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## Reflections on Selectivity

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## REFLECTIONS ON SELECTIVITY

Jonathan D. Glater\*

*Selective public high schools, which do not and cannot enroll all the students who want to attend, face a daunting challenge. New York City's elite high schools illustrate the problem: Longstanding student selection practices, including an all-important standardized admission test, perpetuate racial inequality. The student population at these schools is less racially diverse than that of the City overall, and that pattern has resulted in litigation. Yet parents of children who are members of groups currently overrepresented at these elite schools also will (and have) challenged changes to student selection criteria to promote accessibility to students who are members of historically excluded groups, primarily Black and Latinx students. Schools walk a doctrinal knife's edge because there is no neutral baseline to look to for determining when student selection processes are fair. This Essay analyzes the conundrum and suggests that prioritizing fairness, which would manifest in a student body that looks more like the larger applicant pool, provides the answer.*

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## INTRODUCTION

Admission to selective and prestigious institutions has likely always been contested, and admission to elite, public exam schools — high schools that screen applicants on the basis of test scores, middle school grades, or other criteria — is no exception. But the effects of the chosen criteria on the demographic character of the admitted student population<sup>1</sup> prompt difficult and ever more urgent questions about the justifications for those criteria. At the same time, the reasoning of court decisions that limit how public schools may select students has become both more formally complex and more hostile to lived realities. Those deciding how selective public high schools choose students now walk a knife's edge, facing the threat of litigation both if they attempt to modify their practices and if they do not.

Today's contests over student selection processes take place at a moment of heightened awareness of disparities in access to what is perceived as higher quality education<sup>2</sup> variously along lines of race, class, and gender.<sup>3</sup> Further, the historical backdrop of these contests consists of centuries of explicit exclusion of nonwhite students by force of law, undermined relatively recently by the Supreme Court's 1954 decision in *Brown v. Board of Education*<sup>4</sup> and subsequent federal legislation.<sup>5</sup> Consistent with the desegregation mandate of *Brown* and its progeny, school boards face pressure to modify their selection practices to include more students who are members of historically excluded and underrepresented groups, typically Black and Latinx students.

At the same time, consistent with the belief and Supreme Court mandate that educational opportunity be provided in a "colorblind" fashion,<sup>6</sup> school

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1. See, e.g., Eliza Shapiro, *This Year, Only 10 Black Students Got into N.Y.C.'s Top High School*, N.Y. TIMES, Mar. 20, 2020, at A26 (describing paucity of Black and Latinx students at Stuyvesant High School in New York City); Nina Golgowski, *8 Elite Public Schools in NYC Only Accepted 190 Black Students*, HUFF. POST (Mar. 21, 2019), [https://www.huffpost.com/entry/few-black-students-accepted-nyc-elite-schools\\_n\\_5c910177e4b04ed2c1af083c](https://www.huffpost.com/entry/few-black-students-accepted-nyc-elite-schools_n_5c910177e4b04ed2c1af083c) [<https://perma.cc/XV38-XLWF>] (describing dearth of students of color across New York City's selective public high schools).

2. This is not to suggest that the perception is not valid. This Essay simply does not focus on the quality of the educational experience provided by selective public high schools.

3. At Stuyvesant High School in New York City, for example, nearly 60% of enrolled students are male. *Enrollment Data*, N.Y. STATE EDUC. DEP'T, <https://data.nysed.gov/enrollment.php?instid=800000046741> [<https://perma.cc/9DZ5-8RGC>] (last visited Aug. 23, 2022).

4. 347 U.S. 483 (1954).

5. See, e.g., Civil Rights Act of 1964, 42 U.S.C. § 2000c-6 (authorizing the Attorney General of the United States to sue on behalf of children who are victims of racial discrimination by a school board).

6. In *Parents Involved in Community Schools v. Seattle School District No.1*, the Supreme Court evaluated one school district's student assignment plans that took into account

boards must be very cautious in pursuing racial equity by taking race into account. Moreover, school boards must contend with parents whose children belong to groups that historically have enjoyed more ready access to desirable, selective schools and who oppose change that might reduce their children's odds of attending. This Essay will analyze the arguments made in two lawsuits, one accusing a school board of doing too little to promote racial equity and one accusing a school board of doing too much and engaging in unconstitutional discrimination.

The tension created by the mandate to desegregate, on the one hand, and the prohibition against discrimination, on the other, arises in part because the Court has adopted this formally colorblind stance, which rejects the use of race as a student selection criterion. But it also arises because there is no baseline that can serve as a point of reference. That is, maintaining selection criteria and practices that consistently, disproportionately, and adversely affect students who are members of historically excluded groups runs counter to the desegregation mandate, and is perceived by members of these groups as the continuation of unlawful discrimination. Modifying selection criteria and practices to change the demographic profile of an admitted student body runs counter to the formalist prohibition on consideration of race, and is perceived by members of different, even historically privileged, groups as discrimination. A majority of the Court has consistently rejected racial balancing, which is pursuing a particular racial mixture for its own sake.<sup>7</sup> And in the absence of a recognized benchmark against which admissions outcomes can be compared, a process and result that all could agree would be fair, there will be no resolution of the tension.

This brief Essay explores the conundrum confronting public schools and school districts that must allocate the scarce resource that is selective high schooling. It pursues four goals. First, it aims to demonstrate the absence of a normative baseline that could guide school boards and courts. Second, it shows how the traditional, historical criteria used by selective high schools to screen students may perpetuate and even worsen disparities along lines of race and class. Third, it teases apart the doctrinal knot created by the

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"racial composition of the particular school and the race of the individual student," and another's requiring that "all nonmagnet schools . . . maintain a minimum black enrollment of 15 percent, and a maximum black enrollment of 50 percent." 551 U.S. 701, 712, 716 (2007). A majority of the Court rejected the justification offered by the districts that use of a racial classification furthered a compelling interest in student body diversity at different schools, and concluded that the racially aware assignment system was not narrowly tailored. *See id.* at 732, 735. Thus, both systems failed to survive strict scrutiny review. As the majority opinion summarized, "[s]imply because the school districts may seek a worthy goal does not mean they are free to discriminate on the basis of race to achieve it, or that their racial classifications should be subject to less exacting scrutiny." *Id.* at 743.

7. *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003).

competing mandates to desegregate while not discriminating, as the Court has defined the terms. And fourth, it argues that pursuit of equity should dominate other values in the choice of criteria for admission to selective public schools.

The discussion that follows has three substantive Parts. The first Part describes the doctrinal context in which both lawsuits attacking student selection practices for excluding members of historically marginalized groups and lawsuits attacking student selection processes for attempting to remedy such exclusion coexist. The second Part describes two such lawsuits, one challenging a school board's move to scrap selection criteria that disproportionately excluded Black and Latinx students from an elite public high school in Virginia, and the other challenging the continued use of selection criteria that have similar effects in New York City. This Part briefly explores the complicated implications of victory for either group of plaintiffs. The third Part poses the questions: What would the result of a fair allocation regime be? Consequently, what process might produce that result? Does the law afford a pathway to adoption of such a process? The fourth Part concludes.

### I. PERPETUATION OF INEQUITY IN PUBLIC SCHOOLS

The processes that determine who attends desirable, selective public high schools have been the subjects of litigation before, and commitments in the public imagination to those processes run deep. Making changes is consequently a challenging and controversial task. For example, in addition to the lawsuits highlighted above, in the 1990s there was litigation around admissions to Boston's flagship public exam school, the Boston Latin School,<sup>8</sup> and last year there was litigation over possible changes to San Francisco's public flagship, Lowell.<sup>9</sup> As long as perceived disparities in education quality persist and the quantity of opportunities perceived as high-quality remains limited, there will be controversy over selection criteria. And given a general reluctance to increase radically the public investment in traditional public education, neither circumstance looks likely to change; efforts to promote access to children who are members of groups long excluded must navigate this controversy. This Part situates contests over selective public high school admissions in New York in historical and doctrinal contexts.

Perhaps most immediately, New York City's public schools have been operating through a global pandemic that has had devastating effects,

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8. *See* *McLaughlin v. Bos. Sch. Comm.*, 938 F. Supp. 1001, 1003 (D. Mass. 1996).

9. *See* *Friends of Lowell Found. v. S.F. Bd. of Educ.*, CPF-21-517445 (S.F. Super. Ct. dismissed June 17, 2022).

sickening millions and killing, as of this writing, more than one million people in the United States.<sup>10</sup> The COVID-19 pandemic has destabilized and destroyed jobs, prompting deep changes in how people go about their daily lives — including how children go to school. All of the changes have cast in stark relief the profound disparities in educational opportunities and life experiences for children of different racial and ethnic backgrounds, different socioeconomic conditions, and different disability statuses.<sup>11</sup> Schools ceased serving students in-person, putting at a distinct disadvantage those children with less or no access to the internet, and those children less able to engage academically through a screen.<sup>12</sup> The more severe effects of the pandemic and responses to it have increased food<sup>13</sup> and housing insecurity,<sup>14</sup> hindered teacher-student relationships,<sup>15</sup> and slowed the progress of English language learners.<sup>16</sup> In short, the pandemic exacerbated every challenge already confronting disadvantaged students and their families. The need to pursue reform to promote educational access and equity has become more urgent.

At the same time, awareness of race discrimination in the past, its lingering effects, and its current manifestations has expanded dramatically in the wake of horrific police killings of unarmed Black men and the global protests that followed.<sup>17</sup> In the context of education, this awareness has made vulnerable to reform longstanding practices that have restricted access and opportunity for Black students especially, but for students of other minority backgrounds too. For example, colleges and universities have abandoned the SAT and ACT standardized admissions tests, on which students of color

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10. Adeel Hassan, *The U.S. Surpasses 1 Million COVID Deaths, the World's Highest Known Total*, N.Y. TIMES, May 20, 2022, at A19.

11. See Sarah Mervosh, *The Pandemic Hurt These Students the Most*, N.Y. TIMES, July 28, 2021, at A13 (describing research on disparate effects of the pandemic and shift to remote education); EMMA GARCIA & ELAINE WEISS, ECON. POL'Y INST., COVID-19 AND STUDENT PERFORMANCE, EQUITY, AND U.S. EDUCATION POLICY: LESSONS FROM PRE-PANDEMIC RESEARCH TO INFORM RELIEF, RECOVERY, AND REBUILDING 4 (2020), <http://files.eric.ed.gov/fulltext/ED610971.pdf> [<https://perma.cc/XM9A-TUY4>] (describing disparate effects of pandemic and nascent scholarship on the topic).

12. Natalie Gomez-Velez, *Reimagining Public Education Equity After COVID-19: Will Public Voices From New York's Epicenter Be Heard Over the Siren Song of Billionaires?*, 48 FORDHAM URB. L.J. 313, 319–21 (2021).

13. *Id.* at 319.

14. *Id.* at 324–25.

15. *Id.* at 326.

16. *Id.* at 328.

17. See Jelani Cobb, *An American Spring of Reckoning*, NEW YORKER (June 14, 2020), <https://www.newyorker.com/magazine/2020/06/22/an-american-spring-of-reckoning> [<https://perma.cc/M7AG-2VM4>] (describing a “reckoning, a kind of American Spring, one long in the making and ignited not just by a single police killing”).

and students who are poor tend to receive lower scores.<sup>18</sup> Readiness to reconsider the rationales for using admissions criteria that have exclusionary effects may be higher than it has ever been, as disparities along lines of race and class appear more arbitrary and unfair to more observers. There is a flickering possibility of change in student assignment practices, which the New York complaint advocates, and which the Virginia complaint challenges.<sup>19</sup>

While broadening awareness of racial inequity and the global pandemic are new circumstances affecting public education, racial segregation in New York's public schools is nothing new. Indeed, a book of this law journal last year explored some of the issues related to segregation and inequality in the City's schools.<sup>20</sup> Studies have found that New York has the most segregated schools in the entire country.<sup>21</sup> At the same time, neighborhood gentrification has helped to enable some degree of integration in the City, a goal actively pursued by individual school principals.<sup>22</sup> There are potentially viable strategies to promote integration using correlates of race, as well as socioeconomic status, without running afoul of current antidiscrimination laws and doctrine.<sup>23</sup> However, these strategies must function in a doctrinal environment that is increasingly hostile.

The Supreme Court has struggled to balance competing interests in the context of public education, formally prohibiting intentional discrimination on the basis of race,<sup>24</sup> while simultaneously tolerating *de facto* segregation

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18. To be sure, attacks on efforts to spread awareness of the ways that race operates in society have run into a fierce counterattack in the form of efforts to restrict or eliminate teaching of Critical Race Theory.

19. Each complaint is discussed in detail in Part III *infra*.

20. See generally 48 FORDHAM URB. L.J. No. 2.

21. JOHN KUCSERA & GARY ORFIELD, UCLA C.R. PROJECT, NEW YORK STATE'S EXTREME SCHOOL SEGREGATION: INEQUALITY, INACTION, AND A DAMAGED FUTURE vi (Mar. 2014), <https://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/ny-norflot-report-placeholder/Kucsera-New-York-Extreme-Segregation-2014.pdf> [<https://perma.cc/NW48-5F5E>]. A more recent study, released in 2021, gave New York the same dubious distinction. See DANIELLE COHEN, NYC SCHOOL SEGREGATION: A REPORT CARD FROM THE UCLA CIVIL RIGHTS PROJECT, UCLA C.R. PROJECT 1 (June 2021), [https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/nyc-school-segregation-report-card-still-last-action-needed-now/NYC\\_6-09-final-for-post.pdf](https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/nyc-school-segregation-report-card-still-last-action-needed-now/NYC_6-09-final-for-post.pdf) [<https://perma.cc/3PLL-MH3T>].

22. See, e.g., Allison Roda et al., *Making School Integration Work in New York City Schools: A Long-term Solution to the Enduring Problem of Segregation and Inequality*, 48 FORDHAM URB. L.J. 449, 457–58 (2021).

23. See David Tipson et al., *Effective School-Integration Mobilization: The Case for Non-Litigation Advocacy and Impact*, 48 FORDHAM URB. L.J. 475, 499 (2021) (describing this goal and the importance of overcoming resistance from affected communities).

24. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

that hinders desegregation efforts.<sup>25</sup> This acceptance of policies, practices, and realities like segregated residential housing patterns, all of which preserve segregation in schools without formal, express consideration of race, has also extended to tolerance of formally race-neutral policies, practices, and realities harnessed to combat segregation in schools.<sup>26</sup> In its equal protection doctrine, then, the Supreme Court has restricted *explicit* consideration of race in student assignments.<sup>27</sup> A majority of the Supreme Court articulated this view forcefully in *Parents Involved in Community Schools v. Seattle School District No. 1* in 2007.<sup>28</sup> There, a majority of the Court concluded that express use of race as a factor in public school student assignments violated the Fourteenth Amendment: The two school districts did not adequately support either their argument that an interest in student body diversity produced desirable educational benefits and so constituted a compelling interest,<sup>29</sup> or their claim that use of race in their student assignment policies was necessary and narrowly tailored to achieve a compelling interest.<sup>30</sup> The assignment plans thus did not survive strict scrutiny, and the majority's opinion made clear just how difficult it would be for a public school district subsequently to use a race-conscious assignment plan that could satisfy that standard of review.

However, the Court did not then, and has not yet, outlawed *facially neutral* student assignment tactics designed to achieve racial diversity. In fact, one justice explicitly recognized and allowed for the possibility of strategic use of race-neutral assignment criteria to pursue racial diversity, endorsing in a concurrence “race-conscious measures that do not rely on differential

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25. See *Milliken v. Bradley*, 418 U.S. 717, 744–45 (1974).

26. The Court articulated the distinction between *de facto* and *de jure* discrimination in *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, with the former term referring to situations in which “racial imbalance exists in the schools but with no showing that this was brought about by discriminatory action of state authorities” and so may not be entitled to remedy. 402 U.S. 1, 17–18 (1971). Years later Justice Kennedy, in his concurrence in *Parents Involved*, describes this possibility that school district officials could take into account race without committing a constitutional violation. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 789 (2007). Methods available “includ[e] strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race.” *Id.*

27. See *supra* note 6 and accompanying text.

28. 551 U.S. 701, 735 (2007) (ruling that “[c]lassifying and assigning schoolchildren according to a binary conception of race is an extreme approach in light of our precedents and our Nation’s history of using race in public schools”).

29. *Id.* at 724–25 (criticizing the definition of diversity under one plan and the results of its use).

30. *Id.* at 726.

treatment based on individual classifications.”<sup>31</sup> The justice observed that “[t]hose entrusted with directing our public schools . . . can bring to bear the creativity of experts, parents, administrators, and other concerned citizens to find a way to achieve the compelling interests they face without resorting to widespread governmental allocation of benefits and burdens on the basis of racial classifications.”<sup>32</sup>

## II. A DOCTRINAL KNIFE’S EDGE

Schools and school districts concerned about racial segregation face a doctrinal catch-22. If they do not seek to lower barriers that disproportionately exclude Black and Latinx students from educational opportunities, they encounter criticism from and face lawsuits by advocates of greater racial inclusiveness. Yet if they change their student selection processes to lower those barriers and enable more students from underrepresented groups to enroll, they encounter criticism from and lawsuits by parents and advocates on behalf of students who have historically enjoyed access to the selective schools. Suits in this latter category argue that the changes are discriminatory, pursue values other than academic excellence, and exclude students who have earned a place in a selective institution. The potential divergence between state courts and federal courts has added a doctrinal wrinkle: While the Supreme Court’s more recent jurisprudence may favor claims brought by challengers to reforms intended to promote racial equity, some state constitutions may enable claims brought by supporters of those same reforms.

This Part examines the claims and arguments made in two lawsuits, one in response to a school district’s modification of its student selection process to boost enrollment of students who belong to historically underrepresented groups, and one in response to the failure to modify selection processes that help to maintain that underrepresentation. This is a tale of two complaints.

### A. Doing Too Much

The first complaint, filed in federal court in Virginia on behalf of parents opposed to changes in student assignment practices at the elite Thomas Jefferson High School for Science and Technology (TJ High School), charged that the Fairfax County School Board had engaged in constitutionally impermissible “racial[] balanc[ing]” and asked the district

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31. *Id.* at 797 (Kennedy, J., concurring). The Justice asserted that the Court’s decision in *Parents Involved* “should not prevent school districts from continuing the important work of bringing together students of different racial, ethnic, and economic background.” *Id.* at 798.

32. *Id.*

court to undo the student selection reforms.<sup>33</sup> Before the reforms, admission to TJ High School depended on a standardized admission test, which the complaint characterized as “famously rigorous and competitive,”<sup>34</sup> and then for those who scored highly on the test, on teacher recommendations, responses to three written prompts, and a “problem-solving essay.”<sup>35</sup> The student population at TJ High School while this regime was in effect was approximately 73% Asian, 1% Black, 3% “Hispanic,” and 18% white.<sup>36</sup>

The modified student selection system instead allocated slots as follows:

The top 1.5 percent of the eighth grade class at each public middle school meeting the minimum standards will be eligible for admission. A holistic review will be done of students whose applications demonstrate enhanced merit; 550 seats will then be offered to the highest-evaluated students. Students will be evaluated on their grade point average (GPA); a portrait sheet where they will be asked to demonstrate Portrait of a Graduate attributes and 21st century skills; a problem-solving essay; and experience factors, including students who are economically disadvantaged, English language learners, special education students, or students who are currently attending underrepresented middle schools.<sup>37</sup>

Because student populations at middle schools that fed into TJ High School were demographically distinct, with four enrolling predominantly children of Asian descent, the complaint alleged the new selection regime would have reduced the numbers of Asian students at the high school.<sup>38</sup> The complaint predicted that under the new selection process, the share of the student body consisting of students of Asian descent would fall to 54%, while the share of Black students would rise to 7%, Hispanic student enrollment would increase to 8%, and white student enrollment would rise to 25%.<sup>39</sup>

The plaintiffs charged that the school board implemented the changes, which did not incorporate explicit consideration of race, with the goal of reducing the number of students of Asian descent in the high school’s student

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33. See Complaint and Demand for Jury Trial, Coal. for TJ v. Fairfax Cnty. Sch. Bd., No. 1:21-cv-296 (E.D. Va. Mar. 10, 2021) ¶2 [hereinafter TJ Complaint].

34. *Id.* at ¶ 27.

35. *Id.*

36. *Id.* at ¶ 31.

37. *Id.* at ¶ 36 (quoting *School Board Choses Holistic Review as New Admissions Policy for TJHSST*, FAIRFAX CNTY. PUB. SCHS. (Dec. 18, 2020), [https://www.fcps.edu/news/school-board-chooses-holistic-review-new-admissions-policy-tjhsst?utm\\_content=&utm\\_medium=email&utm\\_name=&utm\\_source=govdelivery&utm\\_term=](https://www.fcps.edu/news/school-board-chooses-holistic-review-new-admissions-policy-tjhsst?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=)) [<https://perma.cc/E5P8-HLEZ>].

38. See TJ Complaint, *supra* note 33, at ¶ 31.

39. *Id.* at ¶ 31.

body.<sup>40</sup> By styling the complaint in this way, the plaintiffs avoided pitting academic excellence directly against the goal of achieving racial diversity.<sup>41</sup> Instead, the complaint presents the conduct of the school board as straightforward racial discrimination and offers as evidence statements evincing anti-Asian animus by a former middle school teacher and a state lawmaker, among others.<sup>42</sup> In presenting the changes, the complaint noted that school board officials repeatedly cited the demographic composition of the school relative to the demographic character of the district.<sup>43</sup> The complaint quoted the school district superintendent, Dr. Scott Braband, who at a school board meeting “stated the ‘need to recognize’ that ‘TJ [High School] should reflect the diversity of Fairfax County Public Schools, the community, and of Northern Virginia,’ lamenting that ‘the talent at Thomas Jefferson currently does not reflect the talent that exists in [the public school district].’”<sup>44</sup>

In focusing on these and similar remarks by others involved in approving the overhaul of the admissions process at TJ High School,<sup>45</sup> the plaintiffs equated these efforts to promote diversity — that is, to facilitate access to a valued resource for students historically denied it — to intentional discrimination by proxy to exclude students of particular, disfavored backgrounds. The equivalence is established by focusing on the claimed adverse effects of the new admissions policy on students of Asian descent, who had benefitted from the previous regime at the expense of Black and Latinx children.

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40. *See id.* at ¶ 2.

41. *See generally id.* The Complaint instead charges that the decision-makers who approved the change in admissions policy acted out of anti-Asian bias. *Id.* at ¶¶ 37–47. At the same time, the substance of the allegedly biased comments included in the Complaint emphasizes academic excellence: members of the school board are quoted deriding prospective high school students who “who have been [in] Test Prep since second grade.” *Id.* at ¶ 47. In this way the Complaint makes clear that the change in student assignment policy would work against students who worked hard and would excel, who had done everything right. As the Complaint put it, the biased comments “directly attack[ed] the Asian-American families whose children hope[d] to apply to TJ, demeaning students’ hard work and families’ sacrifices as ‘pay to play.’” *Id.* at ¶ 47. The Complaint thus draws an implicit contrast between students whom the change in policy could exclude, who are hardworking, excellent, and deserving, and those whom prior policy excluded, who presumably are none of those things.

42. *Id.* at ¶¶ 37–38.

43. *See id.* at ¶ 43 (quoting a statement by the Superintendent of Fairfax County Public Schools that “the diversity at TJ doesn’t currently reflect the diversity of Northern Virginia”).

44. *Id.* at ¶ 42 (quoting Fairfax County Public Schools, *FCPS School Board Work Session – 9-15-20 – TJ Admissions Review*, YOUTUBE (Sept. 15, 2020), <https://www.youtube.com/watch?v=n3FS9TY0lcg&list=PLSz76NCRDYQF3hPS2qS2SGEcoO4-Yd7Z&index=54>) [<https://perma.cc/CK7Y-3BYP>]

45. *See generally id.*

Enrollment at TJ High School is a zero-sum game, with students vying for one of just 1,800 slots. To the plaintiffs, then, to be pro-inclusion of underrepresented students is to be anti-inclusion of currently included students. Implicit in the complaint's argument is the claim that the *status quo ante* is the relevant and normatively desirable baseline against which all changes to student selection must be measured.<sup>46</sup> The theory advanced by the plaintiffs opens a pathway to constitutional attack upon facially neutral laws and policies that favor members of historically excluded groups, so long as challengers can find evidence of racial animus toward members of historically, relatively privileged groups. By way of example, this theory of discrimination would make vulnerable the Texas "ten percent" plan, which requires that students in the top 10% of their high school class be admitted to the University of Texas,<sup>47</sup> if the policy's intent to promote racial diversity could be characterized as discrimination against students less likely to be admitted under the plan than under the prior admissions regime.<sup>48</sup> This possibility receives more attention below.

Next, consider the other side of the knife's edge.

### B. Not Doing Enough

The second complaint, filed in state court in New York, was a broadside challenge to New York public education. The complaint alleged that New York public schools failed to provide supportive and diverse learning "environments as well as the culturally responsive curriculum, diverse teaching corps, and mental health supports necessary to prepare students to redress the immensely complex 'public problems confronting the rising generation,' [and that] the State and City deny all New York City schoolchildren a sound basic education in violation" of the State Constitution.<sup>49</sup> The plaintiffs, New York students and a nonprofit organization,<sup>50</sup> alleged that the New York "education system[] reproduces, validates, and even exacerbates the artificial racial hierarchies that have long structured civic, commercial, and social life in the United States [and that

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46. This is evident in the plaintiffs' Prayer for Relief, which seeks to restore the *status quo ante* with a court order "requiring Defendants to return to the admissions procedure in place for entry into TJ in the fall of 2020." *Id.* at ¶ 25 (Prayer for Relief, ¶ 3).

47. The program has been the subject of litigation as well; a description of the "Top Ten Percent Law" is provided in *Fisher v. University of Texas at Austin*, 136 S. Ct. 2198, 2205 (2016).

48. In response to this argument, advocates for return to the *status quo ante* would likely point to the role of consideration of race in the planning of would-be reformers.

49. Complaint for Declaratory and Injunctive Relief ¶ 3, *IntegrateNYC, Inc. v. New York*, No. 152743/2021 (N.Y. Sup. Ct. filed Mar. 9, 2021) [hereinafter *IntegrateNYC Complaint*] (quoting *Campaign for Fiscal Equity, Inc. v. State*, 100 N.Y.2d 893, 905 (2003)).

50. *See id.* at ¶¶ 27–45.

the system] cannot prepare its students for meaningful democratic and economic participation in today's diverse society."<sup>51</sup>

The plaintiffs identified numerous ways that New York schools failed to meet their obligations to students. For example, the complaint alleged that the state imposed discipline disproportionately on Black students,<sup>52</sup> tolerated disproportionately lower graduation rates for Black and Latinx students,<sup>53</sup> exposed students to rats and other vermin in school buildings,<sup>54</sup> and imposed a curriculum biased against students of color by "centering white language, history, and culture, which in turn inculcates in white students a false sense of superiority and centrality."<sup>55</sup> The state's authority to control the curriculum, the plaintiffs contended, did not "include permitting City schools to deliver [a] curriculum that privileges white experience above all others."<sup>56</sup>

Most relevant for purposes of this Essay, though, was the charge that too little had been done to counter the high degree of racial segregation in public schools.<sup>57</sup> Seven years before the complaint was filed, a study by the Civil Rights Project at the University of California, Los Angeles published findings that supported the complaint's material claims, classifying New York schools as among the nation's most segregated.<sup>58</sup> Disparities along lines of race and class throughout elementary and middle school years perpetuated disparities along the same lines at the City's selective and prestigious public high schools.<sup>59</sup> The disparities compound, according to the complaint. Students who are white and students who are of Asian descent are overrepresented in the "gifted and talented" programs at the elementary school level and are more likely to gain access to better, more competitive middle schools.<sup>60</sup> As a result, these students are more likely to obtain a coveted slot at the selective high schools.<sup>61</sup>

The complaint in this case made plain that in response to this situation, the defendants should have enacted reforms. More precisely, the defendants had maintained a *status quo ante* that they knew was unfair and that they

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51. *Id.* at ¶ 3.

52. *Id.* at ¶¶ 5, 57, 99.

53. *Id.* at ¶ 58.

54. IntegrateNYC Complaint, *supra* note 49, at ¶ 75.

55. *Id.* at ¶ 79.

56. *Id.*

57. *See* IntegrateNYC Complaint, *supra* note 49, at ¶ 73.

58. *See supra* note 19.

59. *See* IntegrateNYC Complaint, *supra* note 49, at ¶ 68.

60. *See id.* at ¶ 63.

61. *See id.*

should have attempted to modify.<sup>62</sup> In effect, the plaintiffs asserted that the tolerance of features of the New York public school system that were biased against and unfair to students of color, coupled with awareness that those features would have such effects, constituted a violation of the State's constitution.<sup>63</sup> Such a theory of wrongful discrimination might not work under federal law, which requires a plaintiff to show that a defendant acted “‘because of,’ not merely ‘in spite of’” the harmful effects on members of the group asserting the violation.<sup>64</sup>

This hostile federal doctrinal environment likely explains the decision of the plaintiffs to file the lawsuit in New York state court. Article XI of the New York Constitution provides for the “maintenance and support of a system of free common schools, wherein all the children of this state may be educated.”<sup>65</sup> As the complaint notes, New York's highest court has interpreted that language to require that the State provide a “sound basic education” to its children.<sup>66</sup> The incremental step made by the plaintiffs here lies in the assertion that a sound basic education cannot disproportionately disadvantage children who are members of certain racial or ethnic groups or who are poor by exposing them to a biased curriculum, subjecting them to adverse learning conditions, and ensuring that they are underrepresented in New York's selective schools. The case has not advanced far enough, as of this writing, to determine whether the State's courts will take that step; the decision of the trial court judge to dismiss the claim is on appeal as of this writing. However the claims of the plaintiffs are ultimately resolved, this argument also highlights the absence of a neutral, agreed-upon baseline for determining whether a school system is fairly allocating precious resources. While the past may be precedent and may even be defensible, that does not make it preferable or, perhaps, constitutional.

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62. *See id.* at ¶ 56 (accusing the state and city of “intentionally fail[ing] to take sufficient action—or often any action—to address the egregious inequities in the schools or to reduce their discriminatory harms to communities of color and the economically disadvantaged.”).

63. *See id.* at ¶ 2 (citing N.Y. CONST. Art XI, §1).

64. This is the standard articulated in *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979), discussed in more detail below. *See infra* note 70 and accompanying text. While *Feeney* resolved a discrimination claim in the context of employment, the standard for assessment of whether conduct constitutes intentional discrimination in violation of the federal constitution has been applied in other contexts. *See, e.g., McCleskey v. Kemp*, 481 U.S. 279, 297–98 (1987) (applying the *Feeney* standard in the context of a challenge to a state's procedures for imposing the death penalty); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 676–77 (2009) (applying the *Feeney* test to allegations of discrimination in violation of the First Amendment).

65. N.Y. CONST. Art. XI, §1.

66. *See IntegrateNYC Complaint*, *supra* note 49, at ¶ 2; *see also Campaign for Fiscal Equity, Inc. v. New York*, 655 N.E.2d 661, 666 (1995) (recognizing that the New York State Constitution “requires” that students have an opportunity to obtain such an education).

### C. Doctrinal Implications

In the two cases discussed above, the plaintiffs take aim at practices that do not involve explicit use of race as a criterion. Rather, in the case filed in federal court in Virginia, the plaintiffs contend that the defendant school district made changes to preexisting policies in order to reduce representation of members of a different, particular minority group.<sup>67</sup> In the lawsuit filed in New York state court, the plaintiffs contend that the defendant state and city entities allowed existing, facially neutral policies to persist, knowing of their disproportionate effects on members of racial minority groups. By invoking intent, rather than the simpler question of whether race plays an explicit role or not, each case takes aim at a vulnerability created by a doctrinal commitment to a definition of discrimination as intentional conduct and the definition of intentional conduct, in turn, as requiring explicit use of a racial classification. The paragraphs that follow explore the possible implications of the outcome in each case.

If the claims of the Virginia plaintiffs succeed, TJ High School would likely revert to its prior admissions regime, and the student body would likely soon have a supermajority of students of Asian descent, a sizable white minority, and very small numbers of Black and Latinx students, notwithstanding their higher numbers in the county. Not only is that the outcome the plaintiffs seek, but those are the demographic characteristics of the student population under the prior student selection system.<sup>68</sup> At a deeper level, the decision would reinforce the normalization of exclusion and underrepresentation of Black and Latinx children from desirable education opportunities, because of application of longstanding definitions of, and tests for, academic merit. This federal court precedent could then be used in lawsuits challenging other facially neutral policies that adversely affect members of privileged groups, on the theory that the policies were adopted in order to disadvantage historically marginalized racial and ethnic groups. Because the accepted baseline would have been set in an era of explicit exclusion, any movement from the regime of that era could be criticized as made with intention to reallocate benefits to promote racial inclusiveness, and this precedent as a functional matter would preserve the exclusive practices of a prior era in which exclusion of members of disfavored racial groups was the clear and often explicit goal.

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67. See TJ Complaint, *supra* note 33, at ¶ 2 (alleging changes in the student selection process “were specifically intended to reduce the percentage of Asian-American students who enroll”).

68. See *id.* at ¶ 23 (reporting the class of 2024 at TJ, admitted under the prior selection regime, was “73% [sic] Asian-American, 1% Black, 3.3% Hispanic or Latino, 6% other, and 17.7% white”).

If the claims of the New York plaintiffs succeed, the plaintiffs and City and State school officials would likely have to engage in lengthy and controversial discussion of how New York City schools must change. These changes would include altering their curriculum, student assignment practices, and teacher recruiting, among other aspects of their operation. The significant precedent would establish that failure to modify policies and practices that have a racially disparate effect constitutes a constitutional violation, at least under the constitution of the state of New York.

This would be a marked shift from the well-established standard established by the Supreme Court in *Personnel Administrator of Massachusetts v. Feeney*, which involved an equal protection challenge to a state law that favored veterans.<sup>69</sup> The challenge, which contended that the law discriminated against women, failed because the plaintiffs did not show that the law was enacted “at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.”<sup>70</sup> If the plaintiffs in the New York case succeed, then the bar to claims based on what is known as a “disparate impact” theory of harm might be lower: it would violate the state constitution to act “in spite of,” or with knowledge of, the adverse effect on a particular group. Opponents of facially neutral policies with disproportionate effects along lines of race could attempt similar litigation in other states, under the constitutions of those states.

There is a certain irony to potential victories by both sets of plaintiffs because they all seek to impose a standard of liability that not only recognizes as impermissible discrimination use of a racial classification but also encompasses as discrimination the intentional adoption of a policy that has racially disparate effects. In criminal law, this could be viewed as a shift from *purposeful* to *knowing* misconduct. If either set of claims is successful, other policies adopted with awareness of disparate effects would also be vulnerable to challenge — including the very policies sought by plaintiffs who oppose race-conscious efforts to promote diversity.<sup>71</sup> The possibility that both sets of plaintiffs could be victorious despite their different goals and claims is, yet again, evidence of the absence of a normative baseline, a guiding star, to identify what a fair system of allocation of opportunity would look like. We still have to come up with that.

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69. 442 U.S. 256, 259 (1979).

70. *Id.* at 279.

71. *See supra* Section III.A (describing lawsuit filed against school board for modifying student selection process in ways that would have increased representation of Black and Latinx students).

### III. THE TANTALIZING POSSIBILITY OF PRIORITIZING FAIRNESS

In battles over race-conscious efforts to promote more equitable access to opportunity, educational and otherwise, critics of reforms emphasize the impact of such policies on those who are not benefitted — on “innocent”<sup>72</sup> members of the dominant group who may be adversely affected. Invariably, the goal of greater opportunity for members of historically subordinated groups is put in tension with another value, such as academic excellence, or rewarding the diligence of those dominant group members. For example, in the Virginia litigation described above, the complaint emphasizes the hard work that students may have completed in an effort to gain admission to TJ High School. This suggests that their efforts make them more deserving and that denying them the chance to enroll — an outcome they came to expect based on the prior student selection regime — was not fair.<sup>73</sup>

There are good reasons to contest this adversarial framing. Perhaps most importantly, it elides analysis of the components of academic excellence. To the extent that particular measures of merit, typically standardized test scores, constitute indicators of excellence, the standard justification is that those scores predict who will do well in the selective academic environment. This is a positive, empirical claim and may not hold up consistently, but even assuming the typical criteria enable identification of which students are most likely to do well, the underlying argument is normative and too little addressed: should the goal of student selection be identifying and rewarding those students most likely to do well? Schools could implement different goals, such as identifying those students most likely to benefit or to benefit the most from the education provided. Even if academic excellence, as often and narrowly defined, is set against the goal of greater equity along lines of race and class, the normative assertion that merit should dominate demands justification. After all, prioritizing equity might compel other changes in educational programming and academic support, which may ultimately benefit all students.

Even so, schools and school districts would face the challenge of recognizing when the assignment system they implement is fair. It is here that the instincts of some of the defendants in the Virginia lawsuit are telling: they repeatedly emphasized that the student population at the selective public

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72. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 298 (1978) (criticizing use of race as a positive criterion in admissions decisions at medical schools because of the adverse impact on “innocent” white people).

73. TJ Complaint, *supra* note 33, at ¶¶ 27, 47 (describing the work put into gaining admission to the high school by students of Asian descent and the dismissal of those efforts by decision-makers modifying the school’s admission criteria).

high school did not look like that of the surrounding district.<sup>74</sup> If the student assignment process were fair and if the distribution of abilities across students is the same across lines of race and class, then the enrolled student population at the selective public high school should mirror the applicant pool, with students of different backgrounds present in the same proportions as in feeder middle schools. If this is the aspiration, the result of a fair system, it is not so difficult to reverse engineer a process that gets us there. This is not a call for “racial balancing,” but a suggestion that a fair system will be recognizable based on the outcomes produced. While the Supreme Court has consistently rejected using race explicitly to achieve a particular demographic result, the focus of the justices has been on the intent, rather than the result;<sup>75</sup> if racial diversity itself is an indicator of success but race is not a factor in student assignment, perhaps there is a doctrinal path forward toward greater equity. We have but to try.

### CONCLUSION

Who gets into selective public schools matters.<sup>76</sup> In part this is symbolic, because prestige attaches to students and enrollment is a marker of success. In part it is substantive, because these schools often achieve better results for students, including higher graduation rates — though not necessarily higher standardized test scores or rates of college enrollment and graduation.<sup>77</sup> In some jurisdictions, high-quality schools are also often viewed as a mechanism to entice white families to remain in urban areas and enroll their children in public schools.<sup>78</sup> Selective schools stand in contrast to other public schools that are perceived to offer an inferior educational

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74. The complaint repeatedly quotes school officials’s criticisms of the difference between the demographic profile of TJ High School and that of the population of prospective students in surrounding middle schools. *See id.* ¶¶ 40, 42–44, 46.

75. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. at 701, 740 (2007) (stating “using race simply to achieve racial balance would be ‘patently unconstitutional’” (quoting *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003))).

76. One need look no further than to controversies over school admissions methods to see evidence of the intensity of feeling on the subject. *See, e.g.*, Eliza Shapiro & Vivian Wang, *Amid Racial Divisions, Mayor’s Plan to Scrap Elite School Exam Fails*, N.Y. TIMES, June 24, 2019, at A1 (describing a “contentious” effort to abandon use of an entrance exam at New York’s prestigious Stuyvesant High School).

77. *See generally* Will Dobbie & Roland G. Fryer, Jr., *Exam High Schools and Academic Achievement: Evidence from New York City 2* (Nat’l Bureau of Econ. Rsch., Working Paper No. 17286, 2011), [https://www.nber.org/system/files/working\\_papers/w17286/w17286.pdf](https://www.nber.org/system/files/working_papers/w17286/w17286.pdf) [<https://perma.cc/CYL6-T5JL>]. This project focused on the impact of enrollment at a selective high school on a “marginal” student, who just barely gained admission, and how the impact might be different for other students. *See id.*

78. For example, in Connecticut, magnet schools were recognized as a mechanism to reduce racial, ethnic, and economic isolation. *Sheff v. O’Neill*, 238 Conn. 1, 41 (Conn. 1996).

experience.<sup>79</sup> Perhaps the intensity of feeling around selective schools' admissions practices reflects, more than anything else, two deeply held convictions: first, that admissions should be formally colorblind — meaning that aspects of identity such as race should play no role — and second, that admissions criteria appropriately screen potential students on the basis of merit.<sup>80</sup>

But formal colorblindness is increasingly unsatisfying; after all, it is troubling that the law prohibits explicit use of race but permits its implicit use. The Essay has argued that this tension underscores the absence of a normative baseline to resolve longstanding controversy over the process of determining whom to admit to selective public high schools. That vacuum explains why it is possible for schools, school districts, and states to face litigation if they continue with existing practices, notwithstanding the adverse effects on members of historically subordinated and excluded groups, or if they modify those practices in an effort to promote fair access to educational opportunity for those same children. The Essay has analyzed the arguments and the implications of the arguments made in two cases involving challenges of each type, one in federal court in Virginia and the other in state court in New York. And the Essay has suggested that the proper resolution of disputes over the student selection process used by the public high schools should involve prioritizing of fairness, laying the doctrinal knife flat.

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79. A *New York Times* article captured this by describing the relative difficulty of getting a spot in a New York City public high school and getting into Yale; the former is more difficult. Elizabeth A. Harris, *Couldn't Get into Yale? 10 New York City High Schools Are More Selective*, N.Y. TIMES, Mar. 11, 2017 at A19.

80. See TJ Complaint, *supra* note 33, at ¶ 10 (plaintiffs describing themselves as attempting to “educate their community on the value of merit-based admissions for specialized schools like TJ”). See also *id.* at ¶ 27 (describing the TJ admissions test as “famously rigorous”).