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A Tale of Two Towns: Why New Jersey Needs to Regionalize and Consolidate School Districts

Kevin Cuddihy¹

Every school year, I have my sixth-grade students participate in an activity to demonstrate systemic racism in the United States. Though I wish I could take credit for the activity, it is not my creation and is quite commonly used. Students are asked to take out three pieces of paper and crumple each into a ball. In the front of the classroom is a garbage bin, and students are asked to shoot their crumpled paper balls into the garbage bin for some arbitrary prize, such as extra credit. The catch is that the students are not allowed to move from their seat, so some students are given the extreme advantage of sitting at the desk right in front of the garbage bin, while others are in the back of the classroom unable to even see the target they are supposed to hit. On the count of three, a pandemonium of paper balls are shot across the room and as some students begin to make their shots and the overwhelming majority miss, a chorus of chaotic whining ensues where I am repeatedly told how unfair the activity is. To add fuel to the fire, the students are repeatedly told that this was a fair activity because every student had the same opportunity: three shots at the basket. Quickly, the students explain how each student did not have an equitable opportunity and eventually, one or two students figure out what the activity represents. They raise their hand and explain how if the United States were the classroom, people of color are the ones in the back of the room, and white economically advantaged people sit in the front of the room, dismantling the illusory notion that the United States is a meritocracy.

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In the United States, children of color are more likely to attend under-resourced schools and less likely to have higher levels of economic opportunities in their adulthood compared to their white peers.² In New Jersey, majority white districts have a higher per pupil budget of nearly three thousand four hundred dollars more than nonwhite districts, even accounting for need based state funding.³ The average white student, on the other hand, attends a school where more than two-thirds of the total enrollment is white, despite white students only proportionally representing 41% of the New Jersey school population.⁴ Currently, New Jersey's schools are the sixth most segregated for Black students and seventh most segregated for Hispanic students in the nation.⁵ The number of students attending schools with less than ten percent white enrollment has risen to over twenty percent, nearly doubling since 1989.⁶

Perhaps no area is more exemplary of New Jersey's segregated schools than Red Bank Borough Public Schools. In an eight-mile peninsula along the banks of the Navesink and Shrewsbury Rivers, there are seven school districts, including two high schools that serve as independent districts, with drastically different populations. As a result of local control and the current school district zones, students are triple segregated: by race, economic status, and language.

² MUSU-GILLETTE, ET. AL, U.S. DEP'T OF EDUC., STATUS AND TRENDS IN THE EDUCATION OF RACIAL AND ETHNIC GROUPS (2017), <https://nces.ed.gov/pubs2017/2017051.pdf>.

³ Patrick Wall, CHALKBEAT NEWARK, MOST NJ STUDENTS IN POOR AREAS ATTEND UNDERFUNDED SCHOOLS, REPORT SHOWS, EVEN AS MURPHY PROMISES TO BOOST EDUCATION SPENDING (2019), <https://newark.chalkbeat.org/2019/3/4/21107056/most-nj-students-in-poor-areas-attend-underfunded-schools-reportshows-even-as-murphy-promises-to-bo>.

⁴ ORFIELD, ET AL., NEW JERSEY'S SEGREGATED SCHOOLS: TRENDS AND PATHS FORWARD 15 (2017), <https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/newjerseys-segregated-schools-trends-and-paths-forward/New-Jersey-report-final-110917.pdf>.

⁵ *Id.* at 6.

⁶ *Id.* 15.

School District	White Students	Black Students	Latino Students	Free/Reduced Lunch	English Language Learners
Red Bank Borough ⁷	7%	4.8%	85%	84.3%	34.3%
Red Bank Regional ⁸	54%	5%	37.8%	30.7%	5%
Fair Haven ⁹	95%	0%	3.1%	0.6%	0%
Rumson ¹⁰	93.8%	0.4%	4.4%	0.2%	0%
Little Silver ¹¹	91%	0.1%	4.4%	0.1%	0%
Shrewsbury ¹²	88%	0.9%	4.5%	1.4%	0.5%
New Jersey ¹³	41.1%	14.8%	30.7%	30.8%	0.7%

As it currently stands, New Jersey is failing to abide by its promise in its Constitution for Red Bank students, where the state must “provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all children in the State between the ages of five and eighteen years.”¹⁴ My students are in the back of the metaphorical room, unable to even see the target they are supposed to aim at. Most of them are economically disadvantaged Latinos, who are either immigrants themselves or second-generation immigrants. Yet, the relatively small towns, each with their own school district, that neighbor my district are

⁷ NEW JERSEY DEP’T OF EDUC., 2020-2021 ENROLLMENT DISTRICT REPORTED DATA, <https://www.nj.gov/education/data/enr/enr21/>.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ N.J. CONST., ART. 8, § IV, ¶ 1.

composed of wealthy white students who have the seat right in front of the target, placed in a position where everything is set up for their success.

This article will urge the New Jersey Commissioner of Education and the New Jersey Department of Education to utilize the vast powers bestowed to them to consolidate school districts and eradicate the egregious segregation in New Jersey's schools today. In Part I, this article will discuss the history of government policy and private action that resulted in towns and schools like Red Bank becoming so segregated. Part II will examine what legal authority exists at both the state and federal level to remedy school segregation. Then, Part III will analyze the possible solutions the judiciary of the Department of Education could utilize to solve this crisis, ultimately concluding that the most effective solution is the consolidation of New Jersey's school districts.

I. How the United States Became So Segregated in the Twentieth Century

Though New Jersey is committed to act against both de jure and de facto segregation, it is naive to represent New Jersey's current segregation as entirely private choice.¹⁵ Rather, the federal, state, and local governments worked in concert to enact laws and policies that segregated communities. Federal policy, in particular, has limited the housing opportunities for minorities. For the first half of our nation's history, the federal government did not nearly have the expansive powers it possesses today. However, that all changed during the New Deal Era. As part of the New Deal, the Public Works Administration (PWA) created a nationwide housing program to address middle-class workers' demand for housing that was not being met by the private sector during the Great Depression.¹⁶ In the housing developments created by the PWA, the agency implemented a

¹⁵ See *Booker v. Bd. of Educ. of City of Plainfield*, 45 N.J. 161 (1965) (holding that regardless of whether the segregation is de jure or de facto, the state is not precluded from taking action to further the state's compelling goal of reducing segregation in schools.).

¹⁶ RICHARD ROTHESTEIN, 20, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017).

neighborhood composition rule, where the federal housing projects created by the PWA should reflect the racial compositions of the neighborhoods where the developments were built.¹⁷ Therefore, PWA projects built in white neighborhoods could only house white tenants, and projects built in Black neighborhoods could only house Black tenants.¹⁸ Perplexingly, integrated neighborhoods would either have housing projects with segregated buildings, or the PWA itself designated integrated neighborhoods as either white or “colored”, and then installed projects for that race accordingly.¹⁹ As such, the PWA was able to eradicate any private action towards a more integrated community, and instead play demi-God, perpetuating segregation of its own accord.

With home ownership already on the decline prior to the Great Depression and the Great Depression only exacerbating the issue, President Franklin D. Roosevelt sought to support existing homeowners who were about to default on their payments and alleviate the financial burdens for first-time home purchasers.²⁰ Specifically, President Roosevelt created the Home Owners Loan Corporation (HOLC), who purchased existing mortgages that were near foreclosure and then refinanced the homes with amortized mortgages on a more lenient repayment schedule.²¹ The altruism of this program is tempered by its enforcement and processes because as any bank or lender does, the HOLC wanted to fully assess the risk of these loans.²² In its assessment of risk, the HOLC hired local real estate agents to make the appraisals, and unsurprisingly, the HOLC and its hired agents utilized the racial composition of neighborhoods to gauge the risk in lending.²³ Through a practice of redlining, the HOLC created color coded maps for almost every major

¹⁷ *Id.* at 21.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 63.

²¹ *Id.*

²² *Id.* at 64.

²³ *Id.*

metropolitan area in the country where white neighborhoods were colored green to mark them as safe, and Black neighborhoods were colored red to denote high risk, even if the composition of the Black neighborhoods were composed of middle-class families.²⁴

President Roosevelt and Congress also created the Federal Housing Administration (FHA) in 1934 to assist middle-class families to purchase homes for the first time, but just like the HOLC, the FHA incorporated racist policies into its operations that further segregated the country.²⁵ Through the FHA, home purchasers could secure an amortized bank mortgage insured by the FHA that covered 80 percent of the purchase price, with a loan term of twenty years, a nearly quadrupling of prior loan term lengths.²⁶ With more favorable and secure loan terms, the FHA stimulated a wave of first-time homebuyers.²⁷ Yet through their appraisal process, not everyone would qualify for such loans. Specifically, the FHA's appraisal standards included a white-only requirement, where the FHA even went so far as to deem properties too risky for insurance if they were in racially mixed neighborhoods or in white neighborhoods that might possibly integrate in the future.²⁸ In fact, the appraisal policy in the FHA Underwriting Manual stated:

If a neighborhood is to retain stability it is necessary that properties shall continue to be occupied by the same social and racial classes. A change in social or racial occupancy generally leads to instability and a reduction in values...Important among adverse influences...are infiltration of inharmonious racial or nationality groups.²⁹

The FHA therefore created a federal policy that segregated communities across the country and perpetuated a system of financial inequality, where Black people were unable to qualify for

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 65.

²⁹ *Id.*

mortgages that white people did, forcing Black people to remain renters while white Americans were able to build equity in their homes.³⁰

Not only did the FHA refuse to insure mortgage applications for Black people, the FHA actually subsidized segregation by providing higher ratings to mortgage applications to properties with racial restrictive covenants in deeds.³¹ Though the FHA gave higher ratings to areas with exclusionary zoning ordinances that only permitted single-family units to be constructed nearby, the FHA actually recommended covenants that prohibited the resale to Black families.³² This policy suffered what should have been a major blow in 1948, when the Supreme Court ruled in *Shelley v. Kraemer* that the enforcement of a racially restrictive covenant constitutes state action that violates the Equal Protection Clause of the Fourteenth Amendment.³³

Ultimately, the FHA feigned compliance with the requirements of *Shelley* by creating vaguely worded policies allegedly aimed at prohibiting racial covenants in their mortgages.³⁴ Specifically, the FHA revised its instructions for the issuance of mortgage insurance in 1949 to state:

No application of mortgage insurance shall be rejected solely on the grounds that the subject property or types of occupancy might affect market attitude towards other properties in the immediate neighborhood...In the future, mortgage insurance shall not be precluded because of a different type of occupancy, regardless of whether or not it in violation of a restrictive covenant.³⁵

This update to the FHA's policy was certainly not a proactive requirement to enforce the Supreme Court's ruling in *Shelley*. Instead, the policy was rife with permissive language that

³⁰ *Id.* at 67.

³¹ *Id.* at 83.

³² *Id.* at 84.

³³ *Shelley v. Kraemer*, 334 U.S. 1 (1948).

³⁴ ROTHSTEIN, *supra* note 10, at 86.

³⁵ *Id.*

created wiggle room for underwriters to reject mortgage applicants on the basis of their race, as long as they also possessed other justifications to reject the mortgage application. Additionally, the FHA refused to adjust previously issued mortgages in force and remove the race based restrictive covenants.³⁶ Granted, these prior racial covenants would not be enforceable, but they still remained in priorly issued FHA mortgages.³⁷ Moreover, the FHA continued to circumvent *Shelley* by pushing the enforcement of racial restrictions onto community planning boards, and the FHA continued to finance developments built by subcontractors who support racial discrimination in its housing developments.³⁸

Certainly, private actions contributed to segregation in New Jersey. Under the protections of home rule and localism, hundreds of cities across the United States operated as sundown towns, where Black people were excluded through official ordinances and policies, but also exclusionary covenants, threats, and harassment by rogue vigilantes.³⁹ Therefore, these towns not only prohibited Black people from living there, but discouraged Black people from even entering the town through private enforcement, where individual white actors harassed, threatened, and assaulted Black people.⁴⁰ Some towns even rang bells at sundown to warn Black people to leave.⁴¹ Towns like Cherry Hill, Glen Rock, Ocean Grove, Seaside Park, Spring Lake, Somerset, and Tenafly are believed to have been sundown towns at one point.⁴²

³⁶ *Id.* at 87.

³⁷ *Id.*

³⁸ *Id.* at 88.

³⁹ JAMES W. LOEWEN, 26, *SUNDOWN TOWNS: A HIDDEN DIMENSION OF AMERICAN RACISM* (2005).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Tougaloo University, *Possible Sundown Towns in NJ*, <https://sundown.tougaloo.edu/sundowntownsshow.php?state=NJ>.

Moreover, real estate agents would routinely steer Black families away from purchasing homes in white neighborhoods.⁴³ Even worse, real estate engaged in a practice known as blockbusting, where real estate agents would sell a small number of homes in a white neighborhood to Black families and then scare off white families by informing them that their neighborhood would soon be Black majority.⁴⁴ In fact, real estate agents would go so far as to hire Black women to push baby carriages through white neighborhoods, pay Black men to drive cars around white neighborhoods playing loud music on their car speakers or make random phone calls to residents of white neighborhoods asking to speak to someone with a stereotypical Black name.⁴⁵ For white families, this potential outcome incited a panic, resulting in them selling their homes to realtors at below market value.⁴⁶ The realtors would then flip those homes to middle-class Black families at a premium.⁴⁷ Though there was strong opposition to this practice in places like Teaneck, this practice was largely used in urban centers of New Jersey, like Newark, Camden, and Jersey City.⁴⁸

In 1967, President Lyndon B. Johnson commissioned the Kerner Report to address issues of racial tension and riots that occurred in the late 1960s. Famously, the report concluded that “our nation is moving toward two societies, one black, one white--separate and unequal.”⁴⁹ Unfortunately, the prophecy attached to this report has been fulfilled, as the United States, and particularly New Jersey, largely remains segregated. However, segregation just manifests itself differently now than it did in the past. Segregation at a micro level, from neighborhood to neighborhood within metropolitan areas has decreased, but segregation at a macro level, where

⁴³ DOUGLAS S. MASSET & NANCY A. DENTON, AMERICAN APARTHEID 12-14 (1993).

⁴⁴ *Id.*

⁴⁵ ROTHSTEIN, *supra* note 10, at 95.

⁴⁶ *Id.*

⁴⁷ MASSET, et. al, *supra* note 32, at 14.

⁴⁸ *Sumner v. Teaneck*, 53 N.J. 548 (1969).

⁴⁹ NATIONAL COMMISSION ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968).

segregation exists between different suburban communities, has significantly increased.⁵⁰ It is crucially important to understand the intersection of housing policy and school districting practices in New Jersey, as the interplay between the two result in the status quo of segregation today.

Astonishingly, New Jersey, a state that is less than nine thousand (9000) square miles in size, maintains five hundred ninety-nine (599) school districts operating two thousand four hundred ninety three (2493) schools to serve its nearly nine (9) million citizens in its twenty-one (21) counties.⁵¹ In contrast, Florida, a state nearly eight times the size of New Jersey, has only sixty-seven (67) school districts, organized at the county level, operating three thousand three hundred and thirty four (3334) schools.⁵² Florida's county districting provides more flexibility for diversifying student enrollment, whereas New Jersey's system of creating single municipality districts, evident by the sheer number of districts operating in the state, essentially ensure that the segregated housing perpetuates the current system of segregated schools.

In *Missouri v. Jenkins*, the Supreme Court held that “the Constitution does not prevent individuals from choosing to live together, to work together, or to send their children to school together, as long as the State does not interfere with their choices on the basis of race.”⁵³ This approach is inherently flawed because individuals are not making entirely private choices. Rather, government housing and loaning policies created segregated communities across the country, allowing that private choice to only be made by white families because people of color were expressly prohibited from living in certain communities. While private choice may contribute to

⁵⁰ Daniel Fowler, *With Racial Segregation Declining Between Neighborhoods, Segregation Now Taking New Form*. AMERICAN SOCIOLOGICAL ASSOCIATION (2015). https://www.asanet.org/sites/default/files/savvy/documents/press/pdfs/ASR_August_2015_Lichter_News_Release.pdf.

⁵¹ STATE OF NEW JERSEY DEPARTMENT OF EDUCATION, PUBLIC SCHOOL FACT SHEET (2019), <https://www.nj.gov/education/doedata/fact.shtml>.

⁵² FLORIDA DEPARTMENT OF EDUCATION, 2019-2020 FLORIDA REPORT CARD (2020), <https://edudata.fldoe.org/ReportCards/Schools.html?school=0000&district=00>.

⁵³ *Missouri v. Jenkins*, 515 U.S. 70, 121 (1995).

the problem, the government standing idly by does not absolve itself of its original sin of enacting such racially motivated housing policies. These policies and their aftermath coupled with government inaction have led to such pervasive school segregation that aptly has been categorized as “the civil rights issue of our time.”⁵⁴

II. The New Jersey Judiciary Created an Affirmative Duty for the Department of Education to Eradicate Segregation, Regardless of its Cause.

As New Jersey has with many social issues, the New Jersey Supreme Court and Legislature have created standards that exceed the standards set by the federal government, creating a statutory and agency duty to not just prevent de jure segregation, but de facto segregation as well. In 1881, nearly *seventy* years before the federal government acted in *Brown* to ban segregation, the New Jersey Legislature passed legislation prohibiting school segregation on account of race.⁵⁵ In furtherance of this objective, the New Jersey Legislature acted in 1947 to enact a provision in the New Jersey Constitution prohibiting racial discrimination in schools. The provision, in pertinent part, states “No person shall be . . . segregated. . . in the public schools, because of religious principles, race, color, ancestry or national origin.”⁵⁶ Though racial segregation was explicitly prohibited by law, minimal enforcement efforts allowed public school segregation to persist until the 1950s.⁵⁷

In 1965, though, the New Jersey Supreme Court created a judicial imperative to eradicate *both* de jure and de facto segregation in deciding *Booker v. Board of Education of City of Plainfield*.⁵⁸ In *Booker*, the court reversed a decision by the Commissioner of Education and State

⁵⁴ Richard Rothstein, *For Public Schools, Segregation Then, Segregation Since: Education and the Unfinished March*, ECONOMIC POLICY INSTITUTE (2013).

⁵⁵ R.S. § 18:14-2 (1881).

⁵⁶ N.J. CONST. ART. I, ¶ 5.

⁵⁷ GREG FLAXMAN, ET. AL., A STATUS QUO OF SEGREGATION: RACIAL AND ECONOMIC IMBALANCE IN NEW JERSEY SCHOOLS, 1989-2010 (2013).

⁵⁸ *Booker v. Bd. of Educ. of City of Plainfield*, 45 N.J. 161 (1965).

Board of Education that found the Plainfield Board of Education’s desegregation plan acceptable because it avoided having a school of “all or nearly all” Black students.⁵⁹ While declining to uphold this plan, the Court held that the Commissioner of Education has broad power to deal with the issue of school segregation.⁶⁰ The Court further empowered the Commissioner of Education to exceed the directives established by the federal government, stating that “whether or not the federal constitution compels action to eliminate or reduce de facto segregation in the public schools, it does not preclude such action by state school authorities in furtherance of state law and state educational policies.”⁶¹

Not only did the Court in *Booker* empower the Commissioner of Education to eradicate both de jure and de facto segregation, but the Court emphasized the collective benefit for all when students are educated in diverse settings:

The children must learn to respect and live to respect and live with one another in multiracial and multi-cultural communities and the earlier they do so the better. It is during their formative school years that firm foundations may be laid for good citizenship and broad participation in the mainstream of affairs. Recognizing this, leading educators stress the democratic and educational advantages of heterogeneous student populations and point to the disadvantages of homogeneous student populations It may well be...that when current attacks against housing and economic discriminations bear fruition, strict neighborhood school districting will present no problem. But in the meantime the states may not justly deprive the oncoming generation of the educational advantages which are its due, and indeed, as a nation, we cannot afford standing by.⁶²

Thus, the Court recognized the importance of diverse learning environments and the impediments to the same, creating a standard for the State of New Jersey to eradicate segregation within its borders.

⁵⁹ *Id.* at 164-68.

⁶⁰ *Id.* at 173.

⁶¹ *Id.* at 170.

⁶² *Id.* at 170-71.

In 1971, six years after *Booker*, the Supreme Court of New Jersey held that governmental subdivisions, such as counties, cities or towns, are not sovereign entities and may readily be bridged without violating traditional home rule principles when necessary to fulfill educational and racial policies embodied in the New Jersey Constitution.⁶³ In *Jenkins v. Morris Township School District*, the Court examined the Commissioner of Education's response to a Morris Township referendum where residents voted to operate a separate school district and end their sending-receiving program with Morristown.⁶⁴ Proportionally, Black students were enrolled at Morristown five times the rate than Black students were enrolled in Morris Township.⁶⁵ If the Commissioner of Education allowed this to move forward, the Black student population at Morristown High School would immediately increase from 14% to 35%.⁶⁶ Moreover, testimony at trial suggested that contemporaneous demographic trends, coupled with other districts' anticipated departure from the sending-receiving program, would likely cause the Black student population to reach 56% by 1980.⁶⁷ Though the Commissioner of Education was concerned about the potential racial imbalance this would cause, he nevertheless demonstrated a flat disavowal of the power granted under *Booker* by refusing to block the Morris Township withdrawal of its students from its sending-receiving program with Morristown High School.⁶⁸

In deciding the case, the court ruled that where de facto segregation occurs within a single community region without visible or factually significant boundary separations, the Commissioner of Education most have the power to cross district lines to remediate the segregation.⁶⁹ The court

⁶³ *Jenkins v. Morris Twp. Sch. Dist.*, 58 N.J. 483, 500-01 (1971).

⁶⁴ *Id.* at 492.

⁶⁵ *Id.* at 485.

⁶⁶ *Id.* at 488.

⁶⁷ *Id.*

⁶⁸ *Id.* at 493.

⁶⁹ *Id.* at 501.

further determined that the Commissioner of Education has the power to not only oversee and implement plans for regionalization, but ultimately possesses the full powers to direct a merger on his own if he finds such a course ultimately necessary for fulfillment of the State's educational and desegregation policies in the public schools.⁷⁰ As such, the Commissioner of Education had the authority to prevent students from withdrawing from Morristown High School, ultimately leading to the decision to consolidate the Morris Township and Morristown school districts in 1973.⁷¹

Despite the New Jersey Supreme Court emboldening the Commissioner of Education to eradicate segregation in public schools, subsequent commissioners after the *Booker* and *Jenkins* decisions were gun-shy, afraid to use the vast powers at their disposal. Indeed, for the twenty years following *Jenkins*, the New Jersey Department of Education consistently denied community requests for regionalization, inevitably leading to an increase in segregation.⁷² Notably, the Department of Education declined to merge Plainfield, a district with a minority enrollment of 72.5%, with neighboring Dunellen in 1971.⁷³ Two years later, the Department of Education once again declined to utilize its broad power in its refusal to support New Brunswick, with its 40% minority students, and its proposed merger with North Brunswick.⁷⁴ The disaster of these decisions is evident today, as both Plainfield and New Brunswick are two of the most segregated school systems in the state. In fact, both Plainfield and New Brunswick operate school districts with 99.3% minority student populations.⁷⁵ Juxtaposing Plainfield and New Brunswick with Morristown, one sees the difference between having the power to do something versus being

⁷⁰ *Id.* at 508.

⁷¹ *Id.*

⁷² Jay Romano, *A New Battle on School Segregation*, NEW YORK TIMES, APR. 21, 1991, AT B12.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ NEW JERSEY DEP'T OF EDUC., 2020-2021 ENROLLMENT DISTRICT REPORTED DATA, <https://www.nj.gov/education/data/enr/enr21/>.

willing to do something. As such, commissioners and state courts have been unwilling to tackle segregation and racial imbalances in school, directly contributing to the current status of public school segregation in New Jersey.⁷⁶

For decades, the judiciary was silent on issues of racial segregation in school, until in 2000 when the New Jersey Supreme Court heard *In re Grant of Charter School Application of Englewood on the Palisades Charter School*.⁷⁷ Though *Englewood* was focused on challenges to three charter schools, the decision reinforced the Commissioner of Education's powers under *Booker*. Specifically, the Court held that New Jersey's abhorrence of discrimination and segregation in the public schools is not tempered by the cause of the segregation, whether that cause be due to an official action, or simply segregation in fact.⁷⁸ The Court further stated that public policy applies with equal force against the continuation of segregation in our school regardless of the cause of the segregation.⁷⁹ Thus, New Jersey has created a standard that far exceeds the federal government and has empowered the Commissioner of Education to eradicate segregation in New Jersey's public schools.⁸⁰ Therefore, it is time the Commissioner of Education utilized those broad powers to integrate New Jersey's schools.

III. Not All Remedies to School Segregation Are Created Equal.

Advocates for social justice and equitable education policies often identify three solutions to address school segregation: increased charter schools and school choice programs, expand magnet school options and funding, and school district consolidation or regionalization. All of

⁷⁶ FLAXMAN, et al., *supra* note 7, at 11.

⁷⁷ *In re Grant of Charter School Application of Englewood on the Palisades Charter School*, 164 N.J. 316 (2000).

⁷⁸ *Id.* at 324.

⁷⁹ *Id.*

⁸⁰ *See Freeman v. Pitts*, 503 U.S. 467 (1992) (holding that changes in residential housing choices and their attendant effects on the racial composition of schools present a difficult situation to address through judicial remedies); *see also Missouri v. Jenkins*, 515 U.S. 70 (1995) (holding that it is beyond the authority of the federal courts to counteract individual choices of where to live and continuous demographic changes) (emphasis added).

these options have the potential to significantly reduce racial isolation in schools, but both charter schools and magnet schools are better in theory than they are in actual practice. Indeed, both programs have been utilized throughout the state, but neither of them have effectively addressed school segregation. In fact, both have actually *increased* school segregation by allowing white students in minority-majority school districts to leave their home school. As such, the most effective remedy to combat school segregation is the consolidation of New Jersey's school districts.

A. Charter Schools Exacerbate Public School Segregation in New Jersey

Ignoring the debate about the educational benefits and instructional integrity of charter schools, charter schools are not a clear solution to de facto segregation. First, charter schools place significant financial strains on the sending school district, as the public school district has to help fund the charter school in its community, yet there is no return on investment for those students attending charter schools. Depending on the size of the district and its location, school districts lose between four hundred and seven hundred dollars per pupil sent to a charter school.⁸¹

Even worse, charter schools have contributed to the segregation of school districts. Charter schools in New Jersey are not actively working towards creating diverse learning environments, as only 6.9% of New Jersey students enrolled in charter schools are white.⁸² Despite only 6.9% of charter school students being white, there are several New Jersey charter schools with majority white students, such as: Ridge and Valley Charter School (83.7% white); Sussex County Technology Charter School (83% white); Creativity Collaboratory Charter School (55.9% white); Unity Charter School (50.2% white); Elysian Charter School (68.3% white); Riverbank Charter

⁸¹ Economic Research Initiatives at Duke (ERID), *The Fiscal Externalities of Charter Schools: Evidence from North Carolina*, (2017). https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3082968.

⁸² NEW JERSEY DEP'T OF EDUC., *supra* note 3.

School Of Excellence (55.6% white); Hoboken Dual Language Charter School (59% white); Hatikvah International Academy Charter School (52% white).⁸³ Indeed, this issue of racial segregation in New Jersey's charter schools has plagued Red Bank, where only 7% of the students attending Red Bank are white, yet the Red Bank Charter School's white student population is nearly 50%.⁸⁴ As such, charter schools are not a viable option to eradicate public school segregation.

B. Magnet Schools Ultimately Fail Because of Private Choice.

Magnet schools are public schools, typically, with specialized curriculum that draw students across different school zones, such as inter-district or intra-district. Usually students apply to these schools and attend them voluntarily. Monmouth County School District offers several specialized magnet schools to students in districts throughout the county with scientific specialties, such as High-Tech High, Biotechnology High School, and Allied Health and Sciences. Historically, the United States utilized magnet school programs as a means to remedy racial segregation in its schools, largely beginning in the 1970s.⁸⁵ To increase racial equity across school districts, the first wave of magnet schools utilized involuntary attendance plans, such as court-ordered attendance or busing programs, but ultimately magnet schools became voluntary decisions on the parts of students and their families.⁸⁶ Districts across the country hoped that removing the barriers of local control and opening up student choice for education would decrease de facto segregation, and also allow students from lower achieving schools, particularly students of color, to have the opportunity to attend higher rated schools.⁸⁷ Although the magnet schools seek to

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ U.S. DEPARTMENT OF EDUCATION, *Office of Innovation and Improvement, Innovations in Education: Creating Successful Magnet Schools Programs*, (2004), <https://www2.ed.gov/admins/comm/choice/magnet/report.pdf>.

⁸⁶ *Id.*

⁸⁷ *Id.*

provide students with strong curricular knowledge and skills, that mission is equal, if not subsidized, to the goal of reducing and ultimately eliminating racial isolation and segregation.⁸⁸

A successful example of magnet schools in New Jersey is Montclair. In the 1970s, Montclair parents filed a lawsuit against the Montclair School Board of Education alleging, among others, that the schools in the town were segregated, resulting in unequal access to educational resources depending on the neighborhood school students attended.⁸⁹ In response, the Commissioner of Education ordered Montclair to develop a desegregation plan to address the de facto segregation within its school district.⁹⁰ As such, Montclair created its first two magnet schools in 1977—one a gifted and talented program designed to draw white students to schools with majority people of color populations, and the other a remedial program where students of color were able to develop a fundamental understanding of basic skills at a predominantly white school.⁹¹ Montclair expanded the use of its charter schools, and now, every school in the district effectively operates as a charter school, and with the exception of the single high school, each has their own curricular theme and specialty.⁹² Along with parental preference, the Montclair district assigns students to schools based on five factors: neighborhood racial demographics, free/reduced lunch percentages, poverty rates, median household income, and parental education levels.⁹³ In 1989, an independent evaluation determined that Montclair’s schools reached racial balance, and thus could come out from under the court order mandating their magnet school system, yet the

⁸⁸ *Id.*

⁸⁹ ADAI TEFERA, ET AL., *Integrating Suburban Schools: How to Benefit from Growing Diversity and Avoid Segregation* 19, (2011), <https://files.eric.ed.gov/fulltext/ED520331.pdf>.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

district still maintains its magnet programming in hopes of eradicating the achievement gap between white students and students of color.⁹⁴

However, the success of Montclair is not indicative of the success of magnet schools in general. Rather, Montclair appears to be an outlier because attendance in their magnet schools is compulsory for residents, and school assignment is based on multi-faceted criteria, rather than individual choice. As long as magnet schools are based on voluntary choice, individual biases are going to permeate through and disrupt the system. In fact, a study of Washington D.C.'s magnet school programming found that racial composition was one of, if not the, most important factors parents utilized in ranking their preferred schools, ahead of other factors like testing results, classroom sizes, or teacher training.⁹⁵

In Monmouth County, the magnet schools cherry pick the top students from each district who apply, and in 2021, only 4.4% of their schools' populations were Black and only 10.5% Hispanic.⁹⁶ Although Monmouth County's nearly 85% white population as a whole exacerbates this issue, over the last five years, only *two* Red Bank Borough Public School students were admitted into one of these county-wide magnet schools. To date, no research has been completed analyzing the racial and socioeconomic disparities in the Monmouth County magnet schools, but certainly exacerbating the issue for Red Bank students is the entrance exam for these schools. First, the majority of the students in Red Bank are presently or were formerly English Language Learners (ELLs), which makes the entrance exam more difficult. Research has shown that when ELLs are required to take standardized tests, the results do not accurately assess their content knowledge or

⁹⁴ U.S. DEPARTMENT OF EDUCATION, *supra* note 69.

⁹⁵ Chase M. Billingham & Matthew O. Hunt, *School Racial Composition and Parental Choice: New Evidence on the Preferences of White Parents in the United States*, 89 SOC. EDUC. 99, 101 (2016).

⁹⁶ NEW JERSEY DEP'T OF EDUC., *supra* note 3.

relevant skills, but rather reflect their English language proficiency.⁹⁷ The second hurdle associated with the entrance exam is the preparation. One exam preparation company helped prepare forty-four percent of the students accepted into the Monmouth County magnet schools and they charge one thousand, four hundred and ninety-five dollars to tutor prospective applicants. The average Red Bank family does not have the disposable income to afford such tutoring.⁹⁸ Therefore, magnet schools based on seemingly voluntary choice will continue to be an inadequate measure to eradicate segregation in New Jersey's schools.

Further, as outlined above, New Jersey operates five-hundred ninety-nine districts (599) and as de facto segregation continues to plague the state, intra-district remedies, like the one in Montclair, ultimately will be ineffective because New Jersey is experiencing widespread inter-district segregation. The history of government policy coupled with private choice have created segregated housing patterns across the state. A magnet program within a heavily segregated school district is unable to effectively remedy segregation. New Brunswick, for instance, would not be able to utilize an intra-district system like Montclair because there is not enough racial and economic diversity within the district to utilize race conscious school assignment programs aimed at integrating students. This program is further demonstrated in towns like Red Bank that operate one elementary school and one middle school. There is no flexibility with school assignments unless there is another pool of students from which to draw outside of the town. As such, any remedy that does not involve multiple districts will ultimately be ineffective at addressing segregation.

C. Consolidate School Districts and Regionalize to Provide More Flexibility with School Assignment

⁹⁷ MIKYUNG KIM WOLF, ET AL., NATIONAL CENTER FOR RESEARCH ON EVALUATION, STANDARDS, AND STUDENT TESTING, ISSUES IN ASSESSING ENGLISH LANGUAGE LEARNERS: ENGLISH LANGUAGE PROFICIENCY MEASURES AND ACCOMMODATION USES, (2008), <https://files.eric.ed.gov/fulltext/ED502283.pdf>.

⁹⁸ ExL Prep, *Elite Instruction*, <https://exlprep.com/elite/>.

The Commissioner of Education has the power to consolidate school districts and in doing so, they can utilize a more regional based school system with more flexibility for student assignment.⁹⁹ Though public schools may not assign students to schools solely on the basis of race for the purpose of achieving racial integration, they can use narrowly-tailored, race-conscious objectives to achieve general diversity in schools.¹⁰⁰ Given the systemic inequalities perpetuating wealth disparities between white people and people of color, the Commissioner of Education could prioritize household wealth in its school assignments. Since wealth is not a suspect class, any redistricting plans that primarily utilize wealth would only need to satisfy a rational basis test, which ensuring the thorough and efficient operations of New Jersey schools would do.

If the Commissioner of Education were to utilize a system like Montclair uses but extrapolate to a multi-town region, the benefits would be tremendous. In the case of Red Bank, the students from the Borough schools attend Red Bank Regional High School along with Little Silver and Shrewsbury. Red Bank, Little Silver, and Shrewsbury, all towns less than three square miles with minimal natural barriers between them, all operate their own K-8 schools.

School District	White Students	Black Students	Latino Students	Free/Reduced Lunch	English Language Learners
Red Bank Borough ¹⁰¹	7%	4.8%	85%	84.3%	34.3%
Red Bank Regional ¹⁰²	54%	5%	37.8%	30.7%	5%
Fair Haven ¹⁰³	95%	0%	3.1%	0.6%	0%

⁹⁹ *Jenkins v. Morris Twp. Sch. Dist.*, 58 N.J. at 508.

¹⁰⁰ *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701 (2007).

¹⁰¹ NEW JERSEY DEP'T OF EDUC., *supra* note 3.

¹⁰² *Id.*

¹⁰³ *Id.*

Rumson ¹⁰⁴	93.8%	0.4%	4.4%	0.2%	0%
Little Silver ¹⁰⁵	91%	0.1%	4.4%	0.1%	0%
Shrewsbury ¹⁰⁶	88%	0.9%	4.5%	1.4%	0.5%
New Jersey ¹⁰⁷	41.1%	14.8%	30.7%	30.8%	0.7%

Even though Little Silver and Shrewsbury have 91% and 88% white student populations, respectively, when they attend a regionalized school system with Red Bank Borough, the Red Bank Regional student enrollment data nearly mirrors New Jersey’s public-school demographics as a whole.

Regardless of whether towns support consolidation, the New Jersey Supreme Court held in *Jenkins* that the Commissioner of Education has the full powers to direct a merger on his own if he finds such a course ultimately necessary for fulfillment of the State's educational and desegregation policies in the public schools.¹⁰⁸ Yet, there are many reasons that school district consolidation is beneficial for all, one of which is decreased school operational costs. As a result of decreased school operational costs, municipalities could either decrease their tax levy, or allocate the funds for other projects, such as public works, recreation, or libraries. School district consolidation causes annual operating spending per pupil to decline by more than sixty percent when two 300-pupil districts merge and by nearly half when two 1,500-pupil districts merge.¹⁰⁹

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Jenkins*, 58 N.J. at 508.

¹⁰⁹ WILLIAM DUNCOMBE, ET AL., DOES SCHOOL DISTRICT CONSOLIDATION CUT COSTS?, EDUCATION FINANCE AND POLICY (2007), <https://direct.mit.edu/edfp/article-abstract/2/4/341/10058/Does-School-District-Consolidation-Cut-Costs?redirectedFrom=fulltext>.

For instance, if Red Bank Regional were to transition from a high school to a full K-12 regional district with Red Bank, Little Silver, and Shrewsbury, there would be significant cost savings beginning with the reduction in supervisory staff. Red Bank Regional, Red Bank Borough, Little Silver, and Shrewsbury each have a superintendent, curriculum director, director of special services, and business administrator, each of which make at least \$120,000 a year. A consolidated district would eliminate the salaries stemming from the majority of those positions. However, not all positions would be eliminated as a larger district may need positions like an assistant superintendent. Though other costs may increase, like transportation did in Montclair when they incorporated their magnet programs, that increase in transportation costs is mitigated by the fact that the new regional district would only be about five square miles. Therefore, even if a voter were opposed to school district consolidation, they may be convinced by the potential decrease in taxes caused by lower operational costs.

Beyond lower property taxes, there are several positive financial and societal externalities that are, at worst, correlated with integrated schools, and at best, directly caused by school integration. First and foremost, dropout rates are lower in integrated schools than they are in segregated schools, even when researchers control for family education levels and financial resources.¹¹⁰ Those who drop out of school are significantly more likely to engage in crime and require public assistance for their food, healthcare, and housing, all of which compound costs ultimately paid by the taxpayers.¹¹¹ Integrated schools would also allow the State to reallocate some of their spending, as studies have shown that attending an integrated school is a more effective academic intervention than simply increasing the funding in a highly segregated, higher-

¹¹⁰ JONATHAN GURRYAN, AMERICAN ECONOMIC REVIEW, DESEGREGATION AND BLACK DROPOUT RATES, VOL. 94, NO. 4, 923-940 (2004).

¹¹¹ CINDY JOHNSTON, NATIONAL PUBLIC RADIO, SCHOOL'S OUT: AN OVERVIEW OF AMERICA'S DROPOUT CRISIS (2011), <https://www.npr.org/2011/07/24/138508517/series-overview-the-cost-of-dropping-out>.

poverty school.¹¹² Specifically for Black children, those who attended integrated schools had higher earnings as adults, improved health outcomes, and lower incarceration rates.¹¹³

At large, the public supports racially and economically integrated schools. In a survey completed by the Century Foundation, eighty-four percent of respondents stated that it was either somewhat, very, or extremely important for public schools in their community to have a mix of students from different racial and ethnic backgrounds.¹¹⁴ Additionally, eighty-three percent of respondents from that same study stated that it was at least somewhat important for the public schools in their community to have a mix of students from different economic backgrounds.¹¹⁵ Thus, it is evident that the majority of the public does in fact support racially and economically integrated schools.¹¹⁶ Again, though, the Commissioner of Education has the power to consolidate school districts to prevent racial segregation even if there is no public support for same.

School district consolidation works. The consolidated Morris School District preserved in *Jenkins* has operated its integrated public schools for nearly fifty years and now remains one of the most celebrated and most balanced districts in the state.¹¹⁷ In fact, Morris School District's population is very much in line with state averages, despite existing in one of the least diverse counties in the state, with a white student population of 44.9%, a Black student population of 7.3%, and a Hispanic student population of 41.9%.¹¹⁸ However, it is worth noting that the segregation in *Jenkins* is nowhere near the level of segregation that Red Bank, New Brunswick, and other

¹¹² HEATHER SCHWARTZ, THE CENTURY FOUNDATION, HOUSING POLICY IS SCHOOL POLICY: ECONOMICALLY INTEGRATIVE HOUSING PROMOTES ACADEMIC SUCCESS IN MONTGOMERY COUNTY, MARYLAND (2012), 27-66.

¹¹³ RUCKER JOHNSON, NATIONAL BUREAU OF ECONOMIC RESEARCH, LONG-RUN IMPACTS OF SCHOOL DESEGREGATION & SCHOOL QUALITY ON ADULT ATTAINMENTS (2011), https://www.nber.org/system/files/working_papers/w16664/w16664.pdf

¹¹⁴ HALLEY POTTER, ET. AL, THE CENTURY FOUNDATION, SCHOOL INTEGRATION IS POPULAR. WE CAN MAKE IT MORE SO., (2021), <https://tcf.org/content/commentary/school-integration-is-popular-we-can-make-it-more-so/>.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ FLAXMAN, ET AL., *supra* note 7, at 13.

¹¹⁸ NEW JERSEY DEP'T OF EDUC., *supra* note 3.

communities are experiencing. In *Jenkins*, the court acted to prevent an increase of Morristown's Black student population from 14% to 35%.¹¹⁹ Yet, in Red Bank, the minority student population is 93%, nearly three times the minority population the *Jenkins* court determined required judicial intervention to prevent.¹²⁰ As such, the Commissioner of Education should be even more motivated to consolidate districts like Red Bank with neighboring towns because the segregation is even more egregious now than it was in the past. The time to act is now.

Recently, the New Jersey legislature passed a bill to encourage the creation of regional and countywide school systems. In fact, the bill was co-sponsored by Declan O'Scanlon and Vin Gopal, two state senators from Monmouth County with ties to the Red Bank area. Bill S-3488, which passed both houses on June 30, 2021, established many measures to increase the incentive to create regional and countywide school systems, such as: funding for districts to conduct regionalization studies, increase in regionalization cost apportionment, protections accrued for tenured and senior teachers, and guarantees for state aid for underfunded towns.¹²¹ Perhaps most importantly, the bill bars any regionalization that would have a segregative effect on the racial, socioeconomic, disability, or English Language Learner makeup of the districts.¹²² In support of the bill, State Senator Sweeney stated:

Regionalization is particularly important for small districts. . . One-school districts with fewer than 500 students spend 17% more per pupil than the 60% of New Jersey districts with 1,000 or more students, and those include the large urban districts and comprehensive K-12 districts that are supposed to spend more under the state formula. Regionalization makes sense.¹²³

¹¹⁹ *Jenkins*, 58 N.J. at 485.

¹²⁰ NEW JERSEY DEP'T OF EDUC., *supra* note 3.

¹²¹ Senate Bill No. 3488, N.J. Legis. Assemb. S-3488. Reg. Sess. 2020-2021(2021).

¹²² *Id.*

¹²³ Mackenzie Romano, *Sweeney, Gopal, O'Scanlon Push Bipartisan Bill to Spur K-12 Regionalization, Countywide School Districts*, INSIDER N.J., FEB. 22, 2021. <https://www.insidernj.com/press-release/sweeney-gopal-oscanlon-push-bipartisan-bill-spur-k-12-regionalization-countywide-school-districts/>.

Although the regionalization efforts are primarily supported by fiscal efficiency, removing barriers and encouraging districts to regionalize will fix segregation in schools.

IV. Conclusion

The New Jersey Commissioner of Education must utilize their powers to cross district lines and consolidate school districts to eradicate the segregated school system that presently plagues this state. In his dissent in *Milliken v. Bradley*, Justice Marshall stated that “school district lines, however innocently drawn, will surely be perceived as fences to separate the races.”¹²⁴ To this day, New Jersey operates its nearly six hundred school districts in its racially, economically, and linguistically segregated towns, implementing barriers that prevent students from playing, learning, and working together with people from different backgrounds. The New Jersey judiciary has been proactive in combating a number of social issues, including school segregation, but the state has been hesitant to continue its legacy of standing against public school segregation. Demographics in this state will continue to change, and the COVID-19 pandemic has already disrupted housing patterns in the state. As such, the Commissioner of Education needs to act to ensure that students are able to achieve the desired academic, social, and developmental skills the education system seeks to instill because active efforts to divide our students continue to persist today.¹²⁵ To do so, New Jersey must utilize inter-district remedies, such as district consolidation, or else the barriers created by municipal lines will continue to perpetuate the current system of racially segregated school districts.

¹²⁴ *Milliken v. Bradley*, 418 U.S. 717 (1974).

¹²⁵ See *Absecon Board of Education v. Pleasantville Bd. of Educ.*, OAL Dkt. No. EDU 14364-2019S (2021).