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## The Myth of Merit: The Fight of The Fairfax County School Board and the New Front of Massive Resistance

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# THE MYTH OF MERIT: THE FIGHT OF THE FAIRFAX COUNTY SCHOOL BOARD AND THE NEW FRONT OF MASSIVE RESISTANCE

Janel A. George\*

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## INTRODUCTION

Following the killing of George Floyd in 2020 and the seismic racial reckoning that followed, the Fairfax County School Board (FCSB) revised the admissions protocols of its local magnet school and the nation’s top-ranked public high school,<sup>1</sup> Thomas Jefferson High School for Science and

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Technology (known to the locals as “TJ”).<sup>2</sup> The FCSB pursued an ambitious effort to transform TJ’s admissions protocols to attract students from diverse backgrounds.<sup>3</sup> In response, primarily white and South Asian parents, supported by conservative policymakers and litigators, mobilized in opposition.<sup>4</sup> They waged public demonstrations decrying the admissions changes and held signs with slogans reading: “School board’s lottery fails TJ cancels merit,”<sup>5</sup> and “To have only merit-based admissions saves TJ.”<sup>6</sup>

“Merit” is a recurring theme found not only on these protest signs, but also in the rhetoric and legal arguments of mostly white and conservative policymakers, litigators, and parents nationwide who oppose admissions policies like TJ’s and claim that such efforts threaten the elite status of the

1. See *Thomas Jefferson High School for Science and Technology*, U.S. NEWS & WORLD REP., <https://www.usnews.com/education/best-high-schools/virginia/districts/fairfax-county-public-schools/thomas-jefferson-high-school-for-science-and-technology20461#:~:text=Thomas%20Jefferson%20High%20School%20for%20Science%20and%20Technology%202022%20Rankings,they%20prepare%20students%20for%20college> [https://perma.cc/P83Y-32NB] (last visited Aug. 10, 2022) (showing Thomas Jefferson ranked as the number one public high school in the nation).

2. Editorial Board, *Opinion: Despite Court Decision, Fairfax’s School Board Should Not Abandon the Fight for Equity*, WASH. POST (Mar. 6, 2022, 8:00 AM), <https://www.washingtonpost.com/opinions/2022/03/06/fairfax-virginia-should-appeal-ruling-admissions-thomas-jefferson-high-school-science-technology/> [https://perma.cc/B39H-QEM9] (“The national reckoning over race and inequality that followed the murder of George Floyd nearly two years ago spurred the Fairfax County School Board to confront uncomfortable truths about Thomas Jefferson High School for Science and Technology. While the school could boast about its national ranking as the No. 1 high school, it historically never came close to reflecting the racial and economic composition of the Northern Virginia communities from which it draws its students . . . . The board undertook a much-needed review and implemented an overhaul of the admissions process that sought to be more equitable without sacrificing academic rigor.”).

3. *Id.* The changes to the admissions protocols:

[J]ettisoned an anachronistic entrance exam and application fees that were barriers to economically disadvantaged students and put in place a holistic approach that emphasized student grade-point averages and advance math requirements. Just as prestigious universities have moved away from test scores as an absolute determinant of student ability, so did the Fairfax school board seek to better define the metrics of merit.

4. See Stephanie Saul, *Conservatives Open New Front in Elite School Admission Wars*, N.Y. TIMES (Feb. 16, 2022), <https://www.nytimes.com/2022/02/16/us/school-admissions-affirmative-action.html> [https://perma.cc/44EP-9K8S]; Anna-Lysa Gayle, *Parents, Students Protest Lottery Admission Proposal for Fairfax County Magnet High School*, WJLA ABC NEWS (Sept. 23, 2020), <https://wjla.com/news/local/how-do-you-increase-diversity-in-the-1-high-school-in-the-country-lottery-proposed> [https://perma.cc/4B3K-683P].

5. *Id.*

6. Don Parker, *After Protests, Fairfax County Revises Admissions Process at STEM Magnet School*, WJLA ABC NEWS (Oct. 6, 2020), [https://wjla.com/news/local/fairfax-county-admissions-diversity-at-stem-magnet-school?no\\_cache=1](https://wjla.com/news/local/fairfax-county-admissions-diversity-at-stem-magnet-school?no_cache=1) [https://perma.cc/RHF3-9JGG].

nation's most competitive schools. This Article posits that this kind of opposition to diversity efforts perpetuates a myth of meritocracy rooted in white supremacy that has fueled the historic exclusion of students of color (particularly Black students) from access to quality public education opportunities.<sup>7</sup>

The tactics used by white supremacists seeking to preserve segregated education have evolved and persist in newly constituted forms. Instead of promoting *de jure* Jim Crow segregation,<sup>8</sup> white supremacists now claim that diversity efforts discriminate against white or Asian American students.<sup>9</sup> The images of mobs of angry white parents protesting outside of school houses that signified the era known as “massive resistance,”<sup>10</sup> during which white parents and policymakers resisted school desegregation, have been replaced by the faces of mostly Asian American parents who are enlisted as

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7. The myth of meritocracy is predicated upon racist tropes of the ineducability of “undeserving” Black students who are unable to compete at the highest levels of education and the “Model Minority Myth” that casts Asian Americans as the compliant, successful, and “deserving” minority group. The Model Minority Myth is harmful to Asian Americans because the myth about “instant success” also serves as a way of obscuring laws and policies that sought to exclude and oppress Asian Americans, including the Chinese Exclusion Act, the Chinese Confession Program, and Executive Order 9066 (ordering Japanese Americans to be interned in concentration camps on American soil). See Jin Hee Lee, *A Lawsuit Seeks to Erase Harvard Applicants Racial Identity. It Reveals What Some Americans Still Don't Get About Discrimination*, TIME (Aug. 20, 2018, 5:00 AM), <https://time.com/5370441/harvard-admissions-case-diversity-asian-americans/> [<https://perma.cc/259F-LSTF>] (“Th[e] myth belies the historical truth for Asian Americans in this country, who were once considered so foreign that [they] were legally barred from the privileges of full citizenship. We share a history of racial oppression with Native Americans, African Americans, and Latinos, having been subjected to discrimination in immigration and housing, to segregation in education and to racially motivated violence.”).

8. Scholar Margaret Hu defines Jim Crow as “a structure of exclusion and discrimination devised by white Americans to be employed principally against black Americans . . . [i]ts central purpose was to maintain a second-class social and economic status for blacks while upholding a first-class social and economic status for whites.” See Margaret Hu, *Algorithmic Jim Crow*, 86 *FORDHAM L. REV.* 633, 651 (2017) (quoting JERROLD M. PACKARD, *AMERICAN NIGHTMARE: THE HISTORY OF JIM CROW*, vii–viii (2002)); see also Pamela J. Smith, *Our Children's Burden: The Many-Headed Hydra of the Educational Disenfranchisement of Black Children*, 42 *HOW. L.J.* 133, 165 (1999) (“Indeed, Jim Crow practices, customs, and laws ensured that Blacks would be the slaves of society by putting the force and effect of law behind the individual racial actions of whites in the North, South, and West.”).

9. See, e.g., Complaint at 3–7, 23 Coal. for TJ v. Fairfax Cnty. Sch. Bd., No. 21-296 (E.D. Va. May 12, 2021).

10. The term “Massive Resistance” has been attributed to Virginia Senator Harry Byrd and it signifies the profound opposition to school desegregation enshrined in state and local policy and practice spanning over a decade after the *Brown* ruling. See Mark Goulb, *Remembering Massive Resistance to School Desegregation*, 31 *LAW & HIST. REV.* 491, 504–517 (2013).

litigants in cases seeking to eviscerate affirmative action and school diversity programs.<sup>11</sup>

This Article discusses how the group that brought a legal challenge against the FCSB (the “Coalition for TJ”) exemplifies the new front of massive resistance to school integration.<sup>12</sup> Part I of this Article examines some of the shortcomings of the historic 1954 *Brown v. Board of Education*<sup>13</sup> ruling that invalidated segregated education — namely flaws in the ruling’s implementation — and how those shortcomings left the door open for segregated education to persist in new forms. It also explores how *Brown* has been significantly undermined, including by two subsequent United States Supreme Court school desegregation decisions, *Milliken v. Bradley*<sup>14</sup> and *Parents Involved in Community Schools v. Seattle School District No. 1*,<sup>15</sup> both of which effectively limited strategies that districts could use to reduce racial isolation. This Part also exposes the harmful consequences of the Court’s contemporary “colorblind” rhetoric, which asserts that race should not be considered in school admissions,<sup>16</sup> even to remedy past racial discrimination. This Article argues that this “colorblind approach” disregards the ways that laws and policies contribute to the exclusion of Black students and other students of color from high-quality educational opportunities.

Part II analyzes the battle over TJ’s admissions changes as an exemplar of how this colorblind rhetoric, as well as the co-option of language used by

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11. For example, many of the plaintiffs in the case against the FCSB are South Asian parents who are members of the Coalition for TJ, “The Coalition is multi-cultural and multi-racial, and a majority of its members are Asian-American.” See Complaint, *supra* note 9, at 1–2. On its website, the Coalition describes itself as a “group . . . for community members, including TJ families, students, alumni, and staff, focused on lasting solutions to promoting diversity and excellence for Thomas Jefferson High School for Science and Technology.” *About Us*, OFF. COAL. FOR TJ, <https://coalitionfortj.net/about-us> [https://perma.cc/7HX4-T5EE] (last visited Aug. 23, 2022).

12. See Memorandum Opinion, *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, Civil No. 1:2021cv00296-Document 143 (E.D. Va. Feb. 25, 2022).

13. See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (invalidating the “separate but equal” doctrine of segregation previously upheld in *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

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

15. See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

16. See Janel George, *The End of “Performative School Desegregation:” Reimagining the Federal Role in Dismantling Segregated Education*, 22 RUTGERS RACE & L. REV. 191, 216 (2021) (“In reaching its ruling, the Court distorted *Brown*’s prohibition on the consideration of race, and condemned any consideration of race. This approach decontextualized *Brown*, in which race was considered to remedy historic and racially discriminatory segregation—still pervasive decades later when the Court considered the case. But, the *Parents Involved* Court rejected consideration of race, even when factored into desegregation programs to remedy longstanding segregation motivated by racism.”).

civil rights litigators to challenge discrimination,<sup>17</sup> is being deployed by opponents of school integration and affirmative action to undermine school diversity efforts and maintain segregated schools.

Part III further discusses how the Coalition for TJ's claims distort legal precedent related to discrimination and support the effort to eliminate even race-neutral school diversity efforts like TJ's. The Supreme Court recently denied the Coalition for TJ's application to vacate a stay issued by the Fourth Circuit that permits TJ's updated admissions protocols to remain in place . . . for now.<sup>18</sup>

The challenge to TJ's admissions changes illustrates why it is imperative to expose the new front of massive resistance to school integration. Even the legacy of *Brown* is precarious as federal courts continue to issue rulings that eviscerate previously recognized rights.<sup>19</sup> The nation remains torn between past and present, between the outrage following the killing of George Floyd and the subversive tactics of a popular political agenda seeking to erase the historical and current reality of white supremacy and inequality that enabled Floyd's killing. This analysis concludes by raising central questions: What kind of nation will we be if we allow segregation to persist? What kind of nation will we be if we give up on integrated education?

## I. THE CONSEQUENCES OF COLORBLINDNESS

### A. Retreat and Resegregation: The Gradual Erosion of *Brown*

Before analyzing the state of contemporary school segregation, it is vital to recognize how courts have gradually undermined, misinterpreted, and

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17. For example, the Coalition for TJ argues that Asian American students are being discriminated against and that TJ's admissions policy is an "unconstitutional race-based process." See Memorandum Opinion, *supra* note 12.

18. See *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, No. 22-1280 (U.S. Apr. 25, 2022) (order in pending case denied) ("The application to vacate the stay presented to the Chief Justice and by him referred to the Court is denied. Justice Thomas, Justice Alito, and Justice Gorsuch would grant the application to vacate the stay.").

19. See Ben Olinsky & Grace Oyenubi, *The Supreme Court's Extreme Majority Risks Turning Back the Clock on Decades of Progress and Undermining Our Democracy*, CTR. FOR AM. PROGRESS (June 13, 2022), <https://www.americanprogress.org/article/the-supreme-courts-extreme-majority-risks-turning-back-the-clock-on-decades-of-progress/> [<https://perma.cc/8WEZ-6FQ2>] ("As the Supreme Court nears the end of its term, it is poised to hand down a string of decisions that carry a deeply disturbing theme: the reversal of long-standing precedents and law that will claw back the rights of Americans in a way unseen in modern times."); see also Nina Totenberg & Sarah McCammon, *Supreme Court Overturns *Roe v. Wade*, Ending Right to Abortion Upheld for Decades*, NPR (June 24, 2022), <https://www.npr.org/2022/06/24/1102305878/supreme-court-abortion-roe-v-wade-decision-overturn> [<https://perma.cc/56JA-28JU>] ("In a historic and far-reaching decision, the U.S. Supreme Court officially reversed *Roe v. Wade* declaring that the constitutional right to abortion, upheld for nearly half a century, no longer exists.").

mischaracterized *Brown*'s condemnation of the consideration of race in admissions. The *Brown* ruling invalidated the "separate but equal" doctrine of *Plessy v. Ferguson*, striking down Jim Crow segregation in public facilities.<sup>20</sup> The attorneys of the NAACP Legal Defense and Educational Fund, Inc. (LDF), the organization founded by Thurgood Marshall and Charles Hamilton Houston that led the *Brown* litigation,<sup>21</sup> had debated whether to focus their litigation efforts solely on resource equity among segregated facilities (essentially requiring enforcement of "separate but equal") or to challenge racial segregation head on.<sup>22</sup> In choosing to challenge Jim Crow segregation head on, the LDF attorneys recognized — and argued before the Court using a range of evidence — that racially segregated public facilities were inherently unequal.<sup>23</sup> But, the *Brown* Court, in its effort to secure a unanimous vote striking down segregation,<sup>24</sup> failed to outline or

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20. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954). Siding for the plaintiffs, the unanimous Court concluded that "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal." *Id.* Although the Court specifically recognized the field of public education in its opinion, the ruling was relied upon to dismantle segregation in a wide range of public facilities. See *id.*; see also *Plessy v. Ferguson*, 163 U.S. 537 (1896) (rejecting Homer Plessy's challenge to Louisiana's Separate Car law and validating the "separate but equal" doctrine of racial segregation).

21. See *Celebrating the 65th Anniversary of Brown v. Bd. of Educ.*, LEGAL DEF. FUND, <https://www.naacpldf.org/brown-v-board/> [https://perma.cc/X97H-YW8H] (last visited Aug. 23, 2022).

22. See Sonya Ramsey, *The Troubled History of American Education After the Brown Decision*, ORG. AM. HISTORIANS, <https://www.oah.org/tah/issues/2017/february/the-troubled-history-of-american-education-after-the-brown-decision/> [https://perma.cc/X7G8-YAXF] (last visited Aug. 23, 2022) ("[S]ome prominent black leaders thought that the NAACP should sue for equity for black schools instead. Marshall thought that an overall desegregation decision would eliminate the expensive and time-consuming need to go district by district.").

23. See JANEL GEORGE & LINDA DARLING-HAMMOND, *The Federal Role and School Integration: Brown's Promise and Present Challenges*, in LEARNING POLICY INSTITUTE 5–9 (2019) (the Drs. Clark also co-authored a summary of research for the Court supporting racial integration and demonstrating the harm of racially segregated schools, which was endorsed by 35 leading social scientists); see also LINDA DARLING-HAMMOND, *THE FLAT WORLD AND EDUCATION: HOW AMERICA'S COMMITMENT TO EQUITY WILL DETERMINE OUR FUTURE* 36 (Teachers College Press 2010) ("In this brief, scholars summarized an extensive body of research showing the educational and community benefits of integrated schools for both White and minority students, documenting the persisting inequalities of segregated minority schools, and examining evidence that schools will re-segregate in the absence of race-conscious policies.").

24. As a seasoned politician, Chief Justice Earl Warren recognized that a unanimous ruling would send a powerful message to the nation about segregated education, and he worked to make compromises to achieve unanimity. Following oral arguments for the case in 1952, U.S. Supreme Court Chief Justice Vinson died of a heart attack, and Earl Warren (who had overseen the drafting of California's law invalidating segregated education as Governor of the state following the *Mendez v. Westminster* victory) was appointed to the Court. He achieved a unanimous ruling by excluding specific relief and failing to mandate a timeline for compliance. As Black notes, "the Court wanted to decide the case as narrowly and as decisively as possible." DEREK W. BLACK, *SCHOOLHOUSE BURNING* 176 (Public Affairs 2020).

proscribe a detailed remedy on how school districts should effectuate desegregation.<sup>25</sup> According to critical race theorist and late Harvard law professor Derrick Bell, this failure can be attributed in part to his theory of legal remedies arrived at due to “interest convergence.”<sup>26</sup> Bell’s theory suggests that the Court arrived at the *Brown* ruling because Black people’s interest in dismantling segregated education finally coincided with white people’s interest in preserving America’s reputation abroad as it battled communism and accusations by other countries that America was hypocritical in its mistreatment of Black people while it espoused democracy abroad.<sup>27</sup> Bell asserts that white Americans had a strong interest in finally ending legal segregation, but he notes that remedies achieved by interest convergence have their limits. In particular, the *Brown* decision failed to explicitly condemn white supremacy.<sup>28</sup> Namely, “the ruling’s focus on *de jure* segregation and the moving of bodies to integrate schools without addressing the more pernicious and covert nature of white supremacy left ‘untouched the racial inequality that was both a cause and an effect of *de facto* segregation.’”<sup>29</sup> The failure to clearly articulate a remedy for the decades-long denial of educational opportunity effectuated through invidious segregation left the door open to defiance of the ruling. This defiance — known as massive resistance — spanned for over a decade and required subsequent court rulings to secure defiant district compliance with *Brown*’s call for school desegregation, including *Brown II*,<sup>30</sup> *Cooper v.*

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25. *Id.* at 174–75 (“The Court thought the best chance of acceptance, partial acceptance, or just weathering the storm was a narrowly written decision that appealed to whites’ better angels.”).

26. See Derrick Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) (according to Bell’s interest convergence theory, the interests of Black people in achieving racial equality can only be met when they align with the interests of white people).

27. “[T]he fourteenth amendment, standing alone, will not authorize a judicial remedy providing effective racial equality for blacks where the remedy sought threatens the superior societal status of middle and upper class whites.” *Id.* Further, “[a]ccording to Bell, ‘even when the interest convergence principle results in an effective racial remedy, that remedy will be abrogated at the point that policymakers fear the remedial policy is threatening the superior societal status of whites.’” KHIARA M. BRIDGES, *CRITICAL RACE THEORY: A PRIMER* 447 (Foundation Press 2019).

28. See George, *supra* note 16, at 205–06 (“As one critical race theorist argued, ‘*Brown* did not endeavor to end white dominance and black subordination; it simply sought to dismantle racial hierarchy in the form that it took at the time of the decision.’”).

29. See *id.* at 206 (“In particular, by making a distinction between the *de jure* segregation both prevalent in the south and condemned in *Brown* and the *de facto* segregation prevalent in other parts of the country, the Court opened the door for segregation to persist in reconstituted forms.”).

30. See *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955) (in which the Court ordered states to desegregate “with all deliberate speed”).



Aaron,<sup>31</sup> *Green v. County School Board of New Kent County*,<sup>32</sup> and *Swann v. Charlotte-Mecklenburg* in 1971,<sup>33</sup> in which the U.S. Supreme Court finally called for all vestiges of school segregation to be eliminated “root and branch.”<sup>34</sup> Furthermore, the passage of the Civil Rights Act of 1964 — particularly its Titles IV and VI — authorized the federal government to penalize non-compliant southern school districts and helped to finally secure compliance with federal school desegregation orders.<sup>35</sup>

However, subsequent court decisions have gradually eroded this legal precedent and undermined local efforts to advance school integration. As education scholar Gloria Ladson-Billings notes, “[o]ver the . . . twenty years after *Brown*, several legal cases functioned to effectively roll back the principle of *Brown*.”<sup>36</sup> Namely, these cases have limited the ways that localities can craft programs to promote diversity and reduce racial isolation. These cases include *Milliken v. Bradley*,<sup>37</sup> *San Antonio Independent School District v. Rodriguez*,<sup>38</sup> *Board of Education of Oklahoma City Public Schools v. Dowell*,<sup>39</sup> and *Freeman v. Pitts*.<sup>40</sup>

31. See *Cooper v. Aaron*, 358 U.S. 1, 8 (1958) (relying upon the Supremacy Clause of the U.S. Constitution, the U.S. Supreme Court ordered authorities in Little Rock, AR to comply with federal orders to desegregate pursuant to the *Brown v. Board of Education* ruling).

32. See *Green v. Cnty. Sch. Bd. of New Kent Cnty.*, 391 U.S. 430 (1968).

33. See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

34. See Janel George, *Populating the Pipeline: School Policing and the Persistence of the School-to-Prison Pipeline*, 40 NOVA L. REV. 493, 499 (2017) (“These efforts helped to finally break the beak of the Jim Crow education system and prompted the progression of integrated schools; while only about 1% of African American children in the south attended integrated schools with white children in 1963, that number jumped to 90% by the early 1970s.”).

35. See generally 42 U.S.C. §§2000c–2000c-9; 42 U.S.C. §§2000e–2000e-17.

36. See generally Gloria Ladson-Billings, *Landing on the Wrong Note: The Price We Paid for Brown*, 33 EDUC. RESEARCHER 3, 6 (2004). Namely, *Brown* condemned the consideration of racial classification to deny Black children and other children of color access to public education. But that principle has been distorted by litigants seeking to maintain segregation to argue that any consideration of race — even if race is one of many factors considered to remedy past discrimination — is impermissible under *Brown*. See *id.*

37. See *Milliken v. Bradley*, 418 U.S. 717, 752 (1974) (holding that all white school districts surrounding the majority- Black Detroit public schools could not be compelled to participate in school desegregation plan absent a showing that they were formed with segregative intent).

38. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 56 (1973) (holding that school funding inequities negatively impacting students of color did not violate the Equal Protection clause).

39. See *Bd. of Educ. of Okla. City Pub. Schs. v. Dowell*, 498 U.S. 237, 248–50 (1991) (ruling that federal desegregation oversight should be temporary in nature and focused on remedying past discrimination).

40. See *Freeman v. Pitts*, 503 U.S. 467, 495–96 (1992) (ruling that federal oversight was only required to oversee the district’s compliance with any outstanding factors articulated in *Green v. County School Board of New Kent County* to determine if districts had eradicated all vestiges of segregation and achieved unitary status. It upheld an incremental approach that

One of the most significant blows to *Brown* was inflicted by the Court in 1974's *Milliken*, which involved a challenge brought by Black parents of Detroit public school students seeking to implement a school desegregation program involving Detroit's schools and the surrounding all-white suburban school districts.<sup>41</sup> The suburban white districts had been formed to circumvent federal school desegregation orders mandating the integration of Detroit City's public schools. White families moved out to surrounding suburbs and formed new all-white school districts — a phenomena known as “white flight.”<sup>42</sup> The Supreme Court rejected an earlier ruling in favor of the plaintiff Black parents and instead curated a legal fiction of “discriminatory intent,” concluding that because there was no finding that the surrounding all-white suburban school districts were created for the purpose of fostering racial segregation, they could not be compelled to participate in a desegregation program with Detroit public schools.<sup>43</sup> This ruling contravened *Brown*'s reasoning, and as I asserted elsewhere: “[t]he *Milliken* Court's prioritization of district boundary lines over the goal of integration wholly contradicts *Brown*'s constitutional mandate to dismantle segregated school systems, essentially maintaining a system of racial hierarchy and conceding to the desire of white school districts to maintain segregated systems.”<sup>44</sup> In reaching its ruling, the Court cited *Keyes v. School District No. 1*, a case in which the Court ruled that defendant school districts must prove that they acted without segregative intent when otherwise facially neutral policies are found to result in segregation.<sup>45</sup> This distorted reasoning effectively condoned newly evolved forms of school segregation — namely all-white school districts formed as a result of white flight to avoid school integration. These new configurations of segregated education manifested

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no longer required federal oversight of any factors found to have eliminated segregation); see also Gloria Ladson-Billings, *Can We At Least Have Plessy? The Struggle for Quality Education*, 85 N.C. L. REV. 1279, 1289 (2007) (“Briefly, *Milliken* closed off the opportunity for racially isolated communities of color to draw from white suburbs in order to desegregate; in *Rodriguez* the Court ruled that children had no constitutional right to equal school expenditures; and *Dowell* and *Freeman* allowed formerly desegregated school districts to return to neighborhood schools because they are determined to be ‘unitary,’ i.e., there was no separate school district for children of color.”).

41. See *Milliken*, 418 U.S. at 717.

42. See Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Role of the Courts*, 81 N.C. L. REV. 1597, 1605 (2003) (white flight was widespread by the 1970s and it “came about, in part, to avoid school desegregation and in part, as a result of a larger demographic phenomenon, namely endangered successful desegregation”).

43. “Absent evidence that the school districts in the outlying suburbs had committed any constitutional violation, they could not be forced to pay for the sins of another school district that had actually violated the law.” Bridges, *supra* note 27, at 439.

44. See George, *supra* note 16, at 211.

45. See 413 U.S. 189, 210 (1973).

as facially neutral policies and practices (like the drawing of district boundary lines in ways to maintain all-white school districts) that nevertheless functioned to further segregation.<sup>46</sup> In this way, segregative practices conformed to racially-neutral configurations that no longer implicated the same equal protection concerns that *de jure* policies did. School segregation has consequently deepened over the decades as a result of federal courts' failure to admonish these evolved forms of school segregation absent a showing of segregative intent.<sup>47</sup> As Ladson-Billings concludes of the impact of *Milliken* on *Brown*'s admonition of segregated education, "[t]he power and impact of *Brown* had become substantially diluted."<sup>48</sup>

### B. *Parents Involved* and Race-Neutral Policies

Another consequential case that misconstrued *Brown* was 2007's *Parents Involved in Community Schools v. Seattle School District No. 1*, which involved a challenge to two voluntary school desegregation programs: one in Jefferson County, Kentucky, and one in Seattle, Washington.<sup>49</sup> The Supreme Court divided over the circumstances in which race could be considered in student placement decisions.<sup>50</sup> The Court concluded that race could be considered among other factors if the district had a compelling interest in doing so and the plan was narrowly tailored to achieve that

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46. See George, *supra* note 16, at 204–05. “In particular, while equal protection constrains explicit race-based forms of state action, it does not constrain ‘facially neutral’ policies such as those that segregate Black students, so long as they do not have explicit discriminatory or ‘segregative intent.’” *Id.* at 213 (quoting Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1130 (1997)).

47. Coupled with rollbacks on federal enforcement of school desegregation orders, court decisions failing to condemn new forms of segregation have contributed to deepening school segregation. Consequently, rates of school segregation now rival those that preceded *Brown*'s challenge to segregated education. About half as many Black students attend integrated schools as was the case in the 1980s. During the quarter century since the high point of integration in 1988, the share of intensely segregated, public non-White schools (defined as those schools with only 0- 10% White students) more than tripled, increasing from 5.7% in 1988 to 18.2% in 2016. See ERICA FRANKENBERG ET AL., HARMING OUR COMMON FUTURE: AMERICA'S SEGREGATED SCHOOLS 65 YEARS AFTER BROWN 4, 13, 21 (2019), <https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/harming-our-common-future-americas-segregated-schools-65-years-after-brown/Brown-65-050919v4-final.pdf> [<https://perma.cc/R6FP-JYGK>].

48. Ladson-Billings, *supra* note 36, at 6.

49. The program in Jefferson County, Kentucky began as a court-ordered desegregation program and after the order was lifted, the program was maintained on a voluntary basis. See 551 U.S. 701, 715–16 (2007).

50. See *id.* at 791.

interest.<sup>51</sup> The Court encouraged districts to adopt “race-neutral” policies to promote school diversity.<sup>52</sup> However, in his concurring opinion, Justice Kennedy critiqued the majority opinion, characterizing it as “too dismissive of government’s legitimate interest in ensuring all people have equal opportunity regardless of their race.”<sup>53</sup> Kennedy clarified, “[i]n the administration of public schools by the state and local authorities it is permissible to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body, one aspect of which is its racial composition.”<sup>54</sup>

By rejecting the consideration of race in school admissions to remedy past discrimination even for districts not formally under court desegregation orders,<sup>55</sup> the *Parents Involved* Court “decontextualized *Brown*, in which race was considered to remedy historic and racially discriminatory segregation — still pervasive decades later when the Court considered the case . . . the *Parents Involved* Court rejected consideration of race, even when factored into desegregation programs to remedy longstanding segregation motivated by racism.”<sup>56</sup>

This “colorblind” rhetoric, which I have termed “performative desegregation,” claims to condemn school segregation, yet prohibits the very race-conscious approaches necessary to dismantle it. Furthermore:

“[t]his ‘colorblind’ approach to segregation reflected how detached the Court had become from the reality of racially segregated education and the legacy of slavery and imposition of second-class citizenship underlying it.

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51. See *id.* at 720; see also Derek W. Black, *Voluntary Desegregation, Resegregation, and the Hope for Equal Educational Opportunity*, A.B.A. (Oct. 1, 2011), [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/human\\_rights\\_vol38\\_2011/fall2011/voluntary\\_desegregation\\_resegregation\\_and\\_the\\_hope\\_for\\_equal\\_educational\\_opportunity/](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol38_2011/fall2011/voluntary_desegregation_resegregation_and_the_hope_for_equal_educational_opportunity/) [https://perma.cc/9Z3K-JNTF].

52. *Parents Involved*, 551 U.S. at 735.

53. *Id.* at 787–88 (Kennedy, J., concurring).

54. *Id.* at 788 (also noting, “[i]f school authorities are concerned that the student-body compositions of certain schools interfere with the objective of offering an equal educational opportunity to all of their students, they are free to devise race-conscious measures to address the problem in a general way and without treating each student in different fashion solely on the basis of a systemic, individual typing by race”).

55. *Parents Involved*, 551 U.S. at 721 (quoting *Milliken v. Bradley*, 433 U.S. 267, 280, n.14 (1977):

We have emphasized that the harm being remedied by mandatory desegregation plans is the harm that is traceable to segregation, and that ‘the Constitution is not violated by racial imbalance in the schools, without more’ . . . . Once Jefferson County achieved unitary status, it had remedied the constitutional wrong that allowed race-based assignments. Any continued use of race must be justified on some other basis.

56. George, *supra* note 16, at 216.

By concluding that race-conscious desegregation programs promoted discrimination, the Court repudiated *Brown* and negated the reality of racism in America and its role in school segregation specifically.”<sup>57</sup>

Following the ruling, many districts were unclear about how race could be factored into student assignments without running afoul of the law. This confusion was compounded by a “Dear Colleague” letter issued by the Bush administration on the eve of leaving office, which narrowly interpreted the ruling.<sup>58</sup> In an effort to provide more clarity, the Obama Administration’s Departments of Justice and Education issued guidance to states and districts in 2011 outlining some evidence-based “race-neutral” strategies that could be implemented to promote school diversity.<sup>59</sup> Among the evidence-based and race-neutral strategies that the guidance outlined was the recommendation to revise admissions policies with the goal of achieving diversity, such as giving special consideration to students from disadvantaged neighborhoods and reviewing grade alignment and feeder patterns so they could be adjusted to help mitigate disparities.<sup>60</sup>

The Trump Administration rescinded the guidance in 2018 as part of its efforts to dismantle the Obama Administration’s domestic policy legacy, particularly in the area of civil rights, thereby depriving states and districts of a valuable resource of evidence-based diversity strategies.<sup>61</sup>

The uncertain legal landscape left many localities without the tools necessary to design and implement voluntary school desegregation programs without fear of potential legal or political backlash. The following section analyzes the legal battle currently being waged over admissions changes at Fairfax County, Virginia’s TJ High School, which is instructive because those attacking TJ’s admissions changes invoke the current colorblind rhetoric that distorts *Brown*’s meaning and obfuscates the history of racial discrimination in U.S. public education.

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57. *Id.*

58. This affected and confused district efforts in pursuing race-conscious student assignment programs to promote school diversity. See Erwin Chemerinsky, *Making Schools More Separate and Unequal: Parents Involved in Community Schools v. Seattle School District No. 1*, 2014 MICH. ST. L. REV. 633, 642 (2014).

59. See U.S. DEP’T JUST. & U.S. DEP’T EDUC., GUIDANCE ON THE VOLUNTARY USE OF RACE TO ACHIEVE DIVERSITY AND AVOID RACIAL ISOLATION IN ELEMENTARY AND SECONDARY SCHOOLS (2011) (rescinded July 2, 2018).

60. *Id.*

61. See Juliet Eilperin & Darla Cameron, *How Trump is Rolling Back Obama’s Legacy*, WASH. POST (Jan. 20, 2018), <https://www.washingtonpost.com/graphics/politics/trump-rolling-back-obama-rules/> [https://perma.cc/WDJ7-Z7EX].

## II. THE BATTLE FOR TJ

### A. The Nation's Top Public High School Struggles to Diversify

Thomas Jefferson High School for Science and Technology occupies the site of the previous Thomas Jefferson High School, originally constructed in 1965. TJ was designated a state-chartered magnet school in 1985.<sup>62</sup> TJ offers a comprehensive college preparatory program for grades 9-12 emphasizing science, technology, engineering, and mathematics (STEM).<sup>63</sup> The school was created through partnership with local businesses, the FCSB, and local government entities for the purpose of preparing more students in the state to compete in STEM fields.<sup>64</sup> The school is designated as one of Virginia's Governor's Schools and receives designated funding from the state.<sup>65</sup> First established in 1973, Virginia's Governor's Schools program provides the state's students with "academically and artistically challenging programs beyond those offered in their home schools."<sup>66</sup>

Admission to TJ has never been determined solely by test scores and grades. When TJ was created, the FCSB, which oversees TJ's admissions process, "urged the selection committee to take into account 'considerations relative to achieving an appropriate representative student population in regard to racial/ethnic and sex distributions.'"<sup>67</sup> The FCSB agreed on a two-step process. First, students took an entrance exam. Students were then ranked according to their test scores (which account for 80% of their overall score) and recent grades (which count for the remaining 20% of an applicant's score).<sup>68</sup> The top 800 highest-scoring students were forwarded in a semi-finalist round for admission the following year.<sup>69</sup> In the final step, committees reviewed each applicant, considering teacher recommendations, awards, activities, essays, and personal data, among other materials and a list

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62. See *About Us*, THOMAS JEFFERSON HIGH SCH. FOR SCI. & TECH., <https://tjhsst.fcps.edu/about> [<https://perma.cc/P83Y-32NB>] (last visited Aug. 23, 2022).

63. *Admissions Page*, THOMAS JEFFERSON HIGH SCH. FOR SCI. & TECH., <https://www.fcps.edu/registration/thomas-jefferson-high-school-science-and-technology-admissions/tjhsst-freshman> [<https://perma.cc/8TXA-6U48>] (last visited Aug. 23, 2022).

64. See *About Us*, *supra* note 62.

65. *Governor's Schools Program*, VA. DEP'T EDUC., [https://www.doe.virginia.gov/instruction/governors\\_school\\_programs/](https://www.doe.virginia.gov/instruction/governors_school_programs/) [<https://perma.cc/8TEX-SCBP>] (last visited Aug. 23, 2022).

66. *Id.* "With the support of the Virginia Board of Education and the General Assembly, the Governor's Schools presently include summer residential, summer regional, and academic-year programs serving more than 7,500 students from all parts of the commonwealth." *Id.*

67. PAMELA VARLEY, *VALUES IN CONFLICT: THE FUROR OVER ADMISSIONS POLICY AT A POPULAR VIRGINIA MAGNET SCHOOL* 8 (2006).

68. *Id.*

69. *Id.*

of 400 finalists was developed.<sup>70</sup> This two-step process remained the core of the TJ admissions protocol until the most recent updates were adopted in 2020.

The proportion of African American and Hispanic students in TJ's first four graduating classes ranged from 3.9% to 4.7%, at a time when those same groups constituted about 15% of Fairfax County Public Schools (FCPS).<sup>71</sup> This glaring disparity prompted the beginning of a long list of recommendations and attempts to diversify the student body. These attempts included an affirmative action "second look" practice, implemented in 1990, to scour the school files of Black and Hispanic applicants that did not make the top-800 cut for indicators of academic promise that would support advancing them to the semifinalist pool.<sup>72</sup> In 1992, the FCSB also introduced 'Visions,' a two-year math and science enrichment program for promising African American and Hispanic middle school students in the county that also provided test preparation for the TJ admissions exam.<sup>73</sup> Between 1991 and 1998, these two initiatives together increased the proportion of African American and Hispanic students admitted to between 8.5% and 12.3% (the corresponding county proportion had grown to 21% by 1998).<sup>74</sup>

Admissions to TJ became increasingly competitive, and by 1998, between 65% and 70% of the student body came from FCPS's dedicated Gifted and Talented (GT) "Centers," which were later relabeled as Advanced Academic Program Level 4 Centers.<sup>75</sup> Many parents invested in expensive test prep to help increase their children's chances of securing admission at TJ.<sup>76</sup> In this climate, the affirmative action program at TJ came under fire, and white parents of children who made it to the semifinalist stage but had ultimately been denied admission threatened to sue FCSB.<sup>77</sup>

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70. *Id.*

71. *Id.* at 10–11.

72. *Id.* at 10.

73. *Id.*

74. *Id.* at 10–11.

75. *Id.* at 11.

76. See Lisa Rab, *Does the No.1 High School in America Practice Discrimination?*, WASHINGTONIAN (Apr. 26, 2017), <https://www.washingtonian.com/2017/04/26/is-the-no-1-high-school-in-america-thomas-jefferson-fairfax-discrimination/> [<https://perma.cc/DCG5-CBDF>] (describing how many of the test-preparation programs are modeled after Korean "cram schools," which prepare students for competitive entrance exams, in test preparation classes after school, on weekends, or throughout the summer).

77. See Samar A. Katnani, *PICS, Grutter, and Elite Public Secondary Education: Using Race as a Means in Selective Admissions*, 87 WASH. U. L. REV. 625, 649 (2010); see also VARLEY, *supra* note 67, at 10 ("The parents of several white eighth graders who qualified as semifinalists, but were not ultimately admitted to the school, became incensed to learn that some 30 African American and Hispanic students, who had tested below the top-800, had been admitted to TJ under the affirmative action program."). It is worth noting that "the mean grade point average of the last group of African American and Hispanic students admitted

TJ admitted 24 Hispanic students and 25 Black students to TJ in 1997,<sup>78</sup> but halted all affirmative action practices after a judge ruled against two different affirmative action policies adopted by neighboring Arlington County,<sup>79</sup> a participating school division for TJ situated within Fairfax County's own federal district.<sup>80</sup> TJ's share of Black and Hispanic students subsequently dropped from a high of 9.4% in 1998 when affirmative action policies were in place, to 3.5% in 2004 after the elimination of affirmative action policies.<sup>81</sup>

In 2001, then-superintendent of FCPS, Daniel Domenech, led another charge to diversify the school. FCPS launched a privately funded program called "Quest" to replace Visions.<sup>82</sup> The program commissioned the firm that produced TJ's admissions test to prepare an informational booklet that included a general overview of the test, as well as tips and sample questions, and offered a TJ test preparation course for underrepresented middle schools in the fall of 2002.<sup>83</sup> Domenech also worked to increase the proportion of Black and Hispanic enrollment at Fairfax County's gifted and talented program, known as the Advanced Academic Program (AAP).<sup>84</sup> Domenech proposed to the FCSB a race-neutral policy that would (1) automatically admit any students in the top 800 that qualified for the free-and-reduced-lunch, and (2) sort the top 800 semifinalists by neighborhood and allocate seats for admission by neighborhood.<sup>85</sup> But, Domenech's race-neutral admissions plan was rejected by FCSB, which eventually developed its own compromise with a "plus-30" plan in which rejected semifinalists from under-represented neighborhoods were given a "second look" and

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under the affirmative action program were 3.4 and 3.6, respectively, after two years at TJ." *Id.* at 18.

78. Kevin Sieff, *Black, Hispanic Students Dwindle at Elite Virginia Public School*, WASH. POST (Oct. 30, 2010, 6:49 PM), <https://www.washingtonpost.com/wp-dyn/content/article/2010/10/30/AR2010103003460.html> [<https://perma.cc/TF3F-GRSA>].

79. See VARLEY, *supra* note 67, at 12.

80. *Id.*

81. See Hilde Kahn, *A Stubborn Excellence Gap*, EDUC. NEXT (June 26, 2018, 10:56 PM), <https://www.educationnext.org/stubborn-excellence-gap-despite-efforts-diversity-stalls-elite-public-high-school/> [<https://perma.cc/46K4-26ZM>].

82. Quest was phased out after a 2008 report showing it had not increased the number of students from underrepresented groups at TJ. *Id.*

83. See VARLEY, *supra* note 67, at 16.

84. *Id.* at 16.

85. Under this proposal, if the number of student applications was equal to the allotted slots, then all students would be admitted. If the applications exceeded the number of allotted slots, then the committee reviewed them using the same criteria used for general applications. If a neighborhood did not have enough applicants to fill its allocated slots, then the general pool of applicants from other neighborhoods would be eligible for that neighborhood's available slots. *Id.* at 15.



considered for one of up to 30 slots in the incoming class.<sup>86</sup> However, the plan did not result in drawing students from diverse racial/ethnic backgrounds — the first time the plan was used, only one of the 29 additional students selected was African American and none were Hispanic.<sup>87</sup>

TJ continued to pursue efforts to diversify its student enrollment.<sup>88</sup> On the higher education level, the Supreme Court's ruling in *Grutter v. Bollinger*<sup>89</sup> provided FCPS with inspiration to continue with their diversity efforts. In *Grutter*, the Court ruled that the Equal Protection Clause did not prohibit the narrowly tailored use of race in admissions in higher education to further a compelling interest in obtaining the educational benefits that flow from a diverse student body.<sup>90</sup> Following this ruling, FCPS created an external Blue Ribbon Commission (the "Commission") to review TJ's admissions practices.<sup>91</sup> The Commission concluded that TJ's emphasis on test scores in the admissions process inhibited its ability to further its mission and meet its commitment to diversity.<sup>92</sup> Instead of heavy reliance on standardized scores, the Commission recommended that FCPS adopt a more holistic admission process for TJ.<sup>93</sup> The Commission also recommended lifting the fixed 800-student cap on the size of the semifinalist pool.<sup>94</sup> Following the conclusion of the Commission's review, FCSB revised TJ's admissions policy to include a sliding scale that advanced students with lower test scores but high enough grades to the semifinalist pool and lifted the cap on the semifinalist pool to allow for a holistic review of more

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86. *Id.* at 18.

87. *Id.* at 19; However, more African American and Hispanic students than usual applied to TJ that year — 394, compared to 271 the previous year. Of these applicants, 45 had ranked in the top 800 — compared to 15 the previous year. *Id.*

88. TJ's diversity efforts continued to come under fire, including from parents who labeled TJ's admissions practices as "stealth affirmative action." Lloyd Cohen, father of two TJ students, published an article in the Albany Law Review, arguing that the semifinalist review process "provided 'political camouflage' for a *de facto* system of racial preferences. VARLEY, *supra* note 67, at 20.

89. 529 U.S. 306 (2003).

90. *Id.* at 343.

91. The Fairfax County Public Schools created the Blue Ribbon Commission in 2004, which was comprised of educators from around the country with expertise in selective admissions practices at the high school and higher education levels. *See* Katnani, *supra* note 77, at 650.

92. FAIRFAX COUNTY SCHOOL BOARD BLUE RIBBON COMMISSION ON ADMISSIONS, THE THOMAS JEFFERSON HIGH SCHOOL FOR SCIENCE AND TECHNOLOGY 5 (2004), <https://static1.squarespace.com/static/5f4289cac951f24569ad9488/t/5fff31973ca0ce3823453fa5/1610559896411/TJBlueRibbonReport.pdf> [<https://perma.cc/ZM6X-8WKP>].

93. *See id.* at 6 ("The [Blue Ribbon Commission] therefore recommends that the selection process become more comprehensive and that the information currently considered only at the semifinalist stage be considered for all applicants.")

94. *See id.* at 7.

applicants.<sup>95</sup> As a result, the semifinalist pool doubled in size, and TJ also increased the class size from around 400 students to between 480 and 500 students.<sup>96</sup> These changes again drew the ire of white parents who argued that the admissions policies discriminated against qualified white students.<sup>97</sup>

In 2003, a group of white families, including law professor Lloyd Cohen, filed a complaint with the Office for Civil Rights (OCR) alleging that FCPS discriminated against white students in its updated admissions practices.<sup>98</sup> In 2012, the OCR resolved the complaint and concluded that TJ did not violate federal law by considering race as a factor in its admissions policies.<sup>99</sup> The OCR noted that TJ did not have to rely solely on objective factors like grades and test scores in its admissions policies because the benefits of school diversity and reduction of racial isolation were compelling interests that permitted consideration of student diversity consistent with Title VI.<sup>100</sup> Further, the OCR noted that when race-neutral approaches are unsuccessful in achieving diversity, schools may use generalized race-based approaches to foster school diversity.<sup>101</sup>

TJ continued its efforts to diversify,<sup>102</sup> which included creating an outreach specialist position in 2011 to 2012<sup>103</sup> and adding a problem-solving

95. See Kahn, *supra* note 81.

96. See *id.* at 4–5.

97. See Emma Brown, *2 Complaints About Racial Bias at TJ High School Take Different Tacks*, WASH. POST (July 24, 2012), [https://www.washingtonpost.com/local/education/fairfax-county-faces-two-complaints-about-racial-bias-at-tj-high-school/2012/07/24/gJQAV3Hq7W\\_story.html](https://www.washingtonpost.com/local/education/fairfax-county-faces-two-complaints-about-racial-bias-at-tj-high-school/2012/07/24/gJQAV3Hq7W_story.html) [<https://perma.cc/7RMD-8K7P>].

98. See *id.*

99. Letter from Alice B. Wender, Dir., Dep’t Educ., to Jack Dale, Superintendent, Fairfax Cnty. Schs., May 25, 2012 (on file with author), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/11041020-a.html> [<https://perma.cc/TS8N-DQWE>].

100. See *id.*

101. See *id.* (noting that such generalized race-based approaches are permissible so long as they do not involve decision-making on the basis of any individual student’s race. And when schools do adopt approaches that consider the race of individual students, they should do so in a narrowly tailored manner that closely fits their goal of achieving diversity or avoiding racial isolation and includes race no more than necessary to meet those ends).

102. See *generally* OFFICE OF RESEARCH AND STRATEGIC IMPROVEMENT ET AL., THOMAS JEFFERSON HIGH SCHOOL FOR SCIENCE AND TECHNOLOGY: IMPROVING ADMISSIONS PROCESSES (2020), [https://go.boarddocs.com/vsba/fairfax/Board.nsf/files/BWE23Y004896/\\$file/TJ%20White%20Paper%2011.17.2020.pdf](https://go.boarddocs.com/vsba/fairfax/Board.nsf/files/BWE23Y004896/$file/TJ%20White%20Paper%2011.17.2020.pdf) [<https://perma.cc/L35B-XDTT>] [hereinafter IMPROVING ADMISSIONS PROCESSES] (“[O]ver the past ten years, the admissions process has undergone a series of changes that were intended to impact issues of diversity and inclusion. Nonetheless, as described in the data below, these changes have not made a significant impact on the diversity of the applicants or admitted students.”).

103. *Id.* at 4–5 (“The position was created based on recommendations from the Blue Ribbon Commission about improving diversity in TJHSST admissions . . . [t]he Commission

essay to the application package,<sup>104</sup> but these efforts were not successful in achieving diversity.<sup>105</sup>

Concerned about TJ's persistent lack of diversity, the Fairfax County branch of the NAACP filed a federal civil rights complaint in 2012 alleging that TJ was systematically excluding Black and Latinx students and students with disabilities.<sup>106</sup> At the time the complaint was filed, TJ was drawing a majority of its entering class from schools with Level IV centers, which were highly competitive programs tailored to "gifted and talented" students that started recruiting and testing students for placement in competitive programs as early as kindergarten.<sup>107</sup> These centers did not serve many Black or Latinx students.<sup>108</sup> In addition, AAP, which is widely considered a path to TJ, is disproportionately comprised of white and Asian students.<sup>109</sup> The reliance on these mainly exclusionary pipelines comprised predominantly of white or Asian students for applicants perpetuated segregation at TJ. As research

had recommended the position to allow focused outreach efforts to underrepresented student populations.").

104. *Id.* at 4.

105. *Id.* at 6. This failure to diversify included failure to recruit from diverse racial/ethnic and socio-economic backgrounds as well as students from economically disadvantaged and students for whom English was a second language. *Id.*

106. Press Release, Coal. of the Silence & Fairfax Cnty. Branch of the NAACP, Complaint Against Fairfax Cnty. Pub. Sch. Sys. Regarding Discriminatory Admissions Pol'ys for Thomas Jefferson High Sch. for Sci. and Tech. (July 23, 2012), [http://mlkcommission.dls.virginia.gov/meetings/2012/OCR\\_FCPS\\_COTS\\_fairfax\\_complaint\\_NAACP\\_TJHSST\\_admissions\\_etc\\_7-23-12.pdf](http://mlkcommission.dls.virginia.gov/meetings/2012/OCR_FCPS_COTS_fairfax_complaint_NAACP_TJHSST_admissions_etc_7-23-12.pdf) [<https://perma.cc/5CYA-KHRJ>]; see also Press Release, Coal. of the Silence and NAACP Fairfax Cnty., Coal. of the Silence and NAACP Fairfax Cnty. Branch Applaud U.S. Dep't of Educ.'s Off. for Civil Rights' Decision to Investigate Alleged Discrimination Against African Am. and Hispanic Students by Fairfax Cnty. Pub. Sch. Sys. but Regrets That Students with Disabilities Claims Were Left Out (Sept. 26, 2012), <https://coalitionofthesilence.files.wordpress.com/2012/10/press-release-ocr-partial-accepts-9-15.pdf> [<https://perma.cc/8ZMQ-QAVQ>] ("The Complaint alleges that Fairfax County Public Schools essentially operates a segregated sub school system comprised of level 4 advanced academic centers at the elementary and middle school level . . . . Because nearly every student admitted to TJ attended a Middle School with a level 4 Advanced Academic Center, underrepresentation of Blacks and Latinos in these centers results in disparities in TJ admissions.").

107. Emma Brown, *Jefferson H.S., Fairfax Schools Shut Out Blacks and Latinos, Complaint Alleges*, WASH. POST (July 23, 2012), [https://www.washingtonpost.com/local/education/thomas-jefferson-hs-fairfax-schools-shut-out-blacks-and-latinos-complaint-alleges/2012/07/23/gJQAPOIO5W\\_story.html](https://www.washingtonpost.com/local/education/thomas-jefferson-hs-fairfax-schools-shut-out-blacks-and-latinos-complaint-alleges/2012/07/23/gJQAPOIO5W_story.html) [<https://perma.cc/27P6-JXJC>].

108. *Id.*

109. Hannah Natanson, *Fairfax Families Sue over Changes to Thomas Jefferson High's Admissions*, WASH. POST (Nov. 5, 2020), [https://www.washingtonpost.com/local/education/fairfax-lawsuit-thomas-jefferson-admissions/2020/11/05/b949972a-1f75-11eb-ba21-f2f001f0554b\\_story.html](https://www.washingtonpost.com/local/education/fairfax-lawsuit-thomas-jefferson-admissions/2020/11/05/b949972a-1f75-11eb-ba21-f2f001f0554b_story.html) [<https://perma.cc/B4MQ-HMRW>] ("In 2019-2020, Black and Hispanic students made up just 18 percent of the highest-level AAP classes.").

demonstrates, relying on non-diverse pipeline programs for applicants<sup>110</sup> can contribute to segregation and impose additional barriers for students from diverse backgrounds.<sup>111</sup> Despite raising some urgent concerns, the Fairfax NAACP's complaint was dismissed regarding the allegation of discrimination against students with disabilities, and OCR opened an investigation related to the allegations of discrimination against Black and Latinx students.<sup>112</sup> However, the resolution of this complaint's outstanding allegation of discrimination against Black and Latinx students remains unclear.<sup>113</sup>

The next section examines the FCSB's latest attempt to diversify TJ and the subsequent backlash it experienced.

### B. George Floyd and Thomas Jefferson: Past and Present Collide

In late 2020, a racial reckoning rocked the nation and the world following the killing of George Floyd.<sup>114</sup> In May of 2020, the Virginia legislature included language within its 2020 budget bill requiring the state's regional

110. These practices include drawing from mainly white and exclusive feeder schools, imposing high admissions fees, and relying mainly on standardized test scores and grades. See JENNIFER AYSCUE ET AL., CHOICES WORTH MAKING: CREATING, SUSTAINING, AND EXPANDING DIVERSE MAGNET SCHOOLS 13, 15 (2017).

111. See *id.*; see also GEORGE & DARLING-HAMMOND, *supra* note 23, at 14–15 (noting that inclusive admissions practices, like lotteries and outreach to families with diverse backgrounds, have been found to increase the likelihood of drawing students of color).

112. The disability discrimination allegation was dismissed and OCR noted of the statistics regarding enrollment of students with disabilities at TJ:

Since neither the information in the complaint nor your response to OCR's request for more specific details provided sufficient information for OCR to infer that the Division [FCPS] is discriminating against students based on disability with regard to admission to the School either directly or through identification for gifted and talented services, OCR is closing this aspect of the complaint as speculative.

Letter from Dale Rhines, Program Manager, Office for C.R., to Martina Hone, Founder & Board Chair, Coal. of the Silence, Charisse Espy Glassman, Educ. Chair, NAACP-Fairfax (Sept. 25, 2012), <https://coalitionofthesilence.files.wordpress.com/2012/10/cp-tj-notif-letter-pdf.pdf> [<https://perma.cc/TYT2-C6AK>]. As to the claims of discrimination against Black and Latinx students, the OCR opened an investigation, noting "that opening the complaint for investigation in no way implies that OCR has made a determination with regard to its merits." *Id.*

113. After searching the Office for Civil Rights' recent resolutions database and other sources, the resolution of the outstanding allegations remains unclear. U.S. DEP'T EDUC. OFFICE FOR C.R.: RECENT RESOLUTIONS, <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/index.html> [<https://perma.cc/973Q-ZMSM>].

114. See Jennifer Hassan & Rick Noack, *How George Floyd's Killing Sparked a Global Reckoning*, WASH. POST (May 25, 2012), <https://www.washingtonpost.com/world/2021/05/25/george-floyd-anniversary-global-change/> [<https://perma.cc/JKW6-JSCR>].

magnet schools to set diversity goals and submit status reports to the Governor in the fall.<sup>115</sup> At the time the legislature urged Governor's Schools to take this action, TJ's enrollment did not reflect the school system's overall student enrollment. The following table summarizes and compares the demographics of overall student enrollment for TJ and for Fairfax County, respectively.

	TJ'S ENROLLMENT 2019-2020 <sup>116</sup>	FAIRFAX COUNTY STUDENT DEMOGRAPHICS 2019-2020 <sup>117</sup>
Asian	71.5 %	20%
Hispanic/Latinx	2.6 %	27%
Black	1.72 %	10%
Non-Hispanic White	19.4%	38%
Other	4.70 %	5.0%

As the fall of 2020 approached, the FCSB considered diversity measures that would prove more effective than past efforts. TJ's Office of Admissions

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115. Each Academic Year Governor's School shall set diversity goals for its student body and faculty, and develop a plan to meet said goals in collaboration with community partners at public meetings. Each school shall submit a report to the Governor by October 1 of each year on its goals and status of implementing its plan. The report shall include, but not be limited to the following: utilization of universal screenings in feeder divisions; admission processes in place in or under consideration that promote access for historically underserved students; and outreach and communication efforts deployed to recruit historically underserved students. The report shall include the racial/ethnic make-up and socioeconomic diversity of its students, faculty, and applicants. See VIRGINIA STATE BUDGET: BUDGET BILL - HB30 (Enrolled) (2020) <https://budget.lis.virginia.gov/item/2020/1/hb30/enrolled/1/145/> [<https://perma.cc/MU2S-ET29>].

116. See Mark Walsh, *Lawsuit Challenges Admissions Changes to Boost Diversity at Acclaimed High School*, EDUC. WEEK (Mar. 10, 2021), <https://www.edweek.org/policy-politics/lawsuit-challenges-admissions-changes-meant-to-boost-diversity-at-acclaimed-high-school/2021/03> [<https://perma.cc/4ZVK-MQNE>].

117. *Id.*

and Office of Research and Strategic Improvement presented a white paper to the FCSB that outlined alternative admissions policies.<sup>118</sup> As FCSB embarked on this work, an oppositional group primarily comprised of Asian American parents called the Coalition for TJ formed.<sup>119</sup> Another group of over 1,000 diverse TJ alumni, the TJ Alumni Action Group (TJAAG), spoke out in support of changes to the admissions policy to promote diversity.<sup>120</sup>

In October 2020, the FCSB made initial changes to TJ's admissions practices by voting to eliminate TJ's \$100 application fee and the standardized portion of the admissions test.<sup>121</sup> The FCSB also called upon Superintendent Scott Brabrand to develop an admissions process that would help create a more diverse student body reflective of the communities from which TJ draws its students.<sup>122</sup> These actions prompted immediate protests

118. See IMPROVING ADMISSIONS PROCESSES, *supra* note 102. In an email, TJ's Director of Admissions Jeremy Shughart expressed the hope that the admissions changes may "level the playing field for historically underrepresented groups." Campbell Robertson & Stephanie Saul, *Judge Strikes Down Elite Virginia High School's Admissions Rules*, N.Y. TIMES (Feb. 25, 2022), <https://www.nytimes.com/2022/02/25/us/thomas-jefferson-school-admissions.html> [<https://perma.cc/WYY3-FHSU>].

119. According to its website, the Coalition for TJ is for "community members, including TJ families, students, alumni, and staff focused on lasting solutions to promoting diversity and excellence for Thomas Jefferson High School for Science and Technology." *About Us*, *supra* note 11. The website also indicates that the Coalition is comprised mostly of Asian American and mostly immigrant parents who are devoted to learning, gifted education, and fairness, and who have been challenging Fairfax County Public Schools' decision in 2020 to remove the 'merit-based, race-blind admissions test' and replace it with a process that gives 'bonus points' to various non-academic factors and includes geographic quotas. See Letter from Coalition for TJ Parents, to Fairfax Cnty. Sch. Bd. Members (Nov. 12, 2020), <https://coalitionfortj.net/media> [<https://perma.cc/PY89-Y5E4>].

120. According to its website, the TJAAG is:

[A] committed group of volunteers from diverse backgrounds: Black, Latinx, Asian, White, Indigenous, mixed-race, women, men, parents and non-parents, married and single, immigrants and non-immigrants, English language learners and native speakers, and lived experience across the socioeconomic spectrum . . . [and] seeks to enhance accessibility, inclusion, and innovation within STEM education in order to develop well-rounded and ethical 21<sup>st</sup>-century leaders.

*TJAAG Applauds Supreme Court's Upholding Stay in TJ Admissions Case*, TJ ALUMNI ACTION GROUP, <https://www.tjaag.org/> [<https://perma.cc/WH3D-YUX6>] (last visited Aug. 29, 2022).

121. While the standardized portion of the admissions test was eliminated, applicants are still required to complete a problem-solving Essay. See *TJHSST Freshman Application Process*, FAIRFAX CNTY. PUB. SCHS., <https://www.fcps.edu/registration/thomas-jefferson-high-school-science-and-technology-admissions/tjhsst-freshman> [<https://perma.cc/ZP7A-FMDN>] (last visited Aug. 23, 2022).

122. See Hannah Natanson, *Fairfax County School Board Directs Superintendent to Develop a More Equitable 'Talent Development' Program for Thomas Jefferson High School*, WASH. POST (Oct. 22, 2020), <https://www.washingtonpost.com/local/education/fairfax-county-school-board-directs-superintendent-to-develop-a-more-equitable-talent->

from many families that had invested in test preparation who argued that removing the test would impact TJ's academic reputation.<sup>123</sup> In November of 2020, seventeen families filed a complaint against FCSB challenging the elimination of the application fee and admissions test and arguing that the decision to remove the test violated a Virginia law regulating the Governor's Schools,<sup>124</sup> which was denied.<sup>125</sup>

The FCSB proceeded with the admissions changes and, in December 2020, it voted to adopt additional changes to its protocols aimed at diversifying its student body, including expanding the class size by 15% (from 480 to 550) and guaranteeing admission to top students at each public middle school.<sup>126</sup> The new protocols also required applicants to meet academic criteria, like maintaining an unweighted GPA of at least 3.5 while taking Algebra I or a higher-level math class and other honors courses.<sup>127</sup> Applicants who met these requirements were then invited to complete a problem-solving Essay and a "Student Portrait Sheet." Applicants were also given holistic reviews that capture the following "experience factors:"<sup>128</sup>

- Being from a low-income household;
- Speaking English as a second language;
- Attending a historically underrepresented middle school; or

development-program-for-thomas-jefferson-high-school/2020/10/22/97be07a0-146f-11eb-bc10-40b25382f1be\_story.html [https://perma.cc/HS2Y-97KE].

123. The Coalition for TJ alleged that a new admissions process could "lower" TJ's academic standards and that "deserving" students would be denied acceptance. James Finley, *The Legal Battle Over the Nation's Top High School Reveals a Lot About NoVA's Education Chaos*, N. VA. MAG. (Nov. 11, 2021), <https://northernvirginiamag.com/family/education/2021/11/11/thomas-jefferson-high-school-admissions/> [https://perma.cc/KM2D-3NXXA].

124. Seventeen families filed suit challenging removal of the test. The plaintiffs requested an immediate injunction requiring Fairfax school officials to reinstate the test and argued that Virginia regulations required Governor's schools, which are considered gifted education programs, to administer entrance examinations. *K.C. v. Fairfax Cnty. Sch. Bd.*, No. CL 2020-0017283 (Va. Cir. Ct. Jan. 21, 2021).

125. The court denied plaintiff's request for a preliminary injunction, ruling that, absent a mandate from the General Assembly or the board of education requiring such testing at Governor's schools, the school board had discretion to eliminate standardized testing. *Id.*

126. The new policy allocated each public middle school within the participating school districts a minimum number of seats equal to the top 1.5% of its eighth-grade class, provided there are enough applicants meeting the eligibility requirements. *See TJHSST Freshman Application Process*, *supra* note 121

127. *See id.*

128. *See* Exhibit N at 51, *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, Civ. No. 1:21-cv-00296-CMH-JFA (E.D. Va. May 12, 2021), <https://defendinged.org/wp-content/uploads/2022/01/Exhibit-N-Jeremy-Shughart-Deposition-TJHSST-Admissions-Rubric-Emails-Pages-from-122-PLF-Memo-ISO-MSJ-with-unredacted-and-unsealed-exhibits-12.22.21-1.pdf> [https://perma.cc/82CS-R68M] (detailing the "experience factors rubric").

- Having a disability.

The chart below summarizes the admissions process before and after changes were made and implemented for the class of 2025.

*Changes to TJ Admissions Protocols:*

<b>Admissions Considerations</b>	<b>Class of 2024</b>	<b>Class of 2025</b>
<b>Class Size</b>	<ul style="list-style-type: none"> <li>• 480</li> </ul>	<ul style="list-style-type: none"> <li>• 550</li> </ul>
<b>Application Fee</b>	<ul style="list-style-type: none"> <li>• \$100 fee or receive fee waiver</li> </ul>	<ul style="list-style-type: none"> <li>• No fee</li> </ul>
<b>GPA</b>	<ul style="list-style-type: none"> <li>• 3.0 GPA in core academic subjects</li> </ul>	<ul style="list-style-type: none"> <li>• 3.5 cumulative core GPA (7<sup>th</sup> &amp; 1<sup>st</sup> quarter for 8<sup>th</sup>)</li> </ul>
<b>Course Requirements</b>	<ul style="list-style-type: none"> <li>• Enrollment in Algebra I or have a credit for Algebra I</li> </ul>	<ul style="list-style-type: none"> <li>• Algebra 1 Honors or higher-level math in 8<sup>th</sup> grade</li> <li>• Enrolled in science honors course</li> <li>• Enrolled in one additional honors course or identified as a Young Scholar</li> </ul>
<b>Standardized Test</b>	<ul style="list-style-type: none"> <li>• Percentile ranking on standardized test (Quant-Q, ACT Aspire Reading, ACT Aspire Science) used to select a semifinalist pool for holistic review</li> </ul>	<ul style="list-style-type: none"> <li>• No standardized test</li> <li>• Semifinalist stage eliminated – all applications reviewed</li> </ul>
<b>Holistic Review</b>	<ul style="list-style-type: none"> <li>• Two teacher recommendations</li> <li>• Student Information Sheet (SIS)</li> <li>• Problem-Solving Essay</li> </ul>	<ul style="list-style-type: none"> <li>• No teacher recommendations</li> <li>• Student Information Sheet (SIS)</li> <li>• Problem-Solving essay</li> <li>• Experience factors: <ul style="list-style-type: none"> <li>○ Economically disadvantaged</li> <li>○ English Learner</li> <li>○ Underrepresented Middle school <ul style="list-style-type: none"> <li>○ Allocated seats equivalent to 1.5% of eight graders of each public middle school are preferentially offered to top applicants from each school</li> </ul> </li> </ul> </li> </ul>



### III. THE NEW FRONT OF MASSIVE RESISTANCE

#### A. The Coalition for TJ's Challenge

Shortly after TJ's admissions changes took effect, the predictable backlash followed — this time led by Asian Americans. The Pacific Legal Foundation filed a claim on behalf of the Coalition for TJ, alleging that TJ's admissions changes discriminated against Asian American students in violation of the Fourteenth Amendment.<sup>129</sup> In May 2021, presiding Judge Claude M. Hilton ruled that the case could move forward, but denied a request for an injunction that would have stopped the new admissions policy from taking effect for the Class of 2025.<sup>130</sup>

The Coalition for TJ's claim exemplifies how new tactics are being used by conservatives to challenge school diversity efforts. One tactic — pitting Asian Americans against Black Americans — is deeply rooted in the Model Minority Myth (the “Myth”), a long discredited racist trope that seeks to portray Asian Americans as a monolithic high-achieving minority group juxtaposed to Black Americans, who are the perceived “bad” minority.<sup>131</sup> The Myth is particularly harmful because it obfuscates the history of struggle that Asian Americans have endured in this country to secure citizenship status and civil rights.<sup>132</sup> It also treats Asian Americans as a monolith and ignores economic and educational disparities experienced by different Asian ethnic subgroups.<sup>133</sup> Namely, the Myth has “served as a sociopolitical wedge that divides interest groups who may otherwise collaborate to push for change.”<sup>134</sup>

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129. See Erin Wilcox, *Judge Rules Coalition for TJ's Fight Can Continue in Federal Lawsuit: What It Means for Racial Discrimination in Schools*, PACIFIC LEGAL FOUNDATION (May 26, 2021), <https://pacificlegal.org/coalition-for-tjs-federal-lawsuit-racial-discrimination-in-schools/> [<https://perma.cc/A32V-L325>].

130. *Id.*

131. The Myth originated during the height of the Civil Rights Movement. As Asian Americans contemplated allying with Black Americans in the struggle to realize civil rights, the Myth was propagated by the popular media. The Myth is perpetuated by stories such as overcoming racism through hard work rather than through protest and policymaking as the true sign of character, so taking away social programs and civil rights protections is the compassionate thing to do. See Ki-Taek Chun, *The Myth of Asian American Success and Its Educational Ramifications*, 15 IRDC BULL. 2, 2 (Winter/Spring 1980); see also Lee, *supra* note 7.

132. See Chun, *supra* note 131, at 8.

133. See Kim Girard, *Haas Voices: How the ‘Model Minority’ Myth Hurts Asian Americans*, BERKELEY HAAS NEWSROOM (Mar. 9, 2021), <https://newsroom.haas.berkeley.edu/thoughts-on-the-model-minority-myths-impact-on-asian-americans/> [<https://perma.cc/V525-YVD5>].

134. See Benjamin Chang, *Asian Americans and Education*, in OXFORD RESEARCH ENCYCLOPEDIA OF EDUCATION 15 (Oxford University Press USA ed., 2017).

Despite the opposition being waged against its admissions changes, TJ released data reflecting increased diversity among the students who were offered admission to TJ for the fall of 2021.<sup>135</sup> The data show that the percentage of Black and Hispanic students in the incoming class more than tripled, with the percentage of Black students increasing from 1% to 7% and the Hispanic student percentage increasing from 3% to 11%.<sup>136</sup> The percentage of economically disadvantaged students grew from less than 1% to over a quarter of the incoming class.<sup>137</sup> The percentage of white students also increased from 17% to 22%.<sup>138</sup> Additionally, female student enrollment increased from 42% to 46%.<sup>139</sup> The only student population that experienced decreased enrollment was that of Asian American students whose enrollment decreased from 73% to 54%, or 56 fewer Asian American students than admitted in years past.<sup>140</sup> However, it is worth noting that, according to the TJAAG, the Class of 2025 Asian admittance rate (i.e. the likelihood that any individual Asian student would be admitted) was in line with historical trends going back at least 17 years,<sup>141</sup> and the drop in the overall proportion of Asian American students admitted is likely due to a smaller increase in the number of Asian applicants compared to that of other demographic groups.<sup>142</sup> Superintendent Brabrand stated that the data “speaks volumes of the fact that when we truly center our work on equity, all of our students have an opportunity to shine.”<sup>143</sup>

While the data demonstrated the efficacy of the admissions changes in drawing students from diverse backgrounds to TJ, the backlash against TJ’s admissions changes continued. It began in the form of a legislative response.

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135. See Jeffrey R. Young, *After Controversial Admissions Changes, Nation’s ‘Best’ High School Gets More Diverse*, EDSURGE (June 24, 2021), <https://www.edsurge.com/news/2021-06-24-after-controversial-admissions-changes-nation-s-best-high-school-gets-more-diverse> [<https://perma.cc/9EX7-YHYF>].

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. See Young, *supra* note 135; see also Asra Q. Nomani & Erin Wilcox, *The Purge of Asian American Students at Thomas Jefferson High School Has Begun*, WASH. POST (July 2, 2021, 10:00 AM), <https://www.washingtonpost.com/opinions/2021/07/02/purge-asian-american-students-thomas-jefferson-has-begun/> [<https://perma.cc/DZH7-T5YK>].

141. “[T]he percentage of Asian students admitted out of all Asian students who applied last year is in line with historical trends going back at least 17 years . . . showing Asian students remain just as competitive under the reformed system.” *TJAAG Denounces District Court Opinion Striking Down TJ Reform*, TJ ALUMNI ACTION GRP., <https://www.tjaag.org/district-court-opinion> [<https://perma.cc/9GZA-322G>] (last visited Aug. 23, 2022).

142. See *Debunking the Lie*, TJ ALUMNI ACTION GRP., <https://www.tjaag.org/debunking-the-lie> [<https://perma.cc/9D7G-JHGQ>] (last visited Aug. 23, 2022).

143. Young, *supra* note 135.

Delegate Glenn Davis introduced a bill to ban the use of demographics in Governor's Schools admissions.<sup>144</sup> However, and as noted by FCPS's Division Counsel John Foster, the individuals reviewing admissions at TJ did not have students' names or demographic information when they evaluated applications — TJ's admissions process was race-neutral.<sup>145</sup>

### B. Rewriting Precedent, Erasing History

In January of 2022, Judge Hilton issued a ruling announcing that he would decide the case against FCSB.<sup>146</sup> In February of 2022, he granted summary judgment in favor of the Coalition plaintiffs.<sup>147</sup>

In his ruling, Judge Hilton asserted that FCSB was motivated by racial animus against Asian American students in the development of TJ's new admissions protocols. This ignored the documentation reflecting that FCSB's motivation was the racial reckoning of 2020 and the Virginia's General Assembly requirement that Governor's Schools develop diversity goals and submit a report detailing their progress on those goals.<sup>148</sup> TJ's efforts were also a continuation of TJ's diversity efforts dating back decades. As detailed in Part II, TJ had grappled with its admissions protocols for decades, seeking to promote diversity and draw students who reflected the public that all public schools should serve. It did so amidst constant opposition. Neither the Coalition nor the court cites evidence that members of the FCSB were motivated by a desire to discriminate against or exclude Asian American students.

Furthermore, Hilton's opinion misinterpreted how courts have historically interpreted disparate impact, a legal theory used by plaintiffs — often in civil

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144. The bill bars Governor's Schools from considering data on race, sex, nationality, or ethnicity during admissions and prohibits what Del. Davis terms as "proxy discrimination," which he refers to as the use of geographic or socioeconomic factors or limiting the number of students admitted from a single school. "No academic year Governor's School or governing board member, director, administrator, or employee thereof shall discriminate against any individual or group on the basis of race, sex, color, ethnicity, or national origin in the process of admitting students to such school." Act of Apr. 11, 2022, h. 127, ch. 485, 2022 Va. Acts (amending VA. CODE ANN. § 22.1-26.2 (A)).

145. See Laura Scudder, *Here's Everything We Know So Far About the TJ Admissions Controversy*, N. VA. MAG. (Mar. 30, 2022), <https://northernvirginiamag.com/family/education/2022/03/30/tj-admissions-timeline/> [<https://perma.cc/NA2E-PYXY>].

146. In January 2022, Judge Hilton ruled that the suit will not go to trial, but he would decide the case on existing law. *Id.*

147. Coal. for TJ v. Fairfax Cty. Sch. Bd., No. 1:21CV296, 2022 WL 579809, at \*11 (E.D. Va. Feb. 25, 2022).

148. See H.B. 30 (Enrolled), 2020 Va. Acts (Va. 2020) § 27(i).

rights cases<sup>149</sup> — to assert that a facially neutral policy can have a disproportionate impact on a protected group of individuals.<sup>150</sup> Hilton concluded that discriminatory intent existed because FCSB was aware that changes to the admissions protocols might possibly reduce the number of Asian American students admitted to TJ.<sup>151</sup> But, conjectures about and analysis of demographic data hardly amounts to demonstration of discriminatory intent.

Furthermore, this leap of logic fails to acknowledge that the admissions policies adopted by FCSB are race-neutral — race is not a factor in consideration for admission to TJ.<sup>152</sup> The admissions policies include race-neutral factors such as socioeconomic status, English Learner status, and disability status. Nevertheless, reflecting an intention to dismantle even race-neutral policies, Hilton characterized the FCSB's desire to reflect the demographics of the communities from which TJ draws its students as “substantial evidence” of discriminatory intent against Asian American students.<sup>153</sup> Hilton attempted to justify his failure to cite discriminatory intent by concluding that “[d]iscriminatory intent does not require racial animus. What matters is that the Board acted at least in part because of, not merely in spite of, the policy's adverse effects upon an identifiable group.”<sup>154</sup>

Hilton also asserts that the FCSB could accomplish its diversity goals by increasing the size of TJ (which it did) or by providing free test preparation.<sup>155</sup> This assertion overlooks prior efforts made by TJ over the decades to diversify the student body like its previous effort to provide free

149. A private plaintiff bringing a disparate impact claim has the additional burden of trying to prove that the government actor behaved with discriminatory intent, a legal hurdle that even the most seasoned civil rights lawyers have found practically impossible to overcome. “However, because contemporary discrimination is frequently structural in nature, unconscious, and/or hidden behind pretexts (despite the fact that a tangible harm has resulted from their actions), the showing of ‘intent’ becomes a near impossible burden for plaintiffs.” *Intent Standard, EQUAL JUST. SOC'Y*, <https://equaljusticesociety.org/law/intentdoctrine/><https://perma.cc/3QJ6-SYJ3> (last visited Aug. 23, 2022).

150. The court seems to conclude that the Coalition constitutes a protected class. Although some of its members identify as Asian American, the complete demographic makeup of the Coalition is unclear. *See Coal. for TJ, supra* note 147, at \*10.

151. *See Walsh, supra* note 116. Hilton concluded: “Even aside from the statements confirming that the Board's goal was to bring about racial balance at TJ, the Board's requests for and consideration of racial data demonstrate discriminatory intent under *McCrorry*.” *See Coal. for TJ, supra* note 147, at \*6–7, \*10.

152. *Cf.* Justice Kennedy's concurring opinion in *Parents Involved* concluded that race can be a factor in student assignments, although it cannot be determinative, and that seeking diversity and reducing racial isolation are compelling interests. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 797–98 (2007) (Kennedy, J., concurring).

153. *See Coal. for TJ, supra* note 147, at \*6.

154. *Id.* at \*10.

155. *Id.* at \*11.

test preparation in 2002, which did not increase its diversity.<sup>156</sup> Hilton also overlooks historical and systemic barriers to admissions for under-represented students. For example, the admissions fee can have a chilling effect and prevent families from seeking fee waivers. Or even with test preparation, some students from economically disadvantaged backgrounds may attend schools that don't offer courses that prepare them for the subject matter included on the tests or that ensure that they are eligible to meet the course requirements prescribed under the prior admissions policy.<sup>157</sup> The FCSB's efforts sought to address systemic barriers such as these that prevented students from different backgrounds in the county from applying to TJ.

Finally, Hilton concluded that Asian American students were not treated equally in the revised admission process, arguing that "the challenged policy renders their children unable to compete on a level playing field for a racial purpose."<sup>158</sup> To support this conclusion, Hilton pointed to the preferential seat allocation for the top 1.5% of each middle school's eighth-grade class, characterizing this as discriminatory because it limited the number of Asian American students that could be admitted from a few feeder schools.<sup>159</sup> This argument overlooks the longstanding marginalization of the students at schools outside of the six feeder schools who had been excluded from the process for decades. Hilton also noted that few Asian American students are likely to qualify for the experience factors considered in the admission process.<sup>160</sup> The TJAAG debunked this assertion, noting that "[d]ue to the admissions changes, there was a large increase of enrolled FCPS 9<sup>th</sup> graders considered economically disadvantaged . . . Asians represent the largest racial group [of this category], at 38 students, 34% of the total."<sup>161</sup> The ahistorical nature of Hilton's conclusions and the distortion of legal precedent to arrive at the desired result disturbingly signify the tactics that many members of the current conservative federal judiciary are deploying to repudiate any school diversity efforts.

The Fourth Circuit's grant of the FCSB's request for a stay to implement the admissions process for the current school year highlights the shortcomings of Hilton's conclusions.<sup>162</sup> In a concurring opinion, Circuit

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156. See VARLEY, *supra* note 67, at 19.

157. Compounding access and resource issues is the reality that many middle school counselors may be unprepared to shepherd students from under-resourced schools through the application process or to identify potential students who can apply to TJ.

158. See *Coal. for TJ*, *supra* note 147, at \*4.

159. *Id.* at \*6.

160. See *id.*

161. *Debunking the Lie*, *supra* note 142.

162. *Coal. for TJ v. Fairfax Cty. Sch. Bd.*, No. 21-296, 2022 WL 986994, at \*1 (4th Cir. Mar. 31, 2022) (renumbered No. 22-1280) ("Appellant has satisfied the applicable legal

Judge Toby Heytens notes, “I have grave doubts about the district court’s conclusions regarding both disparate impact and discriminatory purpose, as well as its decision to grant summary judgment in favor of a plaintiff that would bear the burden of proof on those issues at trial.”<sup>163</sup> Heytens also notes that Asian American students, even under the new policies, comprised a higher percentage of students offered a spot at TJ (54.36%) than of total applicants (48.69%).<sup>164</sup> Furthermore, Heytens cites *Personnel Administrator of Massachusetts v. Feeney*,<sup>165</sup> noting that awareness of a potential outcome is inadequate to show discriminatory intent.<sup>166</sup> Heytens’ interpretation of *Feeney* differs from Hilton’s and he notes that, under the holding, “a plaintiff challenging a facially neutral policy must show that a decisionmaker acted ‘at least in part,’ ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.”<sup>167</sup>

Furthermore, Heytens notes that the FCSB did not engage in racial balancing or setting racial quotas, and it was not seeking to achieve a certain number or percentage of students from particular racial categories to enroll in TJ.<sup>168</sup>

Finally, Heytens underscores, “[t]he Supreme Court has repeatedly stated that it is constitutionally permissible to seek to increase racial (and other) diversity through race neutral means.”<sup>169</sup> He asserts that “it would be quite the judicial bait-and-switch to hold that such race-neutral efforts — much less, the *race blind* policy at issue here — are also subject to strict scrutiny.”<sup>170</sup> Heyton’s terminology, “bait-and-switch,” is an accurate term for what the Coalition and Judge Hilton attempted to do to discredit TJ’s race-neutral admissions protocols and maintain racial stratification in public education.

## CONCLUSION

The battle over TJ exemplifies the distance this nation has traveled from the progress made to foster school integration after the resistance waged against the *Brown* ruling. Massive resistance to *Brown* never really

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requirements for a stay pending appeal . . . and thus may proceed with its use of the challenged admissions plan.”).

163. *Id.* (Heytens, J., concurring).

164. *Id.* at \*2.

165. 442 U.S. 256 (1979).

166. *Coal. for TJ*, 2022 WL 986994, at \*4 (citing *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)).

167. *Id.* at \*4 (quoting *Feeney*, 442 U.S. at 279 (emphasis in original)).

168. *Id.*

169. *Id.*

170. *Id.*

disappeared, it just evolved. Its latest iteration manifests in the faces of mostly Asian American plaintiffs who are enlisted to challenge school diversity. Using the racist trope of the Myth, opponents of integration pit Asian Americans against Black Americans in their ongoing efforts to eviscerate school diversity. TJ is among the institutions caught in the crosshairs of this latest front of massive resistance. The challenge against TJ exemplifies how the opponents of integration must mischaracterize precedent to advance their campaign. TJ's race-neutral admissions changes are consistent with the diversity strategies recommended by the Court, including in *Parents Involved*,<sup>171</sup> yet conservative courts are disregarding this precedent.

This leaves the nation at a moral crossroads — either we expose these attacks as efforts to maintain white supremacy and racial subordination in public education, or we continue to espouse an unsustainable status quo of “performative desegregation” and allow separate and unequal education to persist at the cost of our public education system and the educational futures of too many of our nation's children. Which option do we choose? What kind of country do we want to be?

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