

TAKING THE COURT AT ITS WORD: HOW ADVOCATES ADAPT WHEN THE SUPREME COURT SAYS NO

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Education in the United States is still segregated. But opponents of affirmative action now argue that affirmative action policies—which they maintain were never constitutional to begin with—are no longer needed to serve the goals of our education system. Yet while these policies in the education context continue to face challenges and public scrutiny, affirmative action policies in another area of law have consistently been upheld as constitutional. States, localities, and the federal government run robust minority- and women-owned business enterprise (M/WBE) programs, which set goals for minority- and women-owned business participation in government contracts. These programs are consistently upheld under Supreme Court doctrine in that area. This Note offers a reason for M/WBE success and a path forward for education: By taking the Court at its word and leveraging language about what “not to do,” advocates can design permissible programs to increase diversity.

*Part I explores affirmative action in public contracting. Affirmative action policies have been actualized in government contracting through the use of disparity studies. These studies look at the disparity between available minority contractors and available work, using the blueprint laid out by Justice O’Connor in *City of Richmond v. J.A. Croson Co.*, to set goals for minority participation in public contracting. Next, Part I reviews New York City’s and New York State’s M/WBE programs in-depth: their design, challenges to the programs, and their constitutional justification. Part II discusses how affirmative action in education differs from government contracting, and then looks to New York and Louisville school districts for examples of how advocates have started to navigate the Court’s language of what is impermissible to create plans that diversify permissibly. Part III explores the lessons for advocates seeking to achieve more diversity and better outcomes for minority communities. By focusing on what the Court wants in its opinions overturning advocates’ first tries at solving a problem, there is hope for more diversity using just the tools in the Court’s limited toolbox.*

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INTRODUCTION

Education in the United States is still segregated. While frequently lauded, it is no secret that the Court’s ruling in *Brown v. Board of Education*¹ was insufficient to address the reality that our schools were, are, and will be segregated unless we employ more active strategies to intervene. A 2019 report that looked at state and local funding for school districts in the 2015–16 school year “found that more than half the nation’s schoolchildren are in racially concentrated districts,” defined as a district in which seventy-five percent of students are either white or nonwhite.² The report further found that nonwhite school districts get \$23 billion less in funding than districts that serve primarily white students—despite serving the same number of students. Unquestioned celebration of the victory in *Brown* has cre-

¹ 347 U.S. 483 (1954).

² See Sarah Mervosh, *How Much Wealthier Are White School Districts Than Nonwhite Ones? \$23 Billion, Report Says*, N.Y. TIMES (Feb. 27, 2019), <https://www.nytimes.com/2019/02/27/education/school-districts-funding-white-minorities.html>.

ated a sense of complacency³: If schools are legally required to be integrated, how could they be segregated?

This is not to say that school districts have failed to recognize this problem or that they have not attempted to remedy it. But in 2007, the Supreme Court significantly curtailed the possibility of active interventions by holding, in a plurality opinion by Chief Justice Roberts in *Parents Involved in Community Schools v. Seattle School District No. 1*,⁴ that racial diversity is not a compelling interest which can justify the use of race in selecting students for admission to public high schools and that the City of Seattle's plan to employ racial tiebreakers for admission violated the Equal Protection Clause. The Seattle School District's program had attempted to remedy racial segregation by using a system of tiebreakers for oversubscribed high schools. The other program at issue in the case, in Jefferson County, Kentucky, used a percentage system to allocate student seats at elementary schools such that the schools were racially diverse. Both programs were adopted voluntarily by the districts, and both programs were struck down.⁵

However, affirmative action programs in another area of law have been consistently upheld by lower courts as constitutional even after the Supreme Court supposedly foreclosed them. Contracting goals established by states, localities, and the federal government are currently in place to address the disparities in public contracting dollars awarded to minority-owned firms. These programs often employ explicit goals for racial diversity. For example, New York State set an across-the-board goal of thirty percent minority- and women-owned business participation. These programs have been challenged, but ultimately upheld as constitutional.⁶

The Supreme Court may not have realized that it actually established a blueprint for these programs when it considered their constitutionality in *Richmond v. J.A. Croson Co.*⁷ The City of Richmond, Virginia voluntarily created a plan that required prime contractors—those who are awarded work by government—to subcontract at least thirty percent of the dollar amount of each contract they were awarded to one or more minority business enterprises.⁸ In *Croson*, the

³ See, e.g., Angela Onwuachi-Willig, *Reconceptualizing the Harms of Discrimination: How Brown v. Board of Education Helped to Further White Supremacy*, 105 VA. L. REV. 343, 349 (2019) (“[T]he failure to examine the full harm of discrimination has precluded us from reaching that elusive goal of equality.”).

⁴ 551 U.S. 701 (2007) (plurality opinion).

⁵ See *infra* Part II.

⁶ See *infra* Part I.

⁷ 488 U.S. 469 (1989).

⁸ *Id.* at 477.

Court held that the City's program could not withstand strict scrutiny because the City failed to demonstrate a compelling interest, and the plan was not narrowly tailored. Critically, however, it also made clear the kinds of data that states and localities *should* produce to survive strict scrutiny. Instead of signaling the end of these programs, the Court created a model for them.⁹

The Court in both *Croson* and *Parents Involved* seemed to foreclose states and cities from affirmative action programs in the public contracting and public education contexts, respectively. This Note argues, however, that the Court instead created blueprints for what “not to do.” By taking the Court at its word—carefully reading the dicta¹⁰ of opinions striking down programs for instructions on how to redesign them—states and cities have found constitutionally permissible ways to promote diversity and remediate discrimination. As opposed to requiring a shift in the litigation strategy defenders might have employed to bolster voluntary desegregation programs, states and cities have instead leveraged innovative design thinking to create “disparity studies” and voluntary integration programs that pass constitutional muster. Like their counterparts in the minority- and women-owned business enterprise (M/WBE) context with respect to *Croson*, this Note shows that education advocates are following a similar model and navigating the doors left open by *Parents Involved*. In both settings, creativity has been an effective response to rigid rejections of first attempts at affirmative action.

This Note proceeds in three Parts. Part I reviews the history, doctrine, and challenges to affirmative action programs in public contracting and discusses the design and use of disparity studies—statistical models that set goals for diversity in contracting by comparing available minority firms and available government work—as a way to support the constitutionality and public policy rationale for public contracting diversity plans. Part II reviews the history, doctrine, and challenges to affirmative action in public education and how actors in K–12 education have learned from the M/WBE experience, taken the Court at its word, and carefully designed voluntary integration programs in the K–12 context in both New York and Louisville,

⁹ See *id.* at 509 (describing circumstances in which “some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion”).

¹⁰ Dicta can often be hard to separate from the central holding of a case, and some scholars have characterized the difference between dicta and holding as a task judges undertake on their own to “assist in the task of resolving particular cases.” See Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 958 (2005). Generally, the task of distinguishing holding from dicta in an opinion is a debate in and of itself, when opinions battle between applications of precedent. See generally *id.*

the latter a city whose program was invalidated by *Parents Involved*. Part III focuses on the lessons that can be learned from this model of leveraging the Court's precise dicta to achieve socially just goals, despite rigid doctrinal barriers. While this Note proposes that a novel approach to addressing the problem of segregation in public education may not require a doctrinal shift, the disparity study model or voluntary integration models could also be used in other contexts to increase racial diversity. Justice Brandeis once said, "[d]enial of the right to experiment may be fraught with serious consequences to the [n]ation."¹¹ As affirmative action programs face further challenges in the courts¹² and a Supreme Court unlikely to expand the programs,¹³ advocates can look to these precedents to continue to diversify our educational institutions.

I

AFFIRMATIVE ACTION IN PUBLIC CONTRACTING

To build, provide, and protect citizens in their jurisdictions, government units "contract out" work to private companies. These contracts range from construction of government buildings,¹⁴ to managing concessions,¹⁵ to the purchase of government commodities.¹⁶ Histori-

¹¹ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

¹² *See, e.g.*, Petition for Writ of Certiorari, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, No. 19-2005 (1st Cir. Feb. 25, 2021), *petition for cert. docketed*, No. 20-1199 (U.S. Mar. 1, 2021), https://www.supremecourt.gov/DocketPDF/20/20-1199/169941/20210225095525027_Harvard%20Cert%20Petn%20Feb%2025.pdf (alleging that Harvard's use of race in admissions is impermissible and presenting the questions of (1) whether the Court should overrule precedent and hold that institutions of higher education cannot use race as a factor in admissions, and (2) whether the college is violating Title VI by "penalizing Asian-American applicants, engaging in racial balancing, overemphasizing race, and rejecting workable race-neutral alternatives").

¹³ *See* Vivi E. Lu & Dekyi T. Tsotsong, *How SFFA Is Trying to Convince SCOTUS To Hear Its Suit Against Harvard*, HARV. CRIMSON (Mar. 5, 2021), <https://www.thecrimson.com/article/2021/3/5/sffa-petitions-supreme-court> ("Should the Supreme Court accept the petition, [Professor David B.] Oppenheimer said most legal experts following the case agree that the Court will rule in favor of SFFA.").

¹⁴ *See, e.g.*, *On-Call General Contracting Services*, N.Y.C. CITYWIDE ADMIN. SERVS.: CITY REC. ONLINE (Mar. 6, 2020), https://a856-cityrecord.nyc.gov/RequestDetail/20200304014?mc_cid=E0434a526c&mc_eid=2d0ff468fc (seeking general contracting services for sites managed by the City's Economic Development Corporation).

¹⁵ *See, e.g.*, *Market Manager Subconcession Opportunity – Times Square Plaza*, N.Y.C. CITYWIDE ADMIN. SERVS.: CITY REC. ONLINE (Mar. 11, 2020), https://a856-cityrecord.nyc.gov/RequestDetail/20200304016?mc_cid=E0434a526c&mc_eid=2d0ff468fc (seeking a manager of outdoor concessions in the Times Square pedestrian plaza).

¹⁶ *See, e.g.*, *Correction: Uniform Shirts*, N.Y.C. CITYWIDE ADMIN. SERVS.: CITY REC. ONLINE (Mar. 4, 2021), <https://a856-cityrecord.nyc.gov/RequestDetail/20210226105> (seeking to purchase uniform shirts for the New York City Police Department).

cally, minority-¹⁷ and women-owned businesses have been underrepresented in government contracts; in response, governments have attempted to enact innovative policies and programs to diversify their procurements.¹⁸ In this Part, I review the doctrinal framework that developed from early challenges to these programs, then look to how the programs have developed since: through the use of studies that show a disparity between available minority contractors and available work in areas in which those firms have capacity to perform. To explore these programs, I review New York City and New York State's M/WBE programs in-depth. Finally, I review challenges to these disparity study-based programs and show their strength to withstand constitutional attack.

A. Doctrinal Framework

The Fourteenth Amendment mandates that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”¹⁹ When a government program or law uses race as a criterion for inclusion or exclusion, it is subject to strict scrutiny. This level of constitutional review by courts is considered the strictest form of judicial review, and is used as the rubric for constitutionality whenever a suspect classification is used by the government.²⁰ Even though the governmental entities who legislate affirmative action programs for their contractors are using racial distinctions to create *more* equality, the programs are still subject to the same level of scrutiny. In this Section, I discuss how the Supreme Court has reviewed M/WBE programs under this standard by looking to the two foundational cases in this area.

¹⁷ While many publications no longer refer to certain communities as “minorities,” I have used the term throughout this Note to refer to the government contracting programs to avoid confusion and to conform with program names and my sources. See, e.g., Rashaad Lambert, ‘There is Nothing Minor About Us’: Why Forbes Won’t Use the Term Minority to Classify Black and Brown People, FORBES (Oct. 8, 2020, 9:15 AM), <https://www.forbes.com/sites/rashaadlambert/2020/10/08/there-is-nothing-minor-about-us-why-forbes-wont-use-the-term-minority-to-classify-black-and-brown-people/?sh=6bf17e737e21>.

¹⁸ See Chris Burrell, *Disparities in Government Contracting Hurt Minority-Owned Businesses*, NPR (Feb. 20, 2020, 5:00 AM), <https://www.npr.org/2020/02/20/807126443/disparities-in-government-contracting-hurt-minority-owned-businesses> (“State and local governments spend billions of dollars hiring contractors for goods and services, but most of those contracts go to white-owned businesses, not minority contractors—despite decades of affirmative action and other policies meant to make up for disparities.”).

¹⁹ U.S. CONST. amend. XIV, § 1.

²⁰ See generally Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1275 (2007) (“Among the strands of doctrine forming the early history of strict judicial scrutiny, one involved race-based classifications under the Equal Protection Clause . . .”).

To increase diversity in its public contracting in 1983, the City Council of Richmond, Virginia adopted regulations requiring companies awarded City contracts to subcontract thirty percent of those contracts to minority²¹ businesses. J.A. Croson, a company in the area, sued, claiming that it lost a contract because of this set-aside policy. In *Croson*, Justice O'Connor wrote for the Court and held that the City had failed to demonstrate a compelling government interest justifying the plan since the facts did not establish discrimination in Richmond's construction industry, and that the plan was not narrowly tailored to achieve its interests. In other words, the program failed muster under strict scrutiny.

In *Croson*, the parties disputed whether the Court should follow *Fullilove v. Klutznick*,²² and uphold the program, or follow *Wygant v. Jackson Board of Education*,²³ and strike the program down unless the efforts were based on the government unit's own prior discrimination.²⁴ In *Wygant*, the program at issue was evaluated under traditional strict scrutiny: whether the government unit had a compelling interest in achieving the results of the program, and then whether the means to achieve that interest were narrowly tailored. In *Fullilove*, the Court seemed to be evaluating a federal minority business enterprise provision of the Public Works Employment Act of 1977 under a form of intermediate scrutiny, or what some have called a "loose" strict scrutiny.²⁵ The Supreme Court, in an opinion by Chief Justice Burger, held that the program was constitutional. After finding that the *objectives* of the program were constitutional, the Court analyzed whether the use of racial and ethnic criteria was appropriate and

²¹ Jurisdictions define minority businesses differently, and how broadly or narrowly they do may impact the constitutionality of their program. For one example of a definition of a minority-owned business, see *infra* Section I.B.1.

²² 448 U.S. 448 (1980) (holding that the minority business program established by the Public Works Employment Act of 1977 was not unconstitutional).

²³ 476 U.S. 267, 274 (1986) (holding that racial classifications must be justified by "a compelling state purpose" where "the means chosen to accomplish that purpose are narrowly tailored").

²⁴ In *Wygant*, nonminority teachers challenged a district's collective bargaining agreement that gave some preference to minority employees. The Court held that the agreement violated the Fourteenth Amendment, and that general societal discrimination was insufficient to justify a racially-based program. Instead, they found there must be "particularized findings" and "some showing of prior discrimination by the governmental unit involved." *Id.* at 276, 274.

²⁵ See R. Randall Kelso, *Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The "Base Plus Six" Model and Modern Supreme Court Practice*, 4 J. CONST. L. 225, 235 (2002); see also *id.* at 235 n.43 (citing *Fullilove*, 448 U.S. at 490-92) (noting that the Court in *Fullilove* "refrain[ed] from adopting a rigorous strict scrutiny approach").

determined the program was “a strictly remedial measure.”²⁶ The Court in *Fullilove* rejected the notion that the Court must be color-blind in addressing remedial discrimination, citing its school desegregation cases and framing them as justified on the basis that “examination of the racial composition of student bodies was an unavoidable starting point.”²⁷ The *Fullilove* Court determined that the program at issue would survive review under “either ‘test’” established in *Regents of the University of California v. Bakke*—referring to the many articulations of strict scrutiny in the opinions in that case,²⁸ and regardless, the program did not violate the Constitution.²⁹

The Court evaluated the program at issue in *Croson* under strict scrutiny, but did not follow either *Wygant* or *Fullilove*’s framework for evaluating whether Richmond had a compelling interest in the program. Instead, the Court quoted an education case, *Bakke*. In *Bakke*, Justice Powell distinguished between an impermissibly broad interest, like societal discrimination, and a permissible interest, which required “judicial, legislative, or administrative findings of constitutional or statutory violations.”³⁰ The *Croson* Court found that the City of Richmond had not made the requisite findings in creating its thirty percent goal, and that “when a legislative body chooses to employ a suspect classification, it cannot rest upon a generalized assertion as to the classification’s relevance to its goals.”³¹ On the question of tailoring, the Court found the legislation overinclusive. There was no evidence of past discrimination against “Spanish-speaking, Oriental, Indian, Eskimo, or Aleut” businesses in the record, but they were included in the City’s plan. Additionally, the government had not considered race-neutral means to achieve minority participation, such as financial support or lessening regulatory requirements for its contractors.³²

Establishing what has become the blueprint for M/WBE programs nationwide, Justice O’Connor made clear that “evidence of a

²⁶ *Fullilove*, 448 U.S. at 481.

²⁷ *Id.* at 482.

²⁸ 438 U.S. 265 (1978) (considering whether the UC Davis Medical School’s affirmative action policy for admissions violated the Fourteenth Amendment or the Civil Rights Act of 1964).

²⁹ *Id.* at 492; see also Leslie Yalof Garfield, *Back to Bakke: Defining the Strict Scrutiny Test for Affirmative Action Policies Aimed at Achieving Diversity in the Classroom*, 83 NEB. L. REV. 631, 637–39 (2005) (calling the Court’s opinion in *Bakke* “highly fractionalized” and describing the different Justices’ interpretations of diversity in the context of a compelling government interest).

³⁰ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 497 (1989) (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978)).

³¹ *Id.* at 500.

³² *Id.* at 507.

pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government's determination that broader remedial relief is justified."³³ Moreover, she suggested that "where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise."³⁴ She went on to explain exactly what the issues were with Richmond's less rigorous program:

The city has not ascertained how many minority enterprises are present in the local construction market nor the level of their participation in city construction projects. The city points to no evidence that qualified minority contractors have been passed over for city contracts or subcontracts, either as a group or in any individual case. Under such circumstances, it is simply impossible to say that the city has demonstrated "a strong basis in evidence for its conclusion that remedial action was necessary."³⁵

In explaining the necessity for this kind of data, Justice O'Connor made clear that these findings serve the goals of defining the injury and the extent of the remedy necessary (and permissible) to address it. As discussed in Part III, *infra*, by saying what was *not* permissible, the Court created a path forward for those interested in achieving diversity in public contracting.

Years later, in *Adarand Constructors, Inc. v. Peña*,³⁶ the Court reaffirmed that such programs would be evaluated under strict scrutiny, and that careful data might support a permissible program. In *Adarand*, a plaintiff contractor brought a challenge to a federal contracting program that would give additional compensation to the prime contractor awarded with a contract if they hired small businesses controlled by socially and economically disadvantaged individuals to do part of the work. "Socially and economically disadvantaged individuals" was defined to include minority business owners. The Court held that all racial classifications imposed by federal, state, or local authorities must pass strict scrutiny review.³⁷ The Court articulated that it intended to "make[] explicit what Justice Powell thought implicit in the *Fullilove* lead opinion: Federal racial classifications, like

³³ *Id.* at 509.

³⁴ *Id.*

³⁵ *Id.* at 510 (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986)).

³⁶ 515 U.S. 200 (1995).

³⁷ *Id.* at 224 ("[A]ny person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny.").

those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest.”³⁸

While the Court remanded the case to the lower court to evaluate the program under strict scrutiny, Justice Ginsburg wrote in dissent that “divisions in this difficult case should not obscure the Court’s recognition of the persistence of racial inequality and a majority’s acknowledgment of Congress’s authority to act affirmatively, not only to end discrimination, but also to counteract discrimination’s lingering effects.”³⁹ She further explained that, based on the clear inequality in treatment of minorities with respect to jobs, housing, and entrepreneurship, Congress could conclude that a “carefully designed” affirmative action program may be required to realize equal protection of the laws.⁴⁰ In the spirit of this dissent and taking the majority at its word, a door was opened to the right program, if only it could be designed appropriately.

B. Disparity Studies

One solution cities and states have embraced in response to *Croson*’s narrow holding is creating disparity studies, which use statistical tools to show whether there is a significant difference between the number of minority businesses available to perform contracting work in various industries in a jurisdiction and the number of contracts actually awarded to minority firms. As mentioned, M/WBE programs are government programs that seek to promote and expand business opportunities for minority-owned, women-owned, and other disadvantaged businesses, especially by increasing access to government contract opportunities. Disparity studies identify available minority contractors in a jurisdiction and compare that number to the available contracts for work from the government to assist municipalities and states with setting goals for minority participation in public contracting. Cities and states have created minority-owned business certification programs to certify⁴¹ these businesses and have established complex processes by which to award contracts with a form of preference for minority-businesses that tracks the goals set in the disparity study for that jurisdiction.

³⁸ *Id.* at 235 (citing *Fullilove v. Klutznick*, 448 U.S. 448, 496 (1980) (Powell, J., concurring)).

³⁹ *Id.* at 273 (Ginsburg, J., dissenting).

⁴⁰ *Id.* at 274 (“Congress surely can conclude that a carefully designed affirmative action program may help to realize, finally, the ‘equal protection of the laws’ the Fourteenth Amendment has promised since 1868.”).

⁴¹ Certification is the process by which the government unit confirms the minority- or women-owned status of the business and provides them with official documentation verifying this status. *See infra* note 49 and accompanying text.

These studies draw on Justice O'Connor's direction in *Croson* that "[w]here there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise."⁴² This has come to be the anchor on which disparity studies rest: Where a study can show a "disparity"⁴³ between the number of minority- or women-owned firms available to perform contracting work and the number of those actually hired, a government-sponsored affirmative action program for awarding procurement contracts could be constitutional under the Fourteenth Amendment. As discussed above, where a program uses race-based classifications, the government must show narrow tailoring and a compelling interest.⁴⁴ Where a program uses gender classifications, the government must show an "exceedingly persuasive justification."⁴⁵ States and cities, including New York City, cite *Croson* as the "foundational case"⁴⁶ that created the legal framework from which they design such studies.

To better understand how these programs are designed and operate, this Note will review the New York City and New York State M/WBE programs in depth. The New York programs are often cited as some of the most robust in the nation,⁴⁷ and provide a helpful example of model disparity studies in response to *Croson*. One practitioner describes successful M/WBE programs as having the following seven attributes: (1) supported by evidence, (2) limited duration and based in current conditions, (3) not overbroad, (4) exclude firms who no longer are disadvantaged and consider carefully immigrant groups who have not faced historical discrimination, (5) have goals based on availability of firms, (6) allow for waivers, and (7) are administered by an agency that also uses non-race based strategies to expand opportu-

⁴² *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989).

⁴³ CITY OF NEW YORK DISPARITY STUDY 1-1 (2018) [hereinafter N.Y.C. DISPARITY STUDY 2018].

⁴⁴ *See id.*

⁴⁵ *Id.* (citing *United States v. Virginia*, 518 U.S. 515, 534 (1996) (striking down the male-only admission policy at the Virginia Military Institute because the school failed to show an "exceedingly persuasive justification" for its gender-based policy)).

⁴⁶ *Id.*

⁴⁷ *See, e.g.*, Zach Williams, *What Comes Next for MWBEs?*, CITY & STATE N.Y. (Oct. 24, 2019), <https://www.cityandstateny.com/articles/personality/interviews-profiles/what-comes-next-mwbes.html> ("New York City and state are getting closer to their respective goals of awarding 30% of their contracts to minority women-owned business enterprises.").

nities for minority businesses.⁴⁸ Two M/WBE programs in particular have successfully followed these principles. Because of their careful design, frequent redesign, political favorability, and the wealth of public information on the programs, this Note looks to the New York programs as concrete examples of affirmative action policy in public contracting.

I. *New York City*

New York City law governs its M/WBE Program. The program sets goals for the amount of City contracting dollars that should be spent through minority- and women-owned contracting firms. Where applicable, the agencies then require firms awarded contracts to meet these goals through subcontracting. Firms are first required to go through a certification process, by which they demonstrate that they are a:

business enterprise[] authorized to do business in this state . . . in which (i) at least fifty-one percent of the ownership interest is held by United States citizens or lawful permanent resident aliens who are either minority group members or women; (ii) the ownership interest of such individuals is real, substantial and continuing; and (iii) such individuals have and exercise the authority to control independently the day to day business decisions of the enterprise.⁴⁹

The City defines minority group members to include those who are Black, Hispanic, Asian-Pacific, Asian-Indian, and Native American.⁵⁰ To qualify for certification, the business's principal office must be within the City's five boroughs, in a nearby county of New York City or New Jersey,⁵¹ or be outside of New York City but have a "substantial presence in the geographic market of New York City," which can be demonstrated through a bank presence, New York license, or proof

⁴⁸ B. SETH BRYANT, *THE 'STATE' OF NEW YORK MWBE PROGRAMS: AN INFLECTION POINT?* 14 (2016), <https://static1.squarespace.com/static/57683282d2b857e786bb5893/t/57f2afe6cd0f682cc9a215c9/1475522535559/Bryant-Rabbino-LLP-The-State-of-NY-MWBE-Programs-9-15-16-2.pdf>.

⁴⁹ N.Y.C. CHARTER § 1304(e)(6)(b).

⁵⁰ *Minority and Women-Owned Business Enterprise (M/WBE) Certification Program*, CITY OF NEW YORK, <https://www1.nyc.gov/nycbusiness/description/minority-and-womenowned-business-enterprise-certification-program-mwbe> (last visited Sept. 13, 2021). While these labels are not universally used or preferred, I have used them throughout this Note in alignment with the City's current practice so as to conform to the program's labels and my sources.

⁵¹ *Id.* The list of counties is Nassau, Putnam, Rockland, Westchester, Suffolk, Bergen, Hudson, and Passaic.

of transactions in New York.⁵² The City predicted 9,000 M/WBEs would be City-certified by the end of 2019.⁵³

Once certified, M/WBEs can be awarded contracts directly or brought on to projects as subcontractors to non-M/WBE prime contractors who can then “count” the participation of the M/WBE firms toward their contract’s M/WBE goals. City agencies will make clear the City’s M/WBE goals in requests for bids for various projects, and while some contractors can offer in their bids to meet those goals solely through their own participation in the project, many bid with the anticipation that they will subcontract out part of the work awarded to them to meet proposed goals.⁵⁴ The City ultimately accounts for these dollars spent as part of the total amount of money spent by the City on M/WBE firms, also known as the M/WBE utilization. Not all contracts are required to have or meet M/WBE goals. M/WBE goals are not required for noncompetitive contracts, non-profit contracts, and contracts preempted by state or federal goals.⁵⁵ Vendors that bid on City contracts can request full or partial waivers of the M/WBE goals during the pre-bid and pre-proposal stages, which are evaluated by the Mayor’s Office of Contract Services according to the vendor’s business and history of subcontracting.⁵⁶ Vendors must show that they have made a “good faith” effort to meet the M/WBE goals for the project and failed in order to be eligible for a waiver.⁵⁷

The City’s M/WBE program is authorized by Local Law 1 of 2013, which was enacted after the City conducted a disparity study.⁵⁸ New York City’s last disparity study was conducted in 2018 by MGT Consulting Group.⁵⁹ The City conducted its first disparity study in 1992,⁶⁰ which led to the adoption of price preferences that year.⁶¹ Two

⁵² *Id.*

⁵³ *Certification*, CITY OF N.Y., <https://www1.nyc.gov/nycbusiness/mwbe?page=&wbe-certification> (last visited Sept. 13, 2021).

⁵⁴ *See M/WBE Regulations*, NYC MAYOR’S OFF. OF CONT. SERVS., <https://www1.nyc.gov/site/mocs/mwbe/regulations.page> (last visited July 31, 2021) (“M/WBE participation goals indicate the percentage (in dollars) of a contract that must be performed by a city-certified woman- or minority-owned business. The goals may be met through an M/WBE prime contractor’s self-performance, a joint venture between an M/WBE and non-M/WBE firm, or through the use of M/WBE subcontractors.”).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ N.Y.C. ADMIN. CODE § 6-129(i)(11)(c).

⁵⁸ *M/WBE Regulations*, *supra* note 54.

⁵⁹ N.Y.C. DISPARITY STUDY 2018, *supra* note 43.

⁶⁰ *Id.* at 22.

⁶¹ Price preferences are either reductions in proposed bid amounts given to particular bidders based on attributes like minority-status, or incentive credits whereby bidders are reviewed more favorably for meeting certain goals. *See MASON TILLMAN ASSOCS., LTD.*,

years later in *Seabury Construction Corporation v. Department of Environmental Protection of the City of New York*,⁶² a Supreme Court in New York County invalidated 11 R.C.N.Y. § 3-09, the New York City rule which permitted the City's Chief Procurement Officer to award a contract to a certified enterprise *over* the lowest responsible bidder.⁶³ The facts of the case are as one might expect: The City's Department of Environmental Protection issued an invitation for bids on a purification project in the City. Seabury Construction was the lowest bidder on the project but was informed by the City that, pursuant to the City's minority-owned and women-owned business program, a price preference was provided to another firm. The City informed Seabury that because the other firms qualified as a joint venture with a ten percent target for utilization (the City's target was ten percent),⁶⁴ it was in the best interest of the City to award the contract to them. Seabury filed the action challenging the law, alleging that the City was bound by the New York City Charter to award the contract to the lowest bidder.⁶⁵ The court invalidated the law on these grounds.⁶⁶

This version of the M/WBE program lapsed in 1998, and a second disparity study was conducted seven years later in 2005, which led to the adoption of Local Law 129. This law was the first version of the program to set both prime and subcontracting goals—as opposed to price preferences—for contract awards.⁶⁷ The program was renewed by New York City Mayor Michael Bloomberg's Administration as Local Law 1 of 2013,⁶⁸ based on a disparity study conducted in 2012. Local Law 1 updated the goals for ethnic and gender categories, covered more services, removed a cap on contracts subject to M/WBE goals, eliminated goals on goods in excess of \$100,000, expanded women-owned businesses to include all women-owned businesses regardless of race, and increased accountability for M/WBE compliance.⁶⁹ Mayor Bill de Blasio's Administration has continued the M/WBE program through Local Law 1 of 2013, prioritizing increased

STATE OF NEW YORK 2016 MWBE DISPARITY STUDY: POLICY REVIEW FINAL REPORT, VOL. II, at 2 (May 2017), https://esd.ny.gov/sites/default/files/Vol_II_NYS_PolicyStudy.pdf.

⁶² 607 N.Y.S.2d 1017 (Sup. Ct. 1994).

⁶³ *See id.* at 1019 (describing 11 R.C.N.Y. § 3-09 and quoting from § 3-09(a)).

⁶⁴ *Id.*

⁶⁵ *Id.* at 1020.

⁶⁶ *Id.* at 1022–23.

⁶⁷ *See* N.Y.C. DISPARITY STUDY 2018, *supra* note 43, at 2-2 (setting goals to award a percentage of contracts between \$5,000 and \$1 million to M/WBEs).

⁶⁸ 2013 N.Y.C. Local Law No. 1, § 1.

⁶⁹ This is not an exhaustive list of the changes made in the 2013 update to the M/WBE program, but it includes most of the significant changes. *See also* N.Y.C. DISPARITY STUDY 2018, *supra* note 43, at 2-2 to -3.

certification of M/WBE firms, and announced in 2016 the City's goal to award "at least 30 percent of the dollar amount of City contracts to M/WBEs by 2021."⁷⁰ In 2020, the City claimed it reached 27.9% M/WBE utilization.⁷¹ In the FY 2021 Compliance Report, the City reported 25.3% prime and subcontract M/WBE utilization, which totaled awards of \$927 million in prime contracts for the year, and more than \$260 million in subcontracts.⁷²

The City's goals are, however, divided according to race, ethnicity, and gender by type of work available, outlined in the table below.

TABLE 1. NEW YORK CITYWIDE GOALS: PERCENT OF TOTAL ANNUAL AGENCY EXPENDITURES⁷³

Category	Construction Contracts ⁷⁴	Professional Services Contracts ⁷⁵	Standard Services Contracts ⁷⁶	Goods Contracts Under \$1,000,000
Black Americans	12%	11.81%	14.32%	5.94%
Asian Americans	11.10%	9.40%	9.88%	10.59%
Hispanic Americans	17.95%	8.99%	10.20%	7.07%
Native Americans	0.56%	0.65%	0.03%	2.44%
Women	25.66%	36.67%	29.26%	30.51%
Emerging Businesses ⁷⁷	6%	6%	6%	6%

⁷⁰ *Mayor de Blasio Announces Bold New Vision for the City's M/WBE Program*, CITY OF N.Y. (Sept. 28, 2016), <https://www1.nyc.gov/office-of-the-mayor/news/775-16/mayor-de-blasio-bold-new-vision-the-city-s-m-wbe-program>.

⁷¹ *The City's M/WBE Program*, NYC MAYOR'S OFF. OF CONT. SERVS., <https://www1.nyc.gov/site/mocs/partners/about-m-wbe.page> (last visited Aug. 27, 2021) ("These goals are the basis for the City's commitment to award M/WBEs 30% of the value of all LL1 City contracts by Fiscal Year (FY) 2021. In FY 2020, the City realized 27.9% M/WBE utilization in contracting, more than tripling the rate in just five years.").

⁷² VICTOR OLDS & JONNEL DORIS, CITY OF NEW YORK MINORITY AND WOMEN-OWNED BUSINESS ENTERPRISE (M/WBE) PROGRAM ANNUAL FOR FISCAL YEAR 2021, at 3 (2021), https://www1.nyc.gov/assets/mocs/downloads/pdf/MWBEReports/FY21_Q4/FY21_Q1-Q4_MWBE_Compliance_Report_Final.pdf.

⁷³ 66 R.C.N.Y. § 11-61.

⁷⁴ Construction is defined as: "construction, reconstruction, demolition, excavation, renovation, alteration, improvement, rehabilitation, or repair of any building, facility, [or] physical structure of any kind." *Id.* § 11-60(10).

As noted above, the City also maintains a certification and goal program for Emerging Business Enterprises, or EBEs. In the City Charter, an EBE is defined as a business in which at least fifty-one percent of the owners are economically or socially disadvantaged in some way.⁷⁵ The City also offers a second race- and gender-neutral program, the Locally Based Enterprise program (LBE). LBE certification is available to construction and construction-related businesses that do business in economically depressed areas of the City.⁷⁹ As of June 2021, there were 28 certified EBE companies and 19 certified LBE firms in the City.⁸⁰

The City's May 2018 Disparity Study employs methodology in compliance with the functional requirements of *Croson*. The overarching research question is whether "there [is] factual predicate evidence for the City's M/WBE program,"⁸¹ and the study includes four subsidiary guiding questions: first, how case law informs the methodology; second, whether there is statistical evidence of disparity between the availability and utilization of M/WBE firms; third, whether there is anecdotal evidence of specific barriers that M/WBEs face in working with the City or prime contractors; and fourth, whether disparities exist in the private sector.⁸² I discuss each of the sections in the study to show, in detail, how government units are

⁷⁵ Professional services are defined as "services that require specialized skills and the exercise of judgment, including but not limited to accountants, lawyers, doctors, computer programmers and consultants, architectural and engineering services, and construction management services." 66 R.C.N.Y. § 11-60(29).

⁷⁶ Standard services are defined as "services other than professional services and human services or services procured under a construction contract." *Id.* § 11-60(33).

⁷⁷ Emerging businesses are those owned by socially or economically disadvantaged business owners. See *Emerging Business Enterprise (EBE) Certification Program*, CITY OF N.Y., <https://www1.nyc.gov/nycbusiness/description/emerging-business-enterprise-ebe-program> (last visited July 28, 2021).

⁷⁸ N.Y.C. CHARTER § 1304(e)(6)(c). The definition for EBEs includes that owners "are socially and economically disadvantaged," which means they have "experienced social disadvantage in American society as a result of causes not common to individuals who are not socially disadvantaged, and whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to [competitors] . . . not socially disadvantaged." *Id.* An individual claiming disadvantage must have a net worth of less than one million dollars. *Id.*

⁷⁹ N.Y.C. DISPARITY STUDY 2018, *supra* note 43, at 2–6 (describing the LBE program and eligibility requirements); see 66 R.C.N.Y. §§ 11-02, -03 (defining "LBE" and providing overview of the LBE certification process). The LBE program is limited to firms that have gross receipts totaling less than two million dollars and have earned twenty-five percent of their gross receipts on construction projects in economic development areas, or have employed a workforce of which at least twenty-five percent are economically disadvantaged people.

⁸⁰ OLDS & DORIS, *supra* note 72, at 4–5.

⁸¹ N.Y.C. DISPARITY STUDY 2018, *supra* note 43, at 1-2.

⁸² *Id.*

meeting the rigors of the Court's dicta requiring statistical evidence of disparity. Together, the market itself, available contractors, available work, and the resulting disparity between available contractors and available work form the foundation of the City's M/WBE contracting goals.

The study looks first to "Market Area and Utilization Analyses," which "establish[] the universe of available vendors and awards that will be considered in identification of any disparate treatment of assorted classifications of firms."⁸³ Essentially, the study looks at the available universe of bidders in specific procurement categories to determine if there is a disparity. In making this determination, the study reviews those procurement categories which are competitively bid by the City in five areas: Architecture & Engineering, Construction, Professional Services, Standardized Services, and Goods or Commodities.⁸⁴ The study addresses a fundamental question in both the procurement and education contexts: What should be the boundaries of the market analyzed? If the boundaries are too broadly delineated, they encompass vendors that are not interested in working with the City. Setting them too narrowly, however, might exclude interested firms. While M/WBE programs map out the relevant contracting market, education advocates must address how broadly or narrowly to define a district or locality for integration purposes.⁸⁵

New York City's Disparity Study uses a "75 percent rule" of agency spending to determine the relevant market, which is imported from antitrust cases in the Second Circuit.⁸⁶ The market is defined using geographic units (e.g., boroughs or counties). In applying this seventy-five percent standard, the relevant market for New York City includes Bronx County, Kings County, New York County, Richmond County, Queens County, Nassau County, Putnam County, Rockland County, Suffolk County, Westchester County—all in New York—and also Bergen County, Hudson County, and Passaic County in New

⁸³ *Id.* at 3-1.

⁸⁴ *Id.* at 3-1 to -2.

⁸⁵ See *infra* Parts II, III.

⁸⁶ N.Y.C. DISPARITY STUDY 2018, *supra* note 43, at 3-2 ("[T]he use of 75 percent as a measure of determining the relevant market area has been accepted by antitrust cases in the 2nd [C]ircuit, and serve[s] as persuasive precedent."); see also, e.g., *Jones v. N.Y.C. Hum. Res. Admin.*, 528 F.2d 696, 698 (2d Cir. 1976) (finding a dataset of less than 100% is "not fatal" to a "prima facie case of disproportionate impact"). In *Jones*, the court accepted less than 100% of the data when it was reasonable to assume missing data would not change its analysis. *Jones*, 528 F.2d at 698. In this seventy-five percent rule, the overall market area is established using the full geographic extent of City awards and then isolated with the seventy-five percent standard to eliminate "extraneous" geography. See N.Y.C. DISPARITY STUDY 2018, *supra* note 43, at 3-2 to -3.

Jersey. These counties together represent the geographic locations of firms who were awarded 74.82% of citywide awards, with each of the categories reviewed, except for Goods or Commodities, achieving close to this benchmark.⁸⁷

After enumerating the market, the study proceeds to a utilization analysis, in which businesses are assigned to a classification of one or more of the following: a M/WBE firm (defined according to the U.S. Census Bureau and including “African Americans,” “Asian Americans,” “Hispanic Americans,” “Native Americans,” and “Nonminority Female” owners), non-M/WBE firm, MBE firm, or WBE firm.⁸⁸ The most recent study determined that total M/WBE utilization was 10.36%.⁸⁹ This rate represents the total percent of dollars awarded to minority- or women-owned firms across the study’s procurement categories. The study also looks at how well M/WBE firms do across contract sizes in the relevant categories.⁹⁰

Then, the study analyzes availability and disparity. Availability is defined as “a measure of the numbers and proportions of vendors willing and able to work with an agency,” and disparity is “an observed statistically significant difference between the utilization of minority- and women-owned firms . . . relative to their respective availability.”⁹¹ These measures are responsive to the Court’s instructions in *Croson*, which envisioned “significant statistical disparity” between contractors “willing and able” to perform and those “actually engaged.”⁹² The study explains that it uses a “custom census” and assumes willingness through registration to work with a government agency, but judges ability loosely through presence within the market area.⁹³ MGT Consulting used the custom census to create representative samples of firms and found that in total, M/WBEs represented 50.69% of all available vendors.

⁸⁷ N.Y.C. DISPARITY STUDY 2018, *supra* note 43, at 3-5.

⁸⁸ *Id.* at 3-6 to -7. According to the study, firms that were identified as both minority- and women-owned were classified according to their minority firms. Note that as above, I have used the racial/ethnic/gender labels used in the disparity study to conform with the program and its sources. *See* CITY OF NEW YORK, *supra* note 50.

⁸⁹ N.Y.C. DISPARITY STUDY 2018, *supra* note 43, at 3-7.

⁹⁰ *See id.* tpls.3-8 to -14.

⁹¹ *Id.* at 4-1.

⁹² *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989).

⁹³ In judging availability this way, the study follows guidance from a 2010 report by the National Cooperative Highway Research Program, which explained that using this kind of “custom census” approach was the most preferable way to measure availability of disadvantaged businesses. *See* N.Y.C. DISPARITY STUDY 2018, *supra* note 43, at 4-1 to -2 (citing JON WAINWRIGHT & COLETTE HOLT, TRANSP. RSCH. BD. OF THE NAT’L ACADS. OF SCIS., ENG’G, & MED., GUIDELINES FOR CONDUCTING A DISPARITY AND AVAILABILITY STUDY FOR THE FEDERAL DBE PROGRAM 33 (2010)).

Finally, and before moving into anecdotal evidence, the study calculated the disparities in the City's procurement and evaluated whether the disparities are statistically significant. The study found disparities and a resulting "disparity index"—a percentage amount of disparity measuring what percent of 100 a specific group is being utilized compared to their availability⁹⁴—of 20.43% across the board for M/WBEs with significant variation in the different racial or gender groups: 12.95% disparity for African American firms, 31.61% disparity for Asian American firms, 16.19% disparity for Hispanic American firms, 0.41% disparity for Native American firms, and 15.23% for women-owned firms.⁹⁵ This, paired with the anecdotal evidence from contractors themselves describing how barriers in the City's systems might have reduced opportunities for M/WBEs, informs the City's goals for M/WBE participation in procurement and illuminates other potential policy solutions for increasing opportunities for M/WBEs: increased access to capital, reducing barriers to certification, and more. The study recommends the current City goal of thirty percent utilization of M/WBEs and that the City add additional goals for Asian Americans in the professional services category and Native Americans in all categories.⁹⁶

2. *New York State*

At the State level, Article 15-A outlines and mandates a similar M/WBE program. Propelled by former Governor Andrew Cuomo's commitment to raising the contracting goals during his time as Governor,⁹⁷ the State's robust program has seen continued growth and attention in recent years. Article 15-A of the Executive Law was signed into law in July 1988 and authorized the creation of a state office dedicated to Minority and Women's Business Development.⁹⁸ New York State's most recent disparity study was conducted in 2016

⁹⁴ N.Y.C. DISPARITY STUDY 2018, *supra* note 43, at 4-10 (explaining the methodology for calculating the disparity index).

⁹⁵ *Id.* at 4-12.

⁹⁶ *Id.* at 6-3.

⁹⁷ See Michael DeMasi, *MWBE Contracts Total More than \$3 Billion in New York, a First*, ALBANY BUS. REV. (Dec. 4, 2020, 2:42 PM), <https://www.bizjournals.com/albany/news/2020/12/04/ny-mwbe-utilization-rate-2019-2020.html> ("The statewide utilization rate was 9.9% in 2010, the year before Cuomo took office. Cuomo initially set a 20% goal for the MWBE program, and later raised the goal to 30%.")

⁹⁸ *Summary of Article 15-A of the Executive Law*, N.Y. STATE, EMPIRE STATE DEV., <https://esd.ny.gov/mwbe/programmandate.html> (last visited Aug. 5, 2021).

by Mason Tillman Associates and forms the basis for new State contracting goals.⁹⁹

Unlike the City program, the State establishes a contracting goal—currently thirty percent—across all racial, ethnic, and gender groups and for all kinds of work.¹⁰⁰ According to New York State, the purpose of its disparity study is to “determine whether any race or gender-based disparity exists in New York State contracting.”¹⁰¹ The study was conducted by identifying available businesses through outreach, reviewing the State’s contract records, certification lists, outreach meetings, and trade lists.¹⁰²

Generally, New York State’s program operates similarly to that of New York City’s—firms are certified and then can bid on projects as either prime contractors or subcontractors. Remarkably, in October 2018 Governor Cuomo announced that actual utilization of M/WBE firms was at twenty-nine percent.¹⁰³ The State, like the City, uses a statistical method to determine if there is a disparity between certain contractors and the work the State contracts out. The State describes the steps in the study as comparing utilization of M/WBEs as prime contractors and subcontractors, defining availability, and finally, determining whether there is a statistically significant disparity between utilization and availability.¹⁰⁴ Utilization is measured through contract sampling, and availability is measured through examination of contracting records, bidding records, business directories, trade organizations, and surveys.¹⁰⁵ The total number of available M/WBEs was found to be 53.05% for prime contractors and 53.48% for subcontractors.¹⁰⁶ The study then determined whether there was a statistically significant disparity and found that there was strong evidence of a disparity for Black-owned, Hispanic- and Latino-owned, Asian-Pacific-owned, and Caucasian Women-owned businesses.¹⁰⁷ The study

⁹⁹ DIV. OF MINORITY & WOMEN’S BUS. DEV., 2016 NYS DISPARITY STUDY FACT SHEET (2017), https://esd.ny.gov/sites/default/files/final2016_MWBEDisparityStudy_FactSheet.pdf [hereinafter FACT SHEET].

¹⁰⁰ *Governor Cuomo Announces Statewide Minority and Women-Owned Business Enterprise Utilization Rate Increases to Nearly 29 Percent*, NEW YORK STATE (Oct. 3, 2018), <https://www.governor.ny.gov/news/governor-cuomo-announces-statewide-minority-and-women-owned-business-enterprise-utilization-0> [hereinafter NEW YORK STATE].

¹⁰¹ FACT SHEET, *supra* note 99, at 1.

¹⁰² *Id.* at 2.

¹⁰³ NEW YORK STATE, *supra* note 100.

¹⁰⁴ *See* NEW YORK STATE, MWBE F., NEW YORK STATE DISPARITY STUDY: OUTCOMES, TRENDS, AND NEW OPPORTUNITIES 5 (2017).

¹⁰⁵ *Id.* at 6–7.

¹⁰⁶ *Id.* at 7.

¹⁰⁷ *Id.* at 8. Note that here, like in the City context, I have used the same racial and ethnic labels used by the State so as to avoid confusion. *See* CITY OF NEW YORK, *supra* note 50.

found just mixed evidence of a disparity for Asian-Indian-owned and Native-American-owned businesses.¹⁰⁸ In addition to the statistical information, the study presents anecdotal evidence that “illustrate[s] a pattern of practices that have adversely affected M/WBE participation in the State’s contracting process.”¹⁰⁹ The practices were summarized into thirteen categories: racial barriers, sexism, project labor agreements,¹¹⁰ difficulty breaking in to the contractor community, preferred sources, a “Good Old Boy” network, prime contractors circumventing program requirements, problems with the certification process, late payments by prime contractors, late payments to agencies and authorities, comments on the State program, counter-examples of exemplary practices of Executive Agencies and Public Authorities, and recommendations to enhance the program.¹¹¹

C. Challenges

The City and State programs have been upheld on constitutional grounds. In fact, many of the cases challenging the M/WBE program are filed as Article 78 proceedings—to appeal the decision of a government agency—simply challenging denials of M/WBE certification and not the programs themselves.¹¹² In this section, I review the most salient challenges to the New York State and City programs, though none were successful at striking them down. I conclude by looking to a challenge of a North Carolina program that relied on a study by the same firm that conducted the disparity study in New York City, and which was also found constitutional.

The New York State M/WBE Program was challenged in 1988 under the New York State Constitution, but the court relied on U.S. Supreme Court precedent. The Appellate Division held in *Rex Paving Corp. v. White* that the State had legislative authority to implement the program, that it did not violate separation of powers because it was acting pursuant to legislative directive, and that “the challenged programs represent a constitutionally appropriate means of redressing

¹⁰⁸ NEW YORK STATE, NEW YORK STATE DISPARITY STUDY: OUTCOMES, TRENDS, AND NEW OPPORTUNITIES 8 (2017).

¹⁰⁹ MASON TILLMAN ASSOC., LTD., STATE OF NEW YORK 2016 MWBE DISPARITY STUDY: FINAL REPORT, Vol. I, at 9-4 (2017).

¹¹⁰ Some agencies enter into collective bargaining agreements for projects called project labor agreements, or PLAs. *See id.* at 9-8.

¹¹¹ *Id.* at 9-4.

¹¹² *See, e.g.,* Ignelzi Interiors, Inc. v. N.Y.C. Dep’t of Small Bus. Servs., 918 N.Y.S.2d 299 (Sup. Ct. 2011) (reviewing and striking a denial of certification as without rational basis); Panko Elec. & Maint. Corp. v. Zapata, 100 N.Y.S.3d 746 (App. Div. 2019) (challenging denial of recertification).

identified discrimination against minority contractors.”¹¹³ The plaintiff, a supplier of goods, sought a declaration that the disadvantaged business programs promulgated by the State were illegal and unlawful.¹¹⁴ Their ultimate argument in the case was that the program deprived them of equal protection of the laws in violation of the state constitution.¹¹⁵ The Appellate Division evaluated the program under strict scrutiny and followed the two-prong test: asking first whether the racial classification was justified by a compelling government interest, and second, whether it was narrowly tailored to achieve that goal.¹¹⁶

On the question of compelling interest, the court explained that the government must show some prior discrimination by the government unit at issue before allowing limited use of racial classifications as a remedy.¹¹⁷ The Appellate Division made clear that in enacting the program, the State must be acting “at least in part” to remedy its own discrimination, which could be shown through findings that private and governmental discrimination had led to low minority contracting numbers as was the case in *Fullilove v. Klutznick*.¹¹⁸ The Appellate Division held that in defending these programs, governments do not need to show current discrimination, only evidence that there was apparent prior discrimination.¹¹⁹ As an example, they cite that “evidence of an abrupt disparity between the actual participation of minority business concerns in public contracts and the percentage of qualified DBEs in the relevant labor pool should suffice.”¹²⁰ Because the Supreme Court had not considered this question and the program relied on national findings which “may be inadequate,” the Appellate Division remanded the case for a determination of whether the program had a remedial purpose.

The Appellate Division found the program to be sufficiently narrowly tailored because of its similarity to the federal program in *Fullilove*. The court cited specific features of the New York State program that added to the inference of appropriate tailoring: that it does not impose a fixed, mandatory set-aside of contracts to be awarded to M/WBEs, but only requires “good faith efforts;” that goals vary by each contract according to availability of contractors; that a formula

¹¹³ *Rex Paving Corp. v. White*, 531 N.Y.S.2d 831, 839 (App. Div. 1988).

¹¹⁴ *Id.* at 834.

¹¹⁵ *See id.*

¹¹⁶ *Id.* at 837.

¹¹⁷ *See id.* at 838 (citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 284 (1986)).

¹¹⁸ 448 U.S. 448 (1980).

¹¹⁹ *Rex Paving Corp.*, 531 N.Y.S.2d at 838.

¹²⁰ *Id.*

was used to set the goal and took into account geography, demographics, and past performance; and that the program is subject to annual review. It was clear the program would survive strict scrutiny.

The State program was also challenged unsuccessfully in 1992. In *Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo*,¹²¹ a group of all-white, male-owned contracting companies brought an equal protection challenge to the New York Department of Transportation's implementation of the federal set-aside program, which was upheld as constitutional in *Fullilove*. The Plaintiffs challenged both the Federal and State M/WBE programs, alleging that the programs violated their right to equal protection of the laws. The District Court dismissed both claims on the merits, and the Second Circuit affirmed. In affirming, the Second Circuit was prevented from ruling on the constitutionality of the State program because after *Croson* in 1989, the State's M/WBE program was preliminarily enjoined and the State temporarily amended the law. The amendment prevented enforcement of the program until a "firm basis in fact"¹²² existed for believing that a compelling state interest existed for minority-owned goals, and a constitutionally sufficient interest existed for women-owned goals.

The Second Circuit affirmed that the federal program was constitutional, relying on *Fullilove*,¹²³ and distinguishing *Croson* as applying to nonfederal programs. The Second Circuit further held that New York had permissibly implemented the federal program.¹²⁴ Because of the changes to the law after *Croson*, the challenge to the State program was moot. The Second Circuit made clear, however, that "New York's disadvantaged business program . . . must meet *Croson's* requirements."¹²⁵ Because it has, the State program remains in place and has not been successfully challenged.

The City's program has been challenged as well. In 1998, a district court in the Eastern District of New York denied a motion for summary judgment from contractors alleging that the City's program was unconstitutional—but severed the portion of the program that set goals for Native Americans and Alaskan Natives.¹²⁶ Because the City included the two groups without disparity evidence specific to them,

¹²¹ 981 F.2d 50 (2d Cir. 1992).

¹²² *Id.* at 55.

¹²³ *Id.* at 57 ("It is now beyond doubt that the set-aside program for federally-funded projects was lawfully enacted.")

¹²⁴ *Id.*

¹²⁵ *Id.* at 58.

¹²⁶ *N. Shore Concrete & Assoc., Inc. v. City of New York*, No. 94 CV. 4017, 1998 WL 273027, at *13 (E.D.N.Y. Apr. 12, 1998). Note that I am using the racial and ethnic labels used in the opinion in discussion of the case for consistency.

that part of the program was deemed overbroad.¹²⁷ The court explained that “[i]t is a question of fact as to whether or not the methodology of the [] study was such that it fairly calculated the number of qualified M/WBEs that are available to do work for the City.”¹²⁸ The court clearly read *Croson* as striking down the program at issue in that case because the program, unlike New York City’s, was based on a comparison of the minority population in its entirety and the number of contracts awarded to minority businesses, but did not include statistics about the number of minority-owned contractors in the area.¹²⁹ This allowed the court to conclude that nothing in *Croson* rendered the study used to justify the City’s law—one which was more tailored to the germane discrimination than that in *Croson*—insufficient as a matter of law, except with regard to Native Americans and Alaskan Natives.¹³⁰ The opinion cited *Cone Corp. v. Hillsborough County*, in which the Eleventh Circuit said,

[N]either did *Croson* provide a set of standards or guidelines describing the kind of MBE plan that would pass constitutional muster. . . . The Court described an outer perimeter of unacceptable behavior; plans which fall on or outside of that perimeter are clearly unconstitutional, while the constitutionality of plans which fall inside the perimeter apparently depends on the contours of the individual plan.¹³¹

This quotation, from *Cone Corp.*, is exactly the door through which the programs like New York City’s and New York State’s M/WBE programs have fit through: By navigating outside of the bounds of what the Court has deemed *unconstitutional*, they have been able to design programs in this negative space that have been upheld as *constitutional*.

Disparity studies have been upheld as the way to pass strict scrutiny in other states. For example, a North Carolina program was challenged by a nonminority prime contractor asserting that an M/WBE program there was unconstitutional.¹³² The Fourth Circuit held that the program’s goals were necessary to remedy past discrimination,

¹²⁷ *Id.* (“In respect to Native Americans and Alaskan Natives, the City of New York has failed to present any evidence to show that it has a compelling governmental interest in including those groups in its M/WBE preference program. This aspect of the City’s program thus fails to meet the requirements of strict scrutiny.”).

¹²⁸ *Id.* at *10.

¹²⁹ *Id.* (“[T]he Supreme Court was concerned with the gross generality of the statistics used in justifying the Richmond program.”).

¹³⁰ *Id.*

¹³¹ 908 F.2d 908, 913 (11th Cir. 1990).

¹³² *H.B. Rowe Co. v. Tippett*, 615 F.3d 233 (4th Cir. 2010). As above, I have used the racial and ethnic group labels used by the program and the court to describe the various groups.

and that the program was narrowly tailored with regard to “African American” and “Native American” subcontractors. However, the court held that there was not an exceedingly persuasive justification, because of lack of statistical evidence, for the gender, “Asian American,” and “Hispanic” goals and remanded the case in part on those grounds. In upholding the program for African American and Native American contractors, the court reviewed the program in great detail. Notably, the same firm responsible for the most recent New York City disparity study, MGT Consulting, conducted the North Carolina study.

The court found that a compelling interest was demonstrated by the State’s data, which “powerfully demonstrates that prime contractors grossly underutilized African American and Native American subcontractors . . . during the study period” at a statistically significant level.¹³³ Additionally, the study’s anecdotal evidence showed an “informal, racially exclusive network that systematically disadvantaged minority subcontractors.”¹³⁴ Citing *Adarand*, the court concluded that these data taken together were clearly a permissible reason to remedy the contracting system.¹³⁵

The court also found the program narrowly tailored.¹³⁶ First, the plaintiffs challenging the statute were unable to show any race-neutral alternatives that were not considered by the State in promulgating the program.¹³⁷ Also persuasive were two durational terms of the statute: its expiration date and its requirement of a new study every year.¹³⁸ The court also pointed to the fact that the goals were related to the markets relevant to the contract, allowed flexibility through the program’s waiver feature, that the program was not overly burdensome, and that the statute attached a remedy only for those groups who had suffered discrimination.¹³⁹ These features—durational limits, frequent review, flexibility through waiver—consistently appear as elements supportive to a finding of adequate tailoring sufficient to uphold these programs.

¹³³ *Id.* at 250.

¹³⁴ *Id.* at 251.

¹³⁵ *Id.* at 251–52.

¹³⁶ *Id.* at 236.

¹³⁷ *Id.* at 252.

¹³⁸ *Id.* at 253.

¹³⁹ *Id.* at 253–54.

II

AFFIRMATIVE ACTION IN K-12 EDUCATION

This Part turns to another area of affirmative action law, education, in which advocates have already started to take lessons from the public contracting model to navigate the design of permissible programs. The development of permissible affirmative action programs in the education context could not be more different from the development of the same programs in the public contracting context. First, the development of affirmative action programs in higher education has bifurcated from permissible programs in K-12 education. Second, in K-12 education, the ability of school districts to take affirmative steps to remedy discrimination has been severely limited by the Supreme Court's decision in *Parents Involved in Community Schools v. Seattle School District No. 1*.¹⁴⁰ However, like in the public contracting context, advocates and districts have found ways to leverage what the Court has said is impermissible to design programs that pass constitutional muster.

A. Doctrinal Framework in Higher Education

In the 1960s and 1970s, colleges and graduate schools started to develop affirmative action policies to expand access for minorities. In 1977, the Supreme Court heard a challenge to an affirmative action program developed by the University of California, Davis (UC Davis) School of Medicine.¹⁴¹ The plaintiff, a thirty-five-year-old white man, had applied for admission to UC Davis's medical school and been rejected twice. The university reserved sixteen spots of its hundred-person class for minorities. The plaintiff argued that his qualifications exceeded those of minority applicants who filled those seats, and he challenged the program on those grounds. The Court was unable to reach a majority opinion. Four Justices contended that any racial quota system violated the Civil Rights Act of 1964. Justice Powell agreed, and in his plurality opinion, argued that the use of quotas also violated the Equal Protection Clause. The other four Justices, joined by Justice Powell, believed that race, in context with other admission criteria, was permissible for the school to consider in admissions decisions.¹⁴² Some commentators see this as a way that the Court mini-

¹⁴⁰ *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (plurality opinion).

¹⁴¹ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

¹⁴² *See id.* at 265-68.

mized opposition to the ruling while extending gains for racial minorities.¹⁴³

Justice Powell attached the details of the Harvard College Admissions Program, which he described as an “illuminating example.”¹⁴⁴ Again, in striking a program, the Court was creating space for advocates to formulate a permissible alternative. The Harvard program used what Justice Powell called a “plus” for the applicant when race or ethnicity was taken into account and did not insulate the applicant from comparison with the entire applicant pool.¹⁴⁵ Through this maneuvering, Justice Powell opened the door to the kind of admissions programs we see today in higher education.

Justice Powell’s opinion in *Bakke* created “[o]ne especially enduring justification for affirmative action policies, the diversity rationale.”¹⁴⁶ This justification was bolstered and updated through the Court’s holdings in *Gratz v. Bollinger* and *Grutter v. Bollinger*, both decided in June of 2003. In *Gratz*, the Court found that the University of Michigan’s use of racial preferences in undergraduate admissions violated the Equal Protection Clause because the policy at issue did not provide for sufficient individual consideration of applicants.¹⁴⁷ In *Grutter*, the Court upheld the University of Michigan Law School’s use of racial preferences because the law school had a compelling interest in a diverse student body,¹⁴⁸ and their review of applicants was highly individualized and thus appropriately race-conscious and tailored to the goal of diversity.¹⁴⁹ This proposition, that diversity is a permissible end that plus-programs can achieve, continues to be challenged, but has generally been upheld.¹⁵⁰

¹⁴³ Accord Michele S. Moses, *Can We Find Common Ground on Affirmative Action 30 Years After Bakke?*, in *REALIZING BAKKE’S LEGACY: AFFIRMATIVE ACTION, EQUAL OPPORTUNITY, AND ACCESS TO HIGHER EDUCATION* 41, 43 (Patricia Marin & Catherine L. Horn eds., 2008) (describing Powell’s vote as one that rejects quotas while permitting the use of race as a factor in admissions decisions).

¹⁴⁴ *Bakke*, 438 U.S. at 316.

¹⁴⁵ *Id.* at 317.

¹⁴⁶ Moses, *supra* note 143, at 43; see also *Bakke*, 438 U.S. at 313 (“But even at the graduate level, our tradition and experience lend support to the view that the contribution of diversity is substantial.”).

¹⁴⁷ *Gratz v. Bollinger*, 539 U.S. 244 (2003).

¹⁴⁸ In explaining the value of diversity in higher education, Justice Powell explained in *Bakke* that “[t]he atmosphere of ‘speculation, experiment and creation’—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body.” *Bakke*, 438 U.S. at 312 (Powell, J., concurring) (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring)).

¹⁴⁹ *Grutter v. Bollinger*, 539 U.S. 306 (2003).

¹⁵⁰ Most recently, this proposition prevailed in the First Circuit, but the plaintiffs in that challenge are seeking certiorari. See *Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll.*, 980 F.3d 157, 187 (1st Cir. 2020), *aff’d* 397 F. Supp. 3d 126 (D.

B. Doctrinal Framework in K–12 Education: Parents Involved

The story of affirmative action in K–12 education is quite different. Generally, where education systems offer a choice between schools within a district or other boundary, assignment plans are used to select a school appropriate for a student.¹⁵¹ In *Parents Involved in Community Schools v. Seattle School District No. 1*, the Supreme Court severely limited the ability of school districts to take voluntary measures to diversify school districts. At issue in the case were two plans: one in Seattle, Washington, and one in Louisville, Kentucky. The Seattle plan used race as a tiebreaker;¹⁵² the Louisville plan used race to assign elementary school slots to achieve racial balance.¹⁵³

1. The Plurality

Five Justices held that these programs violated the Equal Protection Clause. In determining whether there was a compelling interest, the Court rejected the argument that there was a remedial interest: Seattle had no past legal segregation at all, and Louisville had achieved formal unitary status.¹⁵⁴ The second argument the cities advanced was that the programs could be supported by the diversity rationale discussed above in the context of higher education. Justice Roberts, writing for a plurality of the Court, distinguished those cases and made clear that the diversity rationale should only apply to higher education, where there was particular value in exposure to different

Mass. 2019), *petition for cert. filed*, No. 19-2005 (1st Cir. Feb. 25, 2021), *petition for cert. docketed*, No. 20-1199 (U.S. Mar. 1, 2021), https://www.supremecourt.gov/DocketPDF/20/20-1199/169941/20210225095525027_Harvard%20Cert%20Petn%20Feb%2025.pdf; see also *supra* notes 11 and 12.

¹⁵¹ See, e.g., *Student Assignment Plan*, SEATTLE PUB. SCHS., https://www.seattleschools.org/departments/enrollment_planning/student_assignment_plan (last visited Sept. 13, 2021) (explaining how students are sorted into a Seattle public school).

¹⁵² *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 712 (2007) (“If an oversubscribed school is not within 10 percentage points of the district’s overall white/nonwhite racial balance, it is what the district calls ‘integration positive,’ and the district employs a tiebreaker that selects for assignment students whose race ‘will serve to bring the school into balance.’”).

¹⁵³ *Id.* at 728 (“The Jefferson County plan, however, is based on a goal of replicating at each school ‘an African-American enrollment equivalent to the average district-wide African-American enrollment.’”).

¹⁵⁴ See *id.* at 715–16 (“Jefferson County operated under this [desegregation] decree until 2000, when the District Court dissolved the decree after finding that the district had achieved unitary status by eliminating ‘[t]o the greatest extent practicable’ the vestiges of its prior policy of segregation.” (alteration in original) (citation omitted)); Danielle Holley-Walker, *After Unitary Status: Examining Voluntary Integration Strategies for Southern School Districts*, 88 N.C. L. REV. 877, 879 n.5 (2010) (“The term ‘unitary status’ is given to school districts that have had their desegregation decrees lifted, thus closing the desegregation case.”).

viewpoints.¹⁵⁵ Justice Scalia, however, in his partial concurrence and partial dissent in *Grutter*, argued that the values served by diversity were not unique to law school, although he did not believe that diversity was a permissible rationale at all.¹⁵⁶ In that opinion, he remarked that, “[t]he educational benefit that the University of Michigan seeks to achieve . . . of cross-racial understanding . . . is a lesson of life rather than law—essentially the same lesson taught to . . . people three feet shorter and 20 years younger than the full-grown adults at the University of Michigan Law School.”¹⁵⁷

2. Justice Kennedy

Justice Kennedy, in his concurrence in *Parents Involved*, disagreed with that conclusion and explained that “[d]iversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue.”¹⁵⁸ In identifying problems with the plans, he lamented the lack of specificity in the Louisville plan and the overly broad white and people of color categories used in the Seattle plan.¹⁵⁹ The school district also did not explain how this distinction furthered its goals. However, Justice Kennedy diverged with Chief Justice Roberts’s opinion and wrote that “parts of the opinion by The Chief Justice imply an all-too-unyielding insistence that race cannot be a factor in instances when, in my view, it may be taken into account.”¹⁶⁰ Further, he explained that “[t]he plurality opinion is too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race.”¹⁶¹ Justice Kennedy made clear that he did not believe the plurality opinion should be read to foreclose the ability of school districts to address the problem of de facto “resegregation,” and “[t]o the extent the plurality opinion suggests the Constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools, it is, in my view, profoundly mistaken.”¹⁶²

Justice Kennedy’s concurrence left open the door for school authorities to do more. He underscored that, if administrators believe

¹⁵⁵ *Parents Involved*, 551 U.S. at 724 (differentiating *Grutter* by noting that in that case the Court “relied upon considerations unique to institutions of higher education”).

¹⁵⁶ *Grutter v. Bollinger*, 539 U.S. 306, 347 (2003) (Scalia, J., concurring in part and dissenting in part).

¹⁵⁷ *Id.*

¹⁵⁸ *Parents Involved*, 551 U.S. at 783. Because the opinion was a 4–1–4 split with Justice Kennedy’s vote breaking the tie, his concurrence controls.

¹⁵⁹ *Id.* at 784–86.

¹⁶⁰ *Id.* at 787 (Kennedy, J., concurring in part and concurring in the judgment).

¹⁶¹ *Id.* at 787–88.

¹⁶² *Id.* at 788.

that the composition of certain schools interferes with the objectives of offering equal educational opportunities to students, they should be “free to devise race-conscious measures to address the problem in a general way.”¹⁶³ He offered examples of ways to promote diversity in schools: strategic site selection for new schools, attendance zones with “general recognition” of the demographics of the neighborhood, different resource allocation, teacher recruitment, and performance tracking by race.¹⁶⁴ Because these methods would not be based on classification, they could avoid the court’s application of strict scrutiny.¹⁶⁵ As explored in the next Section, advocates used this dicta from Justice Kennedy’s concurrence as a strategic plan to guide their initiatives to expand diversity in K–12 education without wading into unconstitutional territory.

3. *The Dissents*

Justices Stevens and Breyer both wrote dissents in *Parents Involved*. Justice Stevens wrote to argue that this case demonstrated the detriment of “rigid adherence” to the tiers of scrutiny in equal protection analysis.¹⁶⁶ Justice Breyer’s dissent, which Justice Stevens joined, made clear that he read the Court’s precedent as permitting local communities to adopt desegregation plans without requiring them to.¹⁶⁷ His dissent described the promise of *Brown*, the actions that were taken in its aftermath, and then the stagnation and stalled progress.¹⁶⁸ Further, he argued that distinction between de jure and de facto segregation was meaningless given continued segregation.¹⁶⁹ Both districts—Seattle and Louisville—were segregated, in fact. The plans adopted by the jurisdictions were thus, in part, remedial. The school districts, based on their experiences, developed plans which they believed would have integrated the schools. Justice Breyer believed the Court should have been deferential to this determination under separation of powers principles.¹⁷⁰

¹⁶³ *Id.* at 788–89.

¹⁶⁴ *Id.* at 789.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 800–03 (Stevens, J., dissenting).

¹⁶⁷ *Id.* at 803 (Breyer, J., dissenting) (“[T]he Constitution *permits* local communities to adopt desegregation plans even where it does not *require* them to do so.”).

¹⁶⁸ *See id.* at 803–06.

¹⁶⁹ *Id.* at 806.

¹⁷⁰ *See id.* at 836–37 (arguing that judges should be “aware that a legislature or school administrators, ultimately accountable to the electorate, could *nonetheless* properly conclude that a racial classification sometimes serves a purpose important enough to overcome the risks”).

Justice Breyer accused the Court of transforming the strict scrutiny standard into one which, in application, is fatal. He argued in his dissent that evaluation under the standard should be contextual and explained that he would have held that, even under the strictest scrutiny, the districts' goals here—what he called a more general interest in integration or “eliminating school-by-school racial isolation and increasing the degree to which racial mixture characterizes each of the district's schools”¹⁷¹—were permissible. Underlying these goals, he explained, were three fundamental interests: a remedial element, an educational element, and a democratic element.¹⁷² Thus, the interest at issue in the case was not to do away with general discrimination, but *specific* segregation at the primary and secondary school levels.

Unlike the majority, Justice Breyer believed that the plan was sufficiently tailored. In coming to this conclusion, he explained that he subjected the plans to “rigorous judicial review.”¹⁷³ His basis for finding the plans sufficiently tailored was first that the criteria set the outer bounds of broad ranges and were employed as tiebreakers, which meant that the plans relied primarily on nonracial factors. Because the plans relied first and foremost on choice, race was often not even used to place students into schools. Second, the plans were less burdensome than other race-conscious plans previously approved by the Court. He pointed to the plan in *Grutter*, in which race is always a factor, and compared it with the Seattle and Louisville plans, where race became a factor only in a small number of student assignments. Third, the development of the plans was done with community input, showing narrow tailoring in the design of the plans themselves.¹⁷⁴ He concluded this argument by refusing to see higher education as legally distinct from elementary education.¹⁷⁵

In the conclusion of his dissent, Justice Breyer asked, “what of the hope and promise of *Brown*?”¹⁷⁶ In imagining a response to that question, this Note observes that advocates and districts have had to find a way around the *Parents Involved* plurality's significant contraction of the avenues by which government actors supporting racial integration might intervene in our current system. Specifically, this Note shows how these actors have used the Court's dicta to find new

¹⁷¹ *Id.* at 838.

¹⁷² *See id.* at 838–45 (detailing the three kinds of interests: remedial as righting historical segregation, educational as ensuring a good education for students through integrated schools, and democratic as making schools reflective of the diversity of American society).

¹⁷³ *Id.* at 846 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 388 (2003) (Kennedy, J., dissenting)).

¹⁷⁴ *See id.* at 848–49.

¹⁷⁵ *Id.* at 854–55.

¹⁷⁶ *Id.* at 867.

“instruments”¹⁷⁷ that school districts and localities might use to overcome the problems of racial segregation.

C. *Leveraging the Court’s Language into Solutions for K–12 Education*

New York schools are the most segregated in the nation.¹⁷⁸ According to a report by the Civil Rights Project at UCLA, students in New York are increasingly isolated by race and class. Moreover, in 2010, the typical Black or Latino student in New York attended a school where nearly seventy percent of their classmates were low-income, compared with the typical white student, whose classmates were less than thirty percent low-income.¹⁷⁹ In New York City, nineteen out of thirty-two Community School Districts had a population of ten percent or less white students.¹⁸⁰ Seventy-three percent of charter schools had less than one percent white student enrollment, and ninety percent were intensely segregated with less than ten percent white enrollment.¹⁸¹ How could a state regularly achieving thirty percent minority-owned business utilization be doing so well at desegregation efforts in one area and so poorly in another? And New York is not alone in this problem. In 2015–2016, a report found that more than half the nation’s schoolchildren were in racially concentrated districts;¹⁸² this has impacts beyond even those sought to be addressed by the ruling of *Brown*. White school districts get \$23 billion more funding than nonwhite districts, despite serving the same number of students.¹⁸³

So, what of *Brown*’s promise? More importantly, now that so many solutions have seemingly been foreclosed, what can advocates do about segregation? This Section will look to the programs that districts in New York and Louisville are currently implementing to show how those cities have navigated the doors left open in *Parents Involved*—just as M/WBE advocates did in response to *Croson*—to creatively integrate despite the Court’s attempts to constrain affirmative action. In developing these proposals, advocates have shown how, in describing what is impermissible, the Court has actually offered specific ways that advocates might still make our education systems

¹⁷⁷ *Id.* at 868.

¹⁷⁸ See Press Release, The Civil Rights Project at UCLA, New York Schools Most Segregated in the Nation (Mar. 26, 2014), <https://www.civilrightsproject.ucla.edu/news/press-releases/2014-press-releases/new-york-schools-most-segregated-in-the-nation>.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² Mervosh, *supra* note 2.

¹⁸³ \$23 Billion, EdBUILD (Feb. 2019), <https://edbuild.org/content/23-billion#CA>.

more equal. I turn now to two examples of how advocates have taken up that challenge in New York and Louisville.

1. *New York*

Community District 15 in New York encompasses Carroll Gardens, Park Slope, Windsor Terrace, and Sunset Park. The District recently created a diversity plan¹⁸⁴ for all middle schools in the district. The plan was the result of a community-based process,¹⁸⁵ which led to recommendations related to, first, integration (which includes equitable admissions, access to information, transit, monitoring, transparency, and coordination) and second, inclusion (integrated schools, inclusive classrooms, restorative practices, collaboration and engagement, resource inequity, and accommodations for students with mental or physical disabilities, including physical access).¹⁸⁶ The plan recommends maintaining school choice, removing all admissions screens, and creating an admissions preference for low-income students, English Language Learners, and/or Students in Temporary Housing.¹⁸⁷ School admissions screens, which include all tests for admission such as lateness, attendance, behavior, admissions exams, standardized test scores, report cards, and auditions,¹⁸⁸ were implemented in the 2000s to draw more middle class families to the district and improve diversity. But the plan found that they resulted in a more than one hundred percent increase in white students from 2007–2017 and a forty percent and twenty-eight percent decrease in Black students and Latino students, respectively, in the same timeframe.¹⁸⁹ For these reasons, the plan removed admissions screens.

The plan recommends increasing antiracism training, adopting best practices for racially diverse classrooms, prioritizing hiring teachers of color, and creating equity teams on campuses who are coaches for cultural responsiveness.¹⁹⁰ The plan mentions race fifty-three times, but most of the practices are likely not what Justice Kennedy would call race-conscious. Rather, they functionally avoid strict scrutiny by looking to other means of achieving racial diversity without explicit quotas or goals for diversity built into the recommendations. This is despite the fact that the plan is clearly intended to

¹⁸⁴ D15 DIVERSITY PLAN (2018), https://d15diversityplan.com/wp-content/uploads/2019/06/190620_D15DiversityPlan_FinalReport.pdf.

¹⁸⁵ *Id.* at 5.

¹⁸⁶ *Id.* at 7.

¹⁸⁷ *Id.* at 7–8.

¹⁸⁸ *Id.* at 8.

¹⁸⁹ *Id.* at 7.

¹⁹⁰ *Id.* at 11.

remedy racial segregation. The plan notes that the District's schools are "among the most socio-economically *and racially* stratified or segregated schools in the New York City public school system,"¹⁹¹ and an entire section of the report is dedicated to reviewing segregation in the district.¹⁹² By November 2019, the new plan had made the schools in the district more diverse without also leading to flight by white and middle-class families, meaning that the plan has been successful in desegregating the districts' schools.¹⁹³ Middle School (M.S.) 51 shifted from forty-seven percent to twenty-eight percent white in just one year, and the percentage of students who were homeless, living in poverty, or learning English as a non-native speaker rose from thirty-four percent to fifty-six percent.¹⁹⁴

In December 2020, Mayor de Blasio announced changes to the way that selective middle and high schools across the City would admit students to remedy discrimination against Black and Latino students.¹⁹⁵ Four hundred of the City's 1,800 schools would be impacted by the changes, which include elimination of all admissions screening for middle schools for at least one year, instead using random lotteries—mirroring the system used in Brooklyn District 15.¹⁹⁶ The plan announced in December 2020 would also eliminate local preferences (also called "district priorities") for some high schools, which produces some of the whitest high schools in the City.¹⁹⁷ The plan also includes grants for five additional districts to develop diversity plans, modeled after District 15, for all grades.¹⁹⁸ The Mayor announced that over the next four years, the City will provide *all thirty-two districts* support to create integration plans.¹⁹⁹ While the changes were made

¹⁹¹ *Id.* at 19 (emphasis added).

¹⁹² *Id.* at 31–32.

¹⁹³ See Michael Elsen-Rooney, *New Admissions Plan Improves Diversity in Brooklyn School District, New NYC Data Shows*, N.Y. DAILY NEWS (Nov. 14, 2019, 2:50 PM), <https://www.nydailynews.com/new-york/education/ny-diversity-integration-brooklyn-district-15-20191114-pnykcguo5fcpnifex5bamstl6i-story.html>.

¹⁹⁴ *Id.*

¹⁹⁵ Eliza Shapiro, *New York City Will Change Many Selective Schools to Address Segregation*, N.Y. TIMES (Dec. 18, 2020), <https://www.nytimes.com/2020/12/18/nyregion/nyc-schools-admissions-segregation.html>.

¹⁹⁶ *Id.* ("In 2018, one local district, Brooklyn's District 15, switched to a lottery admissions system. That closely watched effort, heralded as one of the most substantial desegregation measures in years, will now be extended across the city.").

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ Press Release, Off. of the Mayor of New York, Mayor Bill de Blasio, Mayor de Blasio and Chancellor Carranza Announce 2021–22 School Year Admissions Process (Dec. 18, 2020), <https://www1.nyc.gov/office-of-the-mayor/news/874-20/mayor-de-blasio-chancellor-carranza-2021-22-school-year-admissions-process> (announcing that five additional districts would be receiving grants for diversity plans, bringing the total districts

in light of the COVID-19 pandemic's impact on the ability of schools to test and proceed with normal admissions processes, City officials have expressed hope that changes will remain in place to address inequalities. In the press release announcing the changes, Public Advocate Jumaane Williams said that

New York City's school system was the most segregated in the nation before the pandemic, and COVID-19 has only deepened these inequities in the classroom and remotely, exacerbating the immediate need to bring justice to our admissions systems and create transformational change inside our schools. . . . We will need to continue advocating and implementing school and community led reform, such as a weighted lottery that provides greater access for the most marginalized students across our city, to create truly equitable schools.²⁰⁰

As advocates in New York confront this system, they continue to find permissible ways to address racial segregation without violating the Court's mandates and in accordance with its guidance. This is no accident.

2. *Louisville*

Jefferson County, one of the districts at issue in *Parents Involved*, continues to innovate with respect to racial diversity. Members of the community have spoken publicly about the impact of the Supreme Court's decision on their reformulation of a plan for the school district. Dena Dossett, the District's Chief of Data Management, Planning, and Program Evaluation said that "[a]fter [*Parents Involved*], the school board committed to looking at diversity through multiple factors including race, income, and educational attainment."²⁰¹ After several iterations, the current plan aims to balance "family choice"²⁰² with diversity in school enrollment.

At the elementary level, the district categorized every census block within its geographic boundaries based on income, percentage of white residents, and educational attainment to create a diversity index for each school based on the diversity of students from each

developing diversity-related plans to thirteen and announcing that, "[o]ver the next four years, diversity planning will be expanded to all 32 community school districts").

²⁰⁰ *Id.*

²⁰¹ Kim Bridges, *Jefferson County Public Schools: From Legal Enforcement to Ongoing Commitment*, CENTURY FOUND. 44 (Oct. 14, 2016), <https://production-tcf.imgix.net/app/uploads/2016/10/13201102/JeffersonCountyPublicSchools.pdf>.

²⁰² See, e.g., Stephen D. Sugarman, *Family Choice: The Next Step in the Quest for Equal Educational Opportunity*, 38 LAW & CONTEMP. PROBS. 513 (1974) (arguing in favor of family choice plans).

type of block within the school.²⁰³ The school district set a target of a diversity index of between 1.4 and 2.5.²⁰⁴ In middle and high school, students are assigned to clusters designed to maximize diversity, resulting in the transportation of 69,000 students on 962 buses.²⁰⁵ The Kentucky Supreme Court upheld a 2008 version of the plan²⁰⁶ when it was challenged by parents alleging the statute was impermissible because it allowed the district to assign a student to a school that is not the one nearest to their home. In the opinion upholding the statute that allows the plan, Judge Abramson of the Supreme Court of Kentucky found the statute was a permissible exercise of the General Assembly's authority. The opinion does not mention the words "race" or "diversity," but explored other factors that the General Assembly might have deemed permissible for local school boards to consider in making assignments:

In Eastern Kentucky, the mountainous terrain poses particular problems for local school boards in determining bus routes, school assignments and even where to build a school that is most accessible to the most people. In other areas, including urban areas like Jefferson County, there are no mountains but there are transportation routes, school capacities, residential/commercial development patterns, and numerous other factors that affect student assignment.²⁰⁷

The court made clear that while the parents brought the challenge to the plan in court, the better avenue was "at the ballot box when members of the Jefferson County Board of Education are elected by the voters."²⁰⁸ The plan has been successful at achieving integration and improved student outcomes: 120 out of 134 schools in the district have a diversity index within the guidelines, and the programs have wide community support.²⁰⁹

²⁰³ *See id.*

²⁰⁴ Bridges, *supra* note 201, at 44; *see* Alana Semuels, *The City That Believed in Desegregation*, ATLANTIC (Mar. 27, 2015), <https://www.theatlantic.com/business/archive/2015/03/the-city-that-believed-in-desegregation/388532> (discussing integration efforts in Louisville, including various historical approaches taken since 2006).

²⁰⁵ Bridges, *supra* note 201, at 45.

²⁰⁶ *See* Jefferson Cnty. Bd. of Educ. v. Fell, 391 S.W.3d 713 (Ky. 2012); Allison Ross, *JCPS Desegregation Timeline*, LOUISVILLE COURIER J. (Sept. 3, 2015), <https://www.courier-journal.com/story/news/education/2015/09/03/jcps-desegregation-timeline/71637432>.

²⁰⁷ *Jefferson Cnty. Bd. of Educ.*, 391 S.W.3d at 728.

²⁰⁸ *Id.* at 729.

²⁰⁹ Bridges, *supra* note 201, at 45–46.

III TAKING THE COURT AT ITS WORD

Our schools remain segregated, and we have failed to live up to the promises of the Civil Rights Movement and *Brown*; an equal playing field for minority students has yet to be achieved. But taking a page from the book of the affirmative action movement in public contracting, advocates have found a way to respond to the Court's steady rejection of affirmative action programs for K-12 education. Just as the Court seemed to have foreclosed the possibility of affirmative action in *Croson*, *Parents Involved* has not been the death knell to integration efforts that many feared (or hoped) it would be. This Note argues that where advocates are pushed a step back by the holdings of the Supreme Court, they respond by taking the Court at its word and designing programs responsive to the parameters it sets. This Part first shows how education advocates, like their public contracting counterparts, have adapted to the Court's doctrine. Second, this Part considers how the Court might react to these moves by advocates, and questions whether the Supreme Court will look anew at affirmative action in a recent challenge to Harvard University's admission policies.

A. *Adapting Advocates*

After the Court's admonition of overly broad programs in *Croson*, M/WBE programs responded with statistically significant disparities. Instead of using general claims about the disparities they saw in public contracting, an entire industry developed around the design of disparity studies that support constitutional affirmative action programs in public contracting. This Note looked at the New York City and New York State programs in depth to explore how cities and states have combed through the language of *Croson*, *Adarand*, and *Fullilove* to design programs looking at opportunities, available contractors, and the disparities between these figures to set flexible, waivable, good-faith goals for prime contractors and subcontractors to achieve M/WBE participation. These efforts have been successful. In New York State, minority- and women-owned business utilization sits at an incredible twenty-nine percent, just one percent short of the state's goal—which was once seen as ambitious.²¹⁰

Advocates in education have reacted similarly: Instead of giving up because of the Supreme Court's rejection of the exact plans in *Parents Involved*, New York City and Louisville have both responded

²¹⁰ See *supra* Section I.B.2.

with some of the most-lauded attempts²¹¹ to navigate the Court's language in service of constitutionally permissible diversification efforts. New York's innovative Community District 15 plan identifies structural, race-neutral, and race-conscious programs that can withstand constitutional muster. In designing these programs, it is clear that the districts were influenced by Justice Kennedy's concurrence in *Parents Involved*, which outlined possible ways schools might achieve their purpose without triggering strict scrutiny.

The programs in New York City and Louisville should serve as models of how to accommodate the doctrine established by *Parents Involved*. In finding ways to accommodate the restrictions set through the Court's jurisprudence, these cities are following a game plan established in the M/WBE context. After *Croson*, M/WBE advocates were likely concerned that the possibility of developing a program to remedy past discrimination using current proxies was foreclosed. But cities and states did not take the Court's holding as the answer. Instead, they utilized dicta within the Court's opinion to establish a model for what a constitutionally permissible program, a functional opposite to the program invalidated in *Croson*, would look like. This Note has shown that advocates in the education context have started to do the same. In doing so, advocates must continue to find ways to look explicitly at race, but also, like in New York and Louisville, find alternative, creative ways to promote diversity in compliance with the rules set out in *Parents Involved*.

A program that looked explicitly at the race of students to set goals for diversity would be reviewed under strict scrutiny. Colloquially and in fact, application of strict scrutiny is often fatal to a government policy or program.²¹² However, this has not been true in the context of public contracting programs. Justice Scalia, in his concur-

²¹¹ See, e.g., Bridges, *supra* note 201 ("Though Jefferson County Public School's (JCPS) integration plan began with a court order, district leaders successfully designed a socioeconomic desegregation plan that continues on a voluntary basis today."); Suxi Saxena, Centuty Found., *New York City Public Schools: Small Steps in the Biggest District* ("While systemic progress has been slow, New York City officials, lawmakers, and community leaders have begun to take some smaller steps to support school integration."), in *STORIES OF SCHOOL INTEGRATION* 50, 51 (2016), <https://production-tcf.imgix.net/app/uploads/2016/10/13195652/StoriesOfSchoolIntegration.pdf>; Erin Richards, *New York Is in Uproar over Push to Ax Gifted Programs. This School Is Doing It Anyway*, USA TODAY (Jan. 13, 2020), <https://www.usatoday.com/story/news/education/2020/01/13/nyc-doe-racist-segregation-brooklyn-specialized-high-school-exam-gifted/2763549001> ("One of the most high-profile [efforts to tackle integration] last year: a Brooklyn district where all the middle schools agreed to eliminate selective admissions criteria for incoming students. . . . The move helped to better integrate eight of the district's 11 middle schools.").

²¹² See Fallon, *supra* note 20, at 1336 (describing the complexities of strict scrutiny but explaining that "[o]n one interpretation, strict scrutiny was intended to be fatal in fact in nearly all cases"). *But see* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 237 (1995)

rence in *Croson*, distinguished that case from the Court's school desegregation cases and explained, "we have made plain that States and localities sometimes have an obligation to adopt race-conscious remedies," but that "after the dual school system has been completely de-established, the States may no longer assign students by race."²¹³ This is the door through which this Note explains advocates have walked: We *still* have a dual school system requiring actions to de-establish it, and while advocates should be able to explicitly consider race in achieving goals of diversity, they have found another way.

Advocates do contend that the best integration programs would be able to look explicitly to the racial diversity of students available to attend a school, compared with the racial diversity of the students at a local school, to establish goals for diversity of student attendance.²¹⁴ Of course, use of race would invite a reviewing court to judge the program under strict scrutiny. This is something that states and localities have rightly sought to avoid, through the use of race-neutral alternatives and by relying on the language of especially Justice Kennedy's concurrence in *Parents Involved*. Instead, they identified alternative factors that would encourage diversity in a constitutionally permissible way. Something will, of course, be lost in considering other factors besides race. Making race explicit is important because while other metrics might be a proxy for race, racially unequal education is both part of the problem and a problem in and of itself. While socio-

("Finally, we wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring))).

²¹³ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 524–25 (1989).

²¹⁴ See, e.g., HALLEY POTTER, CENTURY FOUND. RECRUITING AND ENROLLING A DIVERSE STUDENT BODY IN PUBLIC CHOICE SCHOOLS 3 (2019), (advocating for setting school-specific diversity goals); Glenn Ellison & Parag A. Pathak, *The Efficiency of Race-Neutral Alternatives to Race-Based Affirmative Action: Evidence from Chicago's Exam Schools* 1, 51 (Aug. 2016) (Mass. Inst. of Tech. Working Paper), <https://economics.mit.edu/files/11955> (finding that race-neutral alternatives to achieving diversity were less efficient than race-based ones); see also AMY STUART WELLS, LAUREN FOX & DIANA CORDOVA-COBO, CENTURY FOUND., *HOW RACIALLY DIVERSE SCHOOLS AND CLASSROOMS CAN BENEFIT ALL STUDENTS* 29 (2016) (arguing that our current segregated system "can only be addressed via a race-conscious and progressive agenda").

economic status can get part of the way there,²¹⁵ a focus on racial disparities is important in its own right.²¹⁶

In considering alternatives, governments could do two things. First, like in Louisville, they could aggregate different inputs to create some kind of mixed evaluation of diversity and other factors within the study to determine if race-neutral alternatives might achieve the same results as using race, or if the use of race explicitly is necessary for the goals of integration. The Century Foundation has compiled a list of proxy factors that would encourage diversity. These race-neutral alternatives might include²¹⁷:

- Student Level
 - Disability status
 - Eligibility for free/reduced lunch
 - Eligibility for welfare benefits
 - English language learners
 - Foster care status
 - Incarcerated family members
 - Head Start
 - Language
 - Income
 - Parents' educational attainment
 - Section 8 participation
 - Temporary housing
- Neighborhood Level
 - Adult educational attainment
 - Median family income
 - Percent of households with a language besides English
 - Percent of minority residents
 - Percent of owner-occupied homes
 - Percent of single-parent homes
 - Performance of a zoned school

²¹⁵ See Daven Carlson, Elizabeth Bell, Matthew A. Lenard, Joshua M. Cowen & Andrew McEachin, *Socioeconomic-Based School Assignment Policy and Racial Segregation Levels: Evidence from the Wake County Public School System*, 57 AM. EDUC. RSCH. J. 258, 260 (2020) (finding that a socioeconomic integration policy reduced segregation compared to a residence-based policy); M. Monique McMillan, Sarah Fuller, Zoelene Hill, Kate Duch & William A. Darity, Jr., *Can Class-Based Substitute for Race-Based Student Assignment Plans? Evidence from Wake County, North Carolina*, 53 URB. EDUC. 843, 867–68 (2018).

²¹⁶ See Ralph Richard Banks, *An End to the Class vs. Race Debate*, N.Y. TIMES (Mar. 21, 2018), <https://www.nytimes.com/2018/03/21/opinion/class-race-social-mobility.html>.

²¹⁷ Potter, *supra* note 214, at tbl.1.

The Department of Education endorsed many of these strategies in 2011, in guidance rescinded under the Trump Administration.²¹⁸ The guidance cited Justice Kennedy's concurrence in *Parents Involved*, characterizing "[a] majority of the Justices" as "recogniz[ing] that seeking diversity and avoiding racial isolation are compelling interests for school districts."²¹⁹ The guidance recommended districts look to proxy factors including socioeconomic status, parental education, household status, geography, and composition of area housing.²²⁰ Even though the guidance was rescinded, schools modeled programs using these proxy factors as ways to increase diversity.²²¹ Under the Biden Administration, there may be new attention to K–12 diversity.²²²

In developing alternative programs, cities and states should continue to take into account anecdotal evidence to show the structural barriers that have made equal enrollment difficult. This evidence has helped districts identify race-neutral supports in other areas that might equalize educational attainment. For example, advocates recommend free and accessible transportation to schools, lotteries for admissions, and providing translators at schools to mitigate structural barriers that students face in enrolling in schools.²²³ Additionally, in

²¹⁸ See generally U.S. DEP'T OF JUST. & U.S. DEP'T OF EDUC., GUIDANCE ON THE USE OF RACE TO ACHIEVE DIVERSITY TO AVOID RACIAL ISOLATION IN ELEMENTARY AND SECONDARY SCHOOLS (2011), <https://www2.ed.gov/about/offices/list/ocr/docs/guidance-ese-201111.pdf>.

²¹⁹ *Id.* at 2 (citing *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 783, 797 (2007) (Kennedy, J., concurring in part and concurring in the judgment)).

²²⁰ *Id.* at 6.

²²¹ See *supra* Part II.

²²² See *The Biden Plan for Educators, Students, and Our Future*, BIDEN HARRIS, <https://joebiden.com/education> (last visited Aug. 9, 2021) ("President Biden will ensure that no child's future is determined by their zip code, parent's income, race, or disability."). President Biden's proposed FY 2022 budget includes additional funding for the Department of Education to increase opportunities for disadvantaged students and schools, and funding specifically to help communities develop new strategies to make their student bodies more diverse. See U.S. DEP'T OF EDUC., FISCAL YEAR 2022 BUDGET SUMMARY 16 (2021), <https://www2.ed.gov/about/overview/budget/budget22/summary/22summary.pdf> (describing a proposed "Fostering Diverse Schools" program which would make grants for plans that promote diversity); Evie Blad, *Biden's K-12 Budget Seeks \$20 Billion for State Incentives to Address Funding Inequity*, EDUC. WK. (May 28, 2021), <https://www.edweek.org/policy-politics/bidens-k-12-budget-seeks-20-billion-for-state-incentives-to-address-funding-inequity/2021/05> (reviewing proposed increase in funding for Title I, a grant program for educating disadvantaged students); Charles Hendrix, *Biden Details Spending in \$103B Education Budget Plan*, DIST. ADMIN. (May 28, 2021), <https://districtadministration.com/biden-details-education-budget-spending-103-billion> (describing proposed new funding to help communities to "develop and implement strategies that would build more diverse student bodies").

²²³ JENNIFER AYSUE, RACHEL LEVY, GENEVIEVE SIEGEL-HAWLEY & BRIAN WOODWARD, C.R. PROJECT, A MANUAL FOR LOCAL STAKEHOLDERS, CHOICES WORTH

designing any program for the purposes of integrating or diversifying education, governments should be careful to include the same kinds of provisions that have been successful in the M/WBE context: built-in and frequent reevaluation of the underlying data, waivers for students through an appeals process,²²⁴ and frequent consideration of alternatives if schools are able to achieve racial integration results consistent with the goals of the district.²²⁵

Some schools are leveraging a form of the M/WBE disparity model from public contracting in education today, even without explicitly or knowingly borrowing from the other area. Blackstone Valley Prep, a charter network in Rhode Island, serves four communities that together compose a diverse region. The school sets a “goal” of having proportional representation from each of the communities in tandem with a goal of a population of students that is at least fifty percent eligible for free or reduced-price lunch.²²⁶ Louisville, discussed above, uses a form of racial diversity to calculate target diversity indices. Leveraging the disparity model would allow school districts to address race explicitly, not only through race-conscious means, but also race-forward ones.

When I spoke to one of the parents in New York’s Community District 15, the parent was quick to acknowledge that one of the reasons for the plan’s successful passage was that the process of drafting the plan was done with a tremendous amount of community input.²²⁷ The City has an accessible website for the plan, sought members of the community to provide feedback and join a working group, held public workshops, created advisory groups, and used trained facilitators to ensure community input was heard and integrated into the final plan.²²⁸

B. *The Next Open Door*

In reading the Court’s jurisprudence on affirmative action in public contracting or K–12 education, one might be left with the impression that there is nothing more to do: The Court has spoken, and decided that these plans cannot be. But in reality, advocates have not given up on finding ways to actively dismantle disparity. Instead,

MAKING: CREATING, SUSTAINING AND EXPANDING DIVERSE MAGNET SCHOOLS 8–16 (2017), <https://files.eric.ed.gov/fulltext/ED586367.pdf>.

²²⁴ The Louisville plan allows for appeal of assignment and student transfers. *See, e.g., Student Transfers*, JEFFERSON CNTY. PUB. SCHS., <https://www.jefferson.kyschools.us/schools/how-apply/student-transfers> (last visited Aug. 8, 2021).

²²⁵ *See supra* Part I.

²²⁶ Potter, *supra* note 214, at 3.

²²⁷ Interview with Community District 15 Parent, in New York, NY (Jan. 11, 2019).

²²⁸ *See* D15 DIVERSITY PLAN, *supra* note 184.

they have taken the Court's words as a challenge to design programs in the alternative, which navigate the permissible by understanding the impermissible and should give us hope that there is more that can be done to deal with segregation. In closing one door, it seems the Court opened another. It takes only creativity, will, and community buy-in to find the way through that door. And while education and government contracting are entirely different policy areas, with different advocates and different motivations, advocates have learned to adapt in the same ways.

This leaves open the question of what the Court would think of these programs. Without knowing more or digging into the cases the Court has intentionally not taken up, one can only speculate. There are likely some Justices who are pleased, like Justice Powell, who had to write a narrow plurality with some guiding words and footnotes and hope the advocates he may have sided with would find ways to adapt and permissibly further goals of diversity in service of long-term equality. These Justices might point approvingly to the close way that M/WBE programs track the language set out in *Croson*—which created an entirely new model of studying diversity in government contracting—and the way the factors school districts have used to diversify their schools map exactly on to Justice Kennedy's recommendations and have become the foundation of creative thinking around other factors that might achieve their original goals. Many of those factors were even endorsed by a co-equal branch of government via the Department of Education's 2011 guidance to schools,²²⁹ signaling that the Court might be leading or following the political branches, either of which might be something the Justices are hoping for. The advocates are listening, and they are listening closely to what the Court says. In doing so, they are not just taking the Court at its word, but holding the Court to its word, too.

There might be others who believe these programs violate the spirit of the law, even if they have narrowly avoided violating its letter. These Justices may be waiting for the case that treads too far, strays too deeply into the negative space, to rally a grant of certiorari to pull the programs back, flood more light into the space, and make clear what is not allowed under the law.

But ideology aside, the Justices should be pleased. This tension, this back-and-forth between the branches of government and the people, allows policy to carefully navigate the letter of the law but still further change and develop values of our society and community. The

²²⁹ See U.S. DEP'T OF JUST. & U.S. DEP'T OF EDUC., *supra* note 218; *supra* Section III.A.

Court's role is to define and interpret the law, but it is the people—the spirit of the law themselves—who have always found ways to question, extend, and—when necessary—push for changes to the Court's principles. In a way, this is a clear example of the people, through their politically elected leaders, reclaiming their policy preferences while still giving adequate deference and respect to the role of the judiciary. Without explicitly rejecting the Court's refusal to allow racial consideration in education, advocates found a new path forward.

CONCLUSION

We might soon see answers to how this Court feels about affirmative action in higher education. An anti-affirmative action group, Students for Fair Admissions, brought a lawsuit in 2014 against Harvard University alleging that the school's affirmative action policies violate the Constitution and Title VI of the Civil Rights Act.²³⁰ A U.S. District Court in Massachusetts ruled that Harvard's admissions policies do not discriminate against Asian American applicants,²³¹ after which the group appealed to the First Circuit, which upheld the District Court's ruling.²³² The group has since filed a petition for certiorari arguing both that the Supreme Court should overrule *Grutter* and that the Harvard program does not survive strict scrutiny.²³³ The suit has been seen as an invitation, by opponents of affirmative action, to the Court to disallow consideration of race in education once and for all.²³⁴ As advocates consider what a public wave of challenges to affirmative action will bring, they need not be discouraged. Instead, they might pick up the tools left by their colleagues in the contracting and education settings, turn once more to the Court's opinions in the higher-education context, and find the roadmap to a permissible and continued pursuit of diversity amidst an opinion that others might read as invitation to give up.

²³⁰ See *supra* notes 12–13.

²³¹ *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 397 F. Supp. 3d 126 (D. Mass. 2019), *aff'd*, 980 F.3d 157, 187 (1st Cir. 2020).

²³² *Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll.*, 980 F.3d 157, 187 (1st Cir. 2020).

²³³ Petition for Writ of Certiorari at 21–22, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, No. 19-1199 (1st Cir. Feb. 25, 2021), *petition for cert. docketed*, No. 20-1199 (U.S. Mar. 1, 2021), https://www.supremecourt.gov/DocketPDF/20/20-1199/169941/20210225095525027_Harvard%20Cert%20Petn%20Feb%2025.pdf.

²³⁴ Claire Sweetman, *Students for Fair Admissions v. Harvard: The Fate of Affirmative Action in Higher Education*, 97 DENV. L. REV. F. 100, 101 (2019) (“Because *SFFA v. Harvard* implicates affirmative action generally, it is poised for Supreme Court review. Although precedent seems settled in this area, the new ideological makeup of the nation's highest court may have a severe effect on all admissions policies in higher education.”).

As this Note demonstrates, when decisions like *Croson* or *Parents Involved* come down, advocates might at first take them as a blow to affirmative action programs in public contracting or K-12 education. But the Court offers more than a rejection of a program in its holdings: it offers—in its dicta, its citations, and its concurrences—narrow openings that experienced advocates have come to recognize as opportunities. In telling cities and states what they cannot do, the Court is also leaving room for them to design programs in the negative space remaining.