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Constitutional Law—School Integration Reform—A Call for Desegregation Policies that Are More than Skin Deep

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CONSTITUTIONAL LAW—SCHOOL INTEGRATION REFORM —A CALL FOR DESEGREGATION POLICIES THAT ARE MORE THAN SKIN DEEP

I. INTRODUCTION

With race conscious desegregation laws being eliminated by judicial decisions, how should central Arkansas schools respond to prevent a new era of segregation? Arkansas has been home to some of the most notorious desegregation litigation in the nation's history. The Little Rock Nine have been the topic of films, books, and many scholarly writings.[1] *Cooper v. Aaron* is a staple in constitutional law books.[2] Nearly fifty years have passed since *Brown v. Board of Education*, yet desegregation is still on the forefront of Arkansas litigation.[3]

In 1989, the Little Rock School District reached a settlement agreement that put three Pulaski County school districts under judicial supervision and required state funding to facilitate desegregation.[4] The school districts continue to receive millions of dollars under the settlement agreement; however, recently, the Little Rock and North Little Rock School Districts were released from judicial supervision because the schools had obtained unitary status.[5] Pulaski County Special School District was not.[6]

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1. *See Ernest Green*, LITTLE ROCK NINE FOUND., http://littlerock9.com/ErnestGreen.aspx (last visited Feb. 3, 2013). After schools were ordered to desegregate in *Brown v. Board of Education*, 349 U.S. 294 (1955), Little Rock Schools attempted integration. *History*, LITTLE ROCK NINE FOUND. Nine African-American students were registered to attend Little Rock Central High. *Id.* Governor Orval Faubus deployed the Arkansas National Guard to physically prevent the nine students from entering the school. *Id.* The U.S. Army was required to intervene and allow the students access to the school. *Id.*

2. *See* Cooper v. Aaron, 358 U.S. 1 (1958). After the decision in *Brown*, the Arkansas Governor and Legislature attempted to circumvent the ruling by passing legislation to perpetuate the dual school system. *Id.*at 8; *see also Brown*, 349 U.S. at 300–01. The school board requested that the desegregation efforts be delayed due to the resistance created by the state. *Cooper*, 358 U.S. at 4.The Court noted that the school board had acted in good faith, but the deadline would not be extended due to the bad actions of the Governor and the Legislature. *Id.* The most important question answered in the case was that the states were bound by the Court's ruling. *Id.* at 18.

3. *See* Teague *ex rel.* T.T. v. Ark. Bd. of Educ., 873 F. Supp. 2d 1055, 1069 (W.D. Ark. 2012), *vacated as moot sub nom*. Teague v. Cooper, 720 F.3d 973 (8th Cir. 2013) (finding ARK. CODE ANN. § 6-18-206 (f)(1) unconstitutional); Little Rock Sch. Dist. v. Arkansas, 664 F.3d 738, 748 (8th Cir. 2011) (declaring the North Little Rock School District unitary).

4. Little Rock Sch. Dist. v. Pulaski Cnty. Special Sch. Dist. No. 1, 921 F.2d 1371, 1376 (8th Cir. 1990).

5. *Little Rock Sch. Dist.*, 664 F.3d at 748. "[A] school district has achieved 'unitary status' when it is devoid of racial discrimination with regard to: (1) student assignment; (2) faculty and staff; (3) transportation; (4) extracurricular activities; and (5) facilities." Little

As a result of the districts' unitary status, Little Rock and North Little Rock schools are neither under a court order to desegregate, nor are they constitutionally required to continue integration. Ironically, as a result of its denial of unitary status, Pulaski County School District can still receive state funds under the agreement. In short, regardless of the school's status under the settlement agreement, none of the Pulaski County school districts have an incentive to continue integration efforts.

Is the Arkansas education system being held hostage by the unintended consequences of state intervention,[7] or has Arkansas simply failed to tap new resources? This note argues that the 1989 Settlement Agreement and other race-conscious measures are an outdated way to protect equality interests in the educational system and recommends a new form of integration in Pulaski County's public schools: socioeconomic redistricting. This note suggests that parents, educators, and administrators in Pulaski County have the opportunity to encourage new legislation that factors more than race into the equality equation.

First, this note will discuss recent rulings by the Supreme Court of the United States and the impact that the law has on Arkansas's educational system.[8] Next, the note will discuss the 1989 Settlement Agreement and other state laws aimed at Arkansas schools.[9] Part III will discuss how socioeconomic redistricting is a race-neutral alternative that will not only improve the quality of education, but also improve diversity within each school district.[10]

Education equality has been and will forever be the focus of parents and legislatures.[11] In Arkansas, it seems radical to discuss education policies that do not focus on race because of the deeply-rooted history of segregation. Across the nation, however, the focus has shifted to the new concern of wealth disparities.[12] The emerging issue in equality is not limited to what

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Rock Sch. Dist. v. Pulaski Cnty. Special Sch. Dist., 237 F. Supp. 2d 988, 1000 (E.D. Ark. 2002) *aff'd sub nom*. Little Rock Sch. Dist. v. Armstrong, 359 F.3d 957 (8th Cir. 2004). North Little Rock School District is completely unitary, while Pulaski County Special School District is unitary in all but nine areas. *Little Rock Sch. Dist*., 664 F.3d at 748.

6. *Little Rock Sch. Dist*., 664 F.3d at 748.

7. *See* Aaron J. Saiger, *The School District Boundary Problem*, 42 URB. LAW. 495, 504 (2010) ("Since the United States began to enforce the prohibition on de jure school segregation, the territorially sovereign district, . . . has been a preeminent tool for resisting the racial integration of schools.").

8. *See infra* Part II.A.

9. *See infra* Part II.B.

10. *See infra* Part III.

11. The plethora of case law regarding segregation and the movement to school finance litigation shows the continued demand to "equalize the distribution of educational resources." James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 252 (1999).

12. *Education and Socioeconomic Status*, AM. PSYCHOLOGICAL ASS'N., http://www.apa.

skin color a person is born with, but concerns how many opportunities a person's wealth affords him or her.[13] The desegregation policies created half a century ago can be updated and improved to address the new hurdle to providing equality in Arkansas education.

II. BACKGROUND

Although school policies are thought of as purely a local matter, equal access to education is a constitutional right.[14] As the Supreme Court of the United States declared fifty years ago, "[I]n the field of public education the doctrine of 'separate but equal' has no place."[15] Yet, in the years following that clear statement, the Supreme Court has had to revisit the topic of segregation multiple times.[16] Suddenly, what seemed to be a simple order to integrate became a complex set of constitutional rights and remedies.[17] To propose an effective and legal change to central Arkansas school policies, one must be mindful of 1) the constitutional requirements and limitations; and 2) the current settlement agreement between the Little Rock, North Little Rock, and Pulaski County Special School Districts.

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org/pi/ses/resources/publications/factsheet-education.aspx (last visited Feb. 17, 2013). "Inequities in wealth distribution, resource distribution, and quality of life are increasing in the United States and globally." *Id.*

13. *See* Kelley Holland, *Class System? When It Comes to School Aid, Rich Have the Edge*, CNBC (Aug. 1, 2013, 5:55 AM), http://www.cnbc.com/id/100930851. The article notes that because students from more affluent backgrounds have better chances of obtaining scholarships, "'the nation's public and private four-year colleges and universities are in danger of shutting down what has long been a pathway to the middle class'. . . ." *Id.*

14. Cooper v. Aaron, 358 U.S. 1, 16–17 (1958). In a later case, the Court reiterated that "[s]chool authorities are traditionally charged with broad power to formulate and implement educational policy," but if school authorities have a duty to desegregate "judicial authority may be invoked." Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15–16 (1971).

15. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) [hereinafter *Brown I*]. A year following that ruling the Supreme Court ordered schools begin integration with "all deliberate speed." Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955) [hereinafter *Brown II*].

16. *See infra* Part II.B.

17. Some schools districts have been litigating the Court's ruling for nearly fifty years. *See infra* Part II.B. The Supreme Court has heard either school segregation or an affirmative action case every decade since *Brown I*'s ruling. *See* Fisher v. Univ. of Tex. at Austin, 133 S.Ct. 2411 (2013); Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007); Missouri v. Jenkins, 515 U.S. 70 (1995); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986); Keyes v. Sch. Dist. No. 1, 413 U.S. 189 (1973); Green v. Cnty. Sch. Bd., 391 U.S. 430 (1968).

A. The Constitutional Requirements of Desegregation

In *Brown I*, the Court set out to eliminate segregated or dual school systems.[18] To achieve this goal, the Supreme Court ordered that the state has an affirmative duty to create a unitary system;[19] however, the Court limited the states' attempts to integrate in three key ways.[20] First, a state is required to remedy only segregation caused by state action.[21] Second, the remedy is limited to the district where the violation occurred.[22] Finally, when a state uses a race-based remedy to combat segregation, the remedy must survive a strict scrutiny analysis.[23]

1. Limits Based on State Action

A state is obligated to remedy past segregation only if it is caused by state action, often referred to by the courts as de jure segregation.[24] De jure segregation can mean a statutory scheme that created a dual school system, or it can mean action by the state or school board that has "(1) a racially discriminatory purpose and (2) a causal relationship between the acts complained of and the racial imbalance."[25] School districts have no duty to correct segregation caused by the free choices made by the citizens of that state.[26] This type of segregation is called de facto segregation.[27]

Although de facto segregation is caused by many factors,[28] the key distinction between it and de jure segregation is that de facto segregation cannot be attributed to "discriminatory action of state authorities."[29] For exam-

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18. *Brown I*, 347 U.S. at 495; *Swann*, 402 U.S. at 15 (stating that "[t]he objective today remains to eliminate from the public schools all vestiges of state-imposed segregation.").

19. *Green*, 391 U.S. at 437 ("School boards . . . operating state-compelled dual systems were . . . charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.").

20. *See infra* notes 21–23 and accompanying text.

21. *Keyes*, 413 U.S. at 189.

22. Milliken v. Bradley, 418 U.S. 717, 717–18 (1974).

23. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720 (2007).

24. *Keyes*, 413 U.S. at 189.

25. *Id.* at 207. The Constitutional inquiry of whether the state has committed de jure segregation is a district-by-district analysis; however, if a plaintiff shows intentional segregative actions in a "meaningful portion of a school system," then a burden shifting presumption is created. *Id.* at 208. The school board will have the burden of proving other districts were not victim to intentional segregation. *Id.*

26. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 17–18 (1971).

27. *Id.*

28. Segregation can be caused by "'housing patterns, employment practices, economic conditions, and social attitudes.'" *Parents Involved*, 551 U.S. at 760 (quoting the dissent, *id.* at 838–39 (Breyer, J., dissenting)).

29. *Swann*, 402 U.S. at 18.

ple, state action can include structuring attendance zones on the basis of race or building fixed-size schools located in African American residential areas to influence the racial composition of the schools, but does not include the existence of a single race school due to neighborhood residential patterns.[30] Without some type of state action, courts are not permitted to order remedies for segregated schools.[31]

2. School District Boundary Limits

Once a school is shown to have suffered from the effects of de jure segregation,[32] the remedy must be limited to the scope of the violation.[33] The Court uses school district boundaries as a guideline to define the scope of the remedy.[34] Violations that occur within a school district, intra-district violations, require intra-district remedies.[35] The Court chose school district boundaries as a guideline to avoid the logistical concerns of restructuring many different schools and to maintain the benefits of providing local control.[36]

For example, in Michigan, the state faced the problem of segregation in Detroit's inner-city school districts.[37] The state created attendance zones that encompassed newly created suburban school districts to remedy the segregation.[38] The plan called for the consolidation of fifty-four school districts into

30. *Id.* at 20–21, 25.

31. Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 205–06 (1973).

32. *Swann,* 402 U.S. at 18. "[E]xisting policy and practice with regard to faculty, staff, transportation, extracurricular activities, and facilities were among the most important indicia of a segregated system." *Id.*

33. Milliken v. Bradley, 418 U.S. 717, 744–45 (1974).

34. *Id.* The Court found school district lines significant because the boundary lines were not a creation of mere convenience, but a "deeply rooted tradition" that cannot be ignored. *Id.* at 719, 741–42.

35. *Id.* at 744.

36. *Id.* at 743. The benefits of local control include "afford[ing] citizens an opportunity to participate in decision-making, permit[ting] the structuring of school programs to fit local needs, and encourag[ing] 'experimentation, innovation, and a healthy competition for educational excellence.'" *Id.* at 742 (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 50 (1973)). In contrast, the Court noted that a multidistrict plan did not address matters related to the status and operation of the current school board, taxes, and large scale transportation needs. *Id.* at 743.

37. *Id.* at 729–30. The problem of segregation between districts rather than within was more common place in the northern metropolitan schools, where school districts were drawn based on smaller municipalities rather than large counties. Dana Russo, Note, *School Desegregation: From Topeka, Kansas to Wake County, North Carolina—Changing the Path, but Staying the Course*, 19 GEO. J. ON POVERTY L. & POL'Y 535, 538 (2012).

38. *Milliken*, 418 U.S. at 730 (calling the solution an "implementation of a multidistrict, metropolitan area remedy").

a "vast new super school district."[39] The Court found the plan unconstitutional.[40] Although inner-city districts suffered from the effects of de jure segregation, the suburban districts, being newly created, did not have a history of de jure segregation.[41] Ultimately, the Court limited when the state may undertake large scale reforms by finding that a multidistrict remedy was appropriate only when a constitutional violation in one district causes a "significant segregative effect in another district."[42]

3. Limits of Strict Scrutiny

When the state creates a law based on race, the Court determines whether the law is constitutional using a strict scrutiny standard.[43] In education cases, states have often used remedies that utilize individualized, race-based classifications to combat segregation.[44] Although this is an affirmative effort to integrate, the strict scrutiny standard is applied regardless of whether the plan seeks to include or exclude.[45] The Court will even use a strict scrutiny analysis on a race-neutral law, but only if the Court finds that the law has a racially discriminatory purpose.[46]

In order to pass strict scrutiny, a law must be narrowly tailored to serve a compelling government interest.[47] In education cases, the Court has recognized only two interests as compelling.[48] First, remedying de jure segregation is a compelling government interest that was established by the *Brown I* decision and the litigation that followed.[49] The second recognized interest is

39. *Id.* at 743.
40. *Id.* at 745.
41. *Id.*
42. *Id.* The Court did note that "an interdistrict remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race." *Id.* However, this was not the case in Detroit. The suburban schools districts were not causing the segregation in the inner-city schools. *Id.* The creation of the suburban school districts was not a result of purposeful state action, but more likely because of residential patterns, or de facto segregation. *Id.*
43. Grutter v. Bollinger, 539 U.S. 306, 326 (2003). In equal protection cases the Court uses a more "searching judicial scrutiny." *Id.* The analysis has a reputation for disfavoring the state so much that the phrase "strict in theory, but fatal in fact" has been quoted time and time again by the Court. *See id.*
44. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720 (2007).
45. *Id.*
46. Lawrence v. Texas, 539 U.S. 558, 599–600 (2003) (Scalia, J., dissenting); *See* Washington v. Davis, 426 U.S. 229, 241 (1976) ("A statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race").
47. *Parents Involved*, 551 U.S. at 720.
48. *See infra* notes 49–50 and accompanying text.
49. *Parents Involved*, 551 U.S. at 720.

achieving diversity.[50] If the state demonstrates that it has a compelling interest, the law must still be narrowly tailored to fit that interest.[51] Narrow tailoring requires a "serious, good faith consideration of workable, race-neutral alternatives."[52]

The Court recognizes that the state has a compelling interest in remedying past discrimination.[53] When a school is declared unitary, however, the school no longer can use race-based efforts to remedy de jure discrimination.[54] While recognizing that the state has an affirmative duty to act, the Court held that once the school is unitary, the use of individualized race-based classifications can no longer be justified.[55]

For example, the Jefferson County school district in Lexington, Kentucky was once under a court decree to desegregate.[56] After achieving unitary status, the school district implemented a race-based plan that required minimum minority enrollment that prohibited transfers of certain students on the basis of racial guidelines.[57] The Court found the plan unconstitutional, and the school was prohibited from using it, even though one year prior, the school district was required to maintain policies to desegregate the schools.[58]

The only other compelling interest the Court has found is achieving diversity.[59] The Court held constitutional a law school's policy that used race as a factor in admission.[60] This holding, although limited to higher education by the Court, has been applied to primary and secondary schools.[61] Although

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50. *Id.* at 722. This interest is limited both in scope and in longevity. *See infra* notes 59–69 and accompanying text.

51. *Parents Involved*, 551 U.S. at 720.

52. Grutter v. Bollinger, 539 U.S. 306, 339 (2003). A district court in Arkansas found a law that limited school transfer based on the race of the student had a compelling interest, but was unconstitutional because it was not narrowly tailored. Teague *ex rel.* T.T. v. Ark. Bd. of Educ., 873 F. Supp. 2d 1055, 1069 (W.D. Ark. 2012), *vacated as moot sub nom*. Teague v. Cooper, 720 F.3d 973 (8th Cir. 2013). The court called the law a "blanket rule" that used only race as a criteria. *Id.* at 1066. The court stated the law must "employ a more nuanced, individualized evaluation of the school and student needs" in order to be narrowly tailored. *Id.* at 1068.

53. *Parents Involved*, 551 U.S. at 720. This is referred to above as de jure segregation.

54. *Id.* at 720–21.

55. *Id.* at 721.

56. *Id.* at 720–21.

57. *Id.* at 716.

58. *Id.* at 747–48.

59. Grutter v. Bollinger, 539 U.S. 306, 325 (2003).

60. *Id.* at 343. This matter was recently heard by the Supreme Court. Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411 (2013) (vacating and remanding to the Court of Appeals due to an incorrect application of strict scrutiny).

61. *Parents Involved*, 551 U.S. at 725 ("The Court in *Grutter* expressly articulated key limitations on its holding—defining a specific type of broad-based diversity and noting the unique context of higher education . . . ."). Although this ruling was limited to higher educa-

this decision has been applied beyond the scope the Court imposed, the expansive application of *Grutter v. Bollinger* may be short lived.[62]

In *Fisher v. University of Texas at Austin*,[63] the University of Texas's admission plan automatically admitted students that graduated in the top ten percent of their high school class.[64] The rest of the applicants were evaluated with a process that considered race as one of many factors to encourage diversity among admitted students.[65] The Fifth Circuit Court of Appeals found the plan constitutional as a matter of law by applying strict scrutiny, while being "mindful of a university's academic freedom."[66]

The Petitioner appealed the case to the United States Supreme Court, and many anticipated that *Grutter v. Bollinger*[67] would be overturned, thus eliminating diversity as a compelling interest.[68] The Court remanded the case back for a strict scrutiny review that is not "strict in theory but feeble in fact,"[69] emphasizing the need for close analysis of race-conscious plans.[70] Though the Court declined to overrule *Grutter* because the parties did not ask the Court to do so,[71] the opinion left open the possibility that future reliance on race-conscious plans would be improvident.[72]

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tion in *Parents Involved*, federal district courts have used the *Grutter* reasoning in cases regarding primary schools. *See* Hart v. Cmty. Sch. Bd. of Brooklyn, New York Sch. Dist. No. 21, 536 F. Supp. 2d 274, 283 (E.D. N.Y. 2008). Judge Jack Weinstein wrote in the opinion, "[t]he same considerations that permit race as one factor among many that may be considered in college and graduate schools under *Grutter* . . . should be applied to grade schools . . . ." *Id.*

62. *See* Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2419 (2013) ("There is disagreement about whether *Grutter* was consistent with the principles of equal protection in approving this compelling interest in diversity.").

63. 133 S. Ct. 2411 (2013).

64. Fisher v. Univ. of Tex. at Austin, 631 F.3d 213, 235 (5th Cir. 2011) *cert. granted*, 132 S. Ct. 1536, (2012) and *vacated and remanded*, 133 S. Ct. 2411 (2013).

65. *Id.* at 235–36.

66. *Id.* at 234.

67. 539 U.S. 306 (2003).

68. Lyle Denniston, *Opinion recap: More rigorous race review,* SCOTUSBLOG, (June 24, 2013, 1:39 PM), http://www.scotusblog.com/2013/06/opinion-recap-more-rigorous-race-review/.

69. *Fisher*, 133 S. Ct. at 2421.

> Once the University has established that its goal of diversity is consistent with strict scrutiny, however, there must still be a further judicial determination that the admissions process meets strict scrutiny in its implementation. The University must prove that the means chosen by the University to attain diversity are narrowly tailored to that goal. On this point, the University receives no deference.

Id. at 2419–20.

70. *Id.* at 2419.

71. *Id.*

72. *See id.* at 2422. (Thomas, J., concurring) ("I would overrule [*Grutter*], and hold that a State's use of race in higher education admissions decisions is categorically prohibited by

B. Desegregation in Arkansas

After the Supreme Court of the United States ordered integration in *Brown I*, the Arkansas government resisted desegregation.[73] In 1956, the Arkansas Constitution was amended to oppose the desegregation decisions made by the Supreme Court.[74] The Supreme Court ruled that state officials must obey judicial orders.[75] The Little Rock schools allowed minority students to enter, but the resistance to integration continued until the 1980s.[76] Thirty years of ineffective efforts and resistance culminated in a federal lawsuit between the Little Rock, North Little Rock, and Pulaski County Special School Districts.[77]

1. The 1989 Settlement Agreement

Despite many efforts to maintain integrated schools, Little Rock schools suffered from "severe financial problems and an eroding financial base."[78] The Little Rock School District complained that school district boundaries were purposely maintained to prevent integration— while the city grew,[79] the school district did not.[80] Attractive residential areas that counted as part of the city of Little Rock were not included in the city's

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the Equal Protection Clause."); Denniston, *supra* note 68 ("[T]he tone of the opinion would seem to invite such further testing" of race-conscious plans.).

73. Little Rock Sch. Dist. v. Pulaski Cnty. Special Sch. Dist. No. 1, 778 F.2d 404, 413 (8th Cir. 1985).

74. Cooper v. Aaron, 358 U.S. 1, 8–9 (1958). The state opposed desegregation by "'enacting laws, calling out troops, making statements vilifying federal law and federal courts, and failing to utilize state law enforcement agencies and judicial processes to maintain public peace.'" *Id.* at 15 (quoting Brief for Petitioner, Cooper v. Aaron, 358 U.S. 1 (1958)). Little Rock schools, both majority and minority, were closed completely for a year. *Little Rock Sch. Dist*., 778 F.2d at 415. The state even passed legislation to garner funding for litigating its position in opposing integration. *Id.* at 414.

75. *Cooper*, 358 U.S. at 18. The Eighth Circuit summed up *Cooper*'s holding by stating that "public opposition to desegregation of the races, no matter how deeply entrenched, could not be allowed to interfere with the full realization of the constitutional rights of black citizens." Little Rock Sch. Dist. v. Pulaski Cnty. Special Sch. Dist. No. 1, 921 F.2d 1371, 1376 (8th Cir. 1990).

76. *Little Rock Sch. Dist.*, 778 F.2d at 417.

77. *See id*. These three districts are located in Pulaski County Arkansas, the state's most populous county. *Id.* at 408.

78. Little Rock Sch. Dist. v. Pulaski Cnty. Special Sch. Dist., 237 F. Supp. 2d 988, 1000 (E.D. Ark. 2002), *aff'd sub nom*. Little Rock Sch. Dist. v. Armstrong, 359 F.3d 957 (8th Cir. 2004).

79. *Little Rock Sch. Dist.*, 778 F.2d at 419.

80. *Id.* (noting that at that time had the district grown as the city "the black-white ratio in the Little Rock schools would now be sixty-forty rather than seventy-thirty.").

school district, but rather in Pulaski County Special School District.[81] Additionally, Pulaski County closed minority schools and built newer schools in suburban areas that were remote and inaccessible to minority students.[82]

The litigation revealed not only purposeful blocks to integration, but also a disturbing trend of minority students receiving grossly inadequate educational opportunities.[83] In the pre-*Brown I* era, per pupil expenditures in minority schools were significantly less than other schools.[84] Post *Brown I,* segregated county schools received more state aid than city schools.[85] Integrated schools were more likely to label minority students as learning disabled, and less likely to offer extracurricular activities to minority students.[86]

The Eighth Circuit Court of Appeals found that the school districts had violated the law, and an inter-district remedy was warranted because the boundary manipulation in Pulaski County "had a substantial interdistrict segregative effect."[87] The ruling was highly contested,[88] but finally, the schools consented to a plan the court termed the 1989 Settlement Agreement.[89] The court considered the plan to be a "complete cure for all interdistrict violations."[90] The agreement would allow school administrators to focus on education—not litigation.[91]

The Settlement Agreement focused on the creation of magnet schools, voluntary transfers, and state funding.[92] The districts agreed that Pulaski County Special School District would create two types of magnet schools.[93] The first would be a school that enrolled minority students from the Little Rock School District and majority students from the Pulaski County District.[94] The other would be themed magnet schools that would entice parents

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81. *Id.*

82. *Id.* at 420.

83. *Id.* at 412.

84. *Id.* In the pre-*Brown I* era, Little Rock became known as the only Arkansas school district that offered educational opportunities for minority students, prompting many minority students to transfer to Little Rock schools. *Id.* at 418–19.

85. *Little Rock Sch. Dist.*, 778 F.2d at 420.

86. *Id.* at 422.

87. *Id.* at 419 (meeting the "significant segregative effect in another district" requirement set out in *Milliken*).

88. Little Rock Sch. Dist. v. Pulaski Cnty. Special Sch. Dist. No. 1, 921 F. 2d 1371, 1376 (8th Cir. 1990) (noting that the ruling was followed by ten appeals.).

89. Little Rock Sch. Dist. v. Arkansas, 664 F.3d 738, 757 (8th Cir. 2011).

90. *Little Rock Sch. Dist.*, 921 F.2d at 1377.

91. *Id.* at 1394.

92. *Id.* at 1379–80.

93. *Id.* at 1379. "'[M]agnet schools,' . . . as their name suggests, aim to provide such improved educational quality that whites as well as blacks will be drawn to attend them." Paul Gewirtz, *Choice in the Transition: School Desegregation and the Corrective Ideal,* 86 COLUM. L. REV. 728, 763 (1986).

94. *Little Rock Sch. Dist.*, 921 F.2d at 1379.

of all races to enroll their students because of the schools' special offerings.[95] The plan allowed the district to convert some of the non-magnet schools into "incentive schools" that would be comprised of nearly all minority students, but would receive "special compensatory-education programs and markedly increased amounts of money."[96]

In addition to the creation of magnet schools, the plan also allowed for voluntary school choice, which allowed students to transfer into the school district of their choice.[97] The agreement gave control of the school's integration efforts to the judicial branch.[98] Finally, the plan would require the state to pay over $100 million to the schools over a ten-year period.[99]

2. Current Status

In order to be released from the Settlement Agreement, the schools must petition the court.[100] The court reviews several key areas of the Settlement Agreement and decides if the school has reasonably complied with the agreement.[101] Currently, the Little Rock School District is unitary,[102] and the North Little Rock School District has been declared unitary in all areas as well.[103] Pulaski County Special School District is unitary in all areas but nine.[104]

Currently, the state continues to pay $38 million per year to the three districts to fund the schools' desegregation efforts.[105] Arkansas has made clear that unitary schools would no longer receive this type of funding.[106] In 2011, a federal district court released the state from its funding obligation, but the appellate court reversed.[107] The trial court noted that the additional funding could encourage school districts to delay integration.[108] Although

95. *Id.* at 1389.
96. *Id.* at 1379.
97. *Id.*
98. *Id.* at1383.
99. *Id.* at 1381.
100. Little Rock Sch. Dist. v. Arkansas, 664 F.3d 738, 744 (8th Cir. 2011).
101. *Id.*
102. *See* Little Rock Sch. Dist. v. N. Little Rock Sch. Dist., 561 F.3d 746 (8th Cir. 2009).
103. *Little Rock Sch. Dist*., 664 F.3d at 744–48 (reversing the trial court's decision to deny unitary status in the area of staff recruitment to North Little Rock).
104. *Id.* at 748–57.
105. *Id.* at 757.
106. *Id.*
107. Little Rock Sch. Dist. v.Pulaski Cnty. Special Sch. Dist., No. 4:82cv00866 BSM, 2011 WL 1935332, at *54 (E.D. Ark. May 19, 2011), *rev'd in part sub nom.* Little Rock Sch. Dist. v. Arkansas, 664 F.3d 738 (8th Cir. 2011).
108. *Id.* The trial court referred to the funding as using the "carrot and stick approach . . . but that the districts are wise mules that have learned how to eat the carrot and sit down on the job." *Id.*

the appellate court reinstated the funding, the court agreed that the funding created a "perverse incentive[]" to not integrate.[109]

In 2013, the Arkansas Legislature repealed the Arkansas Public School Choice Act of 1989[110] after a district court found the law unconstitutional.[111] The original law provided students an opportunity to transfer to the district of their choice as long as the students did not move from a district where their race was the minority to a district where their race was the majority.[112] The court applied strict scrutiny because the law used race as a remedy.[113] The court found the state had a compelling interest in remedying past discrimination but overturned the law because it was not narrowly tailored.[114] The Arkansas legislature reacted by passing a law that does not use a student's race when approving transfers, but does exclude school districts from transfers if those districts are under a desegregation order, like the Settlement Agreement.[115] Accordingly, because it has not obtained unitary status,[116] students in the Pulaski County Special School District do not have the option to transfer to the school of their choice.

III. ARGUMENT

As one commenter noted, "[i]n spite of more than a century of activism seeking equal schooling for African American children, America's schools remain substantially segregated and unequal."[117] Integration has failed for many reasons, both legal and social. The reasons for the impact of failed integration are tied to funding and educational quality, race and poverty, and the fact that schools are under no obligation to remedy all types of segrega-

109. *Little Rock Sch. Dist.*, 664 F.3d at 758.

110. Schools and School Districts—Public School Choice Act of 2013, 2013 Ark. Acts 1227 (2013) (repealing ARK. CODE ANN. § 6-18-206 (2007)).

111. Teague *ex rel*. T.T. v. Ark. Bd. of Educ., 873 F. Supp. 2d 1055, 1069 (W.D. Ark. 2012), *vacated as moot sub nom*. Teague v. Cooper, 720 F.3d 973 (8th Cir. 2013).

112. ARK. CODE ANN. § 6-18-206 (f)(1) (2007) (repealed 2013).

113. *Teague*, 873 F. Supp. 2d at 1064.

114. *Id.* at 1066.

115. 2013 Ark. Acts 1227 at sec. 6 (codified at ARK. CODE ANN. §§ 6-18-1901 to -1909 (Supp. 2013)).

116. Little Rock Sch. Dist. v. Pulaski Cnty. Special Sch. Dist., 237 F. Supp. 2d 988, 1000 (E.D. Ark. 2002) *aff'd sub nom*. Little Rock Sch. Dist. v. Armstrong, 359 F.3d 957 (8th Cir. 2004).

117. 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 3, 23 (Maurice R. Dyson & Daniel B. Weddle eds., 2009). "[M]any schools—especially those located in urban communities—are more segregated today than they were prior to the *Brown v. Board of Education* decision." Eboni S. Nelson, *The Availability and Viability of Socioeconomic Integration Post*-Parents Involved, 59 S.C. L. REV. 841, 841–42 (2008).

tion.[118] The solution to the problem of quality education in the Little Rock, North Little Rock, and Pulaski County Special School Districts is to implement socioeconomic redistricting.

A. Integration Plateaus

The Supreme Court's limitation on legal remedies and voluntary desegregation plans has resulted in the re-segregation of many American cities.[119] As time passes, the vestiges of state-created segregation have almost been eliminated, yet the country continues to have racially isolated schools.[120] Schools across the country have become more segregated, not because of state action, but because of de facto segregation.[121] The combined effect has led one commenter to note that "[m]andatory racial desegregation has almost run its course."[122]

Due to legal limits on when a state may combat segregation, wealthier families have the option to avoid integrated schools simply by moving to the suburbs where dual systems never existed, but low socioeconomic classes and minorities are not represented.[123] Accordingly, inner-city schools are left with high concentrations of low-income minority students while the suburbs are home to wealthier, segregated schools. [124]

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118. *See infra* Part IV.A–B.

119. 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, 215 (Maurice R. Dyson & Daniel B. Weddle eds., 2009).

120. Gary Orfield, *Segregated Housing and School Resegregation*, *in* DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION 291, 294 (Gary Orfield, Susan E. Eaton, & Harvard Project on School Desegregation, eds., 1996) [hereinafter Orfield, *Segregated Housing*] ("Even where extensive desegregation was achieved under an old court order, racial integration was threatened by the spread of minority segregation in city neighborhoods and the continuous construction of new all-white suburbs.").

121. Derek W. Black, *Middle-Income Peers as Educational Resources and the Constitutional Right to Equal Access*, 53 B.C. L. REV. 373, 374 (2012) ("Schools are as racially segregated today as they were four decades ago . . . ."). In the *Parents Involved* decision, Justice Kennedy in a concurring opinion feared the plurality was ignoring the impact of de facto segregation in school districts. 551 U.S. 701, 788 (2007) (Kennedy, J., concurring).

122. Black, *supra* note 121, at 374.

123. Missouri v. Jenkins, 515 U.S. 70, 87 (1995) (noting the Court does not find a violation just because of a racial imbalance in a school without a showing of something more); *see* Richard D. Kahlenberg, *Socioeconomic School Integration*, 85 N.C. L. REV. 1545, 1551 (2007) [hereinafter Kahenberg, *Socioeconomic School Integration*]. Kahlenberg argues that this view is acceptable to society because of the "deeply held notion that wealthy parents have a right to purchase homes in affluent neighborhoods and send their children to public schools that in effect exclude less well-off children." *Id.*

124. Ryan, *supra* note 11, at 272. "Roughly two-thirds of black students attend elementary and secondary school in central-city districts." *Id.*

Social influences have contributed to re-segregation as well. Patterns in housing have become less integrated.[125] Economic factors affect minorities' ability to purchase homes in more affluent areas, which has impacted the demographic makeup of neighborhoods.[126] African Americans face disadvantages in receiving loans to purchase homes in wealthier neighborhoods.[127] Furthermore, African Americans suffer from an income gap that affects their ability to build the assets required for social mobility.[128] Since many school districts rely on neighborhood districts,[129] the outcome is simple: if we live segregated, we learn segregated.

The judicial system has avoided regulating all causes of residential segregation.[130] The Supreme Court has referred to the phenomenon as a product of "demographic forces" rather than addressing the historical impact of segregation that has fostered the current demographic makeup of the country.[131] One author has gone so far as criticizing the court's decisions for "enshrin[ing] 'choice,' for those who can afford it, and deem[ing] marginalization or exclusion acceptable for the less fortunate other."[132] Another explanation, however, may be that the courts have been reluctant to challenge de facto segregation because of the implications of finding a legal harm in racial isolation itself, rather than in the state's action of segregating students.[133]

Even though schools still suffer from segregation, administrators are restricted in the voluntary use of integration plans. The state has no constitu-

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125. Orfield, *Segregated Housing*, *supra* note 120, at 291.

126. John A. Powell & Rebecca High*, The Common Schools Democracy Requires: Expanding Membership through Inclusive Education, in* LESSONS IN INTEGRATION: REALIZING THE PROMISE OF RACIAL DIVERSITY IN AMERICAN SCHOOLS 265, 269–70 (Erica Frankenberg & Gary Orfield eds., 2007).

127. *See id.*

128. *Id.* at 269.

129. Kahlenberg, *Socioeconomic School Integration*, *supra* note 123, at 1569 (noting "roughly three quarters of American students attend neighborhood public schools").

130. Orfield, *Segregated Housing*, *supra* note 120, at 292–95. S*ee also* Missouri v. Jenkins, 515 U.S. 70, 96 (1995) ("The record here does not support the District Court's reliance on 'white flight' as a justification for a permissible expansion of its intradistrict remedial authority through its pursuit of desegregative attractiveness").

131. Orfield, *Segregated Housing*, *supra* note 120, at 296–97. Orfield refers to the patterns in housing as a "residential apartheid." *Id.* at 299.

132. Powell & High, *supra* note 126, at 270. Supreme Court Justice Lewis Powell voiced a similar sentiment in his concurring opinion in the *Keyes* decision. Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 219 (1973) (Powell, J., concurring in part and dissenting in part). Justice Powell stated "if our national concern is for those who attend [segregated] schools, rather than for perpetuating a legalism rooted in history rather than present reality, we must recognize that the evil of operating separate schools is no less in Denver than in Atlanta." *Id.*

133. *See* Missouri v. Jenkins, 515 U.S. 70, 115 (1995) (Thomas, J., concurring). In his concurring opinion, Justice Thomas made clear that findings of harm in a racially isolated school rest on the assumption that a predominantly minority school is inferior. *Id.* at 114–15.

tional duty to combat de facto segregation.[134] If a state does endeavor to address segregation, any state law using race will be tested with strict scrutiny.[135] Because the only compelling interest likely to pass strict scrutiny is combating de jure segregation, a school can only combat segregation by using race is if the district is constitutionally required to eliminate the segregation. Exacerbating the problem is the fact that even when inner-city districts can prove a de jure violation, the city may not be able to actually combat the segregation in a meaningful way.[136]

In Arkansas, the legal impact has been significant. More of Arkansas's schools have become unitary.[137] Such schools, therefore, may not make efforts to integrate using race-based criteria under Supreme Court precedent.[138] Even Arkansas's Public School Choice Law was found unconstitutional under the strict scrutiny standard.[139] Each decision points to the conclusion that the use of race in Arkansas school legislation is coming to an end, but problems of segregation still exist.

B. The Impact of Isolation

Minority students suffer disproportionately from the effects of racial isolation. Although wealth disparities in general have grown, race and poverty are especially linked.[140] In Pulaski County Special School District's effort to attain unitary status, the district had to demonstrate its efforts to implement a plan to address the achievement gap of African-American students.[141] The district presented evidence that any plan would be futile be-

134. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 788 (2007) (Kennedy, J., concurring). Although under no affirmative duty to desegregate in a de facto area, Justice Kennedy argued it is a mistake that "[schools] must accept the status quo of racial isolation . . . ." *Id.*

135. *See supra* Part II.A.3.

136. Orfield, *Segregated Housing*, *supra* note 120, at 294. Orfield writes about the impact of the *Milliken* ruling on the Detroit School District noting that "Detroit was the nation's second most segregated metropolitan area a generation after [the post *Milliken* remedy was instated]." *Id*.

137. *See* Little Rock Sch. Dist. v. Arkansas, 664 F.3d 738, 758 (8th Cir. 2011) (finding North Little Rock School District unitary).

138. *See supra* Part II.

139. Teague *ex rel* T.T. v. Ark. Bd. of Educ., 873 F. Supp. 2d 1055, 1069 (W.D. Ark. 2012), *vacated as moot sub nom*. Teague v. Cooper, 720 F.3d 973 (8th Cir. 2013).

140. Black, *supra* note 121, at 404. Black notes the achievement gap between minority and majority students is the equivalent of two or three grade years; however, "[r]esearch indicates that much of this achievement gap is not based on race itself, but is largely attributable to the fact that predominately minority schools are also overwhelmingly high-poverty schools . . . ." *Id.*

141. Little Rock Sch. Dist. v. Pulaski Cnty. Special Sch. Dist., 237 F. Supp. 2d 988, 1023 (E.D. Ark. 2002), *aff'd sub nom*. Little Rock Sch. Dist. v. Armstrong, 359 F.3d 957 (8th Cir. 2004).

cause "the current socioeconomic differences between African-Americans and whites make it impossible to eliminate the achievement gap."[142] The Eighth Circuit Court of Appeals found that the district's failure to implement a plan aimed solely at African American students warranted a denial of unitary status.[143] The court required the school to make a good faith effort to implement a plan targeted at race, "regardless of whether [the plan] eventually bear[s] fruit."[144]

Furthermore, segregated schools are more likely to be low-income schools.[145] One author noted that minorities made up "80 percent of all students in schools with poverty rates of 90 percent or more."[146] Low income schools have lower test scores, higher drop-out rates, lower parental involvement, fewer connections to higher education, and lower quality teacher retention.[147] The lack of experienced qualified teachers plagues lower income schools.[148] Families are less likely to have the finances for academic support.[149] As a result, minorities suffer far more from the harmful effects of segregation.

The Supreme Court of Arkansas has acknowledged the impact of high poverty schools, and the Legislature has addressed the issue through increased funding.[150] The Legislature enacted bills that provided incentives for teachers to relocate to areas with high concentrations of poverty.[151] In addition, the General Assembly increased school funding by nearly 18% through increased taxes in order to provide all Arkansas students with an adequate

142. *Id.* at 1073.

143. Little Rock Sch. Dist. v. Arkansas, 664 F.3d 738, 756–57 (8th Cir. 2011).

144. *Id.* at 757.

145. Powell & High, *supra* note 126, at 269.

146. *Id.* at 270; *see also* Kahlenberg, *Socioeconomic School Integration*, *supra* note 123, at 1545. "Minority students are almost three times as likely as white students to be low-income." *Id.*

147. Richard D. Kahlenberg, *Socioeconomic School Integration through Public School Choice: A Progressive Alternative to Vouchers*, 45 HOW. L.J. 247, 250–52 (2002) [hereinafter Kahlenberg, *Public School Choice*].

148. One study showed that in low-income schools 27% of the math teachers actually majored in mathematics compared to 43% in middle income schools. AM. PSYCHOLOGICAL ASS'N., *supra* note 12.

149. *Id.* This page notes that studies show a correlation between availability of books, computers, tutors and literacy. *Id.*

150. Lake View Sch. Dist. No. 25 v. Huckabee, 358 Ark. 137, 141–42, 189 S.W.3d 1, 4 (2004). The Court appointed special Masters to evaluate a study on what resources were required to provide an adequate education. *Id*. at 142, 189 S.W.3d at 4. The Masters recommended additional staff for schools with high concentrations of poverty and measures to prevent teachers from migrating from poorer districts. *Id.* at 146, 148, 189 S.W.3d at 4, 8.

151. *Id.* at 148, 189 S.W.3d at 8. Though an improvement, the Masters questioned whether the measures would enable poorer school districts to compete with wealthier districts or districts in neighboring states. *Id.* at 158, 189 S.W.3d at 14.

education.[152] In assessing the effectiveness of the legislation, the court was clear that the measures were an effort not to equalize schools, but to establish a floor each school must meet.[153]

C. Socioeconomic Redistricting as a Solution

Previous methods for dealing with racial segregation are outdated.[154] Race conscious measures are disfavored by the court, and in Arkansas, the "carrot and stick approach" has yielded poor results.[155] Great benefits, however, can be derived from the continuation of integration. In his concurring opinion in *Parents Involved*, Justice Kennedy said that the plurality's holding "should not prevent school districts from continuing the important work of bringing together students of different racial, ethnic, and economic backgrounds."[156] To combat the effects of re-segregation and improve educational opportunities for students of all races, Pulaski County school districts should implement a race-neutral action plan.

Socioeconomic redistricting would be a constitutional method of providing much needed resources to low-income schools and would indirectly integrate schools suffering from *de facto* segregation. Although other schools have used alternative race-neutral approaches, this note proposes

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152. *Id.* at 153, 189 S.W.3d at 12.

153. *Id.* at 155, 189 S.W.3d at 13. The Court noted that some school districts may be able to raise additional funds "which may lead to enhanced curricula, facilities, and equipment [that] are superior to what is deemed to be adequate by the State." *Id.* The goal of achieving equity and adequacy has been a key distinction in school finance litigation across the nation. *See* William A. Kaplin, *Fiscal Inequity and Resegregation: Two Pressing Mutual Concerns of K-12 Education and Higher Education*, *in* OUR PROMISE ACHIEVING EDUCATIONAL EQUALITY FOR AMERICA'S CHILDREN 99, 106 (Maurice R. Dyson & Daniel B. Weddle eds., 2009).

154. *See* Susan E. Eaton, *Slipping Toward Segregation: Local Control and Eroding Desegregation in Montgomery County*, *in* DISMANTLING DESEGREGATION THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION 207, 222 (Gary Orfield, Susan E. Eaton, & Harvard Project on School Desegregation, eds., 1996) Studies have shown that magnet schools, like the ones created in Little Rock, are not powerful enough to draw in voluntary transfers and could actually work against desegregation. *Id. See also* Alison Morantz, *Money and Choice in Kansas City: Major Investments with Modest Returns*, *in* DISMANTLING DESEGREGATION THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION 241, 243 (Gary Orfield, Susan E. Eaton, & Harvard Project on School Desegregation, eds., 1996) (explaining that voluntary magnet schools achieved only modest advances in academic achievement and racial segregation).

155. *See* Little Rock Sch. Dist. v. Arkansas, 664 F.3d 738, 752 (8th Cir. 2011). In 2005, Pulaski County Special School District opened a new elementary school in a predominately African-American area. The cost of the facility broke down to roughly $8,150 per student. *Id.* Compare that to the $25,000 per student cost of a school district that opened seven years later in a predominately white area. *Id.*

156. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 798 (2007) (Kennedy, J., concurring).

that the best solution would be to redistrict schools with high concentrations of low-income students with suburban middle-class schools.

1. Passing the Legal Requirements

Socioeconomic redistricting is a constitutional way to achieve integration and the benefits of better financed schools. Race-based systems are tested by strict scrutiny,[157] but socioeconomic redistricting would focus on race-neutral criteria such as the number of students on free lunches[158] or census data.[159] If the law has the race-neutral purpose of achieving integration of middle and low-income children,[160] the court will find the law constitutional as long as there is a rational basis for the law.[161] Adequate resources are rationally related to how well schools perform,[162] and redistricting to get those resources in all schools is a legitimate way to achieve the goal considering that the continuation of low income schools is economically inefficient.[163]

While it is true that the redistricting would necessarily cross the district boundaries in Pulaski County, socioeconomic redistricting would not be limited by the intra-district rule in *Milliken*[164] because the plan would still pass constitutional muster.[165] First, the purpose of redistricting is to better finance the county's schools, not to remedy past segregation.[166] Since the plan is not remedial action combating a violation, the limitation of *Milliken* would not apply. Second, even if the rule did apply, the Eighth Circuit Court

157. *See supra* Part II.A.3.

158. When a school is segregated due to de facto segregation, the school must use racially neutral means to combat the wrong unless there is some extraordinary showing. *Parents Involved*, 551 U.S. at 796 (Kennedy, J., concurring).

159. Black, *supra* note 121, at 414; *see* AM. PSYCHOLOGICAL ASS'N., *supra* note 12 (Socioeconomic status can be measured "as a combination of education, income and occupation.").

160. Gewirtz, *supra* note 93, at 773 (stating "educational improvements are relevant in their own right, because they also promote a separate remedial goal").

161. Lawrence v. Texas, 539 U.S. 558, 599 (2003) (Scalia, J., dissenting).

162. Kahlenberg, *Public School Choice*, *supra* note 147, at 250 ("Successful schools require an adequate financial base.").

163. Black, *supra* note 121, at 411 ("The federal government estimates that the cost of educating low-income students is approximately forty percent more than middle-income students.").

164. Milliken v. Bradley, 418 U.S. 717 (1974).

165. *See* Gary Orfield, *Toward an Integrated Future: New Directions for Courts, Educators, Civil Rights Groups, Policymakers, and Scholars*, *in* DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION 331, 345 (Gary Orfield, Susan E. Eaton, & Harvard Project on School Desegregation, eds., 1996) [hereinafter Orfield, *Toward an Integrated Future*] ("The most stable desegregation plans are plans that include cities and suburbs.").

166. Integration is a secondary benefit of the plan, not the purpose.

has already determined that significant intra-district violations had occurred between the three districts in Pulaski County, so the scope of this plan would be permitted.[167]

Furthermore, Arkansas law could provide a basis for the plan. The statutory law allows for the consolidation of districts that are not geographically contiguous if it will result "in the overall improvement of the educational benefit to students in all of the districts involved."[168] Although the Supreme Court of the United States has held that an adequate education is not a fundamental right,[169] some scholars have suggested that allowing students access to adequate resources such as middle-class peers is required by the state constitution.[170]

Arkansas courts have found that children are entitled to adequate resources.[171] Socioeconomic redistricting could be argued as a way to adequately fund Arkansas's schools.[172] Recently, a new wave of litigation has focused on the entitlement of adequate education as a way to improve education in poor, racially isolated districts.[173] If redistricting fails to pass legal concerns regarding segregation laws, a strong argument can be made that the change is required under state law.[174]

2. Producing Integration and Improvement in Education

Redistricting Pulaski County schools would bring additional resources to the schools while indirectly addressing the harmful impacts of segregation. The change would increase resources by providing a range of low-income and middle-income students to each school district.[175] Creating mid-

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167. Little Rock Sch. Dist. v. Pulaski Cnty. Special Sch. Dist. No. 1, 921 F.2d 1371, 1377 (8th Cir. 1990).

168. ARK. CODE ANN. § 6-13-1404(f)(1) (Repl. 2007 & Supp. 2013).

169. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973).

170. Ryan, *supra* note 11, at 259. "Whereas school desegregation cases sought equality indirectly through integration, school finance cases directly attacked the apparent source of the inequality: the distribution of education resources." *Id.*

171. Lake View Sch. Dist. No. 25 v. Huckabee, 358 Ark. 137, 155, 189 S.W.3d 1, 12–13 (2004).

172. Ryan, *supra* note 11, at 260 (noting that in current desegregation litigation the "end goal changed from integration to reparation; indeed, a number of these cases have come to resemble isolated versions of school finance litigation").

173. *Id*. The author recommends this type of litigation over desegregation because "some federal courts have used school desegregation decrees to circumvent the limitations imposed by *Rodriguez* or similar state-court decisions rejecting school finance challenges." *Id.* at 264.

174. *See* Kaplin, *supra* note 153, at 99–100. Kaplin points out that "school finance litigation displaced desegregation litigation as the major instrument for enhancing equal educational opportunity." *Id.*

175. *See* Kahlenberg, *Socioeconomic School Integration*, *supra* note 123, at 1570–71. Kahlenberg points out that "part of receiving an adequate education is having access to 're-

dle-class schools would increase funding per pupil and cost less to operate.[176] Finally, redistricting would provide integrated schools.

Low-income students would reap benefits from working in an environment with middle-income peers.[177] Middle-income students bring intangible "educational capital" to the schools they attend.[178] Those students and their parents attract better qualified teachers and higher expectations on school officials, which have an indirect positive impact on the other students in those schools.[179] Also, students enrolled in middle-class schools are more likely to have access to college prep classes and an environment with children that have high goals and support.[180]

Arkansas's current approach to funding, though it addresses the issue of poverty, fails on two fronts.[181] First, research has shown that spending money directly on low-income schools does not improve results.[182] In states where inner-city schools were funded at higher amounts than their suburban counterparts, the inner-city schools continued to score lower on standardized tests.[183] Second, the adequate education reforms do not consider the advantages student integration has on achievement.[184] The school districts receive none of the positive byproducts of racial integration.[185] For example, in St. Louis, a study found that when a minority student transferred to a suburban school district, the student consistently performed better than his or her peers in inner-city schools.[186]

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sources' provided in mixed-income schools like positive peer influences, active school parent volunteers, and high-quality teachers who teach a rigorous curriculum. *Id.*

176. Black, *supra* note 121, at 410–11.

177. James, *supra* note 119, at 227.

178. Black, *supra* note 121, at 409.

179. *Id.* at 377, 409.

180. Ryan, *supra* note 11, at 298.

181. *See* Lake View Sch. Dist. No. 25 v. Huckabee, 358 Ark. 137, 142, 189 S.W.3d 1, 4 (2004). Arkansas increased funding to poorer districts and focused on incentives to prevent teacher migration. *Id.*

182. *See* Ryan, *supra* note 11, at 290 (suggesting that the effects of segregation "cannot be adequately addressed by school finance reform . . . .").

183. *Id*. at 290–91. Ryan details the expenditures of the school district at the heart of the *Missouri* decision. The school districts "[h]aving been denied relief that would very likely have been cheaper and more effective, they were granted a bonanza of funds" to convert to magnet schools. *Id.* at 290. While the students saw some improved performance, the students still failed to improve relative to other students in their states. *Id.*

184. *See id.*

185. *See id.*

186. *Id.* at 298–99. Ryan also points out that in a similar San Francisco case study "students from low socioeconomic backgrounds posted significant gains in achievement when they transferred to schools with more advantaged and higher-achieving students." The performance was better "despite the fact that the transfer schools received no increase in funding." *Id.* at 299.

Per pupil funding would be more efficient if central Arkansas schools converted from a system that uses proximity to the school as the sole factor to one that uses socioeconomic status. Instead of increased funding through tax hikes, socioeconomic redistricting could better allocate current resources.[187] Some states have created financial incentives for accepting low-income students by using a "weighted student-funding formula."[188] With this method, schools receive additional funds for accepting low-income students.[189] Other states have the school districts compete for transfers by having state funds follow the student to the new district.[190] If adopted in Arkansas, the increased funding at the school level would entice better teachers and improve test results at historically poor schools.[191] Additionally, economic incentives have been proven to increase the incentive for school districts to accept low income students.[192] Rather than rely on tax increases, Arkansas could reallocate the $38 million it currently spends in desegregation to fund the redistricting plan.[193]

Since many lower-income schools are segregated, socioeconomic redistricting would also indirectly increase diversity.[194] The neighborhood school system encourages racial isolation.[195] Changing the system will change the makeup of the school. Low-income students are more likely to be minority, so integrating low-income students with middle-income ones would necessarily integrate students by race.[196] In addition, over time as schools improve, wealthier families would have less reason to flee inner-city schools, and the school districts would stabilize with a middle-class student body.[197]

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187. *See infra* notes 189–91 and accompanying text.

188. Kahlenberg, *Socioeconomic School Integration*, *supra* note 123, at 1564.

189. *Id.*

190. *Id.* at 1565.

191. *See id.* at 1549. Factors that educators find desirable in a school are "high standards, good teachers, active parents, adequate resources, a safe and orderly environment, and a stable student and teacher population . . . ." *Id.* "[M]oney is useful in producing higher test scores when it purchases teachers with strong literacy skills . . . retains experienced instructors, and increases the number of teachers with advanced degrees." James, *supra* note 119, at 223.

192. Kahlenberg, *Socioeconomic School Integration*, *supra* note 123, at 1565.

193. *See* Ryan, *supra* note 11, at 299–300.

194. Integration is a secondary effect; though the school districts will achieve more integration, the diversity achieved would not be at the same level as plans that concentrate on racial status. Nelson, *supra* note 117, at 847.

195. Orfield, *Toward an Integrated Future*, *supra* note 165, at 331. Orfield points out that minority children are isolated into high poverty schools while "[a]lmost no whites end up in such schools under the neighborhood system." *Id.*

196. Kahlenberg, *Socioeconomic School Integration*, *supra* note 123, at 1569; *see also* Ryan, *supra* note 11, at 301 (noting that "[b]ecause of the racial dimensions of poverty, a by-product of racial integration is often (or certainly can be) socioeconomic integration.").

197. Orfield, *Toward an Integrated Future*, *supra* note 165, at 355.

One district similar to Little Rock has found the socioeconomic redistricting model successful.[198] Wake County Public School System is similar to Little Rock schools in that it was also under a court ordered desegregation plan.[199] Unlike Arkansas, North Carolina actually cut funding from Wake County's budget for failure to integrate.[200] Wake County schools obtained unitary status like Little Rock schools and were no longer under a desegregation plan.[201] Because the schools were no longer under a court order to desegregate, Wake County was obligated to use race-neutral plans to maintain any diversity.[202] In 1999, Wake County implemented a socioeconomic status in its assignment plans for all schools.[203]

The plan was seen as a success and "had been lauded as a national model."[204] In 2005, Wake County's low-income and minority students passed exams at a higher rate than in surrounding traditional school districts.[205] That success, however, was short lived. In order to maintain socioeconomically diverse schools, the district had to reassign students often.[206] Parents wanted stability and neighborhood schools that would not require busing students long distances.[207] These problems led to the demise of socioeconomic redistricting in Wake County.[208]

"All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes. But all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation."[209] School district boundaries should

198. *See infra* notes 197–206 and accompanying text.

199. Russo, *supra* note 37, at 544.

200. *Id.* at 557 (noting "higher levels of achievement can be attained with less spending").

201. *Id.* at 545.

202. *Id.* at 546. The race-based plans failed under the strict scrutiny analysis. *Id.*

203. *Id.* The policy aimed to maintain schools with diverse student populations based on family income and used free or reduced-price lunches as the criteria. *Id.*

204. *Id.* at 543.

205. Kahlenberg, *Socioeconomic School Integration*, *supra* note 123, at 1553–54. More than 63% of Wake County low-income students passed high school end-of-course exams, versus 47.8% of Mecklenburg County's low-income students, 51.8% of Forsyth County's low-income students, and 48.7% of Durham County's low-income students—all counties neighboring Wake County. *Id.* at 1553–54. African-American students in Wake County similarly out-performed African-American students in the same neighboring counties. *Id.* at 1554.

206. Russo, *supra* note 37, at 546–47. This is because "American cities have always been in a state of constant change." Orfield, *Segregated Housing*, *supra* note 120, at 291.

207. Kahlenberg, *Socioeconomic School Integration*, *supra* note 123, at 1559–60.

208. Russo, *supra* note 37, at 548. The Wake County dismantling sparked outrage among the public, but was replaced by a "plan that allows families to choose schools close to home but also permits students who are currently being bused to continue to attend schools outside of their neighborhood." *Id.* at 550.

209. Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 28 (1971).

evolve with the needs of the community.[210] The Seminole County Florida school district is an example of an adaptable socioeconomic redistricting plan.[211] The school district adopted "'attendance zones'" that can be modified when a residential area does not provide diversity.[212] The school district allows the school board to change attendance zones and merge large areas, and allows for socioeconomic transfers as needed.[213] With control still invested in the local school board, the Seminole County plan may prove to be more sustainable than the Wake County plan.[214]

3. Garnering Community Support

While the benefits of socioeconomic integration have been acknowledged, communities seem reluctant to redistrict schools. One argument, that "lasting school integration requires sorting out the links between schools and housing changes,"[215] has prompted some states to address the neighborhood issue on the front end, by enacting legislation that requires portions of new developments to be set aside for low income households.[216] Other districts have opted for public school choice as another alternative to redistricting.

The theory behind school choice is that if schools were allowed to compete for students, then successful schools would be emulated and all schools would benefit.[217] The problem is that schools do not act like a tradi-

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210. Saiger, *supra* note 7, at 495–96. Saiger points out that "[s]chool district boundaries, like the boundaries of electoral districts, should be periodically redrawn. But whereas electoral redistricting periodically restores interdistrict equivalence in population, school redistricting should seek to dissolve within-district accretions of wealth and poverty." *Id.*

211. Danielle Holley-Walker, *After Unitary Status: Examining Voluntary Integration Strategies for Southern School Districts*, 88 N.C. L. REV. 877, 899 (2010). The school district may be an ideal model for Pulaski County because of the similarities between the two. Like Pulaski County school districts, the school is a post unitary school located in central Florida with a large and diverse student population. *Id.*

212. *Id.* at 900.

213. *Id.*

214. Milliken v. Bradley, 418 U.S. 717, 742 (1974) ("[L]ocal autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process.").

215. Orfield, *Segregated Housing*, *supra* note 120, at 291."[R]educing residential segregation by economic status will translate into greater socioeconomic integration." Kahlenberg, *Socioeconomic School Integration*, *supra* note 123, at 1569.

216. Kahlenberg, *Socioeconomic School Integration*, *supra* note 123, at 1569.

217. *See* 2013 Ark. Acts 1227 at sec. 6 (amending ARK. CODE ANN. § 6-18-227(b)(2)(A)(i) (Repl. 2007 & Supp. 2013)) ("Giving more options to parents and students with respect to where the students attend public school will increase the responsiveness and effectiveness of the state's schools because teachers, administrators, and school board members will have added incentive to satisfy the educational needs of the students who reside in the district . . . .").

tional market.[218] School choice provides no mechanism for improvement.[219] As the more successful schools attract students, the unsuccessful districts "become ever more poor and distressed."[220]

Additionally, space in schools is limited.[221] One proponent of socioeconomic integration has aptly pointed out that "it is patently clear that there simply are not enough good schools into which students can transfer."[222] School choice laws do not address what happens to the spillover students when the successful schools reach capacity.[223] Finally, school choice would be an ineffective solution to segregation because school integration would not be a natural result.[224] Parents would still be likely to pick schools based on status and not educational results.[225]

With these drawbacks, it becomes apparent that school choice would be an inadequate plan for Pulaski County schools. As one commenter stated, "freedom of choice plans were unacceptable if there were other ways, such as zoning, that were reasonably available and would result in a speedier and more effective conversion to a unitary, nonracial school system."[226]

A long term socioeconomic redistricting plan can be implemented successfully in Pulaski County by focusing on efficiency, adaptability, and community involvement. Redistricting would achieve the most benefit using the least disruptive method. As this note shows, Pulaski County students would receive many benefits from redistricting. Like the Seminole County plan, the local school boards could maintain local control in the redistricting decisions.

Finally, a key way to combat the pitfalls of parental disagreement is to involve the community.[227] Communities and school districts have worked

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218. *See* Saiger, *supra* note 7, at 500.

219. *See id.*

220. *Id.*

221. Kahlenberg, *Socioeconomic School Integration*, *supra* note 123, at 1561 (noting that in one district "almost 18,000 [students] were unable to transfer because higher-performing schools were full to capacity.").

222. *Id.* at 1565.

223. Kahlenberg, *Public School Choice*, *supra* note 147, at 249 (stating it would be "unfair to trap poor kinds in bad schools.").

224. Saiger, *supra* note 7, at 500. By competing for residents the school district will work with local government to bring in residents with "taxable wealth and to exclude those who are poor and/or expensive to educate." *Id.*

225. Gewirtz, *supra* note 93, at 742 ("Where a choice system is 'tainted' in this sense, it presumptively does not remedy the violation . . . ."); *see* Black, *supra* note 121, at 410 (stating that parents choose to enroll their students in middle income schools).

226. Russo, *supra* note 37, at 537; *see* Ryan, *supra* note 11, at 278 ("The effects of racial and socioeconomic isolation, this Article suggests, cannot be adequately addressed by school finance reform . . . .").

227. *See* Milliken v. Bradley, 418 U.S. 717, 783 (1974) (Marshall, J., dissenting). Justice Marshall argued that the notion of local school control "simply flies in the face of reality." *Id.*

together in finance litigation in the past,[228] demonstrating that it is possible to garner community support to improve academic achievement. This goal far outweighs the inconveniences the middle class may suffer through, such as extended busing.[229] As Justice Marshall said in his dissenting opinion in *Milliken*, "We deal here with the right of all of our children, whatever their race, to an equal start in life and to an equal opportunity to reach their full potential as citizens."[230]

IV. CONCLUSION

Arkansas school districts are in a unique position to not only improve the education of the students, but also to shed its torrid history. Rather than being a reminder of past wrongs that should not be repeated, Little Rock can be a shining example for others to emulate. The Supreme Court appears to be stepping aside in the efforts to integrate, and school districts will now be asked whether to continue improving in a neutral way or stick with the status quo. Socioeconomic redistricting plans should be the path taken for Pulaski County school districts. Redistricting would allow for Pulaski County to improve academic achievement, eliminate the need to spend tax dollars in desegregation efforts, and still integrate public schools.

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at 797. He said, "Centralized state control manifests itself in practice as well as in theory. . . . The State also establishes standards for teacher certification and teacher tenure; determines part of the required curriculum; sets the minimum school term; approves bus routes, equipment, and drivers; approves textbooks; and establishes procedures for student discipline." *Id.* at 795–96.

228. Ryan, *supra* note 11, at 263 ("[T]hese cases often pitted unlikely allies against unusual foes, in that civil rights groups representing school children teamed up with the districts (against whom the initial desegregation case was brought) in an effort to extract money from unwilling state governments.").

229. *See* Kahlenberg, *Socioeconomic School Integration*, *supra* note 123, at 1560.

230. *Milliken*, 418 U.S. at 783 (Marshall, J., dissenting).

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