2007

Constitutional De-Segregation Strategies: Teaching Racial Literacy to Secondary School Students and Preferencing Racially-Literate Applicants to Higher Education

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(STILL) CONSTITUTIONAL SCHOOL DE-SEGREGATION STRATEGIES: TEACHING RACIAL LITERACY TO SECONDARY SCHOOL STUDENTS AND PREFERENCING RACIALLY-LITERATE APPLICANTS TO HIGHER EDUCATION

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In Parents Involved in Community Schools v. Seattle School Dist. No. 1, *the Supreme Court declared that it will continue to scrutinize race-conscious educational decisions to insure that they are narrowly-tailored to serve a compelling governmental interest. This Article develops a strategy for enhancing racial diversity at all levels of American public education that can survive that rigorous constitutional scrutiny. The Article shows that school districts may prove that assigning a meaningful number of racially diverse students to their secondary schools is narrowly-tailored to achieve their compelling educational interest in teaching racial literacy. The constitutionality of this race-conscious educational strategy cannot be undermined by the availability of race-neutral student assignment plans; those race-neutral plans are not tailored to meet the precise educational objective of teaching racial literacy. This Article also demonstrates that an institution of higher learning that values racial literacy in its enrolled students may constitutionally prefer applicants who have a measurably strong foundation in racial literacy by virtue of having attended a racially-diverse secondary school. Those students would receive preferential admissions treatment not because of their race, but because of their acquisition of racial literacy. Accordingly, the compelling educational outcome of racial literacy can provide a constitutional foundation for enhancing racial diversity not only in secondary school, but in colleges and universities as well.*

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INTRODUCTION

In a candid interview after she authored the Supreme Court's *Grutter*[1] decision, Justice O'Connor observed that race–conscious college and university admissions would no longer be necessary if public elementary and secondary schools better prepared racially diverse students for higher education.[2] Justice O'Connor recognized the interdependence between racial diversity in higher education and racial diversity in high–quality pre–collegiate educational institutions, declaring that "artificial" racial preferences in college admissions will be required so long as there are racial disparities in pre–collegiate educational opportunities.[3]

In her *Grutter* Opinion, however, Justice O'Connor rejected the constitutionality of the use of race–conscious admissions to higher education solely as a method of compensating for inequitable educational preparation. According to the Supreme Court, race–conscious admissions policies violate the equal protection clause unless they are part of an individualized consideration of each applicant to determine whether the admission of that applicant might produce the educational benefits of a diverse learning environment.[4] In its most recent decision in *Parents Involved in Community Schools v. Seattle School Dist. No. 1*,[5] the Court reaffirmed its presumption that race–conscious educational decisions are unconstitutional, declaring that it will continue to scrutinize such decisions to determine whether they are narrowly tailored to serve a compelling governmental interest.[6] This Article develops a constitutional

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

2. *See* Steven A. Holmes & Greg Winter, *Test of Time: Fixing the Race Gap in 25 Years or Less*, N.Y. TIMES, June 29, 2003, § 4, at 1.

3. *See id.*

4. *Compare* Grutter v. Bollinger, 539 U.S. 306 (2003)(declaring the University of Michigan Law Schools's race-conscious admissions policy constitutional in part because it provides for individualized consideration of applicants) *with* Gratz v. Bollinger, 539 U.S. 268, 271 (2003)(declaring the University of Michigan's race-conscious Undergraduate Admissions policy unconstitutional in part because it did not provide for individualized consideration of applicants).

5. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (*Parents Involved*), 127 S. Ct. 2738, 2751–2752 (2007) (plurality opinion).

6. *See* McFarland v. Jefferson County Pub Sch., 330 F. Supp. 2d 834, 848–49 (W.D. Ky. 2004), *aff'd per curiam*, 415 F.3d 513 (6th Cir. 2005), *rev'd sub nom. Parents Involved*, 127 S. Ct. 2738 (2007); Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (*Seattle*), 426 F.3d 1162 (9th Cir. 2005), *rev'd*, 127 S. Ct. 2738 (2007). After a history of racial segregation,

and effective strategy for enhancing racial diversity at all levels of American public education. The strategy is built upon Justice O'Connor's recognition that racial diversity in higher education is inextricably tied to the quality and diversity of pre–collegiate educational institutions.

The Article begins by developing the linchpin of this strategy: a specific learning outcome characterized as "racial literacy." In Section I, this Article shows that public school districts may still engage in race–conscious school assignment even after the Supreme Court's *Parents Involved* decision. In particular, a district may assign a meaningful number of racially diverse students to its schools in order to achieve the compelling interest in producing the educational benefits of racial literacy. A school district's use of student assignment to create a pedagogically meaningful number of diverse students in a school in order to serve its compelling interest in teaching racial literacy still should survive any credible constitutional challenge.

In Section II, this Article then demonstrates that race–neutral strategies designed to achieve racially–diverse educational environments are not necessarily tailored to produce the precise educational benefit of racial literacy. Indeed, it is illogical to suppose that these race–neutral strategies will be as effective as decisions designed to produce the educational benefit of racial literacy through the mechanism of maintaining a racially–diverse school environment. Race–neutral strategies, therefore, need not be pursued by a school district as an alternative to using race–conscious decisions, that are narrowly tailored to achieve this particular, compelling educational objective.

Finally, in Section III, this Article shows that an institution of higher learning that values racial literacy in its enrolled students may, and should, preference applicants who have acquired a measurably strong foundation in such literacy by virtue of having attended a racially diverse secondary school. These students would receive preferential treatment not because of their race, but because of their high Racial Literacy Acquisition ("RLA") score. A college or university's preferential treatment of applicants who

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the Jefferson County Public Schools in Kentucky were ordered to maintain an integrated school system. After they were released from the federal court decree, the schools attempted 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, random draw, and . . . student[ ] choice[ ]." *McFarland*, 330 F. Supp. 2d at 841–42.

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. If after following a detailed open choice plan that considers a student's choice, facilities capacity, racial demography and proximity, the District still has space for students in an oversubscribed school, assignment to that school was based on lottery. *Seattle*, 426 F.3d at 1166–67, 1169–71.

have a relatively high RLA would be both an effective and a constitutional strategy for increasing racial diversity in that institution.

I. THE CONSTITUTIONALITY AND EFFECTIVENESS OF RACE-CONSCIOUS EDUCATIONALSTRATEGIES BY PUBLIC SCHOOL DISTRICTS DESIGNED TO TEACH RACIAL LITERACY

A. *Racial Literacy is a Fundamental Learning Outcome*

The concept of racial literacy includes: 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 population; 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 individual; 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.[7]

Racial literacy is hardly a novel educational objective. John Dewey concludes that breaking down racial barriers contributes to the Democratic Ideal.[8] 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.[9] Moreover, local public school districts, under direction from their

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7. *See* Lani Guinier, *From Racial Liberalism to Racial Literacy: Brown v. Board of Education and the Interest-Divergence Dilemma*, 91 J. AM. HIST., 92, 114–15 (2004) (Defining "racial literacy" in the context of developing a sophisticated understanding and reaction to race in America, Guinier writes that "racial literacy reads race as epiphenomenal . . . racial literacy is contextual rather than universal . . . depends upon 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."); *see also* Devon W. Carbado & Mitu Gulati, *What Exactly is Racial Diversity?*, 91 CAL. L. REV. 1149, 1153–1154 (2003)("Central to racial diversity . . . is the notion that how we experience, think about, and conduct ourselves in society is shaped, though not determined, by our race.").

8. Dewey, *Democracy and Education*, *reprinted in* CLASSIC AND CONTEMPORARY READINGS IN THE PHILOSOPHY OF EDUCATION 292 (1997) ("Cahn").

9. *See, e.g.*, Robert E. Slavin & Eileen Oickle, *Effects of Cooperative Learning Teams on Student Achievement and Race Relations: Treatment by Race Interactions*, 54 Sociology of Education 178 (1981) (finding that cooperative diverse learning environments significantly benefit black students and reduce disparities between black and white students); ROBERT E. SLAVIN, COOPERATIVE LEARNING AND INTERGROUP RELATIONS, *in* HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION 628, 633 (James A. Banks ed. 2001) (offering an overview of intergroup research studies and concluding that students in ethnically diverse education settings receive long-lasting cross-ethnic friendships and improved student achievement); AMY STUART WELLS ET AL., COLUMBIA UNIV., HOW DESEGREGATION CHANGED US: THE

states, commonly include racial understanding as a required component of their curriculum and instructional practices.[10] 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.[11] The legitimacy within the educational establishment of the idea that racial literacy is an essential learning outcome for American secondary school students, therefore, is strongly supported.[12]

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

Under the equal protection clause, race–conscious decisions are permissible only where the government carries the burden of proving that these decisions are "narrowly tailored to further compelling governmental interests."[13] The Supreme Court in *Johnson v. California*, 125 S. Ct. 1141 (2005), rejected the argument that a California Department of Cor-

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EFFECTS OF RACIALLY MIXED SCHOOLS ON STUDENTS AND SOCIETY, http://cms.tc.columbia.edu/i/a/782_ASWells041504.pdf (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).

10. *See* BRUCE M. MITCHELL & ROBERT E. SALSBURY, MULTICULTURAL EDUCATION IN THE U.S.: A GUIDE TO POLICIES AND PROGRAMS IN THE 50 STATES *passim* (2000) (citing 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, Nebraska, New Jersey, New Mexico, New York, North Carolina, Washington, and Wisconsin).

11. *Id.*

12. *See e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (*Parents Involved*), 127 S. Ct. 2738, 2821–2822 (2007) (Breyer, J., dissenting) (recognizing the evidence that would render legitimate a school board's determination that racially integrated classrooms serve compelling educational interests).

13. *E.g.*, *Parents Involved*, 127 S. Ct. at 2752 (2007); Johnson v. California, 543 U.S. 499, 505 (2005) (citing Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995)); *Grutter*, 539 U.S. at 326 (2003).

The Fourteenth Amendment provides: "No State shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. The Amendment's prohibition extends to "any person" within the state. Where federal or state governments classify a person according to race, the Supreme Court reviews any such classification under strict scrutiny." *Johnson*, 543 U.S. at 505. Strict scrutiny applies regardless whether the racial classifications are invidious or benign and is not dependent on whether the government distributes burdens or benefits based on race. *Johnson*, 543 U.S. at 505–506. The Court requires such a demanding inquiry "to 'smoke out' illegitimate uses of race by assuring that the [government] is pursuing a goal important enough to warrant use of a highly suspect tool." *Id.* at 506 (modification in the original). Accordingly, all racial classifications by the government, regardless of purported motivation, are "inherently suspect," and "presumptively invalid." Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 234 (1995) (internal citations omitted).

rections ("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."[14] *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.[15] A government action will not survive strict scrutiny unless it is animated by a "compelling state interest."[16] Because strict scrutiny requires the Court to evaluate the "fit" between the government's means and its ends,[17] it is critical to identify precisely the governmental interests to which the government's use of race must fit.[18]

The Supreme Court thus far has recognized a limited number of 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.[19] As the court reaffirmed in *Parents Involved*, however, this interest cannot itself justify racial classifications where a public school district no longer must remedy its past de jure segregation and instead engages in voluntary race-conscious decision-making.[20] 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

14. *Johnson*, 543 U.S. at 506 (2005) (internal quotation marks omitted); *see also id.* at 505–06 (noting 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." (citations omitted) (internal quotation marks omitted)).

15. *See* Comfort v. Lynn Sch. Comm., 418 F.3d 1, 6, 13 (1st Cir. 2005) (en banc); McFarland v. Jefferson County Pub. Sch., 330 F. Supp. 2d 834, 848–49 (W.D. Ky. 2004), *aff'd per curiam*, 416 F.3d 513 (6th Cir. 2005), *rev'd sub nom. Parents Involved*, 127 S. Ct. 2738 (2007).

16. *See Grutter*, 539 U.S. at 327.

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

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

19. *See* Freeman v. Pitts, 503 U.S. 467, 493–94 (1992).

20. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (*Parents Involved*), 127 S. Ct. 2738, 2752 (2007).

in producing the educational benefits of student body diversity.[21] Finally, in his separate, dispositive opinion in *Parents Involved*, Justice Kennedy declared that, "school authorities ... concerned that the student-body compositions ... interfere with the objective of offering an equal educational opportunity to all of their students ... are free to devise race-conscious measures[.]"[22] Justice Kennedy also reaffirmed the Court's view that, "[d]iversity ... is a compelling educational goal a school district may pursue."[23] The Court has struck down every other interest claimed to be compelling enough to justify race-based decision-making.[24] Moreover, the Court has reiterated that racial balance is not by itself a compelling interest to be achieved "for its own sake," and that "outright racial balancing ... is patently unconstitutional."[25]

1. The Supreme Court Has Recognized that the State Has a Compelling Interest in Producing the Educational Benefits of Student Body Diversity

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.[26] The Court 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

21. *See Grutter*, 539 U.S. at 328; *Gratz*, 539 U.S. at 268–69.

22. *Parents Involved*, 127 S. Ct. at 2792. (Kennedy, J., concurring in part, and concurring in the judgment).

23. *Id.* at 2789.

24. *See* Shaw v. Hunt, 517 U.S. 899, 909–12 (1996) (rejecting racial classifications that aim to "alleviate the effects of societal discrimination" in the absence of findings of past discrimination); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 511 (1989) (plurality opinion) (rejecting racial classifications in the awarding of public construction contracts in the absence of findings of past discrimination); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 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 (1978) (rejecting the application of race-conscious measures to improve "the delivery of health-care services to communities currently underserved").

25. *E.g.*, *Grutter*, 539 U.S. at 330 (declaring that "racial balancing" violates the Equal Protection Clause).

26. *See Grutter*, 539 U.S. at 328, 330 (noting that the law school has a compelling interest in attaining a diverse student body and that the law school's concept of critical mass must be "defined by reference to the educational benefits that diversity is designed to produce").

diverse" society and workforce; (8) better preparation as professionals in an "increasingly global marketplace"; (9) helping the military to fulfill its 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.[27]

In evaluating the relevance of diversity to educational objectives, the Court focused principally on the "learning outcomes" that a diverse student body provides.[28] Those learning outcomes are derived not only from having diverse viewpoints represented in the "robust exchange of ideas,"[29] but also from the presence of racially diverse students in the classroom as a method of challenging racial stereotypes.[30] The *Grutter* Court deferred to the law school's educational judgment in determining that diversity would produce these educational benefits.[31]

A majority of the Court in *Parents Involved* also recognized the state's compelling interest in fostering the education benefits of student body diversity. Four members of the Court joined Justice Breyer's Opinion declaring that among the compelling interest that justify race-conscious decision making is "an effort to help create citizens better prepared to know, to understand, and to work with people of all races . . ."[32]

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27. *Id.* at 329–33; *see also* MICHAEL J. KAUFMAN & SHERELYN R. KAUFMAN, EDUCATION LAW, POLICY AND PRACTICE: CASES AND MATERIALS 527 (2005).

28. *See generally* Roslyn Arlin Mickelson, *The Academic Consequences of Desegregation and Segregation: Evidence from the Charlotte-Mecklenburg Schools*, 81 N.C. L. REV. 1513, 1517, 1546 (2003), for an outstanding empirical analysis of the achievement gains produced by a racially-diverse educational environment.

29. *Grutter*, 539 U.S. at 329–30.

30. *Id.* at 330, 333.

31. *Id.* at 328–33. The Court also heeded the judgment of amici curiae—including educators, business leaders and the military—that the educational benefits that flow from diversity constitute a compelling interest. *See id.* at 330 ("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."); *see also id.* ("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."); *id.* at 331 ("[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.") (citations omitted) (internal quotation marks omitted).

32. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (*Parents Involved*), 127 S. Ct. 2738, 2823 (2007) (Breyer, J., dissenting).

Significantly, Justice Kennedy, as well, declared that race-conscious strategies can be employed when narrowly tailored to achieve the "goal of bringing together students of diverse backgrounds and races . . . ."[33] He further declared that school districts may consider the "racial makeup of schools" and the "racial composition" of students in order to encourage a diverse student body.[34]

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

Public school districts readily may articulate the precise and compelling educational benefits produced by a diverse elementary and secondary school population. These benefits include the acquisition of racial literacy.[35] As courts have recognized, "the 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."[36] And yet, the prospect of children across the nation being required to attend racially concentrated or isolated schools is a crisis that school boards, districts, teachers and parents confront daily.[37]

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33. *Id.* at 2792 (Kennedy, J., concurring in part, and concurring in the judgment).

34. *Id.*

35. Academic research has shown that intergroup contact reduces prejudice and supports the values of citizenship. *See* Derek Black, Comment, *The Case for the New Compelling Government Interest: Improving Educational Outcomes*, 80 N.C. L. REV. 923, 951–52 (2002) (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).

36. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (Seattle), 426 F.3d 1162, 1196 (Breyer, J., dissenting); *see also* Comfort v. Lynn Sch. Comm., 418 F.3d 1, 15–16 (1st Cir. 2005) (en banc) ("In fact, there is significant evidence in the record that the benefits of a racially diverse school are more compelling at younger ages."); Comfort v. Lynn Sch. Comm., 283 F. Supp. 2d 328, 356 (D. Mass. 2003) (noting expert testimony describing racial 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 earlier grades to study and learn alongside peers from other racial groups.") (citing *Grutter*, 539 U.S. at 333) (emphasis added)).

37. *See* GARY ORFIELD & CHUNGMEI LEE, HISTORIC REVERSALS, ACCELERATING RESEGREGATION, AND THE NEED FOR NEW INTEGRATION STRATEGIES 9 (UCLA Civil Rights Project/*Proyecto Derechos Civilis* ed., 2007) ("Segregation, it turns out, is built into many structures in the [sic] society and is highly resilient. It came back forcefully when the Supreme Court changed the law and has continually worsened since . . . 1991 . . . .").

Indeed, the Supreme Court also has recognized the legitimate educational benefits of a racially diverse student population.[38] As the Supreme Court's strong line of public school decisions demonstrates, these interests in the educational benefits of a diverse secondary school student population are at least 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."[39] Public secondary schools have an even more significant role in this preparation.[40] As the Supreme Court explained in *Plyler v. Doe*, "[w]e 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."[41] 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".[42] In *Bethel School District No. 403 v. Fraser*, as well, the Court declared that the inculcation of civic values is "truly the work of the schools."[43] In *Ambach v. Norwick*, the Court likewise observed that public schools transmit to children "the values on which our society rests," including "fundamental values necessary to the maintenance of a democratic political system."[44] In *Brown v. Board of Education*, 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 child to cultural values, in

38. *See* 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.").

39. 539 U.S. at 331.

40. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (*Parents Involved*), 127 S. Ct. 2738, 2822 (Breyer, J., dissenting) (finding the interest in student body diversity at the elementary and secondary school level to be even more compelling than the interest in law school diversity found compelling in *Grutter*).

41. Plyler v. Doe, 457 U.S. 202, 221 (1982) (citations omitted) (internal quotation marks omitted).

42. *Id.*

43. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986).

44. Ambach v. Norwick, 441 U.S. 68, 76–77 (1979).

preparing him for later professional training, and in helping him to adjust normally to his environment.[45]

Moreover, for the significant number of public high school graduates who do not attend college,[46] the public elementary and secondary school experience will be their only opportunity to obtain the educational benefits of a diverse learning environment. As the district court found in *McFarland*, these "benefits of racial tolerance and understanding are equally as important and laudable in public elementary and secondary education as in higher education."[47]

Not surprisingly, the Supreme Court itself has relied upon elementary and secondary school cases to reach its judgment that the benefits of racial diversity in an educational institution are compelling. It was in the context of public secondary schools that the Court concluded that the "process 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."[48] The Court also has recognized that the educational benefits of a racially diverse school extend to all students in that school: "[a]ttending 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

45. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954); *see Grutter*, 539 U.S. at 330 (discussing the "substantial" benefits that flow from a racially diverse student body and citing several sources that detail the impact of racial diversity in the educational environment).

46. See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (*Seattle*), 426 F.3d 1162, 1176 n.16 (9th Cir. 2005), *rev'd*, 127 S. Ct. 2738 (2007) ("According to the *Seattle Times*' School Guide submitted by Parents, for the year 2000, on average 34 percent of Seattle's high school graduates attend four-year colleges after graduation and 38.2 percent attend two-year colleges, although percentages vary from high school to high school.").

47. McFarland v. Jefferson County Pub. Sch., 330 F. Supp. 2d 834, 853 (W.D. Ky. 2004) (internal quotation marks omitted), *rev'd sub nom. Parents Involved*, 127 S. Ct. 2738 (2007); *see also Parents Involved*, 127 S. Ct. at 2822 (Breyer, J., dissenting)

48. 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 that

> [i]t 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.

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

heritage."[49] Because racially diverse schools, as the Supreme Court recognized in *Grutter*, promote these "learning outcomes," racially diverse student enrollments also serve the vital local governmental interest of promoting community support for and involvement in local public schools.[50]

3. The Professional Educational Judgment That Producing Racial Literacy is a Compelling Educational 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."[51] 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,"[52] courts have deferred to the professional judgment of local school districts regarding matters of educational policy. The Supreme Court, for example, has 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.[53]

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49. Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 473 (1982) (citations omitted) (internal quotation marks omitted).

50. Estes v. Metro. Branches of Dallas NAACP, 444 U.S. 437, 451 (1980) (Powell, J., dissenting) ("*The general quality of the schools . . . tends to decline when substantial elements of the community abandon them.* The effects of resegregation can be even broader, reaching beyond the quality of education in the inner city to the life of the entire community. When the more economically advantaged citizens leave the city, the tax base shrinks and all city services suffer. And students whose parents elect to live beyond the reach of the [local school district] lose the benefits of attending ethnically diverse schools, an experience that prepares a child for citizenship in our pluralistic society.") (emphasis added).

51. Milliken v. Bradley, 418 U.S. 717, 741 (1974); *see, e.g.*, Dayton 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.").

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

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

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.' "[54] The educational judgment of local school professionals is uniquely entitled to judicial deference. These judgments include: (1) the product of "specialized knowledge" which the judiciary lacks; (2) the product of local governmental agencies accountable to their own local constituencies; (3) the product of a process that benefits from local input and that tailors educational strategies to local circumstances; and (4) the product of data derived from strategies employed by other local educational agencies also allowed to experiment.

C. *Public School Districts Can Meet Their Burden of Proving That Assigning a Meaningful Number of Diverse Students to an Educational Environment is Narrowly Tailored to Achieving the Compelling Interest in Teaching Racial Literacy to Secondary School Students*

A 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.[55] As a majority of the Court, including Justice Kennedy, makes clear in *Parents Involved*, school districts may still engage in a "nuanced, individual evaluation" of student characteristics including their race, to meet a school's compelling educational needs.[56]

1. Race-Conscious Educational Strategies are Narrowly Tailored to Serve the Compelling Educational Need to Teach Racial Literacy

The Supreme Court thus has recognized that states have a compelling interest in encouraging their educational institutions to provide "educational benefits" to their citizens.[57] The Court also has recognized that a school's use of student enrollment to produce a meaningful number of diverse students within an educational institution can be narrowly tailored to achieve the compelling governmental interest in producing these educational benefits.[58]

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

55. *See Grutter*, 539 U.S. at 333.

56. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (*Parents Involved*), 127 S. Ct. 2738, 2793 (2007) (Kennedy, J., concurring in part, and concurring in the judgment).

57. *See Grutter*, 539 U.S. at 330–33.

58. *Grutter*, 539 U.S. at 328–33; *see also Parents Involved*, 127 S. Ct. at 2788 (Kennedy, J., concurring in part, and concurring in the judgment); *id.* at 2800 (Breyer, J., dissenting).

Educational professionals have determined that a uniquely effective method of teaching racial literacy requires students to interact with peers from different racial backgrounds.[59] Secondary school educational professionals understand that racial literacy cannot be taught through the monolithic delivery of information to passive students.[60] Rather, teaching racial literacy requires prompting students to confront the personal and political nature of race and racism in their educational environment.[61] A vast amount of social science research has been generated indicating the benefits of a racially diverse educational environment generally, and the benefits of such an environment to the production of racial literacy.[62] The nuanced use of student assignment to maintain meaningful numbers of racially diverse students in a secondary school is therefore precisely tailored to achieve the compelling interest in teaching racial literacy.

2. Race-Conscious Student Assignment Plans Designed to Teach Racial Literacy Are Also Consistent with the Supreme Court's Hallmarks of Narrowly Tailored Race-Conscious Admission Plans

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 those cases, the Court identified

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59. *See, e.g.*, THE CIVIL RIGHTS PROJECT, HARVARD UNIV., DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION (Gary Orfield & Michal Kurlaender eds., 2002); Thomas F. Pettigrew, *Intergroup Contact: Theory, Research and New Perspectives in* HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION 770 (2nd ed. 2004) (arguing that proper interracial education prepares students for democratic leadership roles).

60. *See* Thomas F. Pettigrew, *Intergroup Contact: Theory, Research and New Perspectives in* HANDBOOK ON RESEARCH ON MULTICULTURAL EDUCATION 770 (2d. ed. 2004); *see also supra* sources listed in note 9.

61. *Id.*

62. *Id.*; *see also supra* sources listed in note 35; Patricia Gurin et al., *The Benefits of Diversity in Education for Democratic Citizenship*, 60 J. SOC. ISSUES 17, 32 (2004) (presenting studies that examine and conclude that diversity in student bodies, although altered by personal experiences with the diverse groups, generally create students that are better suited for "democratic citizenship"); Amy Guttman, *Unity and Diversity in Democratic Multicultural Education*, *in* DIVERSITY AND CITIZENSHIP EDUCATION 71 (2004) (showing that multicultural education furthers democratic ideals through teaching tolerance and defining the role that cultural differences have had in shaping society); Janet Ward Schofield, *Fostering Positive Intergroup Relations in Schools*, *in* HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION 799 (2nd 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).

63. *See Grutter*, 539 U.S. at 333–34 (stating that the narrow tailoring inquiry is context-specific and must be "calibrated to fit the distinct issues raised" in a given case, taking "relevant differences into account") (internal quotation marks omitted).

hallmarks of a narrowly tailored race-conscious admissions plan, including: (1) individualized consideration of student characteristics; (2) the absence of quotas; (3) that no member of any racial group was unduly harmed; and (4) that the program had a sunset provision or some other end point.[64] As shown in this Section, none of these considerations undermines the constitutionality of a school district's decision to assign a meaningful number of diverse students to a particular educational environment in order to achieve the precise compelling interest of producing racial literacy. The final hallmark of individualized consideration is the educational institution's inability to accomplish its compelling educational interests by race-neutral alternatives. As shown in Section III, however, the constitutionality of a school district's strategies cannot be undermined by its failure to pursue such alternative race-neutral strategies where they are not tailored to achieve the district's precise, compelling interest.

a. Individualized Nuanced Consideration of Student Characteristics

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

> 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. T*he importance of this individualized consideration in the context of a race-conscious admissions program is paramount.*[65]

Public school districts, however, generally do not engage in an individualized consideration of each applicant's characteristics and qualifications as part of a selective admissions process.[66] Indeed, the Seattle District conceded its lack of individual assessment by claiming that its interest in encouraging racially diverse schools required that its school assignment plan ultimately must "focus on the race of its students."[67] 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 non-

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

65. *Grutter*, 539 U.S. at 337 (emphasis added).

66. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (*Parents Involved*), 127 S. Ct. 2738, 2818–2819 (2007) (Breyer, J., dissenting)(recognizing that a different standard of review should be applied to a school district's use of race as part a noncompetitive assignment process).

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

competitive, voluntary student assignment plan is otherwise narrowly tailored, a district need not consider each student in a individualized, holistic manner."[68]

In any event, 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 inapposite characteristics. The Supreme Court's requirement of individualized, holistic review in *Grutter* may be relevant to the compelling interest advanced by a law school in fostering viewpoint diversity, but it is not relevant to a public secondary school's compelling interest in producing the educational benefits of racial literacy.[69]

A public secondary school district may well conclude that bringing different viewpoints and experiences to classroom discussions will produce educational benefits.[70] In the law school setting, viewpoint diversity fosters the "robust exchange of ideas."[71] 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."[72]

Whereas individualized assessment may be finely tailored to achieve the educational benefits of viewpoint diversity, such assessment is not at all tailored to achieve the distinct compelling interest in teaching racial literacy. Indeed, as Justice Kennedy wrote in *Parents Involved*, the "nuanced, individual evaluation of school needs and student characteristics that might include race as a component," would certainly allow a school district to tailor the racial composition of its schools to its precise pedagogical goal of teaching racial literacy. The objective of teaching racial literacy is not necessarily advanced by assigning students to schools merely because of the diversity of their views. Instead, the precise educational outcome of teaching racial literacy is advanced by assigning

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68. *Id.*; *see also Parents Involved*, 127 S. Ct. at 2818–2819 (Breyer, J., dissenting) (finding that the focus on an applicant's qualifications is not applicable where there is no competition or consideration of qualifications at issue, such as in a public high school, since no stigma results from any particular school assignment, or in other words, the danger that may be present in the university context of substituting racial preference for qualification-based competition is absent).

69. *See Grutter*, 539 U.S. at 330, 338 (noting 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.")

70. *See* MITCHELL, *supra* note 10 *passim*.

71. *Grutter*, 539 U.S. at 324; *see also Comfort v. Lynn Sch. Comm.*, 418 F.3d 1, 16 (1st Cir. 2005) ("[L]ively classroom discussion is a more central form of learning in law schools (Which prefer the Socratic method) than in a K-12 setting.").

72. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 512 (1969) (internal quotation marks omitted).

pedagogically 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 literacy.[73]

The educational judgment that racial literacy is best taught in a racially diverse school environment is not only reasonable, it is virtually undisputed. According to the Supreme Court, school districts, given their "broad power to formulate and implement educational policy," could "well conclude . . . that in order to prepare students to live in a pluralistic society[,] each school should have a prescribed ratio of [African American] to white students reflecting the proportion for the district as a whole."[74] 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 standard of narrow tailoring.[75]

b. Absence of Quotas

The second narrow-tailoring factor addresses the use of quotas based upon race.[76] A quota is defined as "a program in which a certain

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73. *See Comfort*, 418 F.3d at 18 (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."); Otis Grant, *Teaching and Learning About Racial Issues in the Modern Classroom*, 5 Racial Pedagogy (2003), http://radicalpedagogy.icaap.org/content/issue5_1/02_grant.html (last visited Nov. 6, 2007); Spencer Kagan, *The Power to Transform Race Relations*, 30 TEACHING TOLERANCE, Fall 2006, *available at* http://www.tolerance.org/teach/magazine/sidebar.jsp?p=0&vo=30&si=929 (last visited Nov. 5, 2007); 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 (last visited Nov. 5, 2007); *see also* MITCHELL, supra note 10.

74. 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."); *but see* Higgins v. Bd. of Educ. of Grand Rapids, 508 F.2d 779, 795 (6th Cir. 1974) ("An 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.").

75. Reliance on group characteristics is not necessarily constitutionally infirm under Fourteenth Amendment jurisprudence. *See, e.g.*, Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 84 (2000) ("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.").

76. *See Grutter*, 539 U.S. at 334.

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."[77] School districts arguably create a crude racial quota whenever they establish a predetermined, preferred ratio of white and nonwhite students. In *Bakke*, the medical school argued that it did not operate a quota in its admissions system because it did not always fill the preselected seats; thus, its admissions system only had a "goal." Justice Powell rejected that argument, stating that regardless of whether the preselected seats were a "quota" or a "goal,"

> 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.[78]

Grutter recognized, however, 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. The Court stressed that the University could determine what number of nonwhite admittees would be "meaningful" enough to achieve its desired educational benefit. The Court defined a critical mass as "meaningful numbers" and "meaningful representation" in deference to the University's position that some degree of racial balance would be necessary to achieve the benefits of a diverse educational environment.[79] Hence, 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.[80] The Supreme Court 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."[81] Similarly, Justice Kennedy in *Parents Involved* made clear

77. *Id.* at 335 (citations omitted) (internal quotation marks omitted).
78. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 289 (1978).
79. *Grutter*, 539 U.S. at 318–319.
80. *Id.*
81. *Id.*

that school districts may track the racial makeup of its schools in order to pursue its legitimate interest in student body diversity.[82]

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 racial quota nor the effort to achieve racial balance for its own sake. To the contrary, the school seeks to assign meaningful numbers of diverse students in its educational institution in order to realize its compelling educational interests.[83] A school district that seeks to maintain a relatively stable critical mass of white and nonwhite students in each of its high schools does so in order to produce the educational benefits derived from an educational environment with a "meaningful" number of students from different racial groups. A nuanced 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.[84]

c. Undue Harm

The next narrow-tailoring factor determines whether an institution's use of race-conscious strategies "unduly burden[s] individuals who are not members of the favored racial and ethnic groups."[85] Opponents of race-conscious school assignment plans by school districts argue that every student who is denied his or her choice of schools because of the district's educational goals suffers a constitutionally significant burden. As the Supreme Court of Washington concluded, however, race-conscious student assignment plans typically impose a minimal burden that is shared

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82. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (*Parents Involved*), 127 S. Ct. 2738, 2792 (Kennedy, J., concurring in part, and concurring in the judgment).

83. Thus, the Court in *Seattle* noted: "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." Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 426 F.3d 1162, 1184 n.28 (9th Cir. 2005), *rev'd*, 127 S. Ct. 2738 (2007) (citations omitted) (internal quotation marks omitted).

In fact, the Seattle District's race-based tiebreaker 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. As Morgan Lewis, the Manager of Enrollment Planning, Technical Support and Demographics, testified, "If all the parents ... don't pick [a] school in a massive number, then everyone gets in. And so it's ... a case where the choice patterns, the oversubscription ... [is] the reason the [tiebreaker] kicks in .... Everything happens when more people want the seats. And why they want the seats sometimes we don't know." *Seattle*, 426 F.3d at 1185, *rev'd*, 127 S. Ct. 2738 (2007).

84. *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.") (citations omitted) (internal quotation marks omitted).

85. *See Id.* at 341 (citations omitted) (internal quotation marks omitted).

equally by all of the district's students.[86] As that court noted, it is well established that "there [is] no right under Washington law to attend a local school or the school of the student's choice."[87] Indeed, public schools, unlike universities, have a tradition of compulsory assignment.[88] When an applicant's qualifications are not under consideration at all, no single student has a right or an entitlement to be assigned to any particular school.[89] Accordingly, school districts are entitled to assign all students to any of its schools, no student is entitled to attend any specific school and use of race in student assignment cannot uniformly benefit any race or group of individuals to the detriment of another. Finally, public school districts that consider race as part of a careful effort to teach all of their students racial literacy pursue a learning outcome that benefits *all* of those students.

d. Sunset Provision

The Supreme Court also considered whether an educational institution's race-conscious decisions are "limited in time," and "have a logical end point."[90] 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 assures 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.[91]

Under *Grutter*, however, "this durational requirement can be met by periodic reviews to determine whether racial preferences are still

86. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (*Parents IV*), 72 P.3d 151, 159–60 (Wash. 2003), *rev'd*, 127 S. Ct. 2738 (2007).

87. *Id.* at 159 (citing Citizens Against Mandatory Bussing v. Palmason, 495 P.2d 657, 663 (Wash. 1922)). Subject to federal statutory and constitutional requirements, structuring public education has long been within the control of the states as part of their traditional police powers. *See* Barbier v. Connolly, 113 U.S. 27, 31–32 (1884) (describing the States' traditional police powers).

88. *See* Bazemore v. Friday, 478 U.S. 385, 408 (1986) (White, J., concurring) (noting that "school boards customarily have the power to create school attendance areas and otherwise designate the school that particular students may attend").

89. *See* Comfort v. Lynn Sch. Comm., 418 F.3d 1, 20 (1st Cir. 2005) ("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.").

90. *See Grutter*, 539 U.S. at 342.

91. *Id.* at 341–42 (internal citation omitted) (alteration in original).

necessary to achieve student body diversity."[92] 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. If racial literacy acquisition scores are not improved in a racially-diverse educational environment, the school may certainly attempt alternative educational methods. If racial literacy acquisition scores are improved in a racially-diverse environment and if those higher scores are preferenced in the college admissions process, the enhanced incentive given to students of all races to attend a racially-diverse secondary school that produces high RLA scores may render Justice O'Connor's notion of "artificial" preferences unnecessary.

II. THE CONSTITUTIONALITY OF RACE-CONSCIOUS STUDENT ASSIGNMENT TO ACHIEVE RACIAL LITERACY CANNOT BE UNDERMINED BY THE AVAILABILITY OF INAPPOSITE RACE-NEUTRAL ALTERNATIVES

In *Grutter* and *Parents Involved*[93] the Supreme Court explained that narrow tailoring also "require[s] serious, good faith consideration of *workable* race-neutral alternatives that will achieve the diversity the university seeks."[94]

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) strategic attendance zones and site selections for new, specially resourced magnet schools and programs; (3) student assignment by lottery; and (4) student assignment based on a multi-factoral index. Each of these alternatives is a strategy designed to achieve racial integration in an educational environment in the absence of race-conscious student admissions or assignment. Although these strategies may produce some racial integration in some situations, none of them is as effective as race-conscious school assignment.

92. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (*Seattle*), 426 F.3d 1162, 1192 (9th Cir. 2005) (citing *Grutter*, 539 U.S. at 342), *rev'd*, 127 S. Ct. 2738 (2007).

93. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (*Parents Involved*), 127 S. Ct. 2738, 2743 (2007) (citing *Grutter*, 539 U.S. at 339).

94. *Grutter*, 539 U.S. at 339 (emphasis added).

A. *Race-neutral Strategies Are Not Tailored to Achieve the Compelling Interest in Teaching Racial Literacy*

1. Socio-economic Integration Strategies

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.[95] Because there are instances in which student admission based on socio-economic status can have the collateral benefit of enhancing racial diversity, objectors to a school district's voluntary integration program argue that the district must adopt such a race-neutral strategy. In the Seattle District, for instance, the northern Seattle area contains a majority of "white" students and is "historically more affluent."[96] The southern Seattle area is necessarily less affluent. Thus, moving more affluent students south, and less affluent students north, could possibly provide a more diverse student body. Nonetheless, the Seattle District rejected this alternative for two reasons: (1) "it is insulting to minorities and often inaccurate to assume that poverty correlates with minority status" and (2) students would be reluctant to reveal their socioeconomic status to their peers.[97] The District effectively argued that it considered the strategy to be unworkable in its situation.

Even if student assignment based on socio-economic status were workable and might in certain cases result in enhanced racial diversity, there is no doubt that the use of socio-economic status is less tailored to achieve the goal of meaningful racial diversity than the use of racial diversity itself. The use of socio-economic status as a proxy for racial status is both overbroad and underinclusive. Accordingly, the fit between the "means" of student assignment based on socio-economic status and the "end" of racially diverse educational institutions is not as precise as the fit between the "means" of student assignment based on race and the "end" of racially diverse educational institutions. If the compelling interest that drives student assignment is producing the educational benefits of a

95. *See, e.g.*, CATHERINE L. HORN & STELLA M. FLORES, THE CIVIL RIGHTS PROJECT, HARVARD UNIV., PERCENT PLANS IN COLLEGE ADMISSIONS: A COMPARATIVE ANALYSIS OF THREE STATES' EXPERIENCES, (2003); WILLIAM G. BOWEN ET AL., EQUITY AND EXCELLENCE IN AMERICAN HIGHER EDUCATION 175–93 (2005); Richard Sander, *Experimenting with Class-Based Affirmative Action*, 47 J. LEGAL EDUC. 472, 474 (1997); Mark Satin, *Economic-Class-Based Affirmative Action: The Elites Loathe It, the People Want It*, RADICAL MIDDLE NEWSLETTER, Jul./Aug. 2003, http://www.radicalmiddle.com/x_affirmative_action.htm (last visited Nov. 4, 2007); Alec McGillis, *Basing Affirmative Action on Income Changes Payoff*, BALT. SUN, May 25, 2003, at 1C; RICHARD D. KAHLENBERG, THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION 83 (1996).

96. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (*Seattle*), 426 F.3d 1162, 1166 (9th Cir. 2005), *rev'd*, 127 S. Ct. 2738 (2007).

97. *Id.* at 1188–89.

racially-diverse student body, then the method of socio-economic integration is not tailored to serve that interest.

2. Strategic Site Selection for New Specially-Resourced Magnet Schools and Programs

In his separate concurrence in *Parents Involved*, Justice Kennedy indicated that a school district should attempt to meet its goal of fostering student body diversity through means such as strategic site selection and attendance zoning for new, specially-resourced programs and schools.[98] To avoid racial concentration in its schools, for example, a school district might create merit-based academic, avocational and vocational magnet programs. These programs can help each school address racial diversity issues by encouraging students to travel outside of their geographic attendance zone to participate in a specific magnet program.

Dual-language Spanish magnet schools can be a particularly effective way of achieving racial diversity where the program attracts an equal number of English-dominant 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.

In Illinois School District 112, for example, the district operates a dual-language immersion program which has produced both foreign language acquisition learning outcomes and racial diversity. The district educates approximately 4000 students in eight elementary schools and three middle schools. The district as a whole is predominately white,[99] but more than 62% of the students who reside in the Oak Terrace school attendance zone at the northern section of the district are Hispanic.[100] In 1996, the district began a dual-language (Spanish-English) immersion program. The program was housed in one school building in the predominately Hispanic northern attendance zone, and in two school buildings in the predominately white southern attendance zone. The program requires school administrators to assign an equal number of students who are Spanish-dominant and English-dominant to the same classroom. The program's goals include high academic achievement in Spanish and

98. *Parents Involved*, 127 S. Ct. at 2792. (Kennedy, J., concurring in part, and concurring in the judgment).

99. More than 80% of the district's students are white. ILL. SCH. DIST. 112 STATE REPORT CARD (2005), http://www.nssd112.org/reportcards/schoolrprtcrd/schoolrprtcrd05/ot05src.pdf, 1 [hereinafter, "Report Card."]

100. *Id.*

English, and "cross-cultural awareness."[101] Between 2006 and 2007, 570 of the district's students participated in the program, which enticed English-dominant students to choose to attend school in the predominantly Spanish-dominant attendance zone, and enticed Spanish-dominant students to choose to attend schools in the predominately English-dominant attendance zone. The result of the program was that the dual-language classrooms throughout the district had equal numbers of English and Spanish-dominant children. As a collateral benefit, these classrooms were racially diverse as well.

The program assesses its students to determine whether its educational objectives have been met. Students from both language backgrounds have enjoyed tremendous academic success.[102] Spanish-dominant children in grades Kindergarten through eight acquire English language skills at a more rapid rate than their Spanish-dominant peers in traditional bilingual programs.[103] English-dominant students acquire Spanish language skills at a highly accelerated rate relative to their peers. Moreover, both Spanish-dominant and English-dominant students show great academic success in cognitive areas other than language.[104] In fact, the evidence indicates that English-dominant students in the dual-language program perform better on state standardized tests in Math and English than their English-dominant peers in the same district.[105] Accordingly, this type of magnet program is a race-neutral strategy for producing dual language acquisition which can in some districts also produce the benefits of racial integration.

Yet, these programs as well, will not be as finely tailored to achieve the educational benefits of racial diversity as race-conscious school assignment designed to achieve precisely these benefits. Racial diversity is at best a collateral benefit of the magnet program.

3. 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

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101. North Shore School District 112, Dual Language Immersion Program, http://www.nssd112.org/curriculum/dlgeneral.html (last visited Nov. 4, 2007).

102. *See* North Shore School District 112, Assessment Process for Dual Language Program, http://www.nssd112.org/curriculum/dlassessments.html (last visited Nov. 4, 2007).

103. *Id.*

104. *Id.*

105. Melissa K. Wolf, Dual Language Immersion Program: North Shore District 112, 21, http://www.nssd112.org/curriculum/frameworkpdfs/DLpowerpoint.ppt (showing test scores for dual-language English speakers in grades K through 5) (Spring 2006).

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. 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 where 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 "[i]f 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."[106]

4. Diversity Index

In San Francisco, the California public school district employs a program focused on enhancing diversity in the classrooms. The program allows students to choose any school within the district. When a school is oversubscribed, the program first assigns students with siblings to the same school, and then accommodates students with specialized learning needs. After that, the so-called "Diversity Index" is employed. "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."[107] 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."[108] Furthermore, the school district cannot be required to adopt race-neutral measures that would have forced it to sacrifice other educational values central to its mission.[109] Not surprisingly, 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

106. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (Seattle), 426 F.3d 1162, 1190 (9th Cir. 2005), *rev'd*, 127 S. Ct. 2738 (2007).

107. David I. Levine, *Public School Assignment Methods after Grutter and Gratz: The View from San Francisco*, 30 HASTINGS CONST. L.Q. 511, 529–30 (2003).

108. *Grutter*, 539 U.S. at 340.

109. *Id.* at 340.

students cannot be as precisely tailored as considering the race of students in that process.[110]

B. *The Constitution Does Not Require School Districts to Pursue Race-neutral Alternatives That Are Not Tailored to Achieve Their Compelling Interests*

There may be school districts in which student assignment plans based on socio-economic status, strategic site selection of special 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 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" such as poverty, lottery, magnet schools, or indexes.[111]

III. THE CONSTITUTIONALITY AND EFFECTIVENESS OF PREFERENCING RACIALLY LITERATE APPLICANTS TO HIGHER EDUCATION

The use of race-conscious student enrollment is narrowly tailored to the recognized compelling interests in achieving the educational benefits of student body diversity, including the production of racial literacy. The suggested race-neutral alternatives are not narrowly tailored to achieve these compelling interests. Race-neutral student enrollment strategies, however, are constitutional, even if they are driven by the desire to achieve racial integration. They do not treat students differently *because of* their race. Nor do they preference any student in the operation of a public school. As such, they readily survive judicial scrutiny because they are rationally related to the legitimate governmental interest of school assignment. Put another way, the use of the race-conscious student assignment to achieve the race-neutral end of "educational benefit" is constitutional, and the use of the race-neutral means of student

110. *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"); 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).

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

assignment to achieve the race-conscious end of racial integration is constitutional as well.

The nucleus of any educational strategy that is both constitutional and effective is the compelling interest in producing the educational benefit of racial literacy. The interest has been recognized as compelling by educational professionals and the Supreme Court. The goal of creating racial literacy is best achieved in an educational environment where there are meaningful numbers of racially-diverse students. Students who are taught racial literacy in a racially-diverse educational environment can be expected to achieve extremely high levels of Racial Literacy Acquisition. An institution of higher learning could well conclude that its educational mission would be served by enrolling students who have a record indicating Racial Literacy Acquisition. An institution that offers preferential treatment in admissions to students who score well in the area of Racial Literacy Acquisition would not run afoul of the equal protection clause. As suggested in this section, if institutions of higher education begin to preference students with high RLA scores, families may well be drawn to elementary and secondary schools with the kind of racial diversity that can generate those scores.

A. *Colleges and Universities May Constitutionally Preference Applicants Who Have a Strong Record Indicating Racial Literacy Acquisition*

In some collegiate or graduate programs, racial literacy is a particularly meaningful competency. Suppose the admissions criteria for such a program included racial literacy as a significant aspect of an applicant's qualifications for admission to that program. The admissions process might include assigning a certain score to each applicant depending on the applicant's degree of Racial Literacy Acquisition. An applicant who attended an elementary or secondary school with a meaningful number of racially diverse students could be expected to have acquired a high degree of racial literacy. The educational experience would be recognized as particularly rigorous in the field of racial literacy. Indeed, the secondary school district may develop its own authentic assessment of its students regarding their Racial Literacy Acquisition. Colleges and universities could rely upon that assessment, could conduct their own assessment or could adopt national assessments of Racial Literacy Acquisition.

The admissions standards might include a minimum Racial Literacy Acquisition score, or a range of accepted Racial Literacy Acquisition scores. The highest scores would be achieved by applicants who have been educated in a rigorous pre-collegiate environment in the discipline of racial literacy. The showing would be extremely difficult to make, unless the applicant in fact attended a pre-collegiate educational institution with a meaningful number of students of diverse races.

Such admissions standards would be race-neutral. The race of the applicant would be irrelevant. Preferential treatment would be given to applicants not based on their race, but instead based on their level of exposure to a racially diverse educational environment in which racial literacy is best produced. Moreover, the objective of the strategy would be race-neutral as well. The interest served by this selection method would be to enroll a racially literate class, not a racially-diverse class. Yet, the path to the acquisition of racial literacy would be exposure to meaningful numbers of racially diverse students in educational institutions. The strategy thus would survive constitutional challenge.

B. *Racial Literacy Acquisition Preferencing Would Foster Racial Diversity at Elementary, Secondary and Post-Secondary Educational Institutions*

The strategy of racial literacy is not only constitutional, it is effective. Suppose the University of Washington employed racial literacy as part of its admissions process. If the Seattle District were to assign students to schools within the District based on geographic proximity, the result would be a lack of meaningful racial diversity in the schools. White students applying to the University of Washington from that District would test poorly in the University's authentic assessment of their racial literacy. They may have been taught racial literacy in some form in their predominantly white schools, but the University would be entirely justified in giving them poor scores for racial literacy because of the absence of rigor in their educational experience regarding racial literacy. On the other hand, African American students applying to the University would do slightly better in their literacy assessments because they would have been exposed to at least some number of students that are racially different – even if the students are assigned by geographic proximity. In the absence of any racial integration strategy, therefore, white students from Seattle would be significantly behind African American students in their racial literacy scores. If the University weighed those scores heavily in the admissions process, the effect would be enhanced racial integration.

Similarly, the students in District 112 who participated in a dual-language immersion program may be able to score high on a racial literacy acquisition index that included some measure of exposure to diverse educational environments at the elementary school level. That index might be high if the student enrolled in a dual-language immersion program that happened to result in a meaningful number of racially diverse students in the student's educational environment. The program, however, is narrowly tailored to produce dual-language acquisition rather than racial literacy. Accordingly, students in a dual-language program likely would receive some preferential treatment in admissions because their programs may have some racial diversity. Yet, these students would not be as advantaged as students who were educated in a program designed to produce

racial literacy through interaction with meaningful numbers of racially-diverse students.

Finally, imagine that a university widely publicizes its preference for strong racial literacy acquisition scores. The university's admissions policy would create an incentive for families to strive to enroll their students in pre-collegiate educational institutions with meaningful numbers of diverse students. Students who would otherwise choose to attend school in their segregated neighborhoods might consider attending schools with meaningful numbers of diverse students. Student choice alone might produce meaningful geographic or attendance zone diversity. In fact, in Seattle, student choice might well have resulted in racially-diverse secondary schools if students were motivated by the goal of increasing their college credentials by attending a school with a strong racial literacy acquisition program and reputation.

CONCLUSION

The educational strategy of racial literacy can produce a chain of events that may well lead to racially diverse educational institutions. A public school district's use of race-conscious school assignment can be narrowly tailored to achieve the compelling interest in teaching racial literacy. If racial literacy is a valued quality in an applicant by a particular college or university, then the acquisition of such literacy can be a factor in the consideration of that applicant for admission. If the college or university reaches the educational judgment that a student educated in an elementary or secondary school environment with a meaningful number of racially-diverse students is more likely to acquire, or retain racial literacy, the college or university can preference exposure to that racially-diverse environment as part of its admissions decisions. Students seeking an advantage in the undergraduate and graduate admissions process may self-select schools with a racially-diverse educational environment. Ultimately, families may choose to live in elementary and secondary school attendance zones that are themselves racially diverse. Although many of the nuances of this "racial literacy acquisition strategy" must be worked out by school districts, colleges, universities and demographers, the strategy may just be worth the effort.