutter*'s strict scrutiny standard); Ryan, *supra* note 13, at 131, 135 (overviewing *Parents Involved*'s application of strict scrutiny).

105. *See Grutter*, 539 U.S. at 326 (setting forth basic two-prong strict scrutiny analysis); *see also* Dyson, *supra* note 13, at 29 (summarizing strict scrutiny test in succinct terms).

106. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 314-15 (1978) (noting compelling educational interests in diversity may require looking to more than just race); Dyson, *supra* note 13, at 29 (explaining first prong of strict scrutiny).

107. *See J.A. Croson Co.*, 488 U.S. at 493 (describing purpose of second prong); Dyson, *supra* note 13, at 29 (explaining second prong of strict scrutiny analysis).

108. *See, e.g.*, *Springfield III*, 319 N.E.2d 427, 434 (Mass. 1974) (upholding RIA and city-specific plan but conceding 1974 amendments otherwise removed busing remedy); Sch. Comm. v. Bd. of Educ., 227 N.E.2d 729, 733 (Mass. 1967) (upholding RIA even on facial challenge to racial-data-tracking requirement). As Chief Justice Wilkins of the Supreme Judicial Court wrote, "[t]he [RIA] has its foundation in a legislative finding that the Commonwealth is faced with an *emergency* because of racial imbalance in the public schools." *Sch. Comm.*, 227 N.E.2d at 733 (emphasis added) (drawing on RIA's purpose).

109. *See* Comfort v. Lynn Sch. Comm., 283 F. Supp. 2d 328, 333, 338 (D. Mass. 2003) (identifying parties and claims), *aff'd*, 418 F.3d 1 (1st Cir. 2005).

110. *See id.* at 346-49 (describing formulation of plan and racial tiebreaker).

111. *See id.* at 363 (explaining plaintiffs urged Court to evaluate RIA and Lynn's Plan using strict scrutiny). Judge Gertner articulated circumspection that where a plan is generally race-conscious, yet not outcome-determinative excepting rare tiebreaker scenarios like Lynn's policy, intermediate scrutiny should be the standard. *See id.* at 363, 366 (stipulating while Lynn's plan used race to tiebreak, no preference given to nonwhite students). The plan admitted students in tiebreaker scenarios who would increase racial balance at the receiving school. *See id.* at 349, 365 (writing "no student is advantaged over another on the basis of race"). Judge Gertner emphasized the plan did not give predetermined preference to nonwhite students over white students, but only to the racial identity of the student who would increase balance at the receiving school in the rare tiebreaker scenario. *See id.* at 365-66 (suggesting intermediate scrutiny should apply but effectively using both standards in upholding Lynn's plan).

112. *See* Comfort v. Lynn Sch. Comm., 418 F.3d 1, 8, 13-14, 23 (1st Cir. 2005) (praising district for successful efforts to increase diversity).

give preference to applicants whose race would bring the receiving school closer to racial balance.[113] For one student, this policy led to the denial of her application to a preferred school in favor of admitting a nonwhite applicant who brought the school closer to balance.[114]

On the first strict scrutiny prong, the *Comfort* court reasoned that whether policy goals relating to school diversity are sufficiently compelling depends on "the nature of the setting and the reasons why diversity is sought."[115] Additionally, there must be a clear link between the district's diversity goals and the benefits it "confers in a given situation."[116] Applied to Lynn's plan, the court stressed that Lynn's goal of teaching citizenship was every bit as important as academics, especially in the K–12 years.[117] A school district may seek objectives as simple as ensuring kids "work and play well together," because, in a diverse community like Lynn, a goal of fostering interracial understanding and compassion represents a clearly compelling interest for K–12 schools.[118]

As for the second strict scrutiny prong, the court reasoned it cannot follow that "exact science" is the standard districts must meet in using race as a factor in trying to meet its goals, and that there was not much more Lynn could have done to narrow its plan based on local conditions.[119] Lynn's plan carefully developed balancing targets based on the city's changing population, and though the plan minimally aimed for 20% minority representation at every school, neither DESE, nor the court, construed the RIA to require strict adherence to the 30%–50% target for balance.[120] Lynn's plan did not require rigid quotas or thresholds, and use of the tiebreaker was rare.[121] The court also emphasized that Lynn's plan worked, which helped persuade the court to uphold the policy as

113. *See Comfort*, 283 F. Supp. 2d at 365 (explaining Lynn's plan used race determinatively but did not permit racial preference).

114. *See id.* at 338, 349 (explaining admission deniable based on racial tiebreaker only where limited space and would increase diversity). Judge Gertner reasoned that nothing in the Constitution "obliges me to dismantle the Lynn Plan." *Id.* at 400 (concluding Lynn's plan not violative of equal protection).

115. Comfort v. Lynn Sch. Comm., 283 F. Supp. 2d 328, 368-71 (D. Mass. 2003) (outlining interpretations on strict scrutiny analysis applied in case), *aff'd*, 418 F.3d 1 (1st Cir. 2005). Judge Gertner articulated a deeply nuanced version of strict scrutiny in the K–12 school context. *See id.* at 371-72 (examining if means necessary, narrowly tailored, and have no adequate alternatives).

116. *Id.* at 369 (suggesting compelling interests depend highly on context).

117. *See id.* at 375 (discussing and providing context for Lynn's goals). Judge Gertner broke Lynn's goals into three categories: first, proactive goals to create educational benefits; second, reactive goals to lessen the impact of existing racial barriers and residential segregation in the city; third, goals constitutionally stemming from *Brown I*—civic virtue, democratic values, and cross-racial understanding. *See id.* (categorizing goals).

118. *See id.* at 376 (suggesting Lynn's students not prepared to live in racially diverse society).

119. *See Comfort*, 283 F. Supp. 2d at 386 (concluding Lynn's definition of racial isolation "appropriately calibrated").

120. *See id.* at 384 (describing contours of Lynn's plan in relation to local demographics).

121. *See* Comfort v. Lynn Sch. Comm., 283 F. Supp. 2d 328, 384, 386 (D. Mass. 2003) (stipulating plan rarely used race determinatively and only for transfers to schools not racially balanced), *aff'd*, 418 F.3d 1 (1st Cir. 2005). Judge Gertner found the flexible, limited use of the plan persuasive. *See id.* at 377 (noting policy's flexibility and effectiveness).

constitutional.[122] The city "increased educational opportunities for all students," aided the "amelioration of racial and ethnic tension," increased attendance, and created "a growing feeling of comfort among students in engaging and confronting issues of race."[123] The lack of rigidity and evidence of effectiveness are perhaps the reasons why, in 2005, the Supreme Court declined to hear the case on appeal, despite the similarities between the tiebreaker in Lynn's plan and Seattle's "tiebreaker," which in 2007 the Court held unconstitutional in *Parents Involved*.[124]

4. Parents Involved *and Justice Kennedy's Framework for Strict Scrutiny in K–12 Cases*

Since 2000, *Parents Involved* is the only strict scrutiny application the Supreme Court has offered in a K–12 race-based admissions case.[125] At issue were two assignment plans—one from Seattle, the other Louisville—both of which, in a tiebreaker scenario like *Comfort*'s, used race determinatively if a particular school had less space than seats desired.[126] In *Parents Involved*, five justices rejected both policies, but only as to the second strict scrutiny prong—that the plans were not narrowly tailored.[127] Justice Kennedy concurred with the plurality that the Seattle and Louisville plans were not narrowly tailored and relied too much on race while having only "minimal" effect toward meeting Seattle and Louisville's respective goals.[128]

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122. *See id.* at 376 (stressing Lynn's plan essential and successful in reversing trends of segregation).

123. *See id.* (praising Lynn for careful policy design and demonstrably positive academic and social impact).

124. *Compare* Comfort v. Lynn Sch. Comm., 418 F.3d 1, 25 (1st Cir.) (affirming district court's ruling on constitutionality of RIA and Lynn's plan), *cert. denied*, 546 U.S. 1061 (2005), *with* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007) (Roberts, C.J.) (plurality opinion) (casting shadow on use of race to determine K–12 admission or assignment). The Supreme Court of the United States turned down the opportunity to overrule *Comfort*'s compelling interest rationale, with which the district court and the First Circuit upheld Lynn's plan just two years prior to *Parents Involved*. *See Comfort*, 546 U.S. at 1061 (denying certiorari and leaving RIA untouched).

125. *See* Stacy Hawkins, *What the Supreme Court's Diversity Doctrine Means for Workplace Diversity Efforts*, 33 A.B.A. J. LAB. & EMP L. 139, 141-48 (2018) (reviewing recent Court decisions concerning use of race in admissions; *Parents Involved* only K–12 case); *Parents Involved*, 551 U.S. at 704 (Roberts, C.J.) (plurality opinion) (agreeing with Justice Kennedy Seattle's plan not narrowly tailored). *But see Parents Involved*, 551 U.S. at 798 (Stevens, J., dissenting) (mocking "cruel irony" of reliance on *Brown I* to overturn school integration policy). Justice Stevens ridiculed the plurality for relying on such historically significant authority toward remediation of slavery in America to narrow the boundaries within which districts can work to remediate generational impacts. *See Parents Involved*, 551 U.S. at 799-800 (criticizing plurality for not recognizing only Black children forcibly segregated).

126. *See Parents Involved*, 551 U.S. at 710-11 (Roberts, C.J.) (plurality opinion) (discussing details of Seattle and Louisville assignment plans and mechanics of "tiebreakers").

127. *Compare id.* at 748 (calling Seattle and Louisville's attempts at diversity "discriminating on the basis of race"), *with id.* at 798 (Kennedy, J., concurring in part and concurring in judgment) (suggesting race-*conscious* policies possibly constitutional under intermediate review if not race-determinative).

128. *See id.* at 733-34 (Roberts, C.J.) (plurality opinion) (claiming "minimal" impact of policies indicated lack of narrow tailoring). *But see* Dyson, *supra* note 13, at 40 (criticizing Chief Justice Roberts's characterization of tiebreakers at issue in *Parents Involved*); Maurice R. Dyson, *De Facto Segregation and Group Blindness: Proposals for Narrow Tailoring Under a New Viable State Interest in* PICS v. Seattle School District, *in* OUR

Justice Kennedy diverged from the rest of the plurality on the question of compelling interests in school diversity; his vote meant a five-to-four majority agreed K–12 schools do have a compelling interest, and, in dicta, he articulated a framework (Kennedy's framework) districts have since used in striving to reach "*Brown*'s objective of equal educational opportunity."[129] Though the plurality opinion ultimately controls, Kennedy's framework has been used as a roadmap for school districts that want to create more racially and economically diverse schools while staying within constitutional boundaries.[130] Kennedy's framework says K–12 school districts *do* have a compelling interest in creating integrated classrooms based on a broad theory of diversity under which race, socioeconomic status, and other demographic factors should all play a part.[131] For a district to claim policy goals based on school diversity that hinges on race alone, however, would run against what Kennedy's framework suggests is a sufficiently compelling basis to use race: as a factor, but never the single or only factor, in determining admission.[132]

PROMISE: ACHIEVING EDUCATIONAL EQUALITY FOR AMERICA'S CHILDREN, *supra* note 13, at 67, 72-73 (suggesting Seattle plan more than minimally impactful, but critiquing failure to tie means to ends).

129. *See Parents Involved*, 551 U.S. at 788-89 (Kennedy, J., concurring in part and concurring in judgment) (setting basis of how K–12 districts can show compelling interests in diversity); Ryan, *supra* note 13, at 133 (highlighting Kennedy's framework has had most impact on informing school decision making). Justice Kennedy made his view clear that as to the harm on the children, the extent that adults mean to cause it does not matter: "From the standpoint of the victim, it is true, an injury stemming from racial prejudice can hurt as much when the demeaning treatment based on race identity stems from bias masked deep within the social order as when it is imposed by law." *Parents Involved*, 551 U.S. at 795 (Kennedy, J., concurring in part and concurring in judgment) (questioning distinction between de jure and de facto segregation).

130. *See* Ryan, *supra* note 13, at 133 (highlighting Kennedy framework's impact); ERICA FRANKENBERG, INTERCULTURAL DEV. RSCH. ASS'N, USING SOCIOECONOMIC-BASED STRATEGIES TO FURTHER RACIAL INTEGRATION IN K–12 SCHOOLS 4-5 (2018), https://files.eric.ed.gov/fulltext/ED582810.pdf [https://perma.cc/RH2Q-MKDU] (summarizing interpretations of post-*Parents Involved* standard consistent with two constitutionally safe scenarios from Kennedy's framework). Frankenberg breaks down Kennedy's concurrence in two ways: Districts can either consider race in a facially neutral way, or rely on it determinatively, but only among other factors and based on local need and conditions. *See* FRANKENBERG, *supra*, at 5 (condensing framework into discernable language for districts to apply); Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 789-90 (2007) (Kennedy, J., concurring in part and concurring in judgment) (describing two ways for school districts to remain within narrowly tailored bounds).

131. *See Parents Involved*, 551 U.S. at 798 (stating districts K–12 should have option to pursue "compelling" diversity goals); *see also* Brief of Amici Curiae United Negro College Fund and National Urban League in Support of Respondents at *3, *5, Fisher v. Univ. of Tex. at Austin, 579 U.S. 365 (2016) (No. 14-981) (filing on behalf of amici consortium supporting broad, educationally compelling interest in racial diversity); Consolidated Brief of Lt. Gen. Julius W. Becton, Jr. et al. as Amici Curiae in Support of Respondents at *8, *10, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241, 02-516) (arguing for constitutionality of race-conscious, but not determinative, college admission plan). *But see* Eugene Volokh, *Diversity, Race as Proxy, and Religion as Proxy*, 43 UCLA L. REV. 2059, 2061 (1996) (noting social, cultural, political complications impact diversity when immediate benefit not easily seen).

132. *See Parents Involved*, 551 U.S. at 788-89 (Kennedy, J., concurring in part and concurring in judgment) (scrutinizing any assignment plan determining assignments and/or admission on race); *see also* Ryan, *supra* note 13, at 136 (interpreting Kennedy's concurrence and delineating interests Kennedy considered sufficiently compelling). This second option for constitutional policy suggests K–12 districts may, in some unique circumstances, use race determinatively—among other factors informed by *Grutter*—but as Ryan writes, "[t]he

As to how districts can ensure narrow tailoring, Justice Kennedy suggested two scenarios, and two types of policies therein, by which districts can survive the second strict scrutiny prong.[133] First, districts must at least try a facially neutral option.[134] Facially neutral policies can still be cognizant of race in recognition of residential and economic patterns, Justice Kennedy suggested, perhaps by redrawing attendance boundaries or by reassigning students within existing ones.[135]

The second narrow-tailoring scenario discussed in Kennedy's framework arises if a district can show it contemplated a facially neutral approach that would have been impracticable, or that it tried a facially neutral option, but attempts proved ineffective at meeting the district's diversity goals.[136] If a district can make such a showing, Kennedy's framework says that the district may then rely on individual racial classifications in admissions decisions—with several caveats.[137] Race cannot be the only determinative factor in admission or assignment, and districts can only rely on classifications "if necessary," based on "a more nuanced, individual evaluation of school needs and student characteristics . . . . informed by *Grutter*, though of course the criteria relevant to student placement would differ based on the age of the students, needs of the parents, and the role of the schools."[138] Though post-*Parents Involved* case law is scarce, the Supreme Court will have more to say on race-based admissions when it rules in 2022 on *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*.[139]

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rest is left to imagination." *See* Ryan, *supra* note 13, at 136 (stressing Kennedy's concurrence has practically, though not technically, controlled for school administrators since *Parents Involved*).

133. *See Parents Involved*, 551 U.S. at 789-90, 792-93 (Kennedy, J., concurring in part and concurring in judgment) (distinguishing from *Grutter* and stipulating districts must attempt facially neutral policies before using race). Justice Kennedy hypothesized how some districts may consider or use racial classifications to decide admission based on local conditions. *See id.* at 790 (setting up framework districts have used to shape admissions policies); *see also* FRANKENBERG, *supra* note 130, at 4-5 (summarizing Obama U.S. Department of Education guidance interpreting *Parents Involved* and Kennedy's framework).

134. *See Parents Involved*, 551 U.S. at 789-90 (Kennedy, J., concurring in part and concurring in judgment) (agreeing with plurality regarding burden on districts to try facially neutral options first).

135. *See id.* at 789 (suggesting constitutionally permissible means to achieve compelling interest of school diversity).

136. *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 790 (2007) (Kennedy, J., concurring in part and concurring in judgment) (articulating alternative yet vaguely described scenario in which schools can use race).

137. *See id.* (setting out second narrow-tailoring scenario where racial classifications can play part, but never determinative role).

138. *Id.*

139. *See* 980 F.3d 157 (1st Cir. 2020), *cert. granted*, 142 S. Ct. 895 (2022) (mem.); *e.g.*, Doe v. Lower Merion Sch. Dist., 665 F.3d 524, 532, 555 (3d Cir. 2011) (upholding district's plan for increasing "ethnic, social, economic, religious and racial" diversity); Spurlock v. Fox, 716 F.3d 383, 392, 402 (6th Cir. 2013) (upholding plan nominally devised to increase diversity which decreased Black enrollment at Nashville's best schools). *But see* Lewis v. Ascension Parish Sch. Bd., 662 F.3d 343, 349 (5th Cir. 2011) (holding unconstitutional district's plan to increase diversity through facially neutral means). In *Lewis*, the Fifth Circuit applied strict scrutiny despite the plan lacking any race-determinative elements—a presumption of invalidity exists when any racial classification is used in Louisiana, Mississippi, or Texas. *See Lewis*, 662 F.3d at 349 (vitiating district's plan to

III. ANALYSIS

A. Especially at the K–12 Level, School Diversity Is an Undoubtedly Compelling State Interest

Judicially, federal courts have long recognized that a compelling state interest follows from the goal of integrated schools, and since *Parents Involved*, courts and districts have relied on Kennedy's framework as constitutional guideposts.[140] Educationally, policy experts have taken an analogous view: Basic educational "adequacy" requires diversity because a robust pedagogical exchange requires student exposure to—and teachers to place value upon—the varying viewpoints that come when diverse racial, linguistic, and socioeconomic groups are mixed.[141] Economically, with a workforce as racially diverse as that of the United States, it follows that cross-cultural competency has become an increasingly sought-after trait in applicants and a deficit for those without experience in diverse environments.[142]

Culturally and politically, the theory that education reform should refocus on integration has proven a tough sell.[143] Arguments that integrated schools contribute to increased business acumen or help shape a more cohesive democratic society can sound a little too "high-minded."[144] As Justice Kennedy made clear in *Parents Involved*, however, states absolutely have a compelling

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increase diversity); *see also* Laura Petty, Note, *The Way Forward: Permissible and Effective Race-Conscious Strategies for Avoiding Racial Segregation in Diverse School Districts*, 47 FORDHAM URB. L.J. 659, 682 (2020) (highlighting mixed implications of *Parents Involved*: less scrutiny on districts, resulting ambiguities difficult to navigate).

140. *See* Sweatt v. Painter, 339 U.S. 629, 634 (1950) (recognizing value of educational intangibles like school prestige and diverse student body with varying perspectives); Comfort v. Lynn Sch. Comm., 283 F. Supp. 2d 328, 363, 375-76 (D. Mass. 2003) (noting compelling interest follows in "teaching citizenship," especially at K–12 level), *aff'd*, 418 F.3d 1 (1st Cir. 2005); Ryan, *supra* note 13, at 133 (noting school districts often follow Kennedy's framework).

141. *See* James, *supra* note 13, at 230 (advocating for renewed policy focus on school integration to remedy racial and socioeconomic inequity); *Comfort*, 283 F. Supp. at 355 (noting educational benefits stemming from integration); *see also* JOHNSON, *supra* note 15, at 321 (discussing "why integration works" and noting integration profoundly changes individual views on race). Spending much time to discuss the generational impact of integrated schools, Johnson writes that integration has "the power to break the intergenerational cycle of poverty." *See* JOHNSON, *supra* note 15, at 321 (arguing for continued reform of American schools).

142. *See* Garda, Jr., *supra* note 11, at 622 (pointing out need to build cross-racial experience, especially for white children); *see also Comfort*, 283 F. Supp. at 334, 355 (emphasizing importance of school diversity for social and civic benefits); Petty, *supra* note 139, at 660 (describing need for integration in time of extreme political polarization).

143. *See* Volokh, *supra* note 131, at 2069 (offering thought-provoking assessment on use of racial and religious proxies to allocate public benefits). Volokh notes the challenge for policymakers—and indeed also in politics—in convincing majority groups that demographic factors like race or religion may justifiably be used under affirmative action theory with preference toward minority groups, while discriminatory uses of race advantageous to majority groups are not permissible. *See id.* (suggesting difficult political track on which integration must travel to expand).

144. *See* JOHNSON, *supra* note 15, at 120 (commenting "high-minded" integration and other reform attempts have proved difficult to implement).

interest in shaping diverse schools that reflect not only the communities in which students live, but also the broader communities where they will go to work, play, and raise their own families.[145] Although history teaches that K–12 integration has often sparked the fiercest opposition, this Note argues that states generally have a heightened interest in policies that increase racial and economic diversity at the K–12 level.[146] Through conflict comes discussion, and it is on that path which integration has the "power to heal divisions."[147]

B. Are the RIA and METCO Program Narrowly Tailored After Parents Involved*?*

1. The RIA Is Flexible Enough to Survive the Narrow-Tailoring Test

Considering first whether the voluntary integration and interdistrict transfer provisions of the RIA are overly broad, deep in the *Parents Involved* footnotes is an overlooked debate between Chief Justice Roberts and Justice Stevens, disagreeing over the RIA's constitutionality.[148] The back-and-forth suggests that because of the voluntary nature of the RIA's provisions, the fifty-six-year-old state law—and by extension the METCO program—is constitutional.[149] In contrast to Seattle's assignment policy in *Parents Involved*, the Chief Justice suggested the RIA is constitutional because although the RIA "require[s] school districts to avoid racial imbalance . . . [the RIA] d[oes] not specify how to achieve this goal—and certainly d[oes] not require express racial classifications

145. *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 787-88, 790 (2007) (Kennedy, J., concurring in part and concurring in judgment) (disagreeing with rest of plurality on compelling interest aspect of strict scrutiny).

146. *Compare* Morgan v. Hennigan, 379 F. Supp. 410, 482 (D. Mass. 1974) (ordering Boston School Committee take responsibility for implementation of desegregation remedy), *aff'd sub nom.* Morgan v. Kerrigan, 509 F.2d 580 (1st Cir. 1974); JOHNSON, *supra* note 15, at 195 (calling Boston "first victory for anti-integration activists"), *and* KRUSE, *supra* note 73, at 13 (noting sociopolitical impact of busing in northern cities like Boston), *with Parents Involved*, 551 U.S. at 771, 782, 797-98 (Kennedy, J., concurring in part and concurring in judgment) (commenting stakes higher than legally compelling interests: "Nation has . . . moral and ethical obligation" respecting integration) (Kennedy, J., concurring in part and concurring in judgment), *and* Comfort v. Lynn Sch. Comm., 283 F. Supp. 2d 328, 372 (D. Mass. 2003) (emphasizing importance of socialization at K–12 level, including experiences in racially diverse environments), *aff'd*, 418 F.3d 1 (1st Cir. 2005). Boston, as Johnson writes, represents the need for a return to the movement. *See* JOHNSON, *supra* note 15, at 195 (stating "[o]pposition to integration would continue to manifest itself in ensuing decades").

147. *See* JOHNSON, *supra* note 15, at 52; *Parents Involved*, 551 U.S. at 797-98 (Kennedy, J., concurring in part and concurring in judgment) (emphasizing school diversity, not just in racial sense, compelling state interest); *Comfort*, 283 F. Supp. 2d at 369-70 (setting forth clear and numerous compelling diversity interests for K–12 schools).

148. *Compare Parents Involved*, 551 U.S. at 739 n.16 (Roberts, C.J.) (plurality opinion) (analyzing RIA in past tense, suggesting it enforces nothing on Massachusetts districts), *with id.* at 801 n.5 (Stevens, J., dissenting) (disputing Chief Justice's interpretation and highlighting RIA requires enrollment tracking by race).

149. *See supra* note 148 and accompanying text (noting Chief Justice Roberts and Justice Stevens's competing interpretations of RIA).

as the means to do so."[150] Justice Stevens called the Chief Justice's view "incorrect," countering that the RIA *does* require the use of race to the extent districts must track enrollment by race in every school and share that data with the state, so DESE can determine whether imbalance or isolation exists and how districts that are out of balance should attempt to remedy that imbalance.[151]

For all the rhetorical disagreement, neither interpretation of the RIA was necessarily wrong, and both Justices put forth a view that the RIA is generally constitutional and not overly broad.[152] Chief Justice Roberts did not dispute that all Massachusetts districts have to use racial classifications, at least insofar as collecting data from their schools.[153] Justice Stevens, however, did not dispute that the state has final say over whether districts need do anything about a lack of racial balance when the data identifies an imbalance.[154] As Chief Justice Roberts stressed in *Parents Involved*, and as *Comfort* had emphasized just years prior, DESE does not strictly hold districts to the RIA's 30%–50% target for balance, and school districts, not the state, determine how to achieve diversity.[155]

In sum, to the extent the RIA does not require the express use of racial classifications to determine where students go to school, Chief Justice Roberts's interpretation suggests the RIA is malleable enough on its face in meeting local needs, which DESE flexibly oversees, to pass constitutional muster.[156] Consistent with its voluntary nature, the RIA requires only that districts *track* enrollment data by race, not that districts take action to increase diversity when data shows a lack of racial balance, which should consequently assure the Chief

150. *Parents Involved*, 551 U.S. at 739 n.16 (Roberts, C.J.) (plurality opinion). Curiously, the Chief Justice wrote footnote 16 in the past tense. *See id.*

151. *Compare* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 739 n.16 (2007) (Roberts, C.J.) (plurality opinion) (arguing Justice Stevens review of RIA inapposite to *Parents Involved* issues), *with id.* at 801 n.5 (Stevens, J., dissenting) (calling out Chief Justice's "incorrect" view of RIA's requirements). The RIA does minimally require all districts track enrollment data by race. *See* Racial Imbalance Act § 1, MASS. GEN. LAWS ch. 71, § 37D (2020) (mandating districts track racial enrollment data).

152. *Compare Parents Involved*, 551 U.S. at 739 n.16 (Roberts, C.J.) (plurality opinion) (stressing voluntary nature of "Massachusetts law"), *with id.* at 801 (Stevens, J., dissenting) (arguing for even more favorable interpretation toward RIA's constitutionality).

153. *See* Racial Imbalance Act § 1 (requiring districts to track number of white and nonwhite students in all its schools); *Parents Involved*, 551 U.S. at 739 n.16 (Roberts, C.J.) (plurality opinion) (foregoing mention of RIA's mandate on all districts for data collection).

154. *See* Act Amending the Racial Imbalance Law, ch. 636, sec. 5, § 37D, 1974 Mass. Acts 609, 611-14 (codified as amended at MASS. GEN. LAWS ch. 71, § 37D (subjecting district decisions to accept interdistrict transfers, like through METCO, to state approval).

155. *See Parents Involved*, 551 U.S. at 739 n.16 (Roberts, C.J.) (plurality opinion) (stressing RIA's voluntary nature does not force integration or rigid quotas); Comfort v. Lynn Sch. Comm., 283 F. Supp. 2d 328, 363, 377 (D. Mass. 2003) (explaining DESE did not require Lynn to use specific racial quotas), *aff'd*, 418 F.3d 1 (1st Cir. 2005). The court extensively detailed the specifics of Lynn's plan, enabled by the RIA, and its development with and implementation under the authority of DESE. *See Comfort*, 283 F. Supp. 2d at 347-49 (detailing Lynn-DESE policy). *But see* SCHNEIDER ET AL., *supra* note 6, at 25 (pointing out most schools statewide failing to meet 30%–50% balance).

156. *See Parents Involved*, 551 U.S. at 739 n.16 (Roberts, C.J.) (plurality opinion) (arguing RIA does not require districts to do anything actionable with racial enrollment data).

Justice that the RIA does not go too far because it requires districts to have local decision-making authority over education policy—and, by extension, making a district's voluntary decision to participate in METCO constitutional.[157]

2. METCO's Two-Tier Admissions Process Is Likely Safe Under Narrow-Tailoring Analysis

The RIA's METCO-enabling provisions would likely be narrowly tailored under the Chief Justice's logic if an equal protection challenge arises because METCO districts voluntarily choose to participate in the program to meet their local diversity goals.[158] As for the METCO admissions process itself, consider again its two tiers: First, METCO, Inc. processes applications via its race-blind lottery from all Boston-resident applicants and refers accepted applicants to participating districts with space for the following school year.[159] Second, individual districts then have authority to make final admissions decisions on the basis of the individual applicants METCO refers.[160] Districts' admissions policies for METCO-referred students must be consistent with both the RIA and DESE's current METCO guidance, which states that district policies should be geared toward expanding educational opportunities, increasing diversity, and reducing racial isolation.[161] That is, DESE appears to give districts license to aim their admission policies specifically at reducing isolation, which under the RIA pertains to the condition of white students.[162] And though DESE

157. *Compare* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 739 n.16 (2007) (Roberts, C.J.) (plurality opinion) (suggesting unconstitutionality does not follow from RIA's racial data requirement), *with id.* at 723-24 (taking significant issue with Seattle's exclusive use of racial balancing metrics to determine admission).

158. *See id.* at 739 n.16 (stating RIA not overly broad); *see also* Act Amending the Racial Imbalance Law sec. 1, § 1I (providing for districts to opt into voluntary integration programs like METCO); *Grants FY2020*, *supra* note 76 (explaining annual grants METCO districts must submit to participate). On the district side, the RIA permits "[t]he school committee of any city or town or any regional district school committee . . . [to] adopt a plan for attendance at its schools by any child who resides in another city, town, or regional school district in which racial *imbalance* . . . exists in a public school." *See* Act Amending the Racial Imbalance Law sec. 1, § 1I (emphasis added) (granting district right to accept interdistrict transfers and students right to seek interdistrict transfers); *see also id.* at sec. 7, § 12A (providing districts right to propose and employ, and students to apply to, interdistrict transfer programs). On the student side, the RIA provides a corresponding right for any child attending a public school in with racial imbalance can transfer to a public school in a district they do not reside, so long as the receiving district has voluntarily adopted a plan to take said transfers. *See* Act Amending the Racial Imbalance Law sec. 7, § 12A.

159. *See* RILEY, *supra* note 52, at 1-3 (describing METCO's new lottery process adopted in 2019); *METCO's Structure*, *supra* note 49 (discussing METCO's partnership with thirty-three suburban districts); APFELBAUM & ARDON, *supra* note 15, at 6 (stressing METCO's waiting list in 2011 included over 10,000 Boston students). The waiting list system preceded the adoption of the lottery process. *See* RILEY, *supra* note 52, at 1-3 (outlining legal guidance and parameters for lottery on participating districts' end).

160. *See* RILEY, *supra* note 52, at 2-3 (providing guidance on new system); *see also* Vaznis, *supra* note 51 (contextualizing lottery process with reference to previous "waiting list" system).

161. *See* RILEY, *supra* note 52, at 1 (providing legal guidance for METCO districts following adoption of new lottery process).

162. *See id.* at 1-3 (outlining METCO districts parameters for admissions decisions relating to lottery-referred students).

specifically prohibits districts from discriminating on the basis of a protected status, DESE's guidance also encourages districts to make holistic admissions decisions—when there are more applicants than available seats—in ways that support districts' goals for participating in METCO.[163] For every METCO district, those goals include more racial diversity.[164]

Herein lies the hypothetical issue raised with respect to METCO in the immediate aftermath of *Parents Involved*: If a tiebreaker were to arise between white and nonwhite Boston-resident METCO applicants, both METCO and the receiving district could face an equal protection challenge from a white plaintiff for giving any preference to the nonwhite student.[165] Kennedy's framework and Chief Justice Roberts's comments on the RIA in *Parents Involved* considered together, however, suggest METCO's two-tier process is narrowly tailored and thus constitutionally safe even under strict scrutiny.[166]

At the first tier, METCO, Inc.'s new lottery mechanism for choosing who to refer to districts is race-blind, aligning it with the first scenario for constitutional permissibility under Kennedy's framework.[167] Justice Kennedy suggested that to ensure narrow tailoring, a facially neutral admission policy could consider race generally, but not determinatively, to support compelling goals around a hybrid form of intellectual, economic, and racial diversity.[168] This facially neutral approach is precisely how the new lottery functions, and thus, the first tier of the METCO admissions process is likely constitutional.[169] Assuming strict scrutiny applies, METCO's lottery does not rely on race beyond a general recognition

163. *Compare id.* at 2-3 (describing boundaries within which districts make final admissions decisions after referrals), *with* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 789-90 (2007) (Kennedy, J., concurring in part and concurring in judgment) (describing hypothetical wherein districts could maintain narrowly tailored plan including race-determinative admissions).

164. *See Time to Equalize & Modernize METCO*, *supra* note 70 (interviewing METCO CEO who explained value all METCO districts place on racial diversity).

165. *See* Kahlenberg, *supra* note 13, at A15 (raising alarm post-*Parents Involved* to argue METCO could face litigatory challenge from white plaintiffs); Weeden, *supra* note 13, at 391-93 (suggesting constitutional route for METCO to travel following initial *Parents Involved* concern).

166. *Compare Parents Involved*, 551 U.S. at 739 n.16 (Roberts, C.J.) (plurality opinion) (suggesting RIA constitutional for not requiring balancing or specifically mandating districts to enact balancing policies), *and id.* at 790 (Kennedy, J., concurring in part and concurring in judgment) (outlining means by which schools, "informed by *Grutter*," might still factor in race to decide admissions), *with* Weeden, *supra* note 13, at 391-92 (drawing attention to METCO's constitutional vulnerability for program's express focus on race).

167. *See Parents Involved*, 551 U.S. at 790 (Kennedy, J., concurring in part and concurring in judgment) (describing how some districts may consider or use racial classifications based on local conditions); *see also* FRANKENBERG, *supra* note 130, at 5 (summarizing two scenarios for narrowly tailored race-conscious policy).

168. *See Parents Involved*, 551 U.S. at 789-90 (Kennedy, J., concurring in part and concurring in judgment) (setting out race-conscious but facially neutral approach for constitutional admissions policy attempting diversity).

169. *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 789 (2007) (Kennedy, J., concurring in part and concurring in judgment) (suggesting facially neutral policies constitutional and only require intermediate review); *see also* RILEY, *supra* note 52, at 2 (making equally clear METCO admissions lottery race-blind).

that Boston has a higher concentration of nonwhite residents than its surrounding suburbs, and thus the lottery would likely pass the narrow-tailoring test.[170]

Applying Justice Kennedy's framework to the second tier compels a more difficult analysis.[171] But even if a METCO district granted a student of color referred through METCO's lottery a seat in preference over a white lottery winner in a tiebreaker scenario, courts could still construe that admissions choice as narrowly tailored under Kennedy's framework.[172] Kennedy's framework posits that—where race-blind options are impracticable or shown ineffectual—districts may use individual racial classifications, among other factors, to determine admission where local conditions, needs, and demographics might make the express use of race necessary to achieve any tangible progress toward the compelling goal of more diverse schools.[173] Justice Kennedy stipulated "the criteria relevant to student placement would differ based on the age of the students, the needs of the parents, and the role of the schools."[174]

Applied to a hypothetical tiebreaker scenario between white and nonwhite METCO lottery winners referred to a district, Kennedy's framework appears to provide precisely the kind of constitutional protection METCO districts would need to justify the admission of the nonwhite applicant over the white applicant if only one seat were available.[175] Because demographics in Boston and its suburbs make intradistrict racial balance impracticable, Justice Kennedy's "local needs" logic, applied here, could justify a METCO district's decision to give preference to nonwhite students in the rare tiebreaker scenario above.[176] The

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170. *Compare* RILEY, *supra* note 52, at 3 (highlighting nondiscrimination requirement of new METCO process), *with Parents Involved*, 551 U.S. at 788-89 (2007) (Kennedy, J., concurring in part and concurring in judgment) (stipulating districts should never treat students differently because of race), *and* Petty, *supra* note 139, at 678 (describing Justice Kennedy's framework).

171. *See* RILEY, *supra* note 52, at 3 (noting districts have final say, but applying nondiscrimination policy to all METCO districts).

172. *See* Kahlenberg, *supra* note 13, at A15 (warning *Parents Involved* might bring equal protection challenge to METCO from white plaintiff); Weeden, *supra* note 13, at 391-92 (agreeing *Parents Involved* concerning sign for METCO, but not disaster Kahlenberg initially thought).

173. *See Parents Involved*, 551 U.S. at 790 (Kennedy, J., concurring in part and concurring in judgment) (hypothesizing districts can use individual characteristics, including race, in "nuanced" way based on local conditions); Ryan, *supra* note 13, at 136 (analyzing Judge Kennedy's framework).

174. *Parents Involved*, 551 U.S. at 790 (Kennedy, J., concurring in part and concurring in judgment) (hypothesizing narrowly tailored, constitutional plan could still rely determinatively on race under certain conditions).

175. *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 790 (2007) (Kennedy, J., concurring in part and concurring in judgment) (leaving ambiguous what exactly unique local conditions might look like); *see also* Ryan, *supra* note 13, at 136 (suggesting beyond Justice Kennedy's concurrence, much left to districts' "imagination" on constitutionality).

176. *See Parents Involved*, 551 U.S. at 790 (Kennedy, J., concurring in part and concurring in judgment) (outlining how districts may consider individual racial classifications based on local needs); SCHNEIDER ET AL., *supra* note 6, at 13-14 (explaining demographic patterns of Boston and its suburbs). To this end, the second tier of the METCO admissions process seems to align with Chief Justice Roberts' interpretation, in which the RIA is constitutional because Massachusetts districts are not required to use or rely on the racial classification of students—METCO districts choose to do so, and again, are not necessarily relying on it in accepting referred Boston residents. *See Parents Involved*, 551 U.S. at 739 n.16 (Roberts, C.J.) (plurality opinion) (suggesting RIA

express use of racial classifications in this rare and unique instance is consistent with Kennedy's framework and would be justified as one of the valid factors a district might weigh in admissions decisions given the unique role METCO districts take on by participating in the program.[177] Suburban districts choose to join METCO based on suburban needs, which, for METCO's thirty-three districts, include a lack of racial and socioeconomic diversity.[178] Districts' decisions to participate in METCO serve a goal of creating more—not less—diversity, and that compelling goal could moreover justify giving a nonwhite student preference within narrowly tailored goalposts.[179]

C. Again: Why METCO Succeeds

The foregoing analysis illustrates why the RIA and the METCO Program, as well as districts' voluntary participation therein, are likely constitutional under the Fourteenth Amendment.[180] But the larger point this Note hopes to make is more straightforward: METCO's success is worth a new look.[181]

Fifty-six years have shown that METCO works.[182] Funding challenges affect METCO districts and their students, and much work remains to fully realize the dream of integration in these schools, which could do better at welcoming students of color.[183] But despite these less-than-welcoming circumstances, METCO students outperform their peers in BPS and other urban districts by

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constitutional because data collection does not mandate use of race in admissions); *see also* RILEY, *supra* note 52, at 3-4 (explaining guidelines for district-level admissions decisions when METCO refers applicants to suburbs).

177. *See Parents Involved*, 551 U.S. at 788-90 (Kennedy, J., concurring in part and concurring in judgment) (discussing scenario where unique "role" of schools could make use of racial classifications appropriate).

178. *See* RILEY, *supra* note 52, at 1 (describing METCO's purpose and mission statement).

179. *See Parents Involved*, 551 U.S. at 788-90 (Kennedy, J., concurring in part and concurring in judgment) (articulating basis for potential constitutional use of race in K–12 admissions); *see also* Ryan, *supra* note 13, at 135-36 (stating districts and courts still struggle to interpret Justice Kennedy's convoluted standard).

180. *See Parents Involved*, 551 U.S. at 789-90 (Kennedy, J., concurring in part and concurring in judgment) (suggesting constitutional means of achieving school diversity); *id.* at 739 n.16 (Roberts, C.J.) (plurality opinion) (suggesting lack of explicit requirements in RIA makes it constitutional); *see also* Comfort v. Lynn Sch. Comm., 283 F. Supp. 2d 328, 400 (D. Mass. 2003) (upholding RIA and Lynn's policy with outcome-determinative racial tiebreaker), *aff'd*, 418 F.3d 1 (1st Cir. 2005).

181. *See supra* notes 65-67 and accompanying text (reviewing 1960s congressional hearings advocating for METCO); AYSCUE ET AL., *supra* note 7, at 2-3 (chronicling METCO's evolution, program's consequent expansion from construction incentives, and current funding issues); APFELBAUM & ARDON, *supra* note 15, at 31 (advocating for legislative action to expand program); *Time to Equalize & Modernize METCO*, *supra* note 70 (calling for increased funding and overall program expansion).

182. *Compare Time to Equalize & Modernize METCO*, *supra* note 70 (suggesting more funding deserved and expansion of METCO long overdue), *and* APFELBAUM & ARDON, *supra* note 15, at 31 (calling for legislative attention toward increased funding for METCO expansion), *with Hearings*, *supra* note 65 (statement of Rudolph J. Fobert, Superintendent of Schools, Lexington School Committee) (noting need for integration from white suburban perspective in 1960s).

183. *See* Scharfenberg, *supra* note 39 (recommending increased funding to better support METCO students' needs); Lotan, *supra* note 72 (detailing activism of several METCO students of color to promote racial understanding).

nearly every available academic measure.[184] METCO students are more likely to score highly on state exams, graduate from high school, and go on to college.[185] Although economic data does not exist on METCO alumni specifically, national data shows much higher earning potential for students of color who attend integrated schools.[186] On a social and emotional level, METCO has also taught generations of students—and their families—that when given common goals, a shared identity, and pride in their schools, the human similarities in children can overcome racial differences.[187] When those differences might otherwise breed prejudice, METCO, at its best, breaks prejudice down.[188]

IV. CONCLUSION

The hypothetical in Sections III.A and III.B proposes a relatively unlikely litigatory scenario that, despite some fear it could become reality after *Parents Involved*, has not come to fruition. Meanwhile, as one of the nation's oldest integration programs, METCO has continued to show that it expands educational and economic opportunity to students of color that the Boston School Committee has long neglected. METCO also provides white suburban students a chance to exist beyond themselves in a multiracial environment. For all its talk of increased spending on *new* programs to address racial equity, the State House should act to increase funding for METCO's *existing* and proven model or to incentivize localities to finance METCO's immediate expansion in various towns. Participating districts should accept more Boston students, and the State House should incentivize the participation of new cities and towns on both the sending and receiving ends of the equation.

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184. *See* APFELBAUM & ARDON, *supra* note 15, at 19-21 figs.12-15 (comparing data on state test scores, graduation rates, funding in METCO districts and Boston); AYSCUE ET AL., *supra* note 7, at 2-3 (reviewing METCO student performance relative to peers in BPS and across state).

185. *See* APFELBAUM & ARDON, *supra* note 15, at 20 (noting higher METCO high school graduation rates and college attainment relative to peers across state); AYSCUE ET AL., *supra* note 7, at 3 (highlighting data from 2006 to 2010 showing METCO exam performance "substantially higher" than peers); *see also* ANGRIST & LANG, *supra* note 61, at 5-6 (noting difficulty of research on METCO students because of lack of comparable subgroup). On average, test scores are higher in METCO districts than Boston or Springfield public schools. *See* ANGRIST & LANG, *supra* note 61, at 6-7.

186. *See* AYSCUE ET AL., *supra* note 7, at 11 (noting higher earnings among Black adults who attended desegregated schools); *see also* JOHNSON, *supra* note 15, at 253 (emphasizing generational effects of integration).

187. *See* Cooper-Teleau et al., *supra* note 15 (celebrating Black teacher and mentor, who permanently changed twelve young white minds because of METCO); Lotan, *supra* note 72 (contextualizing—trans-generationally—current METCO students' efforts to inform about and advocate for racial equity). Many Boston students who attend METCO schools are the children of METCO alumni. *See* Lotan, *supra* note 72 (describing generational stories of hardship and strength). For them, stories from generations past about racial bullying and human empathy in METCO suburbs reflect not only the challenges still facing METCO, the Commonwealth, and the country, but also more optimistic stories of interracial friendship and compassion. *See id.*

188. *See* Cooper-Teleau et al., *supra* note 15 (explaining how friendships develop and last between students of different races through METCO).

At the federal level, to the extent that interdistrict integration could help reconnect polarized social and political groups—and better bridge the nation's urban, suburban, and rural divides—an expansion and replication of the METCO model deserves Congress's strongest consideration. For if, like Sumner said, prejudice is the child of ignorance, a replication of the METCO model nationwide would afford students of different backgrounds much-needed opportunities to meet and learn from each other.