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Reading, Writing, and Race: The Constitutionality of Educational Strategies Designed to Teach Racial Literacy.

Michael J. Kaufman
Loyola University Chicago, mkaufma@luc.edu

READING, WRITING, AND RACE: THE CONSTITUTIONALITY OF EDUCATIONAL STRATEGIES DESIGNED TO TEACH RACIAL LITERACY

Michael J. Kaufman *

I. INTRODUCTION

Imagine a social studies class in a public high school. The class has twenty students, ten of whom are white and ten of whom are African-American. The classroom contains ten desks on the east side of the room, which are separated from ten desks on the west side of the room by an aisle. On the first day of class, the ten African-American students choose to sit together in the ten desks on the east side of the room, while the ten white students choose to sit together on the west side of the room. The next day, the teacher decides to reassign five white students to desks on the east side of the room, and five African-Americans to desks on the west side of the room. The teacher believes that racial integration within the classroom is instrumental to one of the critical learning outcomes of the class: teaching racial literacy. The teacher has employed race-conscious student assignment as an educational strategy designed to teach racial literacy.

Under the Supreme Court's equal protection cases, however, such educational judgments will be strictly scrutinized and presumed to be unconstitutional by judges who have no educational expertise. In fact, the Supreme Court granted certiorari and heard arguments to resolve questions about the constitutionality of such race-conscious student assignment decisions by public secondary school officials in the Seattle, Washington and Jefferson

* Associate Dean for Academic Affairs, Director of the Childlaw and Education Institute and Professor of Law, Loyola University of Chicago. I would like to thank Timothy Cox, Elaine Gist, and Christine Heaton for their invaluable assistance with this project.

County, Kentucky School Districts.[1] In considering whether race-conscious educational strategies violate the Equal Protection Clause, the Supreme Court effectively presumes that any decisions made by public educational organizations that treat students differently because of their race are unconstitutional. The presumption can be rebutted only if the organization or the professional establishes that the differential treatment is narrowly tailored to achieve a compelling interest. Although both the Seattle District and Jefferson County Public Schools assign students to particular schools based on a host of considerations, there is no doubting that at least some students have been assigned to their preferred school because of their race and other students have been assigned to a non-preferred school because of their race. The issue presented by such programs is whether a public school district's use of a student's race in deciding to assign that student to

1. *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist., No. 1, 426 F.3d 1162 (9th Cir. 2005) (en banc), *cert. granted,* 126 S. Ct. 2351 (2006); McFarland v. Jefferson County Pub. Schs., 330 F. Supp. 2d 834 (W.D. Ky. 2004), *aff'd*, 416 F.3d 513 (6th Cir. 2005). After a history of racial segregation, the Jefferson County Public Schools in Kentucky were ordered to maintain an integrated school system. The schools did so for 25 years. After they were released from the federal court decree, the schools chose to attempt to maintain their integrated status through a student assignment plan that considers a student's race together with a "myriad of other factors," including residence, school capacity, program popularity, student choice, and random draw. *McFarland*, 330 F. Supp. 2d at 837–48.

The Seattle School District No. 1 was never the subject of a judicial decree requiring remedial action to dismantle racially segregated schools. Rather, the District voluntarily sought to avoid the racial segregation in its schools that resulted from school assignment based on proximity from home to school. The District adopted an open choice plan whereby students could apply to any one of the District's ten schools. Each student ranks at least one, but not necessarily all of the District's high schools in the order of the student's preference. If there is capacity in the student's preferred school, the district assigns the student to that school. When a school becomes oversubscribed, however, the District gives preferential treatment to students who have siblings already attending the requested school. If the school is still oversubscribed, the district then considers the race of the student together with the racial composition of the school in making its school assignment. If the racial composition of a particular high school significantly (initially by 10% or more, and eventually by 15% or more) deviates from the demography of the Seattle district's overall student population (which is about 40% white and 60% nonwhite), and if the assignment of the student would bring the school's demography closer to the Seattle district's overall student demography, then the student would be assigned to that school. After all of the students whose admission to a particular school would bring that school's racial demography closer to the Seattle district's racial demography have been admitted to an oversubscribed school, the district then assigns students to that school based on the distance between their residence and the school. A student who resides as little as one hundredth of a mile closer to the school than another student will be given priority. Finally, if after considering students' choice, facilities capacity, racial demography and proximity, the District still has space for students in an oversubscribed school, assignment to that school is based on a lottery. *Seattle*, 426 F.3d at 1167, 1169–70.

a particular school, classroom or desk within the district, violates the Equal Protection Clause.

In Section II, this article first shows that such race-conscious decision making should satisfy even the Supreme Court's current, strict equal protection scrutiny. The Supreme Court has recognized that states have a compelling interest in encouraging their educational institutions to provide "educational benefits" to their citizens.[2] This article demonstrates that a school district's use of student assignment to produce a meaningful number of diverse students within a school, or classroom, is narrowly tailored to achieve the compelling governmental interest in teaching racial literacy.

Many public school districts, including Seattle and Jefferson County, have determined that their students are benefited by educational strategies designed to teach about race. They have reached the educational judgment that their district's curriculum and instructional practices should be designed to help their students learn "racial literacy." The concept of racial literacy includes several objectives: an understanding of the biological and social components of race itself; an understanding of the history of race throughout the world and in America; an understanding of the current and projected racial composition of the world, the country, the state, the county, the school district and the school; an understanding of the relationship *vel non* between race and politics, law, society, geography, language, culture, religion, family and education; an understanding of the connection *vel non* between race and perceptions of the world and one's self; an understanding of the racial prejudices and biases that may exist in each student; an understanding of the strategies that may be used to overcome such prejudices and biases; and an understanding of the value of racial differences and racial tolerance.[3]

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2. *See* Grutter v. Bollinger, 539 U.S. 306, 343 (2003); Gratz v. Bollinger, 539 U.S. 244, 275 (2003).

3. In *From Racial Liberalism to Racial Literacy:* Brown v. Board of Education *and the Interest-Divergence Dilemma*, 91 J. AM. HIS. ¶¶ 56–60 (June 2004), *available at* http://www.historycooperative.org/journals/jah/91.1/guinier.html, Lani Guinier has defined "racial literacy" in the different context of developing a sophisticated understanding and reaction to race in America. She writes that "racial literacy as epiphenomenal . . . is contextual rather than universal . . . depends on the engagement between action and thought . . . is about learning rather than knowing . . . is an interactive process in which race functions as a tool of diagnosis, feedback and assessment." *Id.* at ¶¶ 56–58.

Racial literacy is hardly a novel educational objective. John Dewey concluded that encouraging students to understand and confront racial differences is a particularly critical function to be performed by education in American democracy.[4] Educational philosophers and practitioners have long recognized that because of the pervasiveness of racial issues throughout the curriculum, students must receive an educational foundation in racial literacy.[5] Moreover, local public school districts, under direction from their states, commonly include instruction in race as a required component of their curriculum and instructional practices.[6] The Jefferson County and Seattle School Districts, for example, specifically affirm their educational judgment that racial literacy is a particularly important objective for a secondary school in a democratic community.[7] Thus no one could credibly deny that a public secondary school district has a compelling educational interest in teaching its students racial literacy.[8]

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4. John Dewey, *Education in Democracy*, *reprinted in* STEVEN M. CAHN, CLASSIC AND CONTEMPORARY READINGS IN THE PHILOSOPHY OF EDUCATION 288–93 (Philip A. Butcher ed., 1997).

5. *See, e.g.*, BRUCE M. MITCHELL & ROBERT E. SALSBURY, MULTICULTURAL EDUCATION IN THE U.S.: A GUIDE TO POLICIES AND PROGRAMS IN THE 50 STATES *passim* (2000) (listing states that have racial literacy programs, persons overseeing such programs, funding for programs, or other similar equity programs: Connecticut, Delaware, Florida, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, New Jersey, New Mexico, New York, North Carolina, Washington, Wisconsin, and Wyoming). Numerous other states, although lacking a specific program, stress multi-racial learning within the classrooms through efforts such as teacher education and local decision making. *See* NEIL POSTMAN, THE END OF EDUCATION: REDEFINING THE VALUE OF SCHOOL (1995).

6. *See* MICHAEL J. KAUFMAN, EDUCATION LAW, POLICY AND PRACTICE: CASES AND MATERIALS 400–04 (2005); *see also supra* note 5.

7. *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist., No. 1, 426 F.3d 1162, 1175 (9th Cir. 2005); McFarland v. Jefferson County Pub. Schs., 330 F. Supp. 2d 834, 849 (W.D. Ky. 2004), *aff'd*, 416 F.3d 513 (6th Cir. 2005).

8. Not even amici supporting objectors to race-conscious school assignment in the Supreme Court can credibly question the compelling interest in teaching racial literacy. In their advocacy piece filed in the Supreme Court, David Armor, Abigail Thernstrom, and Stephan Thernstrom attempt to challenge selected empirical studies demonstrating the connection between a racially diverse school environment and achievement gains. *See* Brief for David Armar, et al. as Amici Curiae Supporting Petitioners, at 9–29 Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, Nos. 05-908 & 05-915 (U.S. Aug. 21, 2006). They do not, and cannot, challenge the judgment of educators and state policymakers that racial literacy acquisition is a compelling interest. Rather, they only question a few of the numerous studies showing the connection between racially diverse schools and achievement. Nor do these amici provide a single example of any serious empirical study *disproving* what educational professionals and experts understand from their actual experience: racially diverse educational environments are related to learning outcomes. Finally, these amici, who were engaged by objectors to Seattle's plan in that litigation, do not question the results of precise studies showing a connection between a diverse educa-

Once it is conceded that teaching racial literacy is a compelling interest, the only remaining question for equal protection analysis is whether a district's educational strategies and instructional practices sufficiently serve that interest. Where race is at issue, those strategies and practices must be narrowly tailored to achieve the compelling interest of teaching racial literacy. There are many approaches to teaching generally, and to teaching racial literacy in particular. Based on a wealth of empirical evidence and experience, however, many educational professionals have determined that an effective method of teaching racial literacy requires students to interact with peers from a different racial background.[9] Secondary school educational professionals under-

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tional environment and racial literacy acquisition.

9. A vast amount of social science research has been generated indicating the educational benefits of a racially diverse educational environment generally, and the benefits of such an environment to the production of racial literacy. *See, e.g.*, James A. Banks, *Introduction: Democratic Citizenship Education in Multicultural Societies*, *in* DIVERSITY AND CITIZENSHIP EDUCATION 10 (James A. Banks ed. 2004) (arguing that proper education can prepare students better for democratic citizenship); Geneva Gay, *Curriculum Theory and Multicultural Education*, *in* HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION 32–35 (James A. Banks ed., 2d ed. 2004) (reviewing scholarship on the value of multicultural education and defining multicultural education as an idea that recognizes the importance of ethnic and cultural diversity in educational settings); Amy Guttmann, *Unity and Diversity in Democratic Multicultural Education*, *in* DIVERSITY AND CITIZENSHIP EDUCATION, *supra*, at 71 (presenting that multicultural education furthers democratic ideals through teaching tolerance and role that cultural differences have had in the shaping of society); THE CIVIL RIGHTS PROJECT, HARVARD UNIVERSITY, DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION (Gary Orfield ed., 2001); Thomas F. Pettigrew, *Intergroup Contact: Theory, Research, and New Perspectives*, *in* HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION 770 (James A. Banks ed., 2d ed. 2004) (arguing that proper education prepares students better for democratic citizenship); Janet Ward Schofield, *Fostering Positive Intergroup Relations in Schools*, *in* HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION 799 (James A. Banks ed., 2d ed. 2004) (agreeing that multicultural education can improve ethnic relations among students, primarily because young students have their first experiences with others from different ethnic backgrounds in schools, and outlining policies to effectively foster those relationships); Robert Slavin, *Cooperative Learning and Intergroup Relations*, *in* HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION 633 (James A. Banks ed. 1995) (offering an overview of intergroup research studies and concluding that students in ethnically diverse education settings receive long-lasting social, cross-ethnic friendships and improved student achievement); Walter G. Stephan & Cookie White Stephan, *Intergroup Relations in Multicultural Education Programs*, *in* HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION 782 (James A. Banks ed., 2d ed. 2004) (affirming that one goal of multicultural education is to improve relations among ethnic groups and reviewing the processes that lead to such change); AMY STUART WELLS ET AL., HOW DESEGREGATION CHANGED US: THE EFFECTS OF RACIALLY MIXED SCHOOLS ON STUDENTS AND SOCIETY, *drawn from* IN SEARCH OF *BROWN* (forthcoming 2005) (reporting positive overall societal results from integration of schools by studying a particular class from 1980, including students who are less racially prejudiced and more open to people of different backgrounds); Patricia Gurin et al., *The Benefits of Diversity in Education for Democratic Citizenship*, 60 J. OF SOC. ISSUES 17, 32 (2004) (presenting studies that examine and conclude that diversity in student bodies, although altered by per-

stand that racial literacy cannot be taught through the monolithic

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sonal experiences with the diverse groups, generally create students that are better suited for "democratic citizenship"); Robert E. Slavin & Eileen Oickle, *Effects of Cooperative Learning Teams on Student Achievement and Race Relations: Treatment by Race Interactions*, 54 SOC. OF EDUC. 174, 178 (1981) (finding that both white and African-American students gained academically from cooperative diverse learning environments); Derek Black, Comment, *The Case for the New Compelling Government Interest: Improving Educational Outcomes*, 80 N.C. L. REV. 923, 944–47 (2002) (noting the vast amount of research affirming the positive effects of diverse educational environments).

A host of literature has begun to emerge on the value of multicultural education in the international forum as well. *See, e.g.*, Stephen Castles, *Migration, Citizenship, and Education*, *in* DIVERSITY AND CITIZENSHIP EDUCATION, *supra* at 32–42 (reviewing different strategies immigrant countries have implemented to further multicultural ideals in education); Peter Figueroa, *Diversity and Citizenship Education in England*, *in* DIVERSITY AND CITIZENSHIP EDUCATION, *supra* at 236 (noting the new curriculum in England to further citizenship education through a multicultural approach).

Several social science studies have generally studied the educational benefits of racially diverse schools. *See, e.g.*, Jomills Henry Braddock II & Tamela McNulty Eitle, *The Effects of School Desegregation*, *in* HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION 828 (James A. Banks ed., 2d ed. 2004) (providing an overview of the social science research regarding the effects of desegregation and concluding that modest, but significant, improvements exist for African-American students); Janet Ward Schofield, *Review of Research on School Desegregation's Impact on Elementary and Secondary School Students*, *in* HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION 597 (James A. Banks ed., 1995) (providing a comprehensive survey of the major social and statistical studies on desegregation and the impact on African-American students, Hispanic students, and white students from 1975 through 1991 and concluding that the positive effects of desegregation include, *inter alia*, improved reading skills for young African Americans and higher college graduation rates leading to higher employment income); Maureen T. Hallinan, *Diversity Effects on Student Outcomes: Social Science Evidence*, 59 OHIO ST. L.J. 733, 753 (1998) (providing an overview of the social science literature regarding diversity and desegregation, the resulting impact on students, and finding that the reliable findings are typically positive); Roslyn Arlin Mickelson, *The Academic Consequences of Desegregation and Segregation: Evidence from the Charlotte-Mecklenburg Schools*, 81 N.C. L. REV. 1513, 1560 (2003) (concluding that all students benefit from diverse schools, African–American identified schools have negative effects on all students, and even desegregated schools may have disproportionate education based on race due to other social and academic factors); Amy Stuart Wells & Robert L. Crain, *Perpetuation Theory and the Long-Term Effects of School Desegregation*, 64 REV. OF EDUC. RES. 531, 532, 540, 546, 552 (1994) (reviewing twenty-one studies of the impacts of desegregation and integrated learning environments, concluding that African-American students attending desegregated schools set future employment goals higher than in segregated schools, a higher ratio of African-American students from desegregated schools attain higher education, and African-American students from desegregated schools are more likely to be employed in white-collar/professional careers); Eric A. Hanushek et al., *New Evidence about* Brown v. Board of Education: *The Complex Effects of School Racial Composition on Achievement* 23–24 (Nat'l Bureau of Econ. Research, Working Paper No. 8741, 2002) (studying academic achievement and concluding that African American achievement, particularly in mathematics, is improved through diverse learning); THE CIVIL RIGHTS PROJECT, HARVARD UNIVERSITY, THE IMPACT OF RACIAL AND ETHNIC DIVERSITY ON EDUCATIONAL OUTCOMES: CAMBRIDGE, MA SCHOOL DISTRICT (Jan. 2002), http://www.civilrightsproject.harvard.edu/research/diversity/cambridge_diversity.pdf; THE CIVIL RIGHTS PROJECT, HARVARD UNIVERSITY, THE IMPACT OF RACIAL AND ETHNIC DIVERSITY ON EDUCATIONAL OUTCOMES: LYNN, MA SCHOOL DISTRICT (Feb. 2002), http://www.civilrightsproject.harvard.edu/research/diversity/Lynn Report.pdf.

delivery of information to passive students.[10] Rather, teaching racial literacy requires prompting students to confront the personal and political nature of race and racism in their educational environment.[11] From an educational perspective, the use of student assignment to maintain meaningful numbers of racially diverse students in a secondary school is precisely tailored to achieve the compelling interest in teaching racial literacy. A school district's use of student assignment to create a meaningful number of diverse students in a school in order to serve its compelling interest in teaching racial literacy, therefore, should survive any credible constitutional challenge.

Still, there are serious challenges to the constitutionality of such educational strategies. The challenges necessarily question whether a public school district's interest in teaching its students racial literacy is indeed compelling, or the connection between that interest and the strategy of maintaining meaningful numbers of diverse students in a school, or both. As this article shows, any judicial determination that the interest in teaching racial literacy in secondary schools is not compelling would be contrary to the educational judgment of countless experts, teachers, school administrators, local school boards, and state boards of education. The judicial determination that the strategy of assigning meaningful numbers of diverse students in a school is not narrowly tailored to serve that interest also would be contrary to the judgment of professional educators.

In addition, requiring school districts to produce meaningful numbers of racially diverse students in a particular school within an otherwise racially segregated district by race-neutral assignment strategies cannot be narrowly tailored to the interest in producing such numbers. Race-neutral school assignment plans in a segregated district cannot produce meaningful numbers of diverse students unless their race-neutral criteria are either a deliberate proxy for race, or their race-neutral criteria happen for-

10. *See supra* note 9; *see also* Jane Bolgatz, *Developing Racial Literacy: What Happens When Students and Teachers Talk About Race* (2004), http://2004.diversityconference.com/ProposalSystem/Presentations/P000465.

11. *Id.*; *see also* Brief for American Council on Education and Twenty Other Higher Education Organizations as Amici Curiae supporting Respondents at 8, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist., No. 1, Nos. 05-908 & 05-915 (U.S. Oct. 10, 2006) (citing Jean Piaget, *Piaget's Theory*, *in* 1 CARMICHAEL'S MANUAL OF CHILD PSYCHOLOGY 703 (Paul H. Mussen ed., 3d ed. 1997)).

tuitously to coincide with race. If a school district's effort to assign students based on race is infirm, its deliberate effort to assign students based on a reliable proxy for race would be equally infirm. Moreover, if the district's assignment plan produces racial diversity by happenstance, that plan cannot be designed to serve the compelling interest in teaching racial literacy. Accordingly, this article concludes that a principled application of the Supreme Court's equal protection standards would reveal that a school district's race-conscious use of student assignment is narrowly tailored to achieve the compelling interest in teaching racial literacy.

Yet, it is extraordinary that the constitutionality of such educational strategies would hinge on the Supreme Court's uneducated judgment about whether the educational benefits of racial literacy are compelling and whether the use of student assignment may achieve those benefits. In Section III, therefore, this article proceeds to demonstrate that the Court's current template for analyzing race-conscious decisions by public school officials should be modified. That template is the product of judicial precedent detached from any authentic understanding of the principle of equality undergirding the Equal Protection Clause. An analysis tethered to an authentic principle of equality would begin by scrutinizing whether the state educational administrators are reasonable in their assessment of the practical educational differences in persons that justify differential educational treatment. Where students affected by such governmental educational programs are not in fact similarly situated, programs that treat them differently should not be presumed to be unconstitutional. Where teaching racial literacy depends on understanding the existence of at least some racial differences, a program that is conscious of those differences in meeting its goal of teaching about them cannot be inconsistent with an authentic understanding of equality.

II. THE CONSTITUTIONALITY OF EDUCATIONAL STRATEGIES BY PUBLIC SCHOOL DISTRICTS DESIGNED TO TEACH RACIAL LITERACY UNDER CURRENT STANDARDS

A. *The Supreme Court Strictly Scrutinizes All Race-Conscious Decisions by Public School Districts*

The Fourteenth Amendment provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[12] The Amendment's prohibition extends to "any person" within the state.[13] Where federal or state governments classify a person according to race, the Supreme Court reviews such governmental action under the most "detailed judicial inquiry."[14] The Court recently has made clear that *"[a]ll* racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized."[15] Strict scrutiny applies regardless of whether the racial classifications are invidious or benign and "is not dependent on the race of those burdened or benefited by a particular classification."[16] The Court requires such a demanding inquiry "to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool."[17] Accordingly, all racial classifications by the government, regardless of purported motivation, are "inherently suspect,"[18] and "presumptively invalid."[19]

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12. U.S. CONST. amend. XIV, § 1.

13. *Id.*

14. Grutter v. Bollinger, 539 U.S. 306, 326 (2002) (quoting Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995)); *see* Miller v. Johnson, 515 U.S. 900, 911 (1995) ("At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class.") (quoting Metro Broad., Inc. v. FCC, 497 U.S. 547, 602 (1990)) (O'Connor, J., dissenting) (internal quotations omitted).

15. *Adarand,* 515 U.S. at 224 (emphasis added).

16. Gratz v. Bollinger, 539 U.S. 244, 270 (2003) (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 464, 494 (1989)) (plurality opinion) (internal quotations omitted); *see* Johnson v. California, 543 U.S. 499, 505 (2004) ("We have insisted on strict scrutiny in every context, even for so-called 'benign' racial classifications, such as race-conscious university admissions policies, race-based preferences in government contracts, and race-based districting intended to improve minority representation.") (internal citations omitted).

17. *Adarand,* 515 U.S. at 226 (quoting *J.A. Croson Co.,* 488 U.S. at 493); *see also Miller,* 515 U.S. at 904 (finding that the Equal Protection Clause's "central mandate is racial neutrality in governmental decisionmaking").

18. *Adarand,* 515 U.S. at 223 (quoting Fullilove v. Klutznick, 448 U.S. 448, 523 (1980)

Under "strict scrutiny," race-conscious actions are permissible only where the government carries the burden of proving that these actions are "narrowly tailored to further compelling governmental interests."[20] The strict scrutiny standard is not "strict in theory, but fatal in fact."[21] Although all governmental uses of race now are subject to strict scrutiny, not all are invalidated by that scrutiny.[22] In applying strict scrutiny, however, the Court also has recognized that "[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause."[23]

B. *The State Has a Compelling Interest in Having its Secondary Schools Teach Racial Literacy*

Under strict scrutiny, a government action will not survive unless it is animated by a "compelling state interest."[24] Because strict scrutiny requires the Court to evaluate the "fit" between the government's means and its ends,[25] it is critical to identify pre-

(Stewart, J., dissenting)).

19. Shaw v. Reno, 509 U.S. 630, 643–44 (1993) (quoting Pers. Admin. of Mass. v. Feeney, 442 U.S. 256, 272 (1979)).

20. *See also Johnson* 543 U.S. at 505, 512; *Adarand,* 515 U.S. at 226–27. The Supreme Court, in *Johnson*, rejected the argument that a California Department of Corrections ("CDC") policy in which all inmates were segregated by race should be subjected to relaxed scrutiny because the policy "neither benefits nor burdens one group or individual more than any other group or individual." 543 U.S. at 506. The Court also recognized that all racial classifications "raise special fears that they are motivated by an invidious purpose" and that "'[a]bsent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining . . . what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.'" *Id.* at 505–06 (omission in original). *Johnson* is not entirely analogous to the voluntary integration strategies because the CDC segregated inmates on the basis of race, whereas the District's use of race is aimed at achieving the opposite result—attaining and maintaining integrated schools. Nevertheless, the First, Sixth and Ninth Circuits—the only circuits to rule, post-*Grutter* and *Gratz*, on the constitutionality of a voluntary plan designed to achieve the benefits of racial diversity in the public secondary school setting—all have concluded that the Plan must be reviewed under strict scrutiny. *See* Comfort v. Lynn Sch. Comm., 418 F.3d 1, 6 (1st Cir. 2005) (en banc); McFarland v. Jefferson County Pub. Schs., 330 F. Supp. 2d 834 (W.D. Ky. 2004), *aff'd*, 416 F.3d 513, 514 (6th Cir. 2005) (per curiam).

21. *Adarand*, 515 U.S. at 237 (quoting *Fullilove*, 515 U.S. at 519) (internal quotations omitted).

22. *Grutter,* 539 U.S. at 326–27.

23. *Id.* at 327.

24. *See id.* at 325, 327.

25. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 280 n.6 (1986) (plurality opinion).

cisely the governmental interests to which the government's use of race must fit.[26]

The Supreme Court thus far has endorsed two compelling governmental interests that have justified race-conscious decision making in the public education context. First, the Court has allowed racial classifications to remedy past racial imbalances in schools resulting from past *de jure* segregation, or proven acts of *de facto* segregation.[27] This interest, however, cannot by itself justify racial classifications where a public school district engages in voluntary race-conscious decision making.[28] Second, the Court has allowed undergraduate and graduate universities to consider race in deciding whether to admit a student in order to achieve the compelling governmental interest in producing the educational benefits of student body diversity.[29] The Court thus far has struck down every other interest claimed to be compelling enough to justify race-conscious decision making.[30] Moreover, the Court has declared that racial balance is not by itself a compelling interest justifying racial classifications and that "outright racial balancing . . . is patently unconstitutional."[31]

1. The Supreme Court Has Recognized that the State Has a Compelling Interest in Teaching Racial Literacy

In *Grutter*, the Supreme Court recognized that the promotion of specific educational benefits that flow from a diverse student population is a compelling governmental interest.[32] The Court

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26. *See* United States v. Paradise, 480 U.S. 149, 171 (1987) (plurality opinion) (stating that, in order to determine whether an order was narrowly tailored, the court "must examine the purposes the order was intended to serve").

27. *See* Freeman v. Pitts, 503 U.S. 467, 494 (1992).

28. *See id.*

29. *See Grutter*, 539 U.S. at 328; Gratz v. Bollinger, 539 U.S. 224, 268–69 (2003).

30. *See, e.g.*, Shaw v. Hunt, 517 U.S. 899, 909–12 (1996) (rejecting racial classifications to "alleviate the effects of societal discrimination"); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 511 (1989) (rejecting racial classifications in the awarding of public construction contracts in the absence of findings of past discrimination); *Wygant*, 476 U.S. at 274–76 (1986) (rejecting racial classifications in a school district's teacher layoff policy when offered as a means of providing minority role models for its minority students and as a means of alleviating past societal discrimination); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 310–11 (Powell, J., concurring) (rejecting the application of race-conscious measures to improve "the delivery of health-care services to communities currently underserved").

31. *Grutter*, 539 U.S. at 330; *see also Freeman*, 503 U.S. at 494 ("Racial balance is not to be achieved for it own sake.").

32. *See Grutter*, 539 U.S. at 330 (stating the law school's concept of critical mass is

identified no less than thirteen "substantial" governmental benefits that flow from a diverse student population: (1) overarching educational benefits; (2) an increase in the "robust" exchange of ideas; (3) cross-racial understanding; (4) breaking down racial stereotypes; (5) livelier, more spirited, enlightening and interesting classroom discussions; (6) the promotion of learning "outcomes"; (7) better preparation of students to work and interact in an "increasingly diverse" society and workforce; (8) better preparation as professionals in an "increasingly global marketplace"; (9) helping the military to fulfill its very mission of "national security"; (10) facilitating the "diffusion of knowledge and opportunity through public institutions of higher education" to be accessible to all individuals and thereby sustaining our "political and cultural heritage"; (11) fostering the effective participation by members of all racial and ethnic groups which is vital to becoming *one* nation; (12) supporting the training in law school for diverse national leaders and thereby cultivating leaders with legitimacy; and (13) developing attorneys of diverse races and ethnicities who will be able, in turn, to help all members of a "heterogeneous society" succeed.[33]

These substantial benefits include racial literacy in the form of cross-racial understanding, breaking down racial stereotypes, learning outcomes about race, preparation to operate in a "diverse" society, and the "diffusion of knowledge" about racial diversity.[34] In evaluating the relevance of diversity to educational objectives, the Court focused principally on the "learning outcomes" that a diverse student body provides.[35] Those learning outcomes are derived not only from having diverse viewpoints represented in the "robust exchange of ideas,"[36] but also from the presence of diverse students in the classroom as a method of challenging racial stereotypes.[37] The Court deferred to the law school's educational judgment not only in determining that diver-

"defined by reference to the educational benefits that diversity is designed to produce").

33. *Id.* at 329–33 (internal quotations omitted).

34. *Grutter*, 539 U.S. at 330–31.

35. *Id.* at 330.

36. *Id.* at 329–30 (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 313 (1978)) (internal quotations omitted).

37. *Id.* at 330, 333.

sity would produce these benefits, but also in determining that these benefits were critical to the school's educational mission.[38]

2. The Educational Benefits of Teaching Racial Literacy to Secondary School Students are Particularly Compelling

In attempting to fit within the compelling interest identified in *Grutter* and *Gratz,* public school districts have identified specific educational benefits produced by a diverse secondary school population. These benefits include the acquisition of racial literacy. For example, in the Seattle District,

> [t]hese interests are articulated in the "Board Statement Reaffirming Diversity Rationale" as:
>
> > Diversity in the classroom increases the likelihood that students will discuss racial or ethnic issues and be more likely to socialize with people of different races. Diversity is thus a valuable resource for teaching students to become citizens in a multi-racial/multi-ethnic world.
> > Providing students the opportunity to attend schools with diverse student enrollment also has inherent educational value from the standpoint of education's role in a democratic society. . . . Diversity brings different viewpoints and experiences to classroom discussions and thereby enhances the educational process. It also fosters racial and cultural understanding, which is particularly important in a racially and culturally diverse society such as ours . . . .
> > The District . . . believes that providing a diverse learning environment is educationally beneficial for all students.[39]

Similarly, the Jefferson County School's objective is "to give all students the benefits of an education in a racially integrated

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38. *See id.* at 328–33. The Court also relied upon the expertise and evidence submitted by amici curiae—including educators, business leaders and the military—that the educational benefits that flow from diversity constitute a compelling interest. *Id.* at 330–31 ("The Law School's claim of a compelling interest is further bolstered by its *amici,* who point to the educational benefits that flow from student body diversity.") ("These benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.") ("[H]igh-ranking retired officers and civilian leaders of the United States military assert that, '[b]ased on [their] decades of experience,' a 'highly qualified, racially diverse officer corps . . . is essential to the military's ability to fulfill its principle mission to provide national security.'") (omissions and alterations in original).

39. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist., No. 1, 426 F.3d 1162, 1174 (9th Cir. 2006).

school,"[40] including "a better academic education for all students" and "better appreciation of our political and cultural heritage for all students."[41]

As the Supreme Court's strong line of public school decisions recognizes, these interests in the educational benefits of a diverse secondary school student population are as compelling as those identified in *Grutter*. The Supreme Court in *Grutter* noted the importance of higher education in "preparing students for work and citizenship."[42] Public secondary schools have an even more significant role in this preparation. As the Supreme Court explained in *Plyler v. Doe*, "We have recognized 'the public schools as a most vital civic institution for the preservation of a democratic system of government,' and as the primary vehicle for transmitting the 'values on which our society rests.'"[43] The Court further recognized that public education perpetuates the political system and the economic and social advancement of citizens and that "education has a fundamental role in maintaining the fabric of our society."[44] In *Bethel School District No. 403 v. Fraser*,[45] as well, the Court declared that the inculcation of civic values is "truly the work of the schools."[46] In *Ambach v. Norwick*,[47] the Court likewise observed that public schools transmit to children "the values on which our society rests,"[48] including "fundamental values necessary to the maintenance of a democratic political system."[49] In *Brown v. Board of Education*,[50] of course, the Court declared:

> [Education] is required in the performance of our most basic public responsibilities. . . . It is the very foundation of good citizenship. Today it is a principal instrument in awakening the

40. *Id.*

41. McFarland v. Jefferson County Pub. Schs., 330 F. Supp. 2d 834, 836 (W.D. Ky. 2004), *aff'd*, 416 F.3d 513 (6th Cir. 2005).

42. *Grutter*, 539 U.S. at 331.

43. Plyler v. Doe, 457 U.S. 202, 221 (1982) (quoting Abington Sch. Dist. v. Shempp, 374 U.S. 203, 230 (1963) (Brennan, J., concurring) and Ambach v. Norwick, 441 U.S. 68, 76 (1979)) (internal citation omitted).

44. *Id.*

45. 478 U.S. 675 (1986).

46. *Id.* at 683 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969)) (internal quotations omitted).

47. 441 U.S. 68 (1979).

48. *Id.* at 76–77.

49. *Id.* at 77.

50. 347 U.S. 483 (1954).

> child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. [51]

Moreover, for the significant number of public high school graduates who do not attend college,[52] the public high school educational experience will be their *sole* opportunity to reap the benefits of a diverse learning environment. As the district court found in *McFarland*, the "benefits of racial tolerance and understanding are equally as 'important and laudable' in public elementary and secondary education as in higher education."[53]

Not surprisingly, the Supreme Court itself relied upon elementary and secondary school cases to reach its judgment in *Grutter* that the benefits of racial diversity in an educational institution are compelling. In these cases, the Supreme Court specifically proclaimed that "'the public schools [are] a most vital civic institution for the preservation of a democratic system of government' and . . . the primary vehicle for transmitting the 'values on which our society rests.'"[54] Moreover, the Court concluded in the context

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51. *Id.* at 493; *see* Grutter v. Bollinger, 539 U.S. 306, 330 (2003) (discussing the "substantial" benefits that flow from a racially diverse student body and citing sources that detail the impact of racial diversity in the educational environment). The Supreme Court in *Grutter* endorsed a law school's compelling interest in diversity in the broader sense of diverse viewpoints. *Id.* at 329–30. In serving that broader goal of diversity, a law school may consider race along with other attributes such as socioeconomic status, ability to speak multiple languages or extracurricular talents. *Id.* at 338. The Ninth Circuit interpreted *Grutter*, however, to recognize that "racial diversity, not some proxy for it, is valuable in and of itself." Parents Involved in Cmty. Schs. v. Seattle Sch. Dist., No. 1, 426 F.3d 1162, 1177 (9th Cir. 2006). Public school districts also asserted a corollary, compelling interest in avoiding the educational disadvantages of racially concentrated or isolated schools. In particular, according to the Ninth Circuit, the Seattle District's program was designed to spread the educational benefits of a diverse learning environment to all its students and to ensure that "no student should be required to attend a racially concentrated school." *Id.* The Court also recognized that "research regarding desegregation has found that racially concentrated or isolated schools are characterized by much higher levels of poverty, lower average test scores, lower levels of student achievement, with less-qualified teachers and fewer advanced courses—'[w]ith few exceptions, separate schools are still unequal schools.'" *Id.*

52. "According to the *Seattle Times*' School Guide submitted by Parents, for the year 2000, on average 34% of Seattle's high school graduates attend four-year colleges after graduation and 38.2% attend two-year colleges, although percentages vary from high school to high school." *Id.* at 1176 n.16.

53. The First Circuit also concluded that there is significant evidence supporting the view that the benefits to be derived from a racially diverse educational milieu "are *more compelling* at younger ages." Comfort v. Lynn Sch. Comm., 418 F.3d 1, 15–16 (1st Cir. 2005) (emphasis added); McFarland v. Jefferson County Pub. Schs., 330 F. Supp. 2d 834, 853 (W.D. Ky. 2004) (quoting *Grutter*, 539 U.S. at 330), *aff'd*, 416 F.3d 513 (6th Cir. 2005).

54. Plyler v. Doe, 457 U.S. 202, 221 (1982) (quoting Abington Sch. Dist. v. Schempp, 374 U.S. 203, 230 (1963) (Brennan, J., concurring) and Ambach v. Ivorwick, 441 U.S. 68,

of public secondary schools that the "[p]rocess of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order."[55] The Court also has recognized that the educational benefits of a racially diverse school extend to all students in that school: "Attending an ethnically diverse school may help . . . [in] preparing minority children 'for citizenship in our pluralistic society' while, we may hope, teaching members of the racial majority 'to live in harmony and mutual respect' with children of minority heritage."[56]

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76 (1979)) (internal citations omitted).

55. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986). With respect to the educational advantages of a racially diverse secondary school, Judge Kozinski in his concurrence in *Seattle* recognized:

> It is difficult to deny the importance of teaching children, during their formative years, how to deal respectfully and collegially with peers of different races. Whether one would call this a compelling interest or merely a highly rational one strikes me as little more than semantics. The reality is that attitudes and patterns of interaction are developed early in life and, in a multicultural and diverse society such as ours, there is great value in developing the ability to interact successfully with individuals who are very different from oneself. It is important for the individual student, to be sure, but it is also vitally important for us as a society.
>
> It may be true, as the dissent suggests, that students are influenced far more by their experiences in the home, church and social clubs they attend outside of school. But this does not negate the fact that time spent in school and on school-related activities, which may take up as much as half of a student's waking hours, nevertheless has a significant impact on that student's development. The school environment forces students both to compete and cooperate in the classroom, as well as during extracurricular activities ranging from football to forensics. Schoolmates often become friends, rivals and romantic partners; learning to deal with individuals of different races in these various capacities cannot help but foster the live-and-let-live spirit that is the essence of the American experience. I believe this is a rational objective for an educational system—every bit as rational as teaching the three Rs, advanced chemistry or driver's education. Schools, after all, don't simply prepare students for further education, though they certainly can and should do that; good schools prepare students for life, by instilling skills and attitudes that will serve them long after their first year of college.

Seattle, 426 F.3d at 1194–95 (Kozinski, J., concurring).

56. Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 473 (1982) (quoting Estes v. Metro. Branches of Dallas NAACP, 444 U.S. 437, 451 (1980) (Powell, J., dissenting) and Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 485 n.5 (1979) (Powell, J., dissenting)) (internal citation omitted).

3. The Professional Educational Judgment that Teaching Racial Literacy is a Compelling School District Objective Should Survive Judicial Scrutiny

The Supreme Court also has recognized that the federal courts are ill-equipped to second-guess the educational judgment of local school officials. The Supreme Court has repeatedly recognized that "[n]o single tradition in public education is more deeply rooted than local control over the operation of schools."[57] Because "the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges,"[58] courts have long deferred to the professional judgment of local school districts regarding matters of educational policy. The Supreme Court, for example, concluded:

> [E]ducational policy [is an] area in which this Court's lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels . . . . [T]he judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions.[59]

Local control serves important interests, particularly in the context of education. According to the Supreme Court, "local control over the educational process affords citizens an opportunity to participate in decision making, permits the structuring of school programs to fit local needs, and encourages 'experimentation, innovation, and a healthy competition for educational excellence.'"[60]

Certainly the interest in local control cannot justify conduct by a local arm of government that is unconstitutional. But where a local school district's goal of enhancing educational opportunities for all of its students is clearly constitutional, the methods by which it seeks to accomplish that goal are entitled to deference. Therefore, the Supreme Court has concluded that a school dis-

57. Milliken v. Bradley, 418 U.S. 717, 741 (1974); *see also* Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 410 (1977) ("[O]ur cases have . . . firmly recognized that local autonomy of school districts is a vital national tradition.").

58. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988).

59. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 42–43 (1973).

60. *Milliken*, 418 U.S. at 742 (quoting *Rodriguez*, 411 U.S. at 50).

trict's judgment that the use of race in considering which of its schools a student should be assigned to is entitled to particular deference. According to the Court, school districts "are traditionally charged with broad power to formulate and implement educational policy, and might well conclude . . . that in order to prepare students to live in a pluralistic society each school should have a prescribed ration of [African-American] to white students reflecting the proportion for the district as a whole."[61]

C. *The Educational Strategy of Assigning Meaningful Numbers of Diverse Students to a Particular Educational Environment is Narrowly Tailored to Achieve the Compelling Interest in Teaching Racial Literacy*

The public school districts' use of race-conscious decision making must be narrowly tailored to achieve its compelling interests in the educational benefits of a diverse student population.[62] The attempt by public school districts to demonstrate that their use of race in student assignment is narrowly tailored to achieve their compelling interests is typically framed by the Court's narrow tailoring analysis in *Grutter* and *Gratz*.[63]

In *Gratz,* the Court held unconstitutional the University of Michigan's undergraduate admissions program, which automatically assigned twenty points on the admissions scale to an applicant from an underrepresented racial or ethnic minority group.[64] In *Grutter*, by contrast, the Court upheld the University of Michigan Law School's admissions policy, which took race into account as one of several variables in an individual's application.[65] The law school's policy also attempted to ensure that a "critical mass"

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61. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971); *see also* Deal v. Cincinnati Bd. of Educ., 369 F.2d 55, 61 (6th Cir. 1966) ("[I]t is not unconstitutional for [boards of education] to consider racial factors and take steps to relieve racial imbalance if in their sound judgment such action is the best method of avoiding educational harm."). Rather, "[a]n integrated school experience is too important to the nation's children for this Court to jeopardize the opportunity for such an experience by constructing obstacles that would discourage school officials from voluntarily undertaking creative programs." Higgins v. Bd. of Educ. of Grand Rapids, 508 F.2d 779, 795 (6th Cir. 1974).

62. *See* Grutter v. Bollinger, 539 U.S. 306, 333 (2003).

63. *See id.* at 333–34 (noting that the narrow tailoring "inquiry must be calibrated to fit the distinct issues raised" in a given case, taking "'relevant differences into account'" (quoting Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 228 (1995)).

64. *See* Gratz v. Bollinger, 539 U.S. 244, 255, 272 (2003).

65. *See Grutter,* 539 U.S. at 315–16, 340, 343.

of underrepresented minority students would be admitted in order to realize the benefits of a diverse student body.[66]

In its analysis, the Ninth Circuit articulated the Supreme Court's identified hallmarks of a narrowly tailored race-conscious admissions plan as "(1) the absence of quotas; (2) individualized consideration of applicants; (3) serious, good-faith consideration of race-neutral alternatives to the program; (4) that no member of any racial group was unduly harmed; and (5) that the program had a sunset provision or some other end point."[67]

1. Individualized Consideration

The first narrow-tailoring factor of individualized consideration appears to be inapplicable in the context of race-conscious decision making by non-competitive public secondary schools. Public school districts do not engage in an individualized consideration of each applicant's characteristics and qualifications.[68] Indeed, the Seattle District conceded its lack of individual assessment by claiming that its interest in encouraging diverse schools required that its "tiebreaker must necessarily focus on the race of its students."[69] The issue is whether the constitutionality of a public secondary school's race-conscious educational strategies should depend on whether those strategies are part of an individualized assessment of each student.

On the one hand, individualized consideration protects the individual from group classifications, especially those by race.[70] The "Fourteenth Amendment 'protect[s] *persons*, not *groups*.'"[71] *Grutter* emphasized the importance of the individualized consideration of each applicant, declaring that in the context of a race-conscious university admissions program, such consideration

66. *See id.* at 316. The Court explained that "critical mass" was defined by the law school as "meaningful numbers" or "meaningful representation," or "a number that encourages underrepresented minority students to participate in the classroom and not feel isolated." *See id.* at 318.

67. *See* Smith v. Univ. of Wash., 392 F.3d 367, 373 (9th Cir. 2004); *see also Grutter*, 539 U.S. at 333–43; Comfort v. Lynn Sch. Comm., 418 F.3d 1, 17 (1st Cir. 2005) (characterizing *Grutter* as outlining a "four-part narrow tailoring inquiry").

68. *Cf. Grutter*, 539 U.S. at 337.

69. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist., No. 1, 426 F.3d 1162, 1183 (9th Cir. 2005).

70. *See Grutter*, 539 U.S. at 326.

71. *Id.* (quoting Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227).

> must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application. *The importance of this individualized consideration in the context of a race-conscious admissions program is paramount.*[72]

Individualized consideration of an applicant, however, does not require an educational program to be indifferent to race. The program may consider race, but in doing so, it must remain "'flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight.'"[73] There can be "no policy, either *de jure* or *de facto*, of automatic acceptance or rejection based on any single 'soft' variable . . . [such as the awarding of] mechanical, predetermined diversity 'bonuses' based on race or ethnicity."[74] The public school districts who consider race in assigning students do so as part of a multi-factoral analysis. Yet, there is no question that some students have been and will be assigned to some schools, or classrooms, because their presence in the school or in the classroom helps provide meaningful numbers of racially diverse students.

Rather than address the school districts' lack of individualized assessment, proponents of race-conscious student assignment plans, and the courts that have accepted them, therefore, have simply concluded that "if a noncompetitive, voluntary student assignment plan is otherwise narrowly tailored, a district need not consider each student in a individualized, holistic manner."[75] A school district need not consider each student in a holistic matter, they argue, because students do not compete for admission to seats in a school district.[76] In the context of university admissions, where applicants compete for a limited number of spaces in a class, the Court in *Grutter* and *Gratz* focused its inquiry on the role race may play in judging an applicant's qualifications. The Court's underlying concern was that the "admissions policy 'is flexible enough to consider all pertinent elements of diversity in

72. *Id.* at 337 (emphasis added).

73. *Id.* at 334 (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 317 (1978)).

74. *Id.* at 337.

75. *See, e.g.*, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist., No. 1, 426 F.3d 1162, 1183 (9th Cir. 2005).

76. *See id.* at 1184.

light of the particular qualifications of each applicant, and to place them on the same footing for consideration . . . ."[77] The focus on fair competition was driven by the desire to avoid the stigma that may attach if some individuals are viewed as unable to achieve success without special protection.[78] In order to prevent race from being used as a mechanical proxy for an applicant's qualifications, the Supreme Court required individualized consideration of each applicant across a broad range of factors, of which race may be but one.[79]

This focus on an applicant's qualifications, including an applicant's test scores, grades, artistic or athletic ability, musical talent or life experience, however, is arguably not applicable where there is no competition or consideration of qualifications at issue. All high school students must and will be placed in a public school.[80] In Seattle, for instance, no assignment to any of the District's high schools is linked to a student's "qualifications."[81] "Thus, no stigma results from any particular school assignment."[82] "Accordingly, the danger that may be present in the uni-

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77. *Grutter*, 539 U.S. at 337 (quoting *Bakke*, 438 U.S. at 317) (Powell, J., concurring); *see* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 211 (1995) ("The injury in cases of this kind is that a 'discriminatory classification prevent[s] the plaintiff from competing on an equal footing.'" (quoting Assoc. Gen. Contractors of Am. v. Jacksonville, 508 U.S. 656, 667 (1993)).

78. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) ("Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility."); *see Bakke*, 438 U.S. at 298 (Powell, J., concurring) ("[P]referential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth.").

79. *Grutter*, 539 U.S. at 336–37; *see* Gratz v. Bollinger, 539 U.S. 244, 272 (2003) (holding that the undergraduate admissions policy was not narrowly tailored because the "automatic distribution of 20 points has the effect of making 'the *factor of race . . . decisive*' for virtually every *minimally qualified* underrepresented minority applicant") (quoting *Bakke*, 438 U.S. at 317) (emphasis added).

80. Children have no right or entitlement to attend a particular school. *See* Bustop Inc. v. Bd. of Educ. of Los Angeles, 439 U.S. 1380, 1383 (1978) (Rehnquist, Circuit Justice) (denying stay and rejecting any legally protected right to have children attend their nearest school).

81. *Seattle*, 426 F.3d at 1181. Students' relative qualifications are irrelevant because regardless of their academic achievement, sports or artistic ability, musical talent, or life experience, any student who wants to attend Seattle's public high schools is entitled to an assignment.

82. *Id.* In *Bakke*, Justice Powell noted:

> Respondent's position is wholly dissimilar to that of a pupil bused from his neighborhood school to a comparable school in another neighborhood in compliance with a desegregation decree. Petitioner did not arrange for respon-

versity context of—substituting racial preference for qualification-based competition [is]—absent"[83] when a public school district assigns students to one of its many schools.[84]

Yet, race-conscious student assignment still appears to be objectionable under *Gratz* as a mechanical, predetermined policy "of automatic acceptance or rejection" based on a student's race.[85] First, objectors argue that any classification of students as "white" or "nonwhite" runs counter to the required individualized consideration of each applicant.[86] Second, opponents argue that, although public school districts do not exclude any student from a public education by operation of race-conscious decisions, and there is no competition for admission to any of the district's schools, there is a competitive market for school attendance zones.[87] Third, opponents argue that individualized assessment by public school districts would not be impractical.[88]

Nonetheless, these arguments in favor of the possibility of individualized assessment are misplaced. A public school district's lack of individualized assessment cannot render its plan unconstitutional where its precise compelling interests are not served by any such individualized assessment of irrelevant characteristics. The Supreme Court's requirement of individualized, holistic review in *Grutter* may be tailored to the compelling interest ad-

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> dent to attend a different medical school in order to desegregate Davis Medical School; instead, it denied him admission and may have deprived him altogether of a medical education.

438 U.S. at 300 n.39.

83. *Seattle*, 426 F.3d at 1181.

84. *See* Comfort v. Lynn Sch. Comm., 418 F.3d 1, 18 (1st Cir. 2005) ("Because transfers under the Lynn Plan are not tied to merit, the Plan's use of race does not risk imposing stigmatic harm by fueling the stereotype that 'certain groups are unable to achieve success without special protection.'") (quoting *Bakke*, 438 U.S. at 298).

85. *See, e.g.*, Brief for the United States as Amicus Curiae Supporting Petitioner at 16–24, Meredith v. Jefferson County Bd. of Educ., No. 05-915 (U.S. Aug. 21, 2006) (quoting *Grutter*, 539 U.S. at 338).

86. *See id.* at 20.

87. *See id.* at 22–23.

88. *Id.* at 22. In the 2000–2001 school year, approximately 3,000 students entered the Seattle District's high schools.

> Ten percent of those students were subject to the racial tiebreaker. Thus, under an individualized approach, the District would have had to examine only three hundred applications to determine who to admit to the oversubscribed schools. Instead, the District grouped those three hundred students into white and nonwhite categories and allowed a computer to select their assignment based solely upon their race.

Seattle, 426 F.3d at 1212 (Bea, J., dissenting).

vanced by the law school in fostering viewpoint diversity, but it is not tailored to a public secondary school's compelling interest in producing the educational benefits of racial literacy.[89] The Supreme Court noted that the law school did not "limit in any way the broad range of qualities and experiences that may be considered valuable contributions to student body diversity."[90] To this end, the law school's policy made clear that "[t]here are many possible bases for diversity admissions, and provide[d] examples of admittees who have lived or traveled widely abroad, are fluent in several languages, have overcome personal adversity and family hardship, have exceptional records of extensive community service, and had successful careers in other fields."[91] These multiple bases for diversity ensure the "classroom discussion is livelier, more spirited, and simply more enlightening and interesting when the students have the greatest possible variety of backgrounds."[92]

In the high school context, as well, the educational benefits of class interactions are enhanced by viewpoint diversity. As the Supreme Court recognized in *Tinker*, "The [high school] classroom is peculiarly the marketplace of ideas. The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues . . . ."[93]

Whereas individualized assessment may be finely tailored to achieve the educational benefits of viewpoint diversity, however, such assessment is not at all tailored to achieve a public school district's *distinct* compelling interest in teaching racial literacy. The objective of teaching racial literacy is not necessarily advanced by assigning students to schools because of the diversity of their views. Instead, the precise educational outcome of teaching racial literacy is advanced by assigning meaningful numbers of *racially* diverse students to a school or classroom. Racial diversity in the high school environment thus has a particularly meaningful role in fostering the precise objective of teaching racial lit-

89. *See Grutter*, 539 U.S. at 337.

90. *Id.* at 338.

91. *Id.* (internal quotations and citations omitted).

92. *Id.* at 330 (internal quotations and citations omitted).

93. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 512 (1969) (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)) (internal quotations and citations omitted).

eracy.[94] The educational judgment that racial literacy is best taught in a racially diverse school environment is not only reasonable; it is virtually undisputed. If a school district has a compelling interest in fostering the educational benefits of a racially diverse educational environment, then a plan precisely designed to achieve that environment certainly meets any credible definition of narrowly tailored.[95]

2. Absence of Quotas

The second narrow-tailoring factor prohibits the use of quotas based upon race.[96] A quota is defined as "a program in which a certain fixed number or proportion of opportunities are 'reserved exclusively for certain minority groups.' Quotas 'impose a fixed number or percentage which must be attained, or which cannot be exceeded.'"[97] Public school districts commonly attempt to achieve a "meaningful" number of diverse students in an educational environment by approximating the racial diversity that exists in the district as a whole.[98]

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94. *See* Comfort v. Lynn Sch. Comm., 418 F.3d 1, 18 (1st Cir. 2005) (holding that when racial diversity is the compelling interest, "[t]he only relevant criterion, then, is a student's race; individualized consideration beyond that is irrelevant to the compelling interest"); Brewer v. W. Irondequoit Cent. Sch. Dist., 212 F.3d 738, 752 (2d Cir. 2000) ("If reducing racial isolation is—standing alone—a constitutionally permissible goal, . . . then there is no more effective means of achieving that goal than to base decisions on race."); *see also* Jeff Sapp, *Cooperative Learning: A Foundation for Race Dialogue*, 30 Teaching Tolerance (Fall 2006), http://www.tolerance.org/teach/magazine/features.jsp?is=39&ar+684; Spencer Kagan, *The Power to Transform Race Relations*, 30 Teaching Tolerance (Fall 2006), http://www.tolerance.org/teach/magazine/features.jsp?is=39&ar=684; Grant, Teaching and Learning About Racial Issues in the Modern Classroom (2003).

95. Reliance on group characteristics is not necessarily unconstitutional under the Fourteenth Amendment:

> Under the Fourteenth Amendment, a State may rely on age as a proxy for other qualities, abilities, or characteristics that are relevant to the State's legitimate interests. The Constitution does not preclude reliance on such generalizations. That age proves to be an inaccurate proxy in any individual case is irrelevant.

Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 84 (2000).

96. *Grutter*, 539 U.S. at 334.

97. *Id.* at 335 (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 496 (1989) and Sheet Metal Workers v. EEOC, 478 U.S. 421, 495 (1986) (O'Connor, J., concurring and dissenting in part)) (internal citation omitted).

98. For example, if a particular Seattle "District school is oversubscribed and 'integration positive'—*i.e.*, the white or nonwhite student body of the school deviates by plus or minus 10% or 15% (depending on the school year) of the preferred 40% white/60% nonwhite ratio," the District assigns students to a particular school whose presence will move the racial composition of that school closer to the racial composition of the entire district.

The districts argued that no quota exists because their race-conscious school assignment program "does not set aside a fixed number of slots for nonwhite or white students."[99] Yet, the districts arguably created a quota when they established the predetermined, preferred ratio of white and nonwhite students. In *Bakke*, the medical school argued that it did not operate an admissions quota because it did not always meet its goal of filling its predetermined number of seats.[100] Justice Powell rejected that argument, stating that regardless of whether the preselected seats were a "quota" or a "goal":

> This semantic distinction is beside the point: The special admissions program is undeniably a classification based on race and ethnic background. To the extent that there existed a pool of at least minimally qualified minority applicants to fill the 16 special admissions seats, white applicants could compete only for 84 seats in the entering class, rather than the 100 open to minority applicants. Whether this limitation is described as a quota or a goal, it is a line drawn on the basis of race and ethnic status.[101]

School districts also have attempted to avoid *Grutter*'s prohibition against quotas by attempting to classify their predetermined ratios as a "critical mass."[102] *Grutter* recognized that in order to achieve its compelling interest in obtaining the educational benefits from a diverse post-secondary school environment, a university could strive to enroll a "critical mass" of nonwhite students.[103] The Court stressed that the University could determine what number of nonwhite admittees would be "meaningful" enough to achieve its desired educational benefit.[104] The Court defined a critical mass as "meaningful numbers" and "meaningful representation" precisely because it recognized that the University could properly determine that some degree of racial balance would be necessary to achieve the benefits of a diverse educational environment.[105]

Parents Involved in Cmty. Schs. v. Seattle Sch. Dist., No. 1, 426 F.3d 1162, 1213 (9th Cir. 2005) (Bea, J., dissenting).

99. *Id.* at 1184.

100. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 288 (1978).

101. *Id.* at 289.

102. *See, e.g.*, *Seattle*, 426 F.3d at 1184.

103. *See Grutter*, 539 U.S. at 333, 335–36.

104. *See Seattle*, 426 F.3d at 1173 (citing *Grutter*, 539 U.S. at 328–33).

105. *See Grutter*, 539 U.S. at 318.

Although the law school's plan did not seek to admit a set number or percentage of minority students, the law school would consult "daily reports" that kept track of the racial composition of the incoming class.[106] As the court in *Seattle* noted, "the Court [in *Grutter*] held that this attention to numbers did not transform the law school plan into a quota, but instead demonstrated that the law school sought to enroll a critical mass of minority students in order 'to realize the educational benefits of a diverse student body.'"[107]

A public school district's decision to assign a student to a particular school or classroom in order to realize these benefits is neither driven by a quota nor the effort to achieve racial balance for its own sake. To the contrary, the school seeks to assign a critical mass of white and nonwhite students in schools in order to realize its compelling educational interests.[108] A school district that seeks to maintain a meaningful number of white and nonwhite students in each of its high schools does so in order to achieve its compelling educational interest in fostering the educational benefits derived from an educational environment with that "meaningful" number of students from different racial groups. The Seattle District, for instance, determined meaningfulness by adopting the 15 percent plus or minus variance tied to

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106. *Id.*

107. *Seattle*, 426 F.3d at 1184 (quoting *Grutter*, 539 U.S. at 318).

108. Thus, the Court in *Seattle* concluded: "Although the dissent contends that the 'tiebreaker aims for a rigid, predetermined ratio of white and nonwhite students,' we believe it is more appropriately viewed as a 'permissible goal.' Such a goal 'requires only a good faith effort . . . to come within a range demarcated by the goal itself.'" *Id.* at 1184 n.28 (quoting *Grutter*, 539 U.S. at 335).

In fact, the Seattle District's race-conscious assignment process

> does not set aside a fixed number of slots for nonwhite or white students in any of the District's schools. The tiebreaker is used only so long as there are members of the underrepresented race in the applicant pool for a particular oversubscribed school. If the number of students of that race who have applied to that school is exhausted, no further action is taken, even if the 15 percent variance has not been satisfied. That is, if the applicant pool has been exhausted, no students are required or recruited to attend a particular high school in order to bring it within the 15 percent plus or minus range for that year.
>
> Moreover, the number of white and nonwhite students in the high schools is flexible and varies from school to school and from year to year. This variance in the number of nonwhite and white students throughout the District's high schools is because, under the Plan, assignments are based on students' and parents' preferences. The tiebreakers come into play in the assignment process only when a school is oversubscribed.

Id. at 1184–85.

demographics of students in the Seattle public schools.[109] As the court in *Seattle* articulated the District's method as:

> [W]hen an oversubscribed high school has more than 75 percent nonwhite students (i.e., more than 15 percent above the overall 60 percent nonwhite student population) and less than 25 percent white students, or when it has less than 45 percent nonwhite students (i.e., more than 15 percent below the overall 60 percent nonwhite student population) and more than 55 percent white students, the school is considered racially concentrated or isolated, meaning that it lacks a meaningful number of students needed to realize the educational benefits of a diverse student body.[110]

In their efforts to assign a meaningful number of racially diverse students to their schools, some school districts use race in their assignment process. According to *Grutter* and *Gratz*, however, the use of race in governmental decisions is not itself a constitutional violation. In *Grutter*, the law school's goal of enrolling between 12 percent to 20 percent of underrepresented minorities in a given year was tied to the demographics of its applicant pool.[111] Moreover, the use of a school district's overall demographics as a guide to what constitutes a "meaningful" number of white and nonwhite students is consistent with traditional standards employed in both voluntary and court-ordered school desegregation plans. As the Seattle District's expert testified:

> Most of the cases I've participated in . . . generally worked with numbers that reflect the *racial composition of the school district* but, at the same time, tr[ied] to allow the district sufficient flexibility so that it would not have to regularly and repeatedly move students on a short-term basis simply to maintain some specific number. That's why *we see ranges of plus or minus 15 percent* in most cases of school desegregation.[112]

Indeed, school districts throughout the country commonly determine whether a particular school is "sufficiently desegregated by looking to the 'population of the district' in question."[113] Given

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109. *See id.* at 1184.

110. *Id.* at 1185 (internal quotations omitted).

111. For example, in 1995, 662 (approximately 16%) of the 4,147 University of Michigan Law School applicants were underrepresented minorities; in 1996, 559 (approximately 15%) of the 3,677 law school applicants were underrepresented minorities; in 1997, 520 (approximately 15%) of the 3,429 law school applicants were underrepresented minorities. *See Grutter*, 539 U.S. at 384 tbl. 1–3 (Rehnquist, C.J., dissenting).

112. *Seattle*, 426 F.3d at 1186.

113. *See id.*; *see also* Comfort v. Lynn Sch. Comm., 418 F.3d 1, 21 (1st Cir. 2005) (hold-

this established conception of "meaningful" numbers of diverse students in the public high school desegregation context, a school district's belief that it can achieve the educational benefits of racial diversity by striving for those numbers is certainly reasonable. A student assignment plan designed to foster the educational benefits recognized to flow from meaningful numbers of white and nonwhite students in a particular school must necessarily attempt to achieve those meaningful numbers.[114]

3. Race-Neutral Alternatives

In *Grutter*, the Supreme Court explained that narrow tailoring "require[s] serious, good faith consideration of *workable* race-neutral alternatives *that will achieve the diversity the university seeks*."[115]

The following "race-neutral" alternatives have been suggested as methods to achieve racial diversity in an educational environment: (1) student assignment based on socio-economic status; (2) student assignment based on interest in magnet schools; (3) student assignment by lottery; and (4) student assignment based on a multi-factoral index.[116]

a. Socio-Economic Integration Strategies

In the Seattle District, "the northern Seattle area contains a majority of white students and is historically more affluent."[117] The southern Seattle area is necessarily less affluent. "Thus, moving more affluent students south, and [less affluent] students

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ing that a "transfer policy conditioned on district demographics (+/- 10–15%)" was not a quota because it "reflects the defendants' efforts to obtain the benefits of diversity in a stable learning environment"); Belk v. Charlotte-Mecklenburg Bd. of Educ., 233 F.3d 232, 287-88 (4th Cir. 2000) (Traxler, J., dissenting) (citing DAVID J. ARMOR, FORCED JUSTICE: SCHOOL DESEGREGATION AND THE LAW 160 (1995), which observed that over [74%] of the school districts with desegregation plans use a variance of plus or minus [20%] or greater) (bracketed figures reflect Armor's data); 34 C.F.R. § 280.4(b)(4) (2006) (defining "minority group isolation" as "a condition in which minority group children constitute more than 50 percent of the enrollment of [the] school").

114. *See Grutter*, 539 U.S. at 336 ("'[S]ome attention to numbers, without more, does not transform a flexible admissions system into a rigid quota.") (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 323 (1978)).

115. *Id.* at 339 (emphasis added).

116. *See Seattle*, 426 F.3d at 1177, 1214–15.

117. *Id.* at 1214 n.23 (Bea, J., dissenting) (quotations omitted).

north, could possibly provide a more diverse student body."[118] Nonetheless, the Seattle District rejected this alternative because it found an imprecise correlation between poverty and minority status, and because it did not want to require students to reveal their socioeconomic status to their peers.[119] There is great debate about whether student assignment or admission based on socio-economic status is an effective race-neutral method of achieving a racially diverse educational environment.[120] Even if student assignment based on socio-economic status might result in racial diversity, there is no doubt that the use of socio-economic status is less precisely tailored to achieve the goal of meaningful racial diversity than the use of racial diversity itself.

b. Magnet Programs Designed to Achieve Integration

In *Seattle*, the court observed:

> [I]n 2000, the Urban League of Metropolitan Seattle presented a high school assignment plan to the District. The plan proposed that each neighborhood region in Seattle would have a designated high school. Students would still be able to apply to any high school in Seattle, but when oversubscription occurred, students living in the designated "reference area" would first be assigned to their regional high school ahead of those who did not. To avoid racial concentration in the schools, the plan proposed "merit-based academic, a vocational and vocational magnet programs."[121]

According to the dissent in *Seattle*, "these programs will help each school address racial diversity issues by encouraging students to travel outside of their communities to participate in a specific magnet program."[122]

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118. *Id.*

119. *See id.* at 1188–89.

120. *See, e.g.*, WILLIAM G. BOWEN ET. AL., EQUITY AND EXCELLENCE IN AMERICAN HIGHER EDUCATION, 176–77 (2005); CATHERINE L. HORN & STELLA M. FLORES, THE CIVIL RIGHTS PROJECT, HARVARD UNIVERSITY, PERCENT PLANS IN COLLEGE ADMISSIONS: A COMPARATIVE ANALYSIS OF THREE STATES' EXPERIENCES (2003); RICHARD KAHLENBERG, THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION (1996); Richard Sander, *Experimenting with Class-Based Affirmative Action*, 47 J. LEGAL EDUC. 471 (1997); Alex MacGillis, *Basing Affirmative Action on Income Changes Payoff*, BALT. SUN. May 23, 2003, at 1C; Mark Satin, *Economic-Class-Based Affirmative Action: The Elites Loathe It, the People Want It*, RADIAL MIDDLE NEWSLETTER, July/Aug. 2003, http://www.radicalmiddle.com/x_affirmative_action.htm.

121. *Seattle*, 426 F.3d at 1215 (Bea, J., dissenting).

122. *Id.* (Bea, J., dissenting).

Among the most effective magnet programs in fostering racial integration involve dual language immersion. These programs attracts an equal number of English speaking students and students for whom Spanish is their first language. The magnet may pull white students away from their geographic attendance zones and into a school with a significant number of Hispanic or Latino students for whom English may not be their first language. The program's goal is foreign-language acquisition, but its methods may have the collateral benefit of achieving a racially diverse classroom. Yet, these programs, as well, will not be as finely tailored to achieve the goal of racial diversity. Racial diversity is at best a collateral benefit of the magnet program.

c. Lottery

Public school districts may always choose to use a lottery to determine which students should be assigned to its oversubscribed high schools. The lottery alternative assumes that drawing from this pool would produce a student body in each of the oversubscribed schools that approaches the district's overall racial composition. These assumptions, however, are not logical. As the Seattle experience suggests, the pool of applicants to any oversubscribed school will necessarily be skewed toward less than meaningful numbers of diverse students. In the Seattle litigation, Superintendent Olchefske testified that "District patterns indicate that more people choose schools close to home."[123] The pool of applicants inevitably would be skewed in favor of the demographic of the surrounding residential area. Where there is meaningful residential segregation in a district such that non-geographic student assignment is necessary to achieve meaningful diversity in a particular school, random sampling from such a racially skewed pool would produce a racially skewed student body. As one Seattle District Board member testified, a lottery was not a viable alternative because "if applicants are overwhelmingly majority and you have a lottery, then your lottery—the pool of your lottery kids are going to be overwhelmingly majority. We have a diversity goal."[124]

123. *Id.* at 1190.
124. *Id.*

d. Diversity Index

The San Francisco California public school district employs a program focused on enhancing diversity in the classrooms.[125] The program allows students to choose any school within the district.[126] When a school is oversubscribed, the program first assigns students with siblings to the same school, and then accommodates students with specialized learning needs.[127] After that, the so-called "Diversity Index" is employed.[128] "Under the Diversity Index process, the school district calculates a numerical profile of all student applicants. The current Diversity Index is composed of six binary factors: socioeconomic status, academic achievement status, mother's educational background, language status, academic performance index, and home language."[129] Even if the program may result in enhanced diversity, the Supreme Court has made clear that "[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative."[130] Furthermore, the school district cannot be required to adopt race-neutral measures that would force it to sacrifice other educational values central to its mission.[131] If the compelling interest to be achieved is meaningful racial diversity within schools in a segregated school district, efforts to achieve that diversity by ignoring the race of students cannot be as precisely tailored as considering the race of students in that process.[132]

There may be school districts in which student assignment plans based on socio-economic status, magnet schools, lottery, or index happen to result in a meaningful number of racially diverse students in a particular school. Yet, while race-neutrality as an

125. David I. Levine, *Public School Assignment Methods after* Grutter *and* Gratz: *The View from San Francisco*, 30 HASTINGS CONST. L.Q. 511, 531–32 (2003).

126. *Id.* at 529.

127. *Id.*

128. *Id.*

129. *Id.* at 529–30.

130. Grutter v. Bollinger, 539 U.S. 306, 339 (2003).

131. *See id.* at 340.

132. *See id.* (dismissing the race-neutral alternative of "percentage plans," advocated by the United States in an amicus brief, because the "United States [did] not . . . explain how such plans could work for graduate and professional schools"); *see also* Comfort v. Lynn Sch. Comm., 418 F.3d 1, 23 (1st Cir. 2005) (noting that Lynn rejected the use of a lottery in place of the race-based tiebreaker, and holding that "Lynn must keep abreast of possible alternatives as they develop, but it need not prove the impracticability of every conceivable model for racial integration") (internal citation omitted).

abstract matter may be preferable to race-conscious decisions, race-neutrality cannot be required where it is not at all tailored to the interest deemed compelling. Because producing the educational benefits of racial literacy is a compelling interest, a school district may permissibly seek that interest if its means are narrowly tailored to achieve that precise interest. A school district should not be encouraged to conceal its compelling interest of achieving *racial* literacy through the use of "some clumsier proxy device" [133] such as poverty, lottery, magnet schools, or indexes.

Professional educators recognize without refutation that student assignment to create meaningful numbers of racially diverse students in a school or classroom is precisely tailored to the compelling interest in teaching racial literacy. According to the Ninth Circuit, the Seattle District established that racial diversity in secondary education produces a number of compelling educational benefits.[134] Experts testified that in racially diverse schools, "both white and minority students experienced improved critical thinking skills—the ability to both understand and challenge views which are different from their own."[135]

As the District's expert explained:

> [T]he social science research "clearly and consistently shows that, for both white and minority students, a diverse educational experience results in improvement in race-relations, the reduction of prejudicial attitudes, and the achievement of a more . . . inclusive experience for all citizens . . . . *The research further shows that only a desegregated and diverse school can offer such opportunities and benefits.* The research further supports the proposition that these benefits are long lasting."[136]

The Seattle District's expert also noted that "'research shows that a[ ] desegregated educational experience opens opportunity networks in areas of higher education and employment . . . [and] strongly shows that graduates of desegregated high schools are more likely to live in integrated communities than those who do

133. *See Comfort*, 418 F.3d at 29 (Boudin, J., concurring).

134. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist., No. 1, 426 F.3d 1162, 1174–77 (9th Cir. 2005); *see also* sources cited *supra* note 9.

135. *Id.* at 1174 (internal quotations omitted).

136. *Id.* at 1174–75.

not, and are more likely to have cross-race friendships later in life.'"[137]

In the *Seattle* litigation, the fact that a diverse secondary school environment produces educational benefits was not disputed. "Even Parents' expert conceded that '[t]here is general agreement by both experts and the general public that integration is a desirable policy goal mainly for the social benefit of increased information and understanding about the cultural and social differences among various racial and ethnic groups.'"[138] In fact, the dissent in the *Seattle* litigation acknowledged

> [t]he idea that children will gain social, civic, and perhaps educational skills by attending schools with a proportion of students of other ethnicities and races, which proportion reflects the world in which they will move, is a notion grounded in common sense. It may be generally, if not universally, accepted.[139]

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137. *Id.* at 1175 (alterations in original). The District's compelling interests in diversity also have been endorsed by Congress. In the Magnet Schools Assistance Act, Congress found that "[i]t is in the best interests of the United States—(A) to continue the Federal Government's support of local educational agencies that are . . . *voluntarily* seeking to foster meaningful interaction among students of different racial and ethnic backgrounds, beginning at the earliest stages of such students' education; (B) to ensure that all students have equitable access to a high quality education that will prepare all students to function well in a technologically oriented and a highly competitive economy comprised of people from many different racial and ethnic backgrounds." 20 U.S.C. § 7231(a)(4)(A)–(B) (emphasis added).

138. *Seattle*, 426 F.3d at 1175 (alteration in original). Research has shown that intergroup contact reduces prejudice and supports the values of citizenship. *See* Black, *supra* note 9, at 951–52 (collecting academic research demonstrating that interpersonal interaction in desegregated schools reduces racial prejudice and stereotypes, improving students' citizenship values and their ability to succeed in a racially diverse society in their adult lives); *see also supra* notes 5 & 8.

139. *Seattle*, 426 F.3d at 1196 (Bea, J., dissenting); *see also Comfort*, 418 F.3d at 14–16 (holding that the "negative consequences of racial isolation that Lynn seeks to avoid and the benefits of diversity that it hopes to achieve" constituted compelling interests) ("In fact, there is significant evidence in the record that the benefits of a racially diverse school are more compelling at younger ages."); Brewer v. W. Irondequoit Cent. Sch. Dist., 212 F.3d 738, 752 (2d Cir. 2000) (holding that "a compelling interest *can* be found in a program that has as its object the reduction of racial isolation and what appears to be *de facto* segregation"), *superseded on other grounds as stated in* Zervos v. Verizon N.Y., Inc., 252 F.3d 163, 171 n.7 (2d Cir. 2001); Parent Ass'n of Andrew Jackson High Sch. v. Ambach, 738 F.2d 574, 579 (2d Cir. 1984) ("[W]e held that the Board's goal of ensuring the continuation of relatively integrated schools for the maximum number of students, even at the cost of limiting freedom of choice for some minority students, survived strict scrutiny as a matter of law."); McFarland v. Jefferson County Pub. Sch., 330 F. Supp. 2d 834, 851 (W.D. Ky. 2004) (concluding that voluntary maintenance of the desegregated school system was a compelling state interest and the district could consider race in assigning students to comparable schools), *aff'd*, 416 F.3d 513 (6th Cir. 2005) (per curium); Comfort v. Lynn School Comm., 283 F. Supp. 2d 328, 356 (D. Mass. 2003) (noting expert testimony describing ra-

The Supreme Court, as well, has recognized the educational benefits of a racially diverse student population.[140]

When producing the educational advantages of a racially diverse school is the compelling interest, there is no more effective means than a consideration of race to achieve that interest. Even the expert called by parents opposed to the district's plan was forced to concede the logic of that plan: "[I]f you don't consider race, it may not be possible to offer an integrated option to students . . . . [I]f you want to guarantee it you have to consider race."[141] As the *Seattle* court concluded: "The logic is self-evident: When racial diversity is a principal element of the school district's compelling interest, then a narrowly tailored plan may explicitly take race into account."[142]

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cial stereotyping as a "'habit of mind' that is difficult to break once it forms" and explaining that "[i]t is more difficult to teach racial tolerance to college-age students; the time to do it is when the students are still young, before they are locked into racialized thinking"); Goodwin Liu, Brown, Bollinger, *and Beyond*, 47 HOW. L.J. 705, 755 (2004) ("[I]f 'diminishing the force of [racial] stereotypes' is a compelling pedagogical interest in elite higher education, it can only be *more so* in elementary and secondary schools—for the very premise of *Grutter*'s diversity rationale is that students enter higher education having had too few opportunities in early grades to study and learn alongside peers from other racial groups.") (quoting Grutter v. Bollinger, 539 U.S. 306, 333 (2003)) (alterations in the original) (emphasis added); *see also supra* notes 5 & 9.

140. *See* Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 480, 487 (1982) (holding unconstitutional the state initiative that blocked the Seattle School District's use of mandatory busing to remedy de facto segregation); Bustop, Inc. v. Bd. of Educ. of Los Angeles, 439 U.S. 1380, 1383 (1978) (Rehnquist, Circuit Justice) (denying a request to stay implementation of a voluntary desegregation plan and noting that there was "very little doubt" that the Constitution at least *permitted* its implementation); Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 242 (1973) (Powell, J., concurring in part and dissenting in part) ("School boards would, of course, be free to develop and initiate further plans to promote school desegregation . . . . Nothing in this opinion is meant to discourage school boards from exceeding minimal constitutional standards in promoting the values of an integrated school experience."); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971) (stating that school authorities "are traditionally charged with broad power to formulate and implement educational policy and might well conclude . . . that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole"); N.C. State Bd. of Educ. v. Swann, 402 U.S. 43, 45 (1971) ("[A]s a matter of educational policy school authorities may well conclude that some kind of racial balance in the schools is desirable quite apart from any constitutional requirements.").

141. *Seattle*, 426 F.3d at 1191 (omissions and alterations in original). As Superintendent Olchefske stated, "'when diversity, meaning racial diversity, is part of the educational environment we wanted to create, I think our view was you took that issue head on and used—you used race as part of the structures you developed.'" *Id.*

142. *Id.* (citing Hunter v. Regents of Univ. of Cal., 190 F.3d 1061, 1067 (9th Cir. 1999)) (upholding as narrowly tailored the admissions policy of an elementary school—operated as a research laboratory—that explicitly considered race in pursuit of a racially balanced research sample).

4. Undue Harm

The fourth narrow-tailoring factor requires that the District's use of the racial tiebreaker "not 'unduly burden individuals who are not members of the favored racial and ethnic groups.'"[143] A narrowly tailored plan ensures that no member of any racial group is unduly harmed.[144] Opponents of district assignment plans argue that every student who is denied his or her choice of schools because of the integration-assignment goals suffers a constitutionally significant burden. Public school students, however, have no constitutional right to attend any particular school within a district.[145]

Moreover, the use of race in student assignment does not uniformly benefit one race to the detriment of another. Under student assignment plans designed to attain meaningful numbers of racially diverse students, white students will be given preference over nonwhite students in some schools and at other schools, nonwhite students are given preference over white students.[146] Accordingly, school districts are entitled to assign all students to any of their schools, no student is entitled to attend any specific school, and the use of race in student assignment cannot uniformly benefit any race or group of individuals to the detriment of another.

143. *Grutter*, 539 U.S. at 341 (quoting Metro Broad., Inc. v. FCC, 497 U.S. 547, 630 (1990) (O'Connor, J., dissenting).

144. *See id.*

145. *See* Bazemore v. Friday, 478 U.S. 385, 408 (1986) (White, J., concurring) ("School boards customarily have the power to create school attendance areas and otherwise designate the school that particular students may attend."); Barbier v. Connolly, 113 U.S. 27, 31–32 (1885) (stating that public education is squarely within the state's traditional police powers); *Comfort*, 418 F.3d at 20 ("The denial of a transfer under the [District's] Plan is . . . markedly different from the denial of a spot at a unique or selective educational institution.").

146. For instance, in Seattle:

> [I]n the 2000-01 school year, 89 more white students were assigned to Franklin, one of Seattle's most popular schools, than would have been assigned absent the tiebreaker; 107 more nonwhite students were assigned to Ballard, another of Seattle's most popular schools, than would have been assigned absent the tiebreaker; 27 more nonwhite students were assigned to Nathan Hale than would have been assigned absent the tiebreaker; and 82 more nonwhite students were assigned to Roosevelt than would have been absent the tiebreaker.

Seattle, 426 F.3d at 1192.

5. Sunset Provision

The fifth and final narrow-tailoring factor requires a public school district's race-conscious student assignment to "be limited in time," and "have a logical end point."[147] A workable "sunset" provision within any government-operated racial classification is vital:

> "[A] core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race."
>
> . . . .
>
> The requirement that all race-conscious admissions programs have a termination point "assure[s] all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself."[148]

Under *Grutter*, "this durational requirement can be met by 'periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity.'"[149] School districts constantly monitor and review their student assignment plans and enrollment figures. They also employ numerous forms of standardized tests and authentic assessments to determine whether their instructional practices are producing the desired learning outcomes. To the extent the monitored data shows that racial literacy is not produced in a racially diverse educational environment, the public school district will be able to make the data driven decision to alter its instructional practices. If the data reveals that racial literacy acquisition increases in a racially diverse environment, then secondary students will acquire that competency. Perhaps the most effective method of hastening the arrival of the day when race-conscious decisions by public school officials are no longer necessary is to ensure that secondary school students are taught racial literacy.

147. *Grutter*, 539 U.S. at 342.

148. *Id.* at 341–42 (quoting Palmore v. Sidoti, 466 U.S. 429, 432 (1984) and City of Richmond v. J.A. Croson Co., 488 U.S. 469, 510 (1989) (alteration in original)).

149. *Seattle*, 426 F.3d at 1192 (quoting *Grutter*, 539 U.S. at 342).

III. EDUCATIONAL STRATEGIES BY PUBLIC SCHOOL DISTRICTS DESIGNED TO TEACH RACIAL LITERACY ARE CONSTITUTIONAL UNDER AUTHENTIC STANDARDS OF EQUAL PROTECTION

As demonstrated in Section II of this article, a public school district's race-conscious school assignment decisions can survive current constitutional standards of strict scrutiny where they are narrowly tailored to achieve the compelling interest in teaching racial literacy.

Under a strict scrutiny regime, however, the Supreme Court could as readily determine that a school district's educational objectives are not "compelling" or that the school district's educational strategies are not "narrowly tailored" to achieve their objectives. Such a judicial determination is possible because the Supreme Court's equal protection doctrine presumes that any race-conscious decisions by governmental officials are unconstitutional, unless the government can affirmatively convince the Court that its interests are "compelling" and its means are sufficiently tailored to achieve those interests. As demonstrated in this Section, the Court's presumption that race-conscious decisions are violative of "equal protection" is contrary to any authentic understanding of the Equal Protection Clause and the principle of equality on which it is based.

A. *The Supreme Court's Presumption that Race-Conscious Decisions Violate the Principle of Equality is Unfounded*

The Court's doctrinal presumption that race-conscious governmental action is unconstitutional has a dubious lineage. The Supreme Court's three-tiered Equal Protection Clause analysis[150] evolved from the Court's suspicion that legislation classifying persons based on race was designed to disadvantage members of a racial minority.[151] Under that analysis, a government educational program that affects a "suspect class," like an underrepresented racial minority, will be strictly scrutinized to determine

150. *See supra* note 16.

151. *See, e.g.*, Korematsu v. United States, 323 U.S. 214, 216 (1944); *see also* Lucy Katz, *Public Affirmative Action and the Fourteenth Amendment: The Fragmentation of Theory after* City of Richmond v. J.A. Croson, Co. *and* Metro Broadcasting, Inc. v. Federal Communications Commission, 17 T. MARSHALL L. REV. 317, 339 (1992).

whether it violates the Fourteenth Amendment.[152] The source for such heightened scrutiny is often traced to footnote four in *United States v. Carolene Products*[153] Yet, that footnote was designed at most to suggest exceptions to the presumption of constitutionality usually given to legislation.[154] The *Carolene Products* Court cautioned that the presumption of constitutionality may be "narrower" where the challenged legislation is within a "specific prohibition of the Constitution," or where the law "restricts those political processes which can ordinarily be expected to bring about the repeal of undesirable legislation" or is "directed at particular religious, [ ] national, or racial minorities," or "discrete and insular minorities."[155]

While the Court questioned whether "exacting judicial scrutiny" might be appropriate in these circumstances, it never suggested overturning the presumption that legislation is constitutionally valid. The Court did not remotely suggest that legislation be presumed unconstitutional even in the situations it identified as exceptional. Nevertheless, under the "strict scrutiny" standard developed since *Carolene Products*, any state regulation that classifies people based on their race is presumed to violate the Equal Protection Clause; that presumption is unassailable unless the state can show that the challenged law is finely tailored to achieve a compelling or substantial state interest.[156] Accordingly, in *Gratz v. Bollinger*, the Court reaffirmed that any governmental program that classifies persons based on race is presumed to vio-

152. *See* Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 560–61 (1982) (citing Carey v. Brown, 447 U.S. 455, 460 (1980)); *cf.* Loving v. Virginia, 388 U.S. 1, 11 (1967) ("'[d]istinctions between citizens solely because of their ancestry [are] odious to a free people whose institutions are founded upon the doctrine of equality'" (quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943)); *Korematsu*, 323 U.S. at 216 ("all legal restrictions which curtail the civil rights of a single racial group are immediately suspect").

153. 304 U.S. 144, 152 n.4 (1938); *see, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 495 (1989); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 290 (1978).

154. *United States v. Carolene Prods.*, 304 U.S. 144, 152, n.4; *see also* JOHN HART ELY, DEMOCRACY AND DISTRUST 75–77 (1980) (expanding upon the footnote's suggestions to create a theory of judicial review based upon the Court's role in protecting the democratic political process).

155. *Carolene Prods.*, 304 U.S. at 152 n.4 (internal citations omitted).

156. *E.g.*, Gratz v. Bollinger, 539 U.S. 244, 270 (2003); Grutter v. Bollinger, 539 U.S. 306, 326 (2003). *See generally* Angelo N. Ancheta, *Contextual Strict Scrutiny and Race-Conscious Policy Making*, 36 LOY. U. CHI. L.J. 21 (2004).

late the Equal Protection Clause, even if it is designed to assist a "suspect class."[157]

The Court's presumption that race-conscious decisions are unconstitutional not only has a questionable precedential foundation, it is contrary to the principle of equality itself. As Aristotle fully understood, his maxim that like cases should be treated in a like manner, and that unlike cases should be treated in an unlike manner[158] requires both a descriptive analysis of the "likeness" of citizens and a normative analysis of the propriety of their treatment by the law.[159] Even if a regime presumes that all persons are entitled by their nature to equal protection of the laws, important judgments about which cases are in fact alike and therefore should be treated alike cannot be resolved without standards independent of equality.

Once these judgments are made, however, the equality maxim appears to call into question laws that treat like cases in an unlike manner. Presuming the constitutionality of laws that treat like cases in a like manner seems to be consistent with the equality maxim. Yet, the equality maxim also appears to question laws that treat unlike cases in a like manner; the maxim should lead to a presumption against the constitutionality of those laws. Laws that treat like cases in a like manner and unlike cases in an unlike manner should enjoy a presumption of constitutionality under the equality principle.

In a seminal series of publications, Professor Peter Westen shows that Aristotle's principle of equality is circular,[160] and cannot be employed to resolve any jurisprudential question without reference to "substantive" values or rights wholly apart from equality itself.[161] Professor Westen dissects each part of the Aris-

157. 539 U.S. at 270.

158. *See* Westen, *supra* note 152, at 543 (citing ARISTOTLE, THE NICOMACHEAN ETHICS 1131a–1131b (Sir David Ross trans. 1925)).

159. Aristotle recognized that each regime would have to reach the political judgment about whether its citizens were "like" or "unalike." He understood that linking justice with equality begged the political question of the relevance of similarities and differences: "all men agree that what is just in distribution must be according to merit in some sense though they do not all specify the same sort of merit." ARISTOTLE, *supra* note 158, at 1131a.

160. Westen acknowledges that this insight into the circular nature of "equality" is not new. Indeed, he posits that Aristotle's equality maxim has had staying power partly because it expresses an unassailable tautology. Westen, *supra* note 152, at 572–78.

161. Westen, *supra* note 152, at 561; *see also* PETER WESTEN, SPEAKING OF EQUALITY:

totelian equality principle. First, the formula requires a determination of whether two or more persons are, or should be deemed, alike for the purpose of applying the equality principle.[162] Because no two persons are truly alike, that determination depends on a judgment about the relevance of the undeniable differences between people. People are alike only if their differences are judged irrelevant by some external standard.[163]

Second, Westen shows that "treatments can be alike only in reference to some moral rule."[164] The same moral rule or independent legal standard that determines the relevance of people's similarities and dissimilarities also determines whether people should or should not be treated alike under the law. A law cannot be judged, therefore, by the extent to which it treats people equally. Westen concludes that the constitutional concept of equal protection under the law is "an empty vessel with no substantive moral content of its own."[165] Accordingly, an idea of justice based solely on the principle of equality is meaningless without "substantive moral or legal standards that determine what is one's 'due.'"[166]

Shortly after Westen authored his seminal work, a host of scholars feverishly attempted to inject some independent meaning into the idea of equality.[167] Westen, however, effectively discarded these arguments.[168] More recently, Professors Christopher

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AN ANALYSIS OF THE RHETORICAL FORCE OF "EQUALITY" IN MORAL AND LEGAL DISCOURSE (1990) [hereinafter SPEAKING OF EQUALITY]; Peter Westen, *The Meaning of Equality in Law, Science, Math, and Morals: A Reply*, 81 MICH. L. REV. 604 (1983) [hereinafter Westen *Reply*].

162. Westen, *supra* note 152, at 543.

163. *See id.* at 544–45.

164. *Id.* at 547.

165. *Id.*

166. *Id.* at 557. Any principle of justice based on this empty idea of equality is vacuous as well. The foundation of justice is "giving every person his due." *Id.* at 556. The equality principle's declaration that persons who are alike should be treated alike indicates that treating people equally means giving them their "due." To argue that justice requires that persons who are alike should be treated alike, therefore, has no genuine meaning unless the argument contains some moral basis for determining whether they are alike in such a way as to make morally proper their similar treatment. *Id.* at 557.

167. *See, e.g.*, Erwin Chemerinsky, *In Defense of Equality: A Reply to Professor Westen*, 81 MICH. L. REV. 575 (1983); William Cohen, *Is Equal Protection Like Oakland? Equality as a Surrogate for Other Rights*, 59 TUL. L. REV. 884 (1985); Anthony D'Amato, *Is Equality a Totally Empty Idea?*, 81 MICH. L. REV. 600 (1983); Kent Greenawalt, *How Empty is the Idea of Equality?*, 83 COLUM. L. REV. 1167 (1983).

168. *See generally* Westen *Reply*, *supra* note 161.

Peters and Kent Greenawalt have tried to resurrect the principle of equality.

Professor Peters argues that the principle of "prescriptive equality" is not meaningless. Under this principle, the bare fact that a person has been treated in a certain way is a reason in itself for treating another, identically situated person in the same way."[169] Once it is determined that two persons are identically situated, Peters contends, the equality principle has meaning because it requires their identical treatment.[170] Peters concedes, however, that if this prescriptive principle does have any meaning, that meaning is misguided because it may lead to treating equals equally, even if that treatment is unjust.[171] For example, Professor Peters imagines a situation in which eleven drowning people compete for only ten available spots on a lifeboat.[172] Because prescriptive equality demands that all of them be treated equally, none of them may receive spots in the lifeboat and all of them equally may drown.[173] Accordingly, Peters concludes that the principle of equality is either irrelevant or harmful when there are conditions of scarcity.[174]

Professor Greenawalt agrees with Peters that the principle of equality does not always lead to "right action."[175] Still, Greenawalt contends that the equality principle has presumptive force because it "might pull some people to treat equals equally, although other considerations would suggest a different outcome."[176] For example, the principle of equality creates a presumption favoring equal distributions of lifeboat spots, but that presumption may be rebutted by stronger values, like saving lives.[177]

These scholars' efforts to resurrect the equality principle ultimately are unavailing. First, as Westen established in anticipating these efforts, any judicial allegiance to a deeply rooted pre-

169. Christopher J. Peters, *Equality Revisited*, 110 HARV. L. REV. 1210, 1223 (1997).
170. *Id.*
171. *Id.* at 1229.
172. *See id.* at 1237.
173. *Id.*
174. *Id.* at 1238.
175. Kent Greenawalt, *"Prescriptive Equality": Two Steps Forward*, 110 HARV. L. REV. 1265, 1277 (1997).
176. *Id.*
177. *Id.*

sumption favoring equal treatment is ultimately indeterminate and obfuscates judgments independent of equality.[178] The equality principle cannot support a presumption opposing laws that treat persons differently because all laws treat some people differently from others for some purposes. Second, and more importantly, the Court's presumption favoring equal treatment for all is inconsistent with the maxim of equality itself. Once again, the equality principle requires not only that like cases be treated in a like manner, but also that unlike cases be treated in an unlike manner.

Absent from the debate about the meaning of equality is any serious discussion of whether cases are in fact alike. Greenawalt, Peters, and even Westen focus their attention on the presumption favoring the like treatment of like cases. They assume that the cases at issue are alike, and question whether the law treats them in a like manner.[179] Hence, Peters' arguments about the possible injustice of treating like cases in a like manner (i.e., all drowning persons are treated the same, but they all die), do not question the basis for determining whether the cases are, in fact, "alike."[180] Greenawalt also argues that deeply rooted feelings favor like treatment, but only after it is determined that the cases at issue are in fact alike.[181] Yet, the equality maxim contains absolutely no presumption favoring like treatment. To the contrary, that maxim demands unlike treatment where it is determined that the persons affected by the treatment are, in fact, not alike.

As Westen shows, the question of whether individuals are "alike" cannot be answered by the principle of equality, but depends on standards anterior to equality.[182] Because no two persons are alike, the judicial system must create a mechanism for determining the significance of differences among individuals. The mechanism must have a descriptive and a normative component. The descriptive component provides a legitimate method of assessing actual, real-world conditions of relevant difference. The normative component provides a legitimate method of assessing which differences should be recognized as morally significant.

178. Westen, *supra* note 152, at 571–75.

179. *Id.* at 572–74; Greenawalt, *supra* note 175, at 1289; Peters, *supra* note 169, at 1260.

180. *See* Peters, *supra* note 169, at 1237–43.

181. Greenawalt, *supra* note 175, at 1273.

182. *See* Westen, *supra* note 152, at 571–72.

The moral or normative proposition that all men are created equal, for instance, may help to explain the presumption that all individuals are like cases and thus should receive like treatment.

Yet, that normative proposition is not a descriptive one. In fact, the premise that all men are created equal says nothing about whether individuals are in fact "alike" for any particular purpose. The premise that all individuals should be treated equally regardless of race or gender permeates the Supreme Court's Equal Protection Clause jurisprudence. That premise, however, obfuscates the fact that individuals are not in fact alike, and creates the unfounded presumption favoring laws that treat unlike cases as if they were alike. Only by ignoring even undisputed facts does the Court presume a lack of racial difference in education.[183]

183. The racial differences in educational opportunities, facilities, and outcomes are undisputed by all credible researchers. *See, e.g.*, MICHAEL KAUFMAN, EDUCATION LAW, POLICY AND PRACTICE 414, 441, 442, 526–32 (2005). Ironically, the Court is careful to consider relevant facts when it conducts its far less exacting review of legislation under the rational basis standard. Even in facial equal protection challenges to legislation, the Supreme Court has made clear that rational basis analysis cannot be conducted without considering the factual circumstances surrounding the legislation. In *Romer v. Evans*, 517 U.S. 620, 632–33 (1996), the Supreme Court reviewed the factual circumstances surrounding Colorado's enactment of a constitutional amendment that precluded governmental action designed to enable persons of gay, lesbian, or bisexual orientation to pursue legal claims. Significantly, the Court explained that when a governmental enactment passes the rational basis test, it does so because the Court has found that the law is "grounded in a sufficient *factual context* for [the Court] to ascertain some relation between the classification and the purpose it served." *Id.* (emphasis added).

The Court first weighed the facts leading up to the legislature's decision to enact the amendment, including the "impetus for the amendment and the contentious campaign" that preceded its adoption. *Id.* at 623. The Court next considered evidence presented to the lower courts of the "ultimate effect" and consequences of the amendment. *Id.* at 627. Third, the Court considered the full array of legal and social protections available in the state to persons who are not members of the group singled out for different treatment. *Id.* at 627–30. Finally, the Court's factual analysis led it to conclude that the amendment was "discontinuous with the reasons offered for it." *Id.* at 632. The Supreme Court did not consider Colorado's several rationales for its amendment in a vacuum. Rather, the Court assessed those justifications in the light of their "factual context." *Id.* at 632–33, 635. After reviewing that "factual context," the Supreme Court determined that it could not "credit" Colorado's explanations for its enactment. *Id.* at 635. The Court found the reality of record to be "so far removed" from the claimed basis for the amendment as to "belie" those claimed basises. *Id.* From the lack of any connection between the proffered justifications for the amendment and the factual circumstances surrounding the amendment, the Court reached the "inevitable inference" that the "disadvantage imposed is born of animosity toward the class of persons affected." *Id.* at 634. *Romer* is consistent with a strong line of Supreme Court authority that rejects any effort to divorce rational basis review from reality—even in facial challenge cases.

B. *The Supreme Court's Presumption That Racial Differences Do Not Exist in Education is Unfounded*

Westen's most important contribution to serious thought about equality may well be his critique of the abuses of the "equality" principle in legal and political discourse surrounding the Constitution's Equal Protection Clause.[184] Once it is conceded that the Equal Protection Clause does not require all persons to be treated alike, that clause, like the equality principle itself, cannot be interpreted without relying upon a legal or moral standard anterior to equality. Even scholars who doubt Westen's premise that equality is meaningless cannot deny his assertion that many judicial interpretations of the Equal Protection Clause rely on the empty rhetoric of equality to support otherwise unexamined and unsupportable presumptions.[185] This insight is particularly helpful in understanding the Supreme Court's equal protection decisions regarding race-conscious educational programs, and in any attempt to correct the Court's flawed logic.

The Court has slighted undisputed racial differences between students that warrant differential treatment under the law, from the apparent remediation of the racially discriminatory educational policies in *Brown v. Board of Education*[186] to the apparent assistance for racial minorities in *Grutter*[187] and *Gratz*.[188]

Brown cannot be justified by the equality principle alone. The Court declared that racially segregated educational facilities are "inherently unequal";[189] however, as Westen shows, there is no such thing as "inherent" inequality.[190] The actual reasoning of *Brown* is that state laws that impose racial segregation in public education violate the Equal Protection Clause because they injure African-American school children.[191] Under this logic, even if such

184. The Equal Protection Clause in the Constitution's Fourteenth Amendment provides that "no State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

185. *See, e.g.*, Cohen, *supra* note 167, at 902 (arguing that judges use equality as a rationale for deciding cases which are really based on other substantive values in order to "avoid larger issues").

186. 347 U.S. 483 (1954).

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

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

189. *Brown*, 347 U.S. at 495.

190. Westen, *supra* note 152.

191. *See Brown*, 347 U.S. at 494.

laws were to provide equal educational resources, they would nevertheless be unconstitutional because they would have a "detrimental effect" on African-American students by perpetuating stereotypes harmful to African-American students: (1) they reinforce a stigma of inferiority; (2) they generate a feeling of lesser status; (3) they retard the mental and educational development of African-American students; and (4) they deny to African-American students the educational benefits of attending a racially integrated school.[192]

On a fundamental level, *Brown* assumed that African-American children were "like" white children in their right to be free from the "injury" of segregated schools or from being denied the opportunity to attend a diverse school.[193] But, *Brown* can be understood only by looking to these important substantive values apart from equality. The notion that African-American students should be treated just like white students is used to legitimize the reality that their educational opportunities are not at all alike.

The misuse of equality also is evident in the Court's decisions regarding the constitutionality of race-conscious school admissions policies, presumably intended to assist racial minorities. Justice Powell's touchstone opinion in *Regents of the University of California v. Bakke* begins with the assertion that "equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color."[194] Yet, as Westen shows, equal protection always means one thing when applied to one individual, and something else when applied to another individual, if those two individuals are adjudged to be different in a relevant respect.[195] Indeed, Justice Powell himself indicates that "the attainment of a diverse student body" is a compelling interest that justifies the treatment of one race differently from another.[196]

The Supreme Court reaffirmed Justice Powell's view in *Grutter v. Bollinger* and *Gratz v. Bollinger*, cases involving the admissions policies at the University of Michigan and its law school.[197]

192. *See id.*
193. *See id.*
194. 438 U.S. 265, 289–90 (1978).
195. Westen, *supra* note 152.
196. *Bakke*, 438 U.S. at 311–12.
197. 539 U.S. 306, 325 (2003); 539 U.S. 244, 270–72 (2003).

The Court recognized that when it strictly scrutinizes all governmental "use[s] of race," it does so in order to take "relevant" differences between the races into account.[198] The Court acknowledges that "[c]ontext matters" and not every "decision influenced by race is equally objectionable."[199] In other words, African-American applicants to college and graduate school may not be "like" white applicants to college and graduate school because African-American students may bring an element of diversity to the educational institution different from that brought by a white student.

Yet, because all governmental programs treat some people differently from others, the question again reduces to whether the Supreme Court is willing to legitimize the distinction made between applicants. In *Grutter*, the Court recognizes that the University of Michigan has valuable reasons for treating applicants of one race differently from those of another, reasons which survive strict scrutiny. As discussed in the first section of this article, however, the Supreme Court has found only two political values to be so compelling as to justify governmental policies which treat persons differently because of their race: (1) remedying past discrimination against members of a racial minority; and (2) attaining a diverse student body.[200] Reduced to the equality principle, the Court indicates that African-American students are like white students in every other circumstance except victimization by specific, proven, past acts of racial injury and the capacity to bring diversity. Yet, the Court presumes that white students are otherwise like non-white students in their educational opportunities.

Suppose the Court did acknowledge that the educational opportunities available to African-American students are different from those available to white students because of their different history of injury from a legally enforced "racial caste system" in education, their different condition of injury from "conscious and unconscious race bias," their different condition of injury from educational segregation, and their different condition of injury from inadequate educational resources. In her dissent in *Gratz*, Justice Ginsburg recognizes that, "[o]ur jurisprudence ranks race

198. *Grutter*, 539 U.S. at 327.
199. *Id.*
200. *See supra* text accompanying notes 27–31.

a 'suspect' category, 'not because [race] is inevitably an impermissible classification, but because it is one which usually, to our national shame, has been drawn for the purpose of maintaining racial inequality.'"[201] Put another way, racial classifications should not be presumed to be "impermissible" where they are designed to eradicate rather than to maintain the actual condition of racial inequality. Governmental programs that treat races differently are not invalid under the Constitution if there is a legitimate determination that the races are in fact different. For Justice Ginsburg, the starting point for a serious Equal Protection Clause analysis is whether the individuals who are affected by a governmental program are in fact different.

C. *The Presumption Against Educational Programs That Differentiate Based on Race is Contrary to Authentic Principles of Equality and Equal Protection*

Genuine allegiance to the equality maxim in interpreting the Equal Protection Clause would lead courts to four analytical parameters.

First, governmental action that treats persons differently would be unconstitutional where those persons are determined to be the same. For example, a governmental program that allows only white students to attend a state law school would be unconstitutional because it treats white students differently from nonwhite students where such students are determined to be the same.[202] Similarly, as the court held in *Frontiero v. Richardson*,[203] a Congressional scheme that gave servicemen the benefit of claiming their spouses as medical dependents but denied that benefit to servicewomen constituted an "unconstitutional discrimination against servicewomen."[204] In his plurality opinion, Justice Brennan concluded that gender should be a "suspect class" and that the statute's classification of gender in the inter-

201. *Gratz*, 539 U.S. at 301 (Ginsburg, J., dissenting) (quoting Norwalk Core v. Norwalk Redev. Agency, 395 F.2d 920, 931–32 (2d Cir. 1968)).

202. *See, e.g.*, Sipuel v. Bd. of Regents, 332 U.S. 631, 632–33 (1948) (Equal Protection Clause requires Oklahoma to provide some codes to in-state legal education to both black and white students); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337, 351 (1938) (holding that the state's provision of legal education within the state for white students only violated the Equal Protection Clause).

203. 411 U.S. 677 (1973).

204. *Id.* at 679.

est of administrative convenience could not be sustained.[205] In his concurrence, Justice Powell (together with Chief Justice Burger and Justice Blackman) resisted the inclusion of women within "suspect classes," but agreed that the statute created an unconstitutional distinction between men and women without a rational basis.[206] Significantly, although Justice Brennan forcefully argued for giving women "suspect class" status, he concluded ultimately that the statute at issue would fail the rational basis standard as well.[207] Justice Brennan contends that "any statutory scheme which draws such a sharp line between the sexes, solely for the purpose of achieving administrative convenience, necessarily commands 'dissimilar treatment for men and women who are . . . similarly situated,' and therefore involves the 'very kind of arbitrary legislative choice forbidden by the [Constitution].'"[208] The Equal Protection Clause thus prohibits treating women differently from men, so long as they are determined to be the same.[209]

Second, governmental action that treats persons alike who are determined to be alike would be consistent with the equality principle within the Equal Protection Clause. For example, a governmental program requiring families to pay a user fee for bus transportation to school treats all families determined to be alike in their proximity to the school in the same way.[210] Similarly, a state statute that mandates the retirement of public employees at a certain age treats persons determined to be alike in their age in the same way.[211]

Third, governmental action that treats differently persons who are determined to be different would also be consistent with the maxim of equality. In *Rostker v. Goldberg*,[212] the Court upheld the Congressional decision to exclude women from registration for

205. *See id.* at 688–89 (plurality opinion).

206. *See id.* at 691–92 (Powell, J., concurring).

207. *See id.* at 684.

208. *Id.* at 690 (quoting Reed v. Reed, 404 U.S. 71, 76–77 (1971) (alteration in original).

209. *See* United States v. Virginia, 518 U.S. 515, 555–56 (1996) (holding that the Virginia Military Institute's refusal to admit women to its unique institution constituted a denial of equal protection).

210. *See* Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 465 (1988) (holding that North Dakota's requirement of a user fee for school bus transportation did not deny students unable to afford the fee equal protection).

211. *See* Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 314–17 (1976).

212. 453 U.S. 57 (1981).

the draft for military combat positions.[213] The Court concluded that the "'gender classification is not individious, but rather realistically reflects the fact that the sexes are not similarly situated' in this case."[214] In *Schlesinger v. Ballard*,[215] as well, the Court upheld a Navy policy that gave females a longer period than males to attain promotions necessary to continued military service.[216] The Court reasoned that "the different treatment of men and women naval officers . . . reflects, not archaic and overbroad generalizations, but, instead, the demonstratable fact that male and female line officers in the Navy are *not* similarly situated with respect to opportunities for professional service."[217]

In *Rostker*, the Court declared that "[t]he Constitution requires that Congress treat similarly situated persons similarly, not that it engage in gestures of superficial equality."[218] This same logic, of course, would lead to a presumption of constitutionality for governmental programs that treat persons differently because of their race or gender where racial or gender differences are determined to exist.

Finally, governmental programs that treat persons alike who are determined to be different would be unconstitutional, in violation of the Equal Protection Clause's principal of equality. For instance, a Virginia statue that subjected all voters to a poll tax would be unconstitutional to the extent it was determined that persons subjected to that similar tax are in fact dissimilar in a significant way.[219] By that same logic, governmental programs that treat all persons the same regardless of race would be unconstitutional where it was determined that there were significant racial differences.

As these possibilities demonstrate, a presumption against laws that treat unlike cases in a like manner is consistent with the maxim of equality within the Equal Protection Clause. That maxim certainly does not support the current presumption against the unconstitutionality of laws that treat students differ-

213. *Id.* at 83.
214. *Id.* at 79 (quoting Michael M. v. Super. Ct., 450 U.S. 464, 469 (1981)).
215. 419 U.S. 498 (1975).
216. *Id.* at 506, 510.
217. *Id.* at 508.
218. 453 U.S. at 79.
219. *See* Harper v. Virginia Bd. of Electors, 383 U.S. 663, 670 (1966).

ently based on race unless the Court determines that such students are in fact alike. Yet, the Court generally does not perform any serious analysis of whether the persons affected by the law are in fact alike. The *Carolene Products* footnote, which was designed to justify treating some classes differently from others, has led the Court to presume that those classes *should* be treated the same as others. Perhaps the assumption that persons should be treated the same regardless of race has led the Court to presume that they are in fact the same. Accordingly, the Court presumes that governmental programs that classify persons based on race are unconstitutional absent a showing that the different treatment is finely tailored to achieve a compelling interest. Yet, the Court never really determines whether the persons treated are in fact alike. The Court is willing to engage in moral determinations about whether differential legal treatments are appropriate, but generally is unwilling to engage in factual determinations about whether persons affected by governmental programs are actually different. In fact, the Court has hinted at its ability to do so. In *Michael M. v. Superior Court of Sonoma County*,[220] the Court declared that, "the Equal Protection Clause does not . . . require 'things which are different in fact . . . to be treated in law as though they were the same.'"[221]

Accordingly, as Justice Ginsburg suggests in her dissents in *Adarand* and *Gratz*, to judge educational programs which benefit African-Americans the same way as programs which injure them is to ignore the history and contemporary reality of differences in educational opportunity.[222] Although the Court employs the rhetoric of equality, its holding is really based on its political judgment that significant racial differences in educational opportunity should have little constitutional significance.

220. 450 U.S. 464 (1981).

221. 450 U.S. at 469 (1981) (quoting Rinaldi v. Yeager, 384 U.S. 305, 309 (1966)); *see also* Parham v. Hughes, 441 U.S. 347, 354 (1979); Califano v. Webster, 430 U.S. 313–18 (1977); Weinberger v. Wiesenfeld, 420 U.S. 636, 653 (1975); Schlesinger v. Ballard, 419 U.S. 498, 506–07 (1975); Kahn v. Shevin, 416 U.S. 351, 355–56 (1974).

222. *Gratz*, 539 U.S. at 301 (Ginsburg, J., dissenting); Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 275–76 (1995) (Ginsburg, J., dissenting).

IV. CONCLUSION

The Supreme Court's presumption that race-conscious educational decisions violate the Equal Protection Clause is based on its premise that white students and nonwhite students are "alike" in their educational opportunities. The evidence to the contrary is overwhelming. Yet, what is more astounding is that the Court is unwilling to test its presumption by looking at any such evidence. Nor is it willing to give much deference to lower courts who have considered such evidence as part of an adversarial process and determined that racial differences in fact exist in educational opportunities. Indeed, the Court may not even defer to the overwhelming educational judgment of educational experts who understand that racial differences exist, that teaching racial literacy is critical, and that racial literacy can best be taught in a classroom with a meaningful number of diverse students. Rather, the Court apparently is willing to presume that the educational opportunities available to white students *are* the "same" as those available to nonwhite students because they *should be* the same. The Court's presumptions about race may be aspirational, but they are not descriptive. Anyone who has had a high school class in racial literacy would know that.

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