Briefing on the Benefits of Diversity in Elementary and Secondary Education

U.S. Commission on Civil Rights

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Briefing on the Benefits of Diversity in Elementary and Secondary Education

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CONTENTS Not for Release: 7/20/2006

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January 29, 2002

The Impact of Racial and Ethnic Diversity on Educational Outcomes: Cambridge, MA School District

By Michal Kurlaender and John T. Yun

Introduction

full report

Cambridge public schools are extremely diverse and have been significantly integrated for many years. This city with a population of more than 100,000 has only a single high school, so the entire diversity of the city is present in this one school. As the nation's public school districts are being forced by court decisions to consider the future of integration in their communities, it is appropriate to ask students who have experienced desegregated schooling about its impacts. Although neighboring Boston has abandoned its desegregation efforts under pressure from conservative federal courts, the Cambridge School Committee decided in early 2002 to embrace a new strategy emphasizing socio-economic desegregation in an attempt to preserve racial and ethnic diversity in a time when policies based solely on race may be prohibited or strictly limited.

RESEARCH

Diversity in Higher Education

"The Impact of Racial and Ethnic Diversity on Educational Outcomes" is CRP's first report on diversity in K-12 education. Much of our work has been focused so far on diversity in higher education. Cambridge is the first of 7 school districts which CRP will study this year.

This is a study of Cambridge high school's twelfth grade students' experiences with racial and ethnic diversity. It is part of a series of studies by The Civil Rights Project across the country on what students in diverse and more segregated schools learn both in specific content areas and in preparation for adult life and work. Our findings are based on the Diversity Assessment Questionnaire (DAQ), a survey instrument developed with the help of leading experts on school desegregation research across the country. We administered the DAQ to 379 seniors in Cambridge last school year.[1] We have previously released results from metropolitan Louisville and will be issuing reports on districts across the country in the coming months.

Students responded to the survey anonymously and were assured that their teachers and school officials would not see it, so there was no pressure to give answers officials might want to hear. The Civil Rights Project made the survey available and prepared this study without cost to the Cambridge public and this report is totally independent of district control or direction. We commend the Cambridge school leaders for permitting an independent examination of important and very sensitive issues. The DAQ results indicate many positive attitudes about diverse educational experiences; in addition, these results also pointed to areas of possible future improvement.

The survey was administered to all high school seniors in Cambridge. It was administered during school and all seniors were required to complete it, so we have data that reflects the entire population of students finishing secondary education in the city. The survey includes 70 distinct items, which were created to test several distinct dimensions of experiences and attitudes (four of these dimensions are highlighted in this report).[2] Since our results on these grouped items were quite consistent, we have strong evidence that the data in this report represents the actual experiences of the responding seniors and that our findings are not simply byproducts of question wording. These responses reflect a broad and consistent pattern of responses.

School level desegregation, of course, does not guarantee the presence of a curriculum that recognizes diversity, fair treatment of all groups of students, or deep and positive interactions between different racial or ethnic groups—all important factors that contribute to positive educational outcomes associated with diversity. It does, however, create a situation within which such interactions may occur, depending on many factors within the school and among the groups of students. Although we have not studied all the factors that can maximize the benefits of diversity, we have examined a number of very important educational outcomes. In this memo we provide basic responses, by race, to a number of questions from the survey.[3] Four distinct areas are explored, (1) student learning and peer interaction; (2) citizenship and democratic principles; (3) future educational aspirations and goals; and (4) perceptions of support by the school. These areas are all well established as important goals of education, and build essential skills that students need in order to achieve academic and professional success, and to become responsible citizens. The district and the state government have already published extensive test score data on the high school.

Obviously since Cambridge has only one large high school for the entire city we cannot compare desegregated and segregated high schools within this district. Our studies of six other school districts do show important differences in attitudes as a function of schools' racial composition. This study should be understood as providing information about the educational experiences of the city's students in an interracial school and their convictions about the way those experiences have contributed to their education.

Results from the survey suggest positive educational impacts of diversity for students in the district. Overall, substantial majorities of students report a strong level of comfort with members of other racial and ethnic groups. Most importantly, students indicate that their school experiences have increased their level of understanding of diverse points of view, and enhanced their desire to interact with people of different backgrounds in the future. Students report that they have been strongly affected by their school experiences. Given that Cambridge is an area of great ethnic and racial diversity and that the population growth of metro Boston is now being driven by non-white immigration, these are important issues both for the future work experiences of students and for community life. The survey results also indicate some dimensions on which an otherwise strongly positive record might be improved.

We received surveys from 78% of the entire senior class. This excellent response rate means that the responses provide a good representation of the class. The students responding to the survey identified themselves as 31% White, 18% African American, 10% Latino, 14% reported they were "other", and 10% said they were multiracial. Only 4% of the respondents identified themselves as Asian. This group is so small that calculations involving Asian students should be treated with caution since the responses of a handful of students can produce a big change in the percentages.

Table 1: Distribution of Student Respondents to the Survey by Race and Ethnicity

	African American	Asian	Latinos	Whites	Other	Multiracial	Unidentified	Total
Frequency	69	16	37	116	51	39	51	379
Percent	18	4	10	30	14	10	14	100

[1] For the purpose of this memo we disaggregate the question responses by race. For this reason students who did not provide an answer to the racial/ethnic identification question (approximately 50 students) were omitted from the tables.
[2] On any given survey question between11-13% of all students did not respond, these non-responses were not included in the calculations of these tables.
[3] The racial/ethnic categories that we use are all self-identified, that is the students choose how they wish to describe themselves from an established list. Our categories are: African American, Asian, Latino, White, Multi-racial, and Other. The survey specifies that students can indicate two categories. We created the Multi-racial category by collapsing all students who identified themselves as more than one race into the multi-racial category.

To view the COMPLETE REPORT and study conducted by The Civil Rights Project go to:

The Impact of Racial and Ethnic Diversity on Educational Outcomes: Cambridge, MA School District (in PDF Format)
What is PDF?

THE IMPACT OF RACIAL AND ETHNIC DIVERSITY ON EDUCATIONAL OUTCOMES: CAMBRIDGE, MA SCHOOL DISTRICT

January, 2002

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Cambridge public schools are extremely diverse and have been significantly integrated for many years. This city with a population of more than 100,000 has only a single high school, so the entire diversity of the city is present in this one school. As the nation's public school districts are being forced by court decisions to consider the future of integration in their communities, it is appropriate to ask students who have experienced desegregated schooling about its impacts. Although neighboring Boston has abandoned its desegregation efforts under pressure from conservative federal courts, the Cambridge School Committee decided in early 2002 to embrace a new strategy emphasizing socio-economic desegregation in an attempt to preserve racial and ethnic diversity in a time when policies based solely on race may be prohibited or strictly limited.

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We received surveys from 78% of the entire senior class. This excellent response rate means that the responses provide a good representation of the class. The students responding to the survey identified themselves as 31% White, 18% African American, 10% Latino, 14% reported they were "other", and 10% said they were multiracial. Only 4% of the respondents identified themselves as Asian. This group is so small that calculations involving Asian students should be treated with caution since the responses of a handful of students can produce a big change in the percentages.

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A. Student Learning and Peer Interaction

One basic theory concerning the educational impact of diversity is that interaction with peers from diverse racial backgrounds—both in the classroom and informally—has major educational importance, particularly when the interaction is done in positive ways. By exposing students to multiple perspectives, students learn to think more critically and to understand more complex issues. This is a basic finding, for example, in recent longitudinal studies of students at the University of Michigan.[4] This was, for instance, the basic educational justification for Harvard University's affirmative action plan and was upheld by the Supreme Court as a compelling educational interest in the 1978 *Bakke* decision which has governed affirmative action in higher education ever since.[5]

Our survey asked Cambridge students about the way they experienced diversity in the curriculum, in classroom discussions and in working with peers from different types of backgrounds. Overall, students report that racial issues are explored fairly frequently during classroom discussions in social studies or history classes. Eighty-seven percent of White students report that they experience frequent discussions about race in social studies or history classes and seventy percent of African American students report similar levels of exposure to discussions about race (Table 2). This is a sign that the teachers are taking advantage of an important learning opportunity in a multiracial school. In a substantially interracial school like Cambridge Rindge and Latin there are opportunities to interact with many members of other racial groups and to understand not only difference in general experiences and perceptions by race but also the diversity within each of these groups.

Table 2

Q8: During classroom discussions in your social studies or history class how often are racial issues discussed and explored? (% indicating 1 to 3 times a month)						
African Americans	Asians	Latinos	Whites	Other	Multiracial	Total
70	85	80	87	74	92	81

Around forty percent of students across all racial and ethnic groups report that exposure in the curriculum to different cultures and experiences of different racial and ethnic groups has helped them understand points of view different from their own, while a third of Latino students agreed (Table 3). In fact, only six percent of all students report that such discussions did not change their understanding of different points of view at all. The educational experience made a significant difference for many students and added something for almost all students.

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[4] See Patricia Gurin, "The Compelling Need for Diversity in Higher Education," expert testimony in *Gratz et al. v. Bollinger* et al. (No. 97-75231 E.D. Mich., filed 1997) and *Grutter et al. v. Bollinger et al.* (No. 97-75928 E.D. Mich., filed 1997), 1999.

[5] For a discussion of the current status of research on this question see *Diversity Challenged,* ed. Gary Orfield., Cambridge: Harvard Educational Publishing Group, 2001.

Table 3

Q9: To what extent do you believe that these discussions have changed your understanding of different points of view? (% indicating "quite a bit" or "a lot")						
African Americans	Asians	Latinos	Whites	Other	Multiracial	Total
38	43	32	40	38	50	40

Given its location, right across the Charles River from a city that experienced massive race relations problems over school integration, and situated within a society with high residential segregation and increasing level of school segregation, Cambridge students of all racial and ethnic backgrounds report a surprisingly high degree of comfort working with people different from themselves in the classroom. In fact, 90 to 99% of all racial groups reported that they were "comfortable" or "very comfortable" working with students from other groups (Table 4). In a community where there is no majority group among the school age population and there is extraordinary diversity and immigration from all over the world, this ability will be an important asset for adult life and community success.

Table 4

Q29: How comfortable are you working with students from different racial and ethnic backgrounds on group projects in your classes? (% indicating "comfortable" or "very comfortable")						
African Americans	Asians	Latinos	Whites	Other	Multiracial	Total
90	94	92	99	96	95	95

Some of the good results we see among Cambridge students have been achieved without strong faculty support. Aside from the small Asian group, fewer than 50 percent of students from the remaining racial and ethnic groups report a high degree of encouragement by teachers to work with students of different racial and ethnic backgrounds (Table 5). (Figure 1 includes the full breakdown of responses for African American, Latino, and White students on this particular question.) Extensive research by both Elizabeth Cohen at Stanford University and Robert Slavin at Johns Hopkins University argues that positive interactions in collaborative academic projects are very important to realizing the potential gains of desegregation.[6] This is clearly an area that could be reinforced with staff development work. There are well developed and tested programs, such as Student Team Learning,[7] which have good techniques for creating successful inter-group learning opportunities. Such learning opportunities are necessary for promoting the type of rich discussions that lead to improved attitudes among peers of different backgrounds. In discussions with school system leaders we were impressed by their interest in strengthening staff development to produce even stronger results.

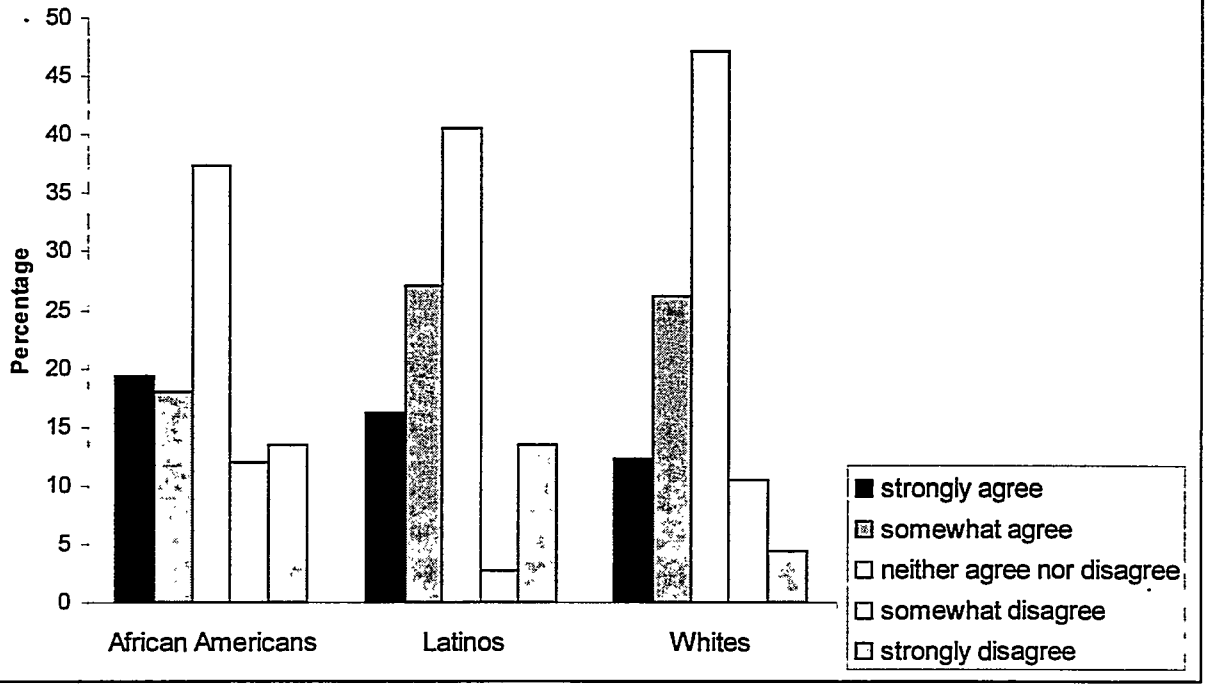
Table 5

Q24: My teachers encourage me to work with students of other racial/ethnic backgrounds. (% indicating somewhat or strongly agree)						
African Americans	Asians	Latinos	Whites	Other	Multiracial	Total
37	50	43	38	50	32	40

[6] See, for example: Cohen, Elizabeth G. and Lotan, Rachel A. "Producing Equal-Status Interaction in the Heterogeneous Classroom," *American Educational Research Journal. v32 n1 p99-120 Spring 1995;* or Cohen, Elizabeth G. "Making Cooperative Learning Equitable," *Educational Leadership. v56 n1 p18-21 Sep 1998.*

[7] See, for example: Slavin, Robert, et al. "Putting Research to Work: Cooperative Learning." *Instructor,* v102 n2 p46-47 Sep 1992.

Figure 1: ***My teachers encourage me to work with students of other racial/ethnic backgrounds.***



B. Democracy and Citizenship

From the time of Thomas Jefferson, American education advocates and leaders have often seen the schools as essential to the operation of a democracy, preparing people to understand their country and its institutions and to participate effectively in democratic life. With the vast migrations that began in the 19th century, schools were seen as central to shaping a nation of millions of people from diverse cultures and languages. In the civil rights movement of the 1960s, the schools became a central focus in the struggle to open the doors of opportunity to African Americans. Now, as the country becomes more multiracial every year, the schools face the challenge of a level of multiracial diversity never before seen in American society. The extremely strong focus on evaluating schools only in terms of standardized test scores in two or three subject areas may have distracted attention from a function of schools that is vital to the future of American society and American democracy. As the only institution that reaches the great majority of young people (nearly nine-tenths of U.S. children attend public schools), this function is of great importance for the future of U.S. society. Given public schooling's unique role in the United States, it is important to understand how they are helping or hindering the preparation of students to live and work among people different from themselves.

We asked the students to write about their personal views on the questions of what they *"learned or gained from attending school with people who are of a racial or ethnic group different from your own?"* One student who transferred into public school wrote: "I came from an all white private school. CRLS has conquered many fears that I had about people from different racial and ethnic groups. I feel very thankful." Diversity was very stimulating for another: "I have seen high school the preppy way (Milton Academy) where most people are white and wealthy. Now, at Cambridge, I have been exposed to more cultures and greater diversity than I ever could have imagined. I value my experience in public school much more because of this."

An immigrant student commented: "I have learned English, different cultures, how to communicate in English, made friends, from different countries. I have learned a lot about America. Cambridge public school changed my life a lot."

Yet another student noted how diversity in the high school not only helped their understanding of others but also to think about one's own background? "I have not only grown very comfortable with people from different racial or ethnic groups, but I have come to be excited and interested by such difference. I have learned to respect others while still staying true to my own heritage and beliefs." For another student, the experience made him aware of the need to continue to work on race relations: "I have learned that teachers and administrators have to deal with the hard issues and discussions that come with talking about diversity. I have learned that while we have had integrated schools for over 50 years, that people's minds are still segregated. And I have learned the importance of trying to overcome this and meet people unlike myself." Another noted that CRLS had a big impact on his thinking about the future.

> "I think that I have learned a lot about how to deal with people who are different, respect them and be interested in their culture and heritage and learn from them. Living and working with people from different race and ethnic group has become ordinary to me – it is not a big deal, and I think this will help me look beyond our differences and work and learn with them, throughout my life. It has taught me a way to see the world and its problems and perhaps how we can work together to fix them."

In a city with the diversity of Cambridge this need is already obvious. Do students develop a consciousness around the importance of interacting with people of different backgrounds, and does this have an impact on their future goals? In this report we examined whether students in Cambridge felt prepared to work and live in the diverse settings in which they currently and will increasingly find themselves. We asked students how their experience in school has contributed to their overall attitudes about working in a multi-racial setting. The findings are overwhelmingly positive in this area, suggesting that Cambridge high school is helping to produce young adults who are ready to operate in diverse communities. This skill is critical to living in this society, particularly as many future economic opportunities will involve contact with people who are from different cultures and may hold different worldviews. Nearly all students (over 90 percent) say that they are prepared to live and work among people of diverse racial and ethnic backgrounds (Table 6a). An overwhelming majority of all students report being comfortable working with a supervisor of a racial and ethnic background different than their own (Table 6b).

Table 6a

Q25: After high school, how prepared do you feel to work in a job setting where people are of a different racial or ethnic background than you are? (% indicating "somewhat" or "very" prepared)						
African Americans	Asians	Latinos	Whites	Other	Multiracial	Total
94	100	89	94	90	95	93

Table 6b

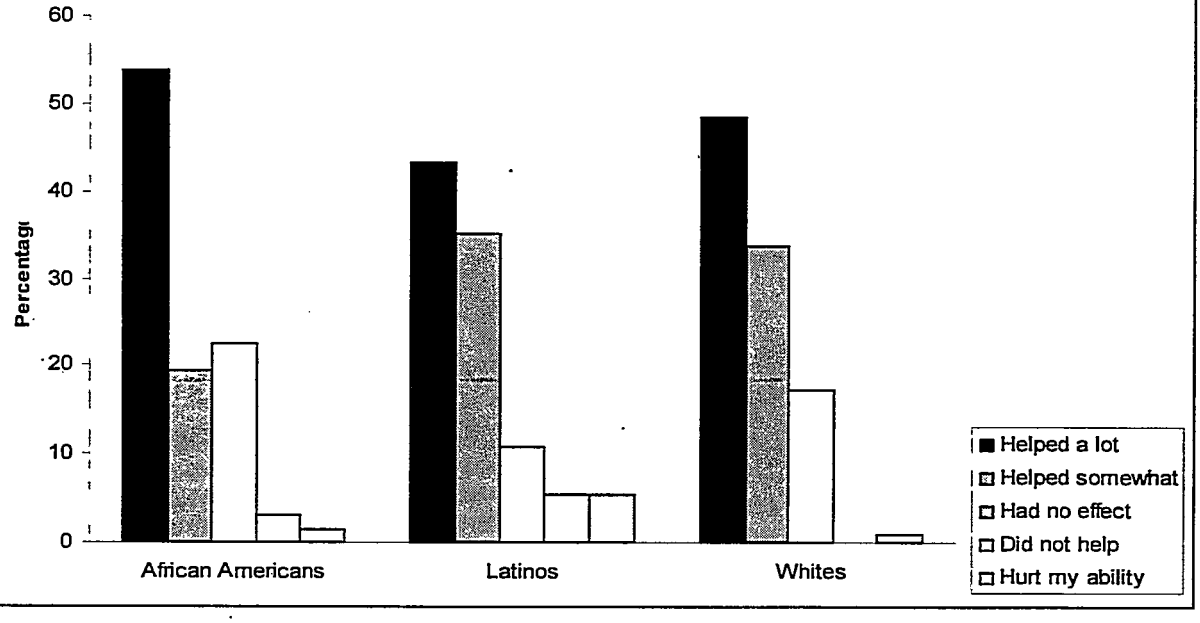
Q27: How comfortable would you be with a work supervisor who was of a different racial or ethnic background than you? (% indicating "very comfortable or "somewhat comfortable")						
African Americans	Asians	Latinos	Whites	Other	Multiracial	Total
93	94	92	95	92	87	94

Students credit their school experiences as contributing to their ability to work with and understand people from different backgrounds. In spite of the city's diversity, children can grow up in communities that are far less diverse than the city as a whole, so school becomes a place where these abilities can be developed. Among all students, nearly seventy percent indicate that their school experiences have "helped a lot" or "helped somewhat" their ability to work with members of other races and ethnic groups (Table 7). (Figure 2 includes the full breakdown of responses for African American, Latino, and White students on this particular question.)

Table 7

Q26: How do you believe your school experiences will affect your ability to work with members of other races and ethnic groups? (% indicating "helped somewhat" or "helped a lot")						
African Americans	Asians	Latinos	Whites	Other	Multiracial	Total
73	88	78	82	78	77	79

Figure 2: *How do you believe your school experiences will effect your ability to work with members of other races and ethnic groups?*



Students not only believe that they can work more effectively across social divisions but also that they are better able to understand other groups. Eighty-four percent of both African Americans and Whites said their school experiences had helped them better understand members from different groups, students from other racial/ethnic groups responded similarly (Table 8). This learning is not about optimistic statements from reading great documents or speeches but from the actual interactions with people of diverse background in the school setting.

Table 8.

Q48: How do you believe your school experiences will affect your ability to understand members of other races and ethnic groups? (% indicating "helped somewhat" or "helped a lot")						
African Americans	Asians	Latinos	Whites	Other	Multiracial	Total
84	88	78	84	80	79	82

C. Goals, Opportunities, and Access to Higher Education

Providing access to college is a crucial goal for high schools today. Students who do not receive post-secondary education have little chance for mobility in the job market and are likely to face a life of low and uncertain incomes. Overwhelming majorities of U.S. students want to go to college and a large majority of recent high school graduates actually enroll in college.[8] Being qualified and prepared for a good college are central goals for students and their families. If one indicator of successful desegregation is defined as equalizing opportunity among different racial/ethnic groups, then raising aspirations of all students to similar levels is a first step. We would hope that students, regardless of their racial or ethnic background, would have similar higher education aspirations. In fact, a remarkably high proportion of every group of students report an interest in attending a four-year college, including seventy-eight percent of Latinos, eighty-nine percent of African Americans, and ninety-two percent of Whites (Table 9).

Table 9

Q41: How interested are you in going to a four-year college? (% indicating interested or very interested)						
African Americans	Asians	Latinos	Whites	Other	Multiracial	Total
89	87	78	92	94	90	90

Counselors and college admissions staff know, of course, that there is often a big difference between saying that you want to go to college and actually getting ready for admissions. In the category of advanced courses necessary for competitive college admissions, the Cambridge results show more racial differences and suggest areas for future improvement. For instance, there are important differences between racial groups on the level of interest in taking honors or AP Mathematics or English courses. About half of African American and Latino students report an interest in taking AP math or English. Thirty-five percent of Whites express interest in AP math and 63 in AP English courses (Table 10).

[8] Digest of Education Statistics 1997, National Center for Education Statistics, U.S. Department of Education, Office of Educational Research and Improvement, (Table 184—College enrollment rates of high school graduates).

Table 10

Q38: How interested are you in taking an honors or AP mathematics course? (% indicating interested or very interested)						
African Americans	Asians	Latinos	Whites	Other	Multiracial	Total
50	75	54	35	39	44	44
Q39: How interested are you in taking an honors or AP English course? (% indicating interested or very interested)						
African Americans	Asians	Latinos	Whites	Other	Multiracial	Total
52	80	57	63	57	49	58

It is also very important to have early information about college admissions requirements in order to adequately prepare for college. Cambridge Rindge and Latin High school is an important urban school in Massachusetts and its students report receiving substantial information about college. Latinos, Whites, and African Americans report receiving information about such things as admissions tests, financial aid, and applications at roughly the same level. About 54 to 57 percent of all students report receiving "a lot " or "some" information about college from their teachers, with Asian students reporting more. About 65-70 percent of all students report receiving "some" to "a lot" of information about college from their counselors, with Latino and Multiracial students reporting this at a modestly lesser degree than do other students (Table 11).

Table 11

Q17: How much information about college admissions have your teachers given you? (such as SAT, ACT, financial aid, college fairs, college applications) (% indicating "some" or "a lot")						
African Americans	Asians	Latinos	Whites	Other	Multiracial	Total
54	69	57	56	62	53	57
Q18: How much information about college admissions have your counselors given you? (such as SAT, ACT, financial aid, college fairs, college applications) (% indicating "some" or "a lot")						
African Americans	Asians	Latinos	Whites	Other	Multiracial	Total
75	69	65	75	71	64	72

D. Support

While more than three-fourths of all groups of students desire to attend a four-year college, it is very important to know whether the students' dreams are supported in their schools. The survey shows very high levels of support from teachers for student aspirations. More than three-fourths of African Americans, Latinos, Asians and Whites report such encouragement. On the question shown in Table 12 Latinos and Whites report the highest level of support. In general, teachers strongly encourage student aspirations.

Table 12

Q15: To what extent have your teachers encouraged you to attend college? (% indicating "somewhat encouraged" or "strongly encouraged")						
African Americans	Asians	Latinos	Whites	Other	Multiracial	Total
78	80	86	89	80	69	82

Even more important is the question of whether or not the school's counselors encourage all groups of students to take demanding classes, honors or AP level, which provide excellent preparation for college. On this question, the results are far less optimistic. Students report far less encouragement to take challenging courses from school counselors, but the numbers are particularly low for African Americans, Latinos, and students from "other" racial or ethnic backgrounds. This single survey question cannot, of course, tell us whether these responses reflect discouragement by school counselors, failure to discuss the importance of advanced classes, or other causes. Some of this difference obviously results from serious gaps in achievement levels that exist when students enter the Cambridge schools and when they leave. The school district is actively engaged in a national coalition working on these problems and it is very important to make certain that students of all racial and ethnic groups are encouraged to take the excellent pre-collegiate courses the high school offers. This difference should be examined much more closely by school and district personnel.

Some AP students spoke about the problem: "I like being in a diverse school very much but my classes, especially the AP classes, lack diversity. The classes that are more diverse are enjoyable, and the AP courses would be much better with a more diverse group of students." In other words, part of the potential intellectual excitement of the classes was lost. Another commented: " I think counselors should encourage black students to attend AP classes. Because presently I'm in an AP History class and I'm the only one who is black. When we have discussions about the black community I get offended and intimidated. I feel I can't attend this class any longer. And this year I left my AP English class because the teacher wasn't willing to help me and suggested that I take a regular English course."

Table 13

Q20: To what extent have your counselors encouraged you to take Honors and/or AP classes? (% indicating "somewhat encouraged" or "strongly encouraged")						
African Americans	Asians	Latinos	Whites	Other	Multiracial	Total
43	75	36	66	38	62	53

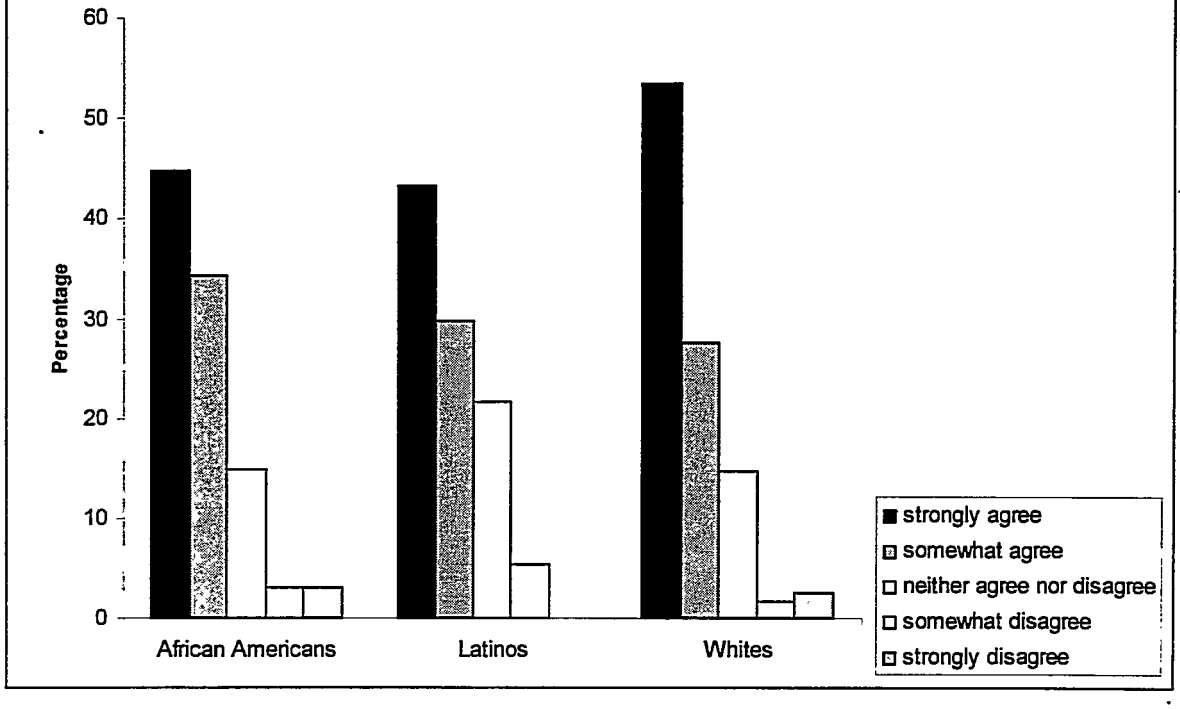
One very important issue for a student's successful incorporation into the academic life of the school is whether or not a student feels his or her teachers care about their academic success. Many adults remember the powerful impact of a strong teacher who showed interest in their work. The survey asks about students' perceptions about whether or not their teachers care about them, and their responses are fairly similar across all racial/ethnic groups, ranging from 65% to 81% positive. White and African American students are more likely to report that their teacher "takes a special interest in them" than Asian or Latino students (Table 14, Figure 3). Since Cambridge is a big high school,[9] the kind of school where lower achieving students often feel lost, this measure of teacher interest in individual students is very promising.

Table 14

Q23: At least one of my teachers takes a special interest in me. (% indicating "somewhat agree" or "strongly agree")						
African Americans	Asians	Latinos	Whites	Other	Multiracial	Total
79	75	73	81	65	77	77

[9] The total enrollment at Cambridge Rindge and Latin high school is nearly 2000 students, see "High School Student Data Report, 2000-2001", Office of Development and Assessment, Cambridge Public Schools.

Figure 3: *At least one of my teachers takes a special interest in me*



How does Cambridge compare to other districts?

Compared to several of the other districts we studied, the record of Cambridge teachers in the area of teacher support looks very positive. Students report receiving more attention from their teachers in almost all racial groups in comparison with students in several other districts (Table 12a). (Since the reports have not yet been released in the other cities, the names of the districts are omitted here.)

Table 12a

Q23: At least one of my teachers takes a special interest in me. (% indicating "somewhat agree" or "strongly agree")							
District	African Americans	Asians	Latinos	Whites	Other	Multiracial	Total
Cambridge	79	75	73	81	65	77	77
City A	70	57	56	71	68	73	66
City B	72		65	65	68		67
City C	68	46	57	66	48		51

In addition, on factors that schools can affect, such as the schools impact on learning to work with other groups and aspirations for college (Table 12b and Table 12c), Cambridge students respond more favorably than those in all other cities in our study, for virtually all racial/ethnic groups. These indicators are of particular importance, because they ask specifically about how students' school experiences affected these important skills.

Table 12b

How do you believe your school experiences will affect your ability to work with members of other races and ethnic groups? (% indicating "helped somewhat" or "helped a lot")							
District	African Americans	Asians	Latinos	Whites	Other	Multiracial	Total
Cambridge	73	88	78	82	78	77	79
City A	72	78	54	71	70	70	71
City B	74		77	68	75		75
City C	71	73	73	71	73		70

Table 12c

To what extent have your teachers encouraged you to attend college? (% indicating "somewhat encouraged" or "strongly encouraged")							
District	African Americans	Asians	Latinos	Whites	Other	Multiracial	Total
Cambridge	78	80	86	89	80	69	82
City A	72	77	59	72	68	72	72
City B	75		78	74	66		74
City C	69	71	70	76	64		68

Conclusions

Students of all racial/ethnic backgrounds report similar views, almost identical, on some key questions on the Diversity Assessment Questionnaire. The similarity among students' reported attitudes and views suggests that the school is providing a broadly positive experience, which generally speaking, leaves no group feeling poorly treated or with negative attitudes towards relationships with other students. Cambridge students indicate a consistently high degree of comfort living and working with students from other groups. First, they feel well prepared for functioning as adults in a very diverse community. Second, students report their school experiences have increased their level of understanding of points of view different from their own and enhanced their understanding of the background of other groups. Third, students report they feel prepared to work in job settings with people who are different from themselves, and further report their school experiences will help them work with, and better understand people from racial and ethnic groups different from their own. Finally, they report positive support and encouragement from their teachers, both generally and specific to their higher education aspirations. In a country experiencing high levels of segregation in housing and schools, and in a world tormented by ethnic divisions, this is very positive news. The picture, however, shows that racial equity has not been fully achieved and there are still certain kinds of unequal treatment within the school that could be improved with appropriate school leadership and staff training. It is through the commitment of the Cambridge leadership to continue to maximize the benefits of diversity in the city's schools that will serve as the groundwork for addressing remaining concerns of racial/ethnic disparities in educational opportunities and in improving problems of understanding among students from an increasingly diverse set of backgrounds.

One of the limitations of studying Cambridge's only high school is that we cannot compare it with other more segregated or integrated schools within the city. We have conducted parallel studies in six other communities across the U.S., however. Although we cannot release the data from those other communities, which have not yet received similar reports, the level of positive response among Cambridge seniors on most of the survey questions is the highest we have seen among all of the students surveyed. In our studies across the nation we have also been able to compare segregated and integrated schools and we do see clear benefits in more integrated schools along many of these outcomes.

We believe that the detailed survey data available to the school district should help in policy and staff development strategies both to assist Cambridge staff in understanding how generally positive the results are and for identifying areas for leadership and further training.

A Personal Note

Those of us who worked on this study are very happy to be able to report such positive findings about our neighbors in this community, something that is far too rare in civil rights research. We greatly appreciate the cooperation of the school district and the active interest by Cambridge's leaders in this work and admire the commitment the school committee recently expressed in adopting an innovative new plan to continue diversity in the city's schools. As citizens in this community, as well as researchers, we are excited by the prospect of future collaborations with the Cambridge schools.

Gary Orfield, Co-Director, The Civil Rights Project

February, 2002

The Impact of Racial and Ethnic Diversity on Educational Outcomes: Lynn, MA School District

By Michal Kurlaender and John T. Yun

Introduction

full report

The Lynn public schools are quite racially and ethnically diverse and have been integrated at the primary school level by the district's voluntary desegregation plans since 1988. This city, with a population of more than 81,000, has three high schools, most of which have students who attended primary schools desegregated by the district's plan. As the nation's public schools are being forced by court decisions to consider the future of integration in their communities, it is appropriate to ask students who have experienced desegregated schooling about its impacts. Although neighboring Boston has abandoned its desegregation efforts under pressure from conservative federal courts, the Lynn schools are attempting to preserve racial and ethnic diversity in a time when policies based solely on race are under attack.

This memorandum addresses the impact of racial and ethnic diversity on the eleventh grade student population in the Lynn School District. It provides information about students' thoughts and feelings about people of other racial and ethnic groups, as well as about how students believe their schooling has been affected by the presence of a diverse student body. It is part of a series of studies by The Civil Rights Project on what students in diverse and more segregated schools learn both in specific content areas and in preparation for adult life and work. Our findings are based on the Diversity Assessment Questionnaire (DAQ), a survey instrument developed with the help of leading experts on school desegregation research across the country. We administered the DAQ to all juniors attending Lynn's three high schools in the Spring of 2000 and received responses from 634 students (a response rate of roughly 78%). The survey includes 73 question items, which were created to test several distinct dimensions of experiences and attitudes (four of these dimensions are highlighted in this report)[1]. Since our results on these grouped items were quite consistent, we have compelling evidence that the data in this report represents the actual experiences of the responding juniors, and that our findings are not simply byproducts of

RESEARCH

Diversity in K-12 Education

"The Impact of Racial and Ethnic Diversity on Educational Outcomes: Lynn, MA District" is CRP's second report on diversity in K-12 education. Cambridge was the first of 7 school districts which CRP will study this year.

POLICY ACTION

Court Decisions

On June 6, 2003, the Federal District Court of Massachusetts ruled that the Lynn School District's voluntary desegregation plan that considers race as a factor in assigning children to K-12 public schools was constitutional.

question wording, instead we believe these responses reflect a broad and consistent pattern.

These data allow us to examine– in the aggregate –how school level desegregation can affect educational outcomes. School level desegregation, of course, does not guarantee the presence of a curriculum that recognizes diversity, fair treatment of all groups of students, or deep and positive interactions between different racial or ethnic groups—all important factors that contribute to positive educational outcomes associated with diversity. It does, however, create a situation within which such interactions may occur, depending on many factors within the school and among the groups of students. Although we have not studied all the factors that can maximize the benefits of diversity, we have examined a number of very important educational outcomes. In this memo we provide basic responses, by race, to a number of questions from the survey[2]. Four distinct areas are explored, (1) future educational aspirations and goals; (2) perceptions of support by the school; (3) student learning and peer interaction; and (4) citizenship and democratic principles. These areas are all well established as important goals of education, and build essential skills that students need in order to achieve academic and professional success, and to become responsible citizens.

Students responded to the survey anonymously and were assured that their teachers and school officials would not see it, so there was no pressure to give answers officials might want to hear. The Civil Rights Project made the survey available and prepared this study without cost to the Lynn public schools and this report is totally independent of district control or direction. The DAQ results indicate many positive attitudes about diverse educational experiences; in addition, these results also pointed to areas of possible future improvement.

[1] On any given survey question between0-7.0% of all students did not respond, these non-responses were not included in the calculations of these tables.
[2] The racial/ethnic categories that we use are all self-identified, that is the students choose how they wish to describe themselves from an established list. Our categories are: African American, Asian, Latino, White, and Other

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To view the COMPLETE REPORT and study conducted by The Civil Rights Project go to:

The Impact of Racial and Ethnic Diversity on Educational Outcomes: Lynn, MA School District (in PDF Format)
What is PDF?

THE IMPACT OF RACIAL AND ETHNIC DIVERSITY ON EDUCATIONAL OUTCOMES: LYNN, MA SCHOOL DISTRICT

February, 2002

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THE IMPACT OF RACIAL AND ETHNIC DIVERSITY ON EDUCATIONAL OUTCOMES: LYNN SCHOOL DISTRICT

The Lynn public schools are quite racially and ethnically diverse and have been integrated at the primary school level by the district's voluntary desegregation plans since 1988. This city, with a population of more than 81,000, has three high schools, most of which have students who attended primary schools desegregated by the district's plan. As the nation's public schools are being forced by court decisions to consider the future of integration in their communities, it is appropriate to ask students who have experienced desegregated schooling about its impacts. Although neighboring Boston has abandoned its desegregation efforts under pressure from conservative federal courts, the Lynn schools are attempting to preserve racial and ethnic diversity in a time when policies based solely on race are under attack.

This memorandum addresses the impact of racial and ethnic diversity on the eleventh grade student population in the Lynn School District. It provides information about students' thoughts and feelings about people of other racial and ethnic groups, as well as about how students believe their schooling has been affected by the presence of a diverse student body. It is part of a series of studies by The Civil Rights Project on what students in diverse and more segregated schools learn both in specific content areas and in preparation for adult life and work. Our findings are based on the Diversity Assessment Questionnaire (DAQ), a survey instrument developed with the help of leading experts on school desegregation research across the country. We administered the DAQ to all juniors attending Lynn's three high schools in the Spring of 2000 and received responses from 634 students (a response rate of roughly 78%). The survey includes 73 question items, which were created to test several distinct dimensions of experiences and attitudes (four of these dimensions are highlighted in this report).[1] Since our results on these grouped items were quite consistent, we have compelling evidence that the data in this report represents the actual experiences of the responding juniors, and that our findings are not simply byproducts of question wording, instead we believe these responses reflect a broad and consistent pattern.

These data allow us to examine– in the aggregate –how school level desegregation can affect educational outcomes. School level desegregation, of course, does not guarantee the presence of a curriculum that recognizes diversity, fair treatment of all groups of students, or deep and positive interactions between different racial or ethnic groups—all important factors that contribute to positive educational outcomes associated with diversity. It does, however, create a situation within which such interactions may occur, depending on many factors within the school and among the groups of students. Although we have not studied all the factors that can maximize the benefits of diversity, we have examined a number of very important educational outcomes. In this memo we provide basic responses, by race, to a number of questions from the survey.[2] Four distinct areas are explored, (1) future educational aspirations and goals; (2)

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perceptions of support by the school; (3) student learning and peer interaction; and (4) citizenship and democratic principles. These areas are all well established as important goals of education, and build essential skills that students need in order to achieve academic and professional success, and to become responsible citizens.

Students responded to the survey anonymously and were assured that their teachers and school officials would not see it, so there was no pressure to give answers officials might want to hear. The Civil Rights Project made the survey available and prepared this study without cost to the Lynn public schools and this report is totally independent of district control or direction. The DAQ results indicate many positive attitudes about diverse educational experiences; in addition, these results also pointed to areas of possible future improvement.

Preliminary results from the DAQ survey indicate positive educational impacts of diversity for students in the district. Overall, a majority of students report a strong level of comfort with members of racial and ethnic groups different than their own. Students also report high level of educational aspirations across the board and there is strong evidence that perceived opportunities to meet these aspirations are equalized across all racial/ethnic groups. The survey data also suggests several areas for improvement. While minority students indicate that their school experiences have increased their level of understanding of diverse points of view, and increased their desire to interact with people of different backgrounds in the future, White students, overall, do not. In addition, there is some work that needs to be done in facilitating the kind of learning environments that promote rich understanding of different points of view.

As stated earlier, we received surveys from 78 percent of the entire Junior class. This high response rate means that the responses should provide a good overall representation of the class. The students responding to the survey identified themselves as 41.5 percent White, 11.2 percent African American, 17.7 percent Latino, 0.7 percent Native American, 8.7 percent reported they were "other", and 3.6 percent declined to answer. Only 0.7 percent of the respondents identified themselves as Native America. This group is so small that calculations involving Native American students were omitted from the analysis since the responses of just one student could produce a big change in the percentages.

Table 1: Distribution of Student Respondents to the Survey by Race and Ethnicity

	African American	Asian	Latino	White	Native	Other	Missing	Total
Frequency	71	105	112	263	5	55	23	634
Percent	11.2	16.6	17.7	41.5	0.7	8.7	3.6	100

We also omitted those students who did not respond to individual items, this percentage ranged from 0 to 7 percent of all respondents. Therefore the numbers on the table presented in this report, are the percent of those people who 1) listed a race category, and 2) answered the question. The highest non-response reported – including both race non-responses and question non-responses – was 8 percent, the lowest 4 percent, therefore on any given question we list the responses from 92 to 96 percent of the people who returned surveys.[3]

[3] This does not include those who "validly" skipped a question, such as "In your social studies class..." if they were not in social studies that year.

Part 1: Educational Aspirations

Providing access to college is an important goal for most high schools. Students who do not receive post-secondary education have little chance for mobility in the job market and are likely to face a life of low and uncertain incomes. Overwhelming majorities of U.S. students want to go to college and a large majority of recent high school graduates actually enroll in college.[4] Being qualified and prepared for a good college are central goals for students and their families. If one indicator of successful desegregation is defined as equalizing opportunity among different racial/ethnic groups, then raising aspirations of all students to similar levels is a first step. We would hope that students, regardless of their racial or ethnic background, would have similar higher education aspirations. In fact, a remarkably high proportion of every group of students report an interest in attending a four-year college, including 81 percent of Latinos, 82 percent of African Americans, and 72 percent of Whites (Table 2).

Table 2.

How interested are you in going to a 4-year college? (% indicating "interested" or "very interested")				
African American	Asian	Latino	White	Total
82	78	81	72	76

Counselors and college admissions staff know, of course, that there is often a big difference between saying that you want to go to college and actually getting ready for admissions. In the category of advanced courses necessary for competitive college admissions, the Lynn results show more racial differences and suggest areas for future improvement. For instance, there are important differences between racial groups on the level of interest in taking honors or AP mathematics or English courses. These differences indicate that perceived opportunity may not yet have been totally equalized. For example, Latino and Asian students report being interested in taking a Honors/AP English course to a greater degree than do African American or White students (Table 3a). These trends are similar when students are asked about Honors/AP math courses (Table 3b).

Table 3a.

How interested are you in taking an honors or AP English course? (% indicating "interested" or "very interested")				
African American	Asian	Latino	White	Total
34	45	58	36	42

Table 3b.

How interested are you in taking an honors or AP math course? (% indicating "interested" or "very interested")				
African American	Asian	Latino	White	Total
28	50	56	25	37

[4] Digest of Education Statistics 1997, National Center for Education Statistics, U.S. Department of Education, Office of Educational Research and Improvement, (Table 184—College enrollment rates of high school graduates).

Despite the fact that disparities exist in advance course taking interest, students' perceptions of institutional support for taking such courses are similar across racial/ethnic groups. This encouragement is a vital component of any attempt to equalize the opportunity for educational attainment across different groups, since policy can have little control over what students will do, but can have significant control over how the school applies it's mission to all students. As such, it is important that students in Lynn high school report encouragement from teachers and counselors at roughly the same degree across all racial groups, particularly on the question of taking demanding classes (honors or AP level), which provide excellent preparation for college, and have, in the past, been less easily reached by minority students.

In fact, African American students report the most encouragement (55%) while White and Latino students report the least amounts of encouragement to take Honors and AP classes (47%) and (46%) respectively (Table 4). Yet, overall, students' perception of encouragement by teachers and other school officials to take Honors or AP classes are quite similar across all racial/ethnic groups.

Table 4.

How strongly have your teachers, counselors, or other adults in this school encouraged you to take honors and/or AP classes? (% indicating "somewhat strongly" or "very strongly")				
African American	Asian	Latino	White	Total
55	50	46	47	48

Part 2: Institutional Support

The previous results point out the importance of the school's role in supporting important outcomes like high educational aspirations. In this section we will more explicitly examine the role of the institution in guiding students towards important academic and democratic outcomes. We are defining institutional support for diversity as schools providing students with the conditions and skills necessary for diverse groups to live, work, and function together in workplace and civic environments. These may include:

- Encouraging students of all races/ethnic groups to take advanced classes or attend college
- Providing information to help students pursue higher education
- Providing students will the skills to be comfortable living, working, and interacting with members of different racial/ethnic groups
- Providing an environment where all students feel supported and fairly treated

This type of institutional support is critically important for two key reasons. First, equal levels of institutional support for educational aspirations between racial groups ensures that all students have the same opportunities to strive to reach a high level of academic achievement and ultimately enter higher education. If schools do not provide this level of support then any of the benefits that accrue from diversity cannot occur, and ultimately the school would be participating in creating inequitable educational conditions based on race. Second, if students do no have the

skills to interact across racial groups then the work of democratic institutions, or businesses that serve diverse communities cannot be realized. Therefore, schools that support and achieve equitable levels of support and comfort between racial groups are reaching the goals for which they may be held accountable—the goals of providing the skills and experiences necessary for democratic discourse.

Academic Support

Do students in Lynn report adequate access to information about college? More importantly, where there is such racial uniformity in interest to pursue college, is the access to information equally uniform for all racial and ethnic groups? The answer appears to be yes. Students from all racial/ethnic groups report encouragement to attend college, with African American and Latino students reporting such encouragement at higher rates than Whites and Asians (Table 5).

Table 5.

How strongly have teachers, counselors, or other adults in this school encouraged you to attend college? (% indicating "somewhat encouraged" or "strongly encouraged")				
African American	Asian	Latino	White	Total
80	77	84	76	78

However, there are important differences in students' perceptions of how much information they receive about college. Latino students report receiving information about college admissions from their teachers or counselors to a larger degree than do their Asian, African American, and White counterparts. Seventy-five percent of Latino students report receiving "some" or "a lot" of information from teachers and counselors compared to 62, 69, 56 percent for African American, Asian, and White students respectively. It is important to note that White students report receiving college information to a much lesser degree than do students from all other racial/ethnic groups.

Table 6.

How much information about college admissions have your teachers, counselors, or other adults in the school given you? (Such as SAT, ACT, financial aid, college fairs, college applications) (% indicating "some" or "a lot" of information)				
African American	Asian	Latino	White	Total
62	69	75	56	63

Although we can not draw specific conclusions from the apparent "information gap" between White students and their African America, Asian, and Latino counterparts, it is possible that this may be due to an assumption on the part of the school faculty, that White students will find the information from other sources, and are thus, less in need of specific types of institutional supports.

Supporting Interaction between different Racial/Ethnic groups

One basic theory concerning the educational impact of diversity is that interaction with peers from diverse racial backgrounds—both in the classroom and informally—has major educational importance, particularly when the interaction is done in positive ways. By exposing students to multiple perspectives, students learn to think more critically and to understand more complex issues. This is a basic finding, for example, in recent longitudinal studies of students at the University of Michigan.[5] This was, for instance, the basic educational justification for affirmative action upheld by the Supreme Court as a compelling educational interest in the 1978 *Bakke* decision, which has governed affirmative action in higher education ever since.[6]

Moreover, the ability to live, work, and interact with people of different ethnic and racial groups is an essential workforce and life skill as the rapid demographic changes show a diverse nation becoming ever more diverse. Without these skills—the ability to work with supervisors, or to think complexly about controversial racial or political issues—the democratic and economic life of the country would be severely compromised. Thus, given the importance of these skills, the results from Lynn are very encouraging. Students from all racial and ethnic backgrounds report being "comfortable" or "very comfortable" working for a supervisor who was of a different racial or ethnic background than their own, and at extremely high levels with 87 to 94 percent of all racial groups stating that they feel "somewhat" or "very prepared" to work with people of different racial or ethnic backgrounds (Table 7).

Table 7.

How comfortable would you be with a work supervisor who was of a different racial or ethnic background than you are? (%indicating "comfortable or "very comfortable")				
African American	Asian	Latino	White	Total
94	95	92	87	91

In addition, students across all racial groups also feel prepared to work in job settings where people are of a different racial or ethnic background than their own (Table 8).

Table 8.

After high school how prepared do you feel to work in a job setting where people are of a different racial or ethnic background than you are? (% indicating "somewhat prepared" or "very prepared"				
African American	Asian	Latino	White	Total
89	91	91	88	89

[5] See Patricia Gurin, "The Compelling Need for Diversity in Higher Education," expert testimony in *Gratz et al. v. Bollinger* et al. (No. 97-75231 E.D. Mich., filed 1997) and *Grutter et al. v. Bollinger et al.* (No. 97-75928 E.D. Mich., filed 1997), 1999.

[6] For a discussion of the current status of research on this question see *Diversity Challenged,* ed. Gary Orfield., Cambridge: Harvard Educational Publishing Group, 2001.

These encouraging numbers extend to comfort levels discussing racial or political issues, which is essential to the work of a functioning democracy. These numbers show slightly larger differences between racial/ethnic groups than the previous numbers, but are still at extremely high levels with no less than 87 percent of students feeling comfortable or very comfortable discussing issues related to race (Table 9), and no less than 78 percent of students feeling comfortable debating social or political issues (Table 10).

Table 9.

How comfortable are you discussing controversial issues related to race? (% indicating "comfortable" or "very comfortable")				
African American	Asian	Latino	White	Total
85	86	91	87	87

Table 10.

How comfortable are you debating current social and political issues? (% indicating "comfortable" or "very comfortable")				
African American	Asian	Latino	White	Total
86	85	78	80	81

Creating an Equitable Learning Environment

Another important aspect of institutional support are the perceptions by students that the school is creating an environment where everyone is treated fairly regardless of their race or ethnicity. One indication of how well the school is performing on that task is student opinions across racial groups. Thus if, on average, students across different racial/ethnic groups report that the school is doing a good or poor job on an issue, then there is little evidence of racial bias on the part of the schools. In general, we might like to see high levels of perceptions of fairness or support, but if instead we are looking for fairness across racial groups, we will settle for equal levels.

Despite the relatively low levels of perception of teacher interest in students, there is no indication of disparities among students of different racial/ethnic groups. Roughly 40 percent of all students report that at least one of their teachers takes a special interest in them, although Asians are slightly lower at 36 percent and African Americans are considerably higher at 48 percent (Table 11).

Table 11.

Do you believe that at least one of your teachers takes a special interest in you? (% indicating "most of the time" or "all of the time")				
African American	Asian	Latino	White	Total
48	36	46	41	42

Again, despite low levels of perception of teachers' fair administering of punishment, there is no indication of disparities among students of different racial/ethnic groups (Table 12). In addition, it is unclear whether ANY school would receive high levels of support on this measure, regardless of the location, or context.

Table 12.

Do you think that your teachers administer punishment fairly? (% indicating "most of the time" or "all of the time")				
African American	Asian	Latino	White	Total
23	28	28	22	24

These measures of equitable environments are encouraging insofar as they show little evidence of differential treatment by race or ethnicity, however, they point to important areas where the Lynn public schools could focus improvement efforts, either through professional development, or simply awareness of these low levels. These questions point to vital areas for improvement because a consistent finding in the research on resilience suggests that one supportive relationship with an adult in a child's life can increase their chances of being successful in overcoming obstacles.[7] In addition, adolescence is also a key period in moral developmental issues of fairness become more prominent.[8] Thus, the responses to these questions should be taken seriously by the district, and improvement in the levels of these responses could improve the overall experience of school in Lynn for all students.

Part 3: Student Choices and Attitudes

Even the most supportive districts cannot force students to actually be interested in or to choose to live and work with students of other racial groups, nor should they. But one could expect that greater exposure to, and comfort with students of different racial and ethnic groups would lead to a greater desire to live and work in diverse settings. In Lynn, this would appear to be true for minority students with 64 percent of Latino, 69 percent of Asian and 70 percent of African American students indicating that they are "interested" or "very interested" in living in a racially diverse neighborhood as an adult. However, White students seem to be much less interested than minority students in living in diverse areas with only 37 percent indicating being "interested" or "very interested" to do so (Table 13).

Table 13.

How interested are you in living in a racially/ethnically diverse neighborhood when you are an adult? (% indicating "interested" or "very interested")				
African American	Asian	Latino	White	Total
70	69	64	37	53

[7] See Michial Rutter (1987). "Psychosocial resilience and protective mechanisms", *American Journal of Orthopsychiatry*, 57(3), pp. 316-331.

[8] See Gilligan, C., Ward, J., Taylor J. M., and Bardige, B. (Eds.)(1989). Mapping the Moral Domain: A Contribution of Women's Thinking to Psychological Theory and Education, , Harvard University Press, Cambridge and Galotti, K. M., Kozberg, S. F. and Farmer, M. C. (1991). Gender and developmental differences in adolescents' conceptions of moral reasoning. *Journal of Youth and Adolescence*. 20(1)

This trend seems to continue when students were asked how interested they were in working in a diverse workplace when they were adults with about 70 percent of minority students indicating they were "interested" or "very interested" and a low 42 percent of White students indicating similar sentiments (Table 14).

Table 14.

How interested are you in working in a racially/ethnically diverse setting when you are an adult? ? (% indicating "interested" or "very interested")				
African American	Asian	Latino	White	Total
70	70	68	42	56

In addition, when students were asked whether classroom or extracurricular activities offered in their high schools increased their desire to live in racially or ethnically diverse settings, student responses were again mixed, with African American, Asian, and Latino students reporting uniformly high numbers (62, 65 and 74 percent), and White students reporting only 36 percent, nearly half that of the other racial groups (Table 15).

Table 15.

Have classroom or extracurricular activities offered through your high school increased your interest in living in a racially/ethnically diverse setting when you are an adult? (% indicating "somewhat increased" or "greatly increased")				
African American	Asian	Latino	White	Total
62	65	74	36	53

Finally, when student's were asked whether school experiences had helped them work more effectively and to get along better with members of other races and ethnic groups? Student responses were again mixed, but much closer among African American, Asian, and Latino students, which report uniformly high numbers (76, 82 and 85 percent), and White students reporting 69 percent (Table 16).

Table 16.

Do you believe your school experiences have helped you, or will help you in the future, to work more effectively and to get along better with members of other races and ethnic groups? (% indicating "somewhat increased" or "greatly increased")				
African American	Asian	Latino	White	Total
76	82	85	69	76

These results suggest a number of different interpretations. First, one could conclude that White students simply don't want to live and work with people of other racial and ethnic backgrounds. Which is a possible interpretation, however, it must be noted that very few students of all racial and ethnic groups stated that they were NOT interested in living and working with members of different racial/ethnic groups. These results imply that non-White respondents were simply more interested.

Alternately we can look at the dominant housing patterns in Lynn for an explanation. In Lynn, housing patterns are quite segregated along racial and socioeconomic lines. Therefore, poor and minority students tend to live together, thus many of the racially diverse neighborhoods in Lynn are the poor neighborhoods.[9] Therefore, it is possible that White students in this survey associate diverse neighborhoods with poor neighborhoods, and their reluctance to live in a "racially/ ethnically diverse neighborhood" reflects an aversion not to diversity, but to poverty.

Regardless of the actual reasons why White students have lower scores on these questions, what is clear is that schooling has increased students' desire to live and work with members of different racial and ethnic groups, for 36 percent of the White students surveyed and twice that percentage for the other racial/ethnic groups. In addition, relatively low numbers of all students (African American 5.7%, Asian 2.7%, Latino 0.0%, White 12.6%) responded that their school experiences "decreased" their interest in living and working with people of different racial or ethnic groups, and (African American 2.8%, Asian 1.0%, Latino 1.0%, White 7.6%) responded than their school experiences "Hurt" their ability work more effectively and to get along better with members of other races and ethnic groups. So, by and large, schooling experiences have been a positive factor for all students, but a more positive factor for minority students, when compared to White students.

Conclusion

Several important conclusions can be made based on these results. First, based on students' reported levels of educational aspirations, we see that all students—regardless of their racial/ethnic background—have high educational aspirations, and that they perceive the levels of encouragement by the school for promoting these aspirations fairly similarly. Second, students across the board are reporting that they are comfortable and prepared to work with members of racial/ethnic groups different from their own. Third, students' sense of the fairness of their learning environment is also similar across all groups, with students from each racial and ethnic group reporting, at similar percentage levels, favorably to questions regarding the perception of teacher interest in students and to the fairness in administration of punishment.

From these data the Lynn school district appears to be doing a good job fostering supportive working environments for students of all racial and ethnic groups. In doing so, they are creating the conditions necessary for democratic interactions to occur in diverse environments. This support appears to be working especially well for the minority students in Lynn who show very high levels of desire to live and work in diverse environments, and confidence in their skills to do so. However, many White students report lower levels of interest in living and working with people of different racial and ethnic groups, while at the same time reporting the competency to do so if they chose. These data show that the schools are doing their jobs by teaching the skills necessary to live and work in diverse environments, but that merely possessing these skills does not mean that students will seek to use them.

[9]Nancy McArdle, personal communication, February, 2002.

THE IMPACT OF RACIAL AND ETHNIC DIVERSITY ON EDUCATIONAL OUTCOMES: CAMBRIDGE, MA SCHOOL DISTRICT

January, 2002

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Cambridge public schools are extremely diverse and have been significantly integrated for many years. This city with a population of more than 100,000 has only a single high school, so the entire diversity of the city is present in this one school. As the nation's public school districts are being forced by court decisions to consider the future of integration in their communities, it is appropriate to ask students who have experienced desegregated schooling about its impacts. Although neighboring Boston has abandoned its desegregation efforts under pressure from conservative federal courts, the Cambridge School Committee decided in early 2002 to embrace a new strategy emphasizing socio-economic desegregation in an attempt to preserve racial and ethnic diversity in a time when policies based solely on race may be prohibited or strictly limited.

This is a study of Cambridge high school's twelfth grade students' experiences with racial and ethnic diversity. It is part of a series of studies by The Civil Rights Project across the country on what students in diverse and more segregated schools learn both in specific content areas and in preparation for adult life and work. Our findings are based on the Diversity Assessment Questionnaire (DAQ), a survey instrument developed with the help of leading experts on school desegregation research across the country. We administered the DAQ to 379 seniors in Cambridge last school year.[1] We have previously released results from metropolitan Louisville and will be issuing reports on districts across the country in the coming months.

Students responded to the survey anonymously and were assured that their teachers and school officials would not see it, so there was no pressure to give answers officials might want to hear. The Civil Rights Project made the survey available and prepared this study without cost to the Cambridge public and this report is totally independent of district control or direction. We commend the Cambridge school leaders for permitting an independent examination of important and very sensitive issues. The DAQ results indicate many positive attitudes about diverse educational experiences; in addition, these results also pointed to areas of possible future improvement.

The survey was administered to all high school seniors in Cambridge. It was administered during school and all seniors were required to complete it, so we have data that reflects the entire population of students finishing secondary education in the city. The survey includes 70 distinct items, which were created to test several distinct dimensions of experiences and attitudes (four of these dimensions are highlighted in this report).[2] Since our results on these grouped items were quite consistent, we have strong evidence that the data in this report represents the actual experiences of the responding seniors and that our findings are not simply byproducts of question wording. These responses reflect a broad and consistent pattern of responses.

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[1] For the purpose of this memo we disaggregate the question responses by race. For this reason students who did not provide an answer to the racial/ethnic identification question (approximately 50 students) were omitted from the tables.

[2] On any given survey question between 11-13% of all students did not respond, these non-responses were not included in the calculations of these tables.

School level desegregation, of course, does not guarantee the presence of a curriculum that recognizes diversity, fair treatment of all groups of students, or deep and positive interactions between different racial or ethnic groups—all important factors that contribute to positive educational outcomes associated with diversity. It does, however, create a situation within which such interactions may occur, depending on many factors within the school and among the groups of students. Although we have not studied all the factors that can maximize the benefits of diversity, we have examined a number of very important educational outcomes. In this memo we provide basic responses, by race, to a number of questions from the survey.[3] Four distinct areas are explored, (1) student learning and peer interaction; (2) citizenship and democratic principles; (3) future educational aspirations and goals; and (4) perceptions of support by the school. These areas are all well established as important goals of education, and build essential skills that students need in order to achieve academic and professional success, and to become responsible citizens. The district and the state government have already published extensive test score data on the high school.

Obviously since Cambridge has only one large high school for the entire city we cannot compare desegregated and segregated high schools within this district. Our studies of six other school districts do show important differences in attitudes as a function of schools' racial composition. This study should be understood as providing information about the educational experiences of the city's students in an interracial school and their convictions about the way those experiences have contributed to their education.

Results from the survey suggest positive educational impacts of diversity for students in the district. Overall, substantial majorities of students report a strong level of comfort with members of other racial and ethnic groups. Most importantly, students indicate that their school experiences have increased their level of understanding of diverse points of view, and enhanced their desire to interact with people of different backgrounds in the future. Students report that they have been strongly affected by their school experiences. Given that Cambridge is an area of great ethnic and racial diversity and that the population growth of metro Boston is now being driven by non-white immigration, these are important issues both for the future work experiences of students and for community life. The survey results also indicate some dimensions on which an otherwise strongly positive record might be improved.

We received surveys from 78% of the entire senior class. This excellent response rate means that the responses provide a good representation of the class. The students responding to the survey identified themselves as 31% White, 18% African American, 10% Latino, 14% reported they were "other", and 10% said they were multiracial. Only 4% of the respondents identified themselves as Asian. This group is so small that calculations involving Asian students should be treated with caution since the responses of a handful of students can produce a big change in the percentages.

[3] The racial/ethnic categories that we use are all self-identified, that is the students choose how they wish to describe themselves from an established list. Our categories are: African American, Asian, Latino, White, Multi-racial, and Other. The survey specifies that students can indicate two categories. We created the Multi-racial category by collapsing all students who identified themselves as more than one race into the multi-racial category.

Table 1: Distribution of Student Respondents to the Survey by Race and Ethnicity

	African Americans	Asians	Latinos	Whites	Other	Multiracial	Unidentified	Total
Frequency	69	16	37	116	51	39	51	379
Percent	18	4	10	30	14	10	14	100

A. Student Learning and Peer Interaction

One basic theory concerning the educational impact of diversity is that interaction with peers from diverse racial backgrounds—both in the classroom and informally—has major educational importance, particularly when the interaction is done in positive ways. By exposing students to multiple perspectives, students learn to think more critically and to understand more complex issues. This is a basic finding, for example, in recent longitudinal studies of students at the University of Michigan.[4] This was, for instance, the basic educational justification for Harvard University's affirmative action plan and was upheld by the Supreme Court as a compelling educational interest in the 1978 *Bakke* decision which has governed affirmative action in higher education ever since.[5]

Our survey asked Cambridge students about the way they experienced diversity in the curriculum, in classroom discussions and in working with peers from different types of backgrounds. Overall, students report that racial issues are explored fairly frequently during classroom discussions in social studies or history classes. Eighty-seven percent of White students report that they experience frequent discussions about race in social studies or history classes and seventy percent of African American students report similar levels of exposure to discussions about race (Table 2). This is a sign that the teachers are taking advantage of an important learning opportunity in a multiracial school. In a substantially interracial school like Cambridge Rindge and Latin there are opportunities to interact with many members of other racial groups and to understand not only difference in general experiences and perceptions by race but also the diversity within each of these groups.

Table 2

Q8: During classroom discussions in your social studies or history class how often are racial issues discussed and explored? (% indicating 1 to 3 times a month)						
African Americans	Asians	Latinos	Whites	Other	Multiracial	Total
70	85	80	87	74	92	81

Around forty percent of students across all racial and ethnic groups report that exposure in the curriculum to different cultures and experiences of different racial and ethnic groups has helped them understand points of view different from their own, while a third of Latino students agreed (Table 3). In fact, only six percent of all students report that such discussions did not change their understanding of different points of view at all. The educational experience made a significant difference for many students and added something for almost all students.

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[4] See Patricia Gurin, "The Compelling Need for Diversity in Higher Education," expert testimony in *Gratz et al. v. Bollinger* et al. (No. 97-75231 E.D. Mich., filed 1997) and *Grutter et al. v. Bollinger et al.* (No. 97-75928 E.D. Mich., filed 1997), 1999.

[5] For a discussion of the current status of research on this question see *Diversity Challenged,* ed. Gary Orfield., Cambridge: Harvard Educational Publishing Group, 2001.

Table 3

Q9: To what extent do you believe that these discussions have changed your understanding of different points of view? (% indicating "quite a bit" or "a lot")						
African Americans	Asians	Latinos	Whites	Other	Multiracial	Total
38	43	32	40	38	50	40

Given its location, right across the Charles River from a city that experienced massive race relations problems over school integration, and situated within a society with high residential segregation and increasing level of school segregation, Cambridge students of all racial and ethnic backgrounds report a surprisingly high degree of comfort working with people different from themselves in the classroom. In fact, 90 to 99% of all racial groups reported that they were "comfortable" or "very comfortable" working with students from other groups (Table 4). In a community where there is no majority group among the school age population and there is extraordinary diversity and immigration from all over the world, this ability will be an important asset for adult life and community success.

Table 4

Q29: How comfortable are you working with students from different racial and ethnic backgrounds on group projects in your classes? (% indicating "comfortable" or "very comfortable")						
African Americans	Asians	Latinos	Whites	Other	Multiracial	Total
90	94	92	99	96	95	95

Some of the good results we see among Cambridge students have been achieved without strong faculty support. Aside from the small Asian group, fewer than 50 percent of students from the remaining racial and ethnic groups report a high degree of encouragement by teachers to work with students of different racial and ethnic backgrounds (Table 5). (Figure 1 includes the full breakdown of responses for African American, Latino, and White students on this particular question.) Extensive research by both Elizabeth Cohen at Stanford University and Robert Slavin at Johns Hopkins University argues that positive interactions in collaborative academic projects are very important to realizing the potential gains of desegregation.[6] This is clearly an area that could be reinforced with staff development work. There are well developed and tested programs, such as Student Team Learning,[7] which have good techniques for creating successful inter-group learning opportunities. Such learning opportunities are necessary for promoting the type of rich discussions that lead to improved attitudes among peers of different backgrounds. In discussions with school system leaders we were impressed by their interest in strengthening staff development to produce even stronger results.

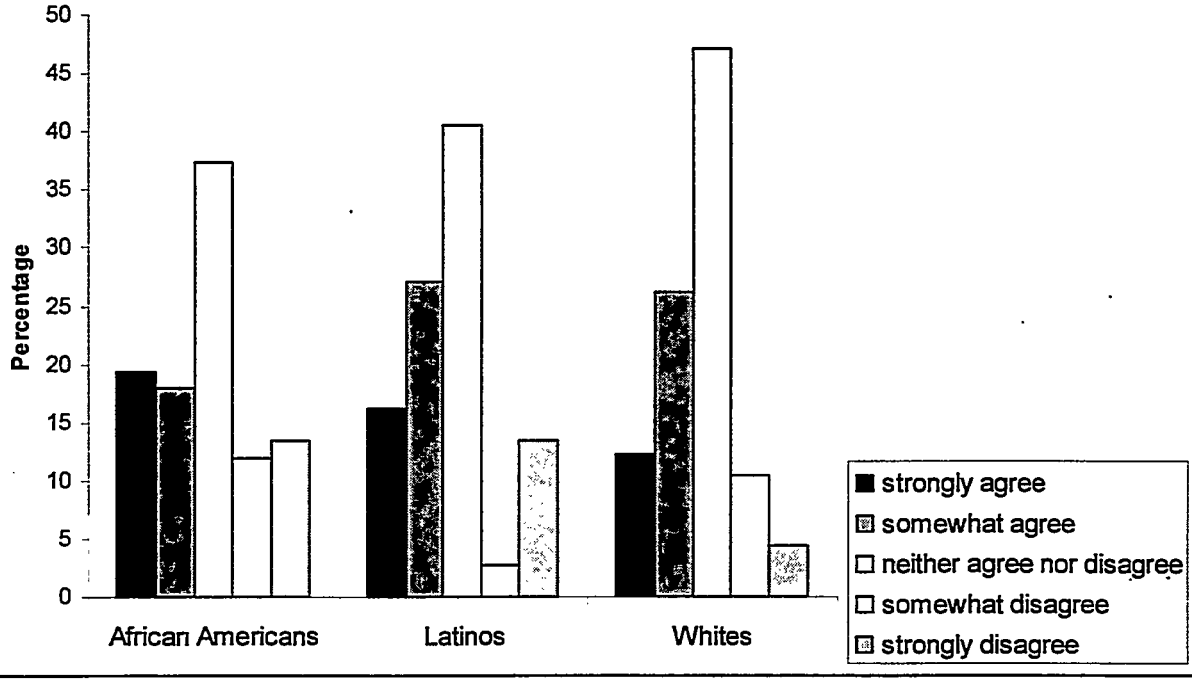
Table 5

Q24: My teachers encourage me to work with students of other racial/ethnic backgrounds. (% indicating somewhat or strongly agree)						
African Americans	Asians	Latinos	Whites	Other	Multiracial	Total
37	50	43	38	50	32	40

[6] See, for example: Cohen, Elizabeth G. and Lotan, Rachel A. "Producing Equal-Status Interaction in the Heterogeneous Classroom," *American Educational Research Journal. v32 n1 p99-120 Spring 1995;* or Cohen, Elizabeth G. "Making Cooperative Learning Equitable," *Educational Leadership. v56 n1 p18-21 Sep 1998.*

[7] See, for example: Slavin, Robert, et al. "Putting Research to Work: Cooperative Learning," *Instructor,* v102 n2 p46-47 Sep 1992.

Figure 1: ***My teachers encourage me to work with students of other racial/ethnic backgrounds.***



B. Democracy and Citizenship

From the time of Thomas Jefferson, American education advocates and leaders have often seen the schools as essential to the operation of a democracy, preparing people to understand their country and its institutions and to participate effectively in democratic life. With the vast migrations that began in the 19th century, schools were seen as central to shaping a nation of millions of people from diverse cultures and languages. In the civil rights movement of the 1960s, the schools became a central focus in the struggle to open the doors of opportunity to African Americans. Now, as the country becomes more multiracial every year, the schools face the challenge of a level of multiracial diversity never before seen in American society. The extremely strong focus on evaluating schools only in terms of standardized test scores in two or three subject areas may have distracted attention from a function of schools that is vital to the future of American society and American democracy. As the only institution that reaches the great majority of young people (nearly nine-tenths of U.S. children attend public schools), this function is of great importance for the future of U.S. society. Given public schooling's unique role in the United States, it is important to understand how they are helping or hindering the preparation of students to live and work among people different from themselves.

We asked the students to write about their personal views on the questions of what they *"learned or gained from attending school with people who are of a racial or ethnic group different from your own?"* One student who transferred into public school wrote: "I came from an all white private school. CRLS has conquered many fears that I had about people from different racial and ethnic groups. I feel very thankful." Diversity was very stimulating for another: "I have seen high school the preppy way (Milton Academy) where most people are white and wealthy. Now, at Cambridge, I have been exposed to more cultures and greater diversity than I ever could have imagined. I value my experience in public school much more because of this."

An immigrant student commented: "I have learned English, different cultures, how to communicate in English, made friends, from different countries. I have learned a lot about America. Cambridge public school changed my life a lot."

Yet another student noted how diversity in the high school not only helped their understanding of others but also to think about one's own background? "I have not only grown very comfortable with people from different racial or ethnic groups, but I have come to be excited and interested by such difference. I have learned to respect others while still staying true to my own heritage and beliefs." For another student, the experience made him aware of the need to continue to work on race relations: "I have learned that teachers and administrators have to deal with the hard issues and discussions that come with talking about diversity. I have learned that while we have had integrated schools for over 50 years, that people's minds are still segregated. And I have learned the importance of trying to overcome this and meet people unlike myself." Another noted that CRLS had a big impact on his thinking about the future.

> "I think that I have learned a lot about how to deal with people who are different, respect them and be interested in their culture and heritage and learn from them. Living and working with people from different race and ethnic group has become ordinary to me – it is not a big deal, and I think this will help me look beyond our differences and work and learn with them, throughout my life. It has taught me a way to see the world and its problems and perhaps how we can work together to fix them."

In a city with the diversity of Cambridge this need is already obvious. Do students develop a consciousness around the importance of interacting with people of different backgrounds, and does this have an impact on their future goals? In this report we examined whether students in Cambridge felt prepared to work and live in the diverse settings in which they currently and will increasingly find themselves. We asked students how their experience in school has contributed to their overall attitudes about working in a multi-racial setting. The findings are overwhelmingly positive in this area, suggesting that Cambridge high school is helping to produce young adults who are ready to operate in diverse communities. This skill is critical to living in this society, particularly as many future economic opportunities will involve contact with people who are from different cultures and may hold different worldviews. Nearly all students (over 90 percent) say that they are prepared to live and work among people of diverse racial and ethnic backgrounds (Table 6a). An overwhelming majority of all students report being comfortable working with a supervisor of a racial and ethnic background different than their own (Table 6b).

Table 6a

Q25: After high school, how prepared do you feel to work in a job setting where people are of a different racial or ethnic background than you are? (% indicating "somewhat" or "very" prepared)						
African Americans	Asians	Latinos	Whites	Other	Multiracial	Total
94	100	89	94	90	95	93

Table 6b

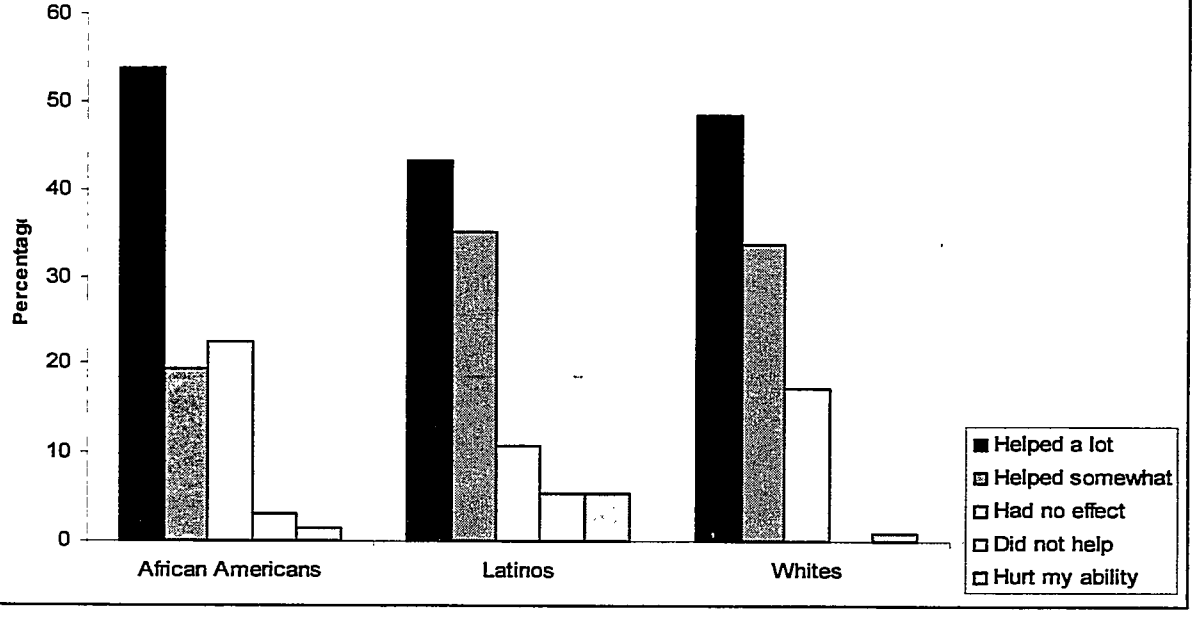
Q27: How comfortable would you be with a work supervisor who was of a different racial or ethnic background than you? (% indicating "very comfortable or "somewhat comfortable")						
African Americans	Asians	Latinos	Whites	Other	Multiracial	Total
93	94	92	95	92	87	94

Students credit their school experiences as contributing to their ability to work with and understand people from different backgrounds. In spite of the city's diversity, children can grow up in communities that are far less diverse than the city as a whole, so school becomes a place where these abilities can be developed. Among all students, nearly seventy percent indicate that their school experiences have "helped a lot" or "helped somewhat" their ability to work with members of other races and ethnic groups (Table 7). (Figure 2 includes the full breakdown of responses for African American, Latino, and White students on this particular question.)

Table 7

Q26: How do you believe your school experiences will affect your ability to work with members of other races and ethnic groups? (% indicating "helped somewhat" or "helped a lot")						
African Americans	Asians	Latinos	Whites	Other	Multiracial	Total
73	88	78	82	78	77	79

Figure 2: *How do you believe your school experiences will effect your ability to work with members of other races and ethnic groups?*



Students not only believe that they can work more effectively across social divisions but also that they are better able to understand other groups. Eighty-four percent of both African Americans and Whites said their school experiences had helped them better understand members from different groups, students from other racial/ethnic groups responded similarly (Table 8). This learning is not about optimistic statements from reading great documents or speeches but from the actual interactions with people of diverse background in the school setting.

Table 8.

Q48: How do you believe your school experiences will affect your ability to understand members of other races and ethnic groups? (% indicating "helped somewhat" or "helped a lot")						
African Americans	Asians	Latinos	Whites	Other	Multiracial	Total
84	88	78	84	80	79	82

C. Goals, Opportunities, and Access to Higher Education

Providing access to college is a crucial goal for high schools today. Students who do not receive post-secondary education have little chance for mobility in the job market and are likely to face a life of low and uncertain incomes. Overwhelming majorities of U.S. students want to go to college and a large majority of recent high school graduates actually enroll in college.[8] Being qualified and prepared for a good college are central goals for students and their families. If one indicator of successful desegregation is defined as equalizing opportunity among different racial/ethnic groups, then raising aspirations of all students to similar levels is a first step. We would hope that students, regardless of their racial or ethnic background, would have similar higher education aspirations. In fact, a remarkably high proportion of every group of students report an interest in attending a four-year college, including seventy-eight percent of Latinos, eighty-nine percent of African Americans, and ninety-two percent of Whites (Table 9).

Table 9

Q41: How interested are you in going to a four-year college? (% indicating interested or very interested)						
African Americans	Asians	Latinos	Whites	Other	Multiracial	Total
89	87	78	92	94	90	90

Counselors and college admissions staff know, of course, that there is often a big difference between saying that you want to go to college and actually getting ready for admissions. In the category of advanced courses necessary for competitive college admissions, the Cambridge results show more racial differences and suggest areas for future improvement. For instance, there are important differences between racial groups on the level of interest in taking honors or AP Mathematics or English courses. About half of African American and Latino students report an interest in taking AP math or English. Thirty-five percent of Whites express interest in AP math and 63 in AP English courses (Table 10):

[8] Digest of Education Statistics 1997, National Center for Education Statistics, U.S. Department of Education, Office of Educational Research and Improvement, (Table 184—College enrollment rates of high school graduates).

Table 10

Q38: How interested are you in taking an honors or AP mathematics course? (% indicating interested or very interested)						
African Americans	Asians	Latinos	Whites	Other	Multiracial	Total
50	75	54	35	39	44	44
Q39: How interested are you in taking an honors or AP English course? (% indicating interested or very interested)						
African Americans	Asians	Latinos	Whites	Other	Multiracial	Total
52	80	57	63	57	49	58

It is also very important to have early information about college admissions requirements in order to adequately prepare for college. Cambridge Rindge and Latin High school is an important urban school in Massachusetts and its students report receiving substantial information about college. Latinos, Whites, and African Americans report receiving information about such things as admissions tests, financial aid, and applications at roughly the same level. About 54 to 57 percent of all students report receiving "a lot " or "some" information about college from their teachers, with Asian students reporting more. About 65-70 percent of all students report receiving "some" to "a lot" of information about college from their counselors, with Latino and Multiracial students reporting this at a modestly lesser degree than do other students (Table 11).

Table 11

Q17: How much information about college admissions have your teachers given you? (such as SAT, ACT, financial aid, college fairs, college applications) (% indicating "some" or "a lot")						
African Americans	Asians	Latinos	Whites	Other	Multiracial	Total
54	69	57	56	62	53	57
Q18: How much information about college admissions have your counselors given you? (such as SAT, ACT, financial aid, college fairs, college applications) (% indicating "some" or "a lot")						
African Americans	Asians	Latinos	Whites	Other	Multiracial	Total
75	69	65	75	71	64	72

D. Support

While more than three-fourths of all groups of students desire to attend a four-year college, it is very important to know whether the students' dreams are supported in their schools. The survey shows very high levels of support from teachers for student aspirations. More than three-fourths of African Americans, Latinos, Asians and Whites report such encouragement. On the question shown in Table 12 Latinos and Whites report the highest level of support. In general, teachers strongly encourage student aspirations.

Table 12

Q15: To what extent have your teachers encouraged you to attend college? (% indicating "somewhat encouraged" or "strongly encouraged")						
African Americans	Asians	Latinos	Whites	Other	Multiracial	Total
78	80	86	89	80	69	82

Even more important is the question of whether or not the school's counselors encourage all groups of students to take demanding classes, honors or AP level, which provide excellent preparation for college. On this question, the results are far less optimistic. Students report far less encouragement to take challenging courses from school counselors, but the numbers are particularly low for African Americans, Latinos, and students from "other" racial or ethnic backgrounds. This single survey question cannot, of course, tell us whether these responses reflect discouragement by school counselors, failure to discuss the importance of advanced classes, or other causes. Some of this difference obviously results from serious gaps in achievement levels that exist when students enter the Cambridge schools and when they leave. The school district is actively engaged in a national coalition working on these problems and it is very important to make certain that students of all racial and ethnic groups are encouraged to take the excellent pre-collegiate courses the high school offers. This difference should be examined much more closely by school and district personnel.

Some AP students spoke about the problem: "I like being in a diverse school very much but my classes, especially the AP classes, lack diversity. The classes that are more diverse are enjoyable, and the AP courses would be much better with a more diverse group of students." In other words, part of the potential intellectual excitement of the classes was lost. Another commented: " I think counselors should encourage black students to attend AP classes. Because presently I'm in an AP History class and I'm the only one who is black. When we have discussions about the black community I get offended and intimidated. I feel I can't attend this class any longer. And this year I left my AP English class because the teacher wasn't willing to help me and suggested that I take a regular English course."

Table 13

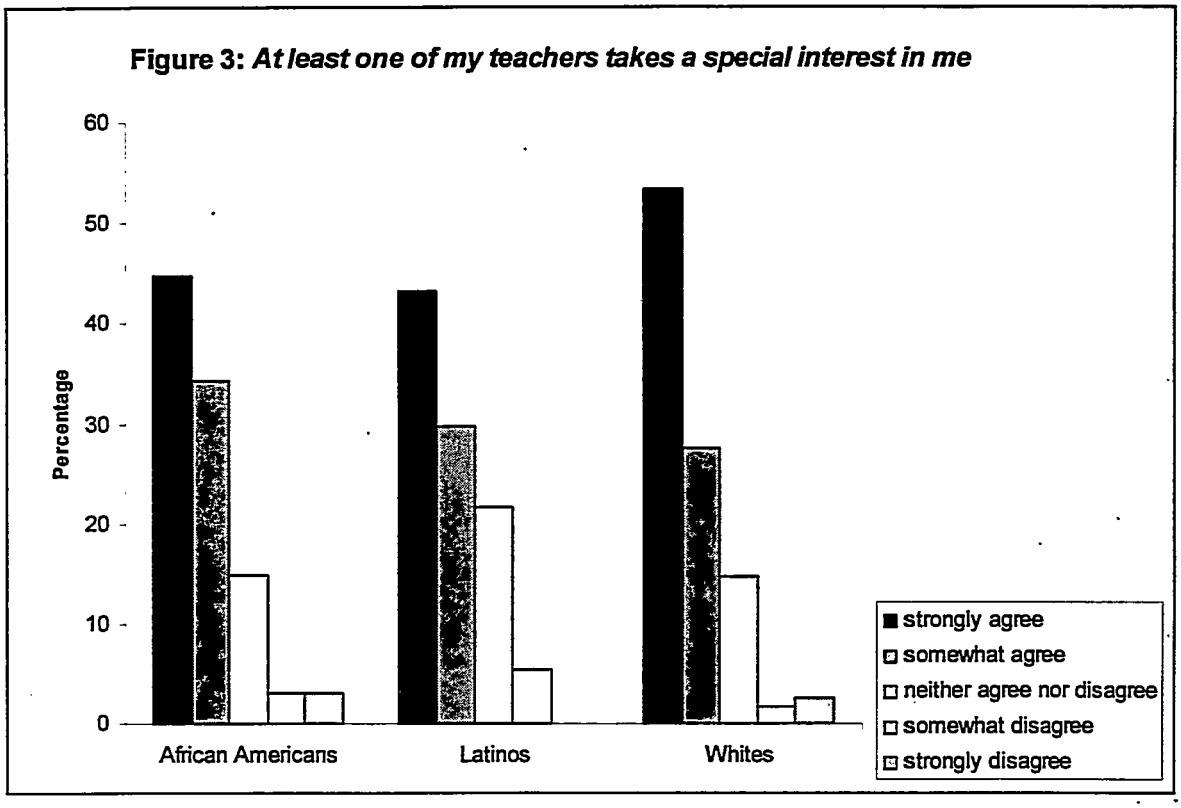
Q20: To what extent have your counselors encouraged you to take Honors and/or AP classes? (% indicating "somewhat encouraged" or "strongly encouraged")						
African Americans	Asians	Latinos	Whites	Other	Multiracial	Total
43	75	36	66	38	62	53

One very important issue for a student's successful incorporation into the academic life of the school is whether or not a student feels his or her teachers care about their academic success. Many adults remember the powerful impact of a strong teacher who showed interest in their work. The survey asks about students' perceptions about whether or not their teachers care about them, and their responses are fairly similar across all racial/ethnic groups, ranging from 65% to 81% positive. White and African American students are more likely to report that their teacher "takes a special interest in them" than Asian or Latino students (Table 14, Figure 3). Since Cambridge is a big high school,[9] the kind of school where lower achieving students often feel lost, this measure of teacher interest in individual students is very promising.

Table 14

Q23: At least one of my teachers takes a special interest in me. (% indicating "somewhat agree" or "strongly agree")						
African Americans	Asians	Latinos	Whites	Other	Multiracial	Total
79	75	73	81	65	77	77

[9] The total enrollment at Cambridge Rindge and Latin high school is nearly 2000 students, see "High School Student Data Report, 2000-2001", Office of Development and Assessment, Cambridge Public Schools.



How does Cambridge compare to other districts?

Compared to several of the other districts we studied, the record of Cambridge teachers in the area of teacher support looks very positive. Students report receiving more attention from their teachers in almost all racial groups in comparison with students in several other districts (Table 12a). (Since the reports have not yet been released in the other cities, the names of the districts are omitted here.)

Table 12a

Q23: At least one of my teachers takes a special interest in me. (% indicating "somewhat agree" or "strongly agree")							
District	African Americans	Asians	Latinos	Whites	Other	Multiracial	Total
Cambridge	79	75	73	81	65	77	77
City A	70	57	56	71	68	73	66
City B	72		65	65	68		67
City C	68	46	57	66	48		51

In addition, on factors that schools can affect, such as the schools impact on learning to work with other groups and aspirations for college (Table 12b and Table 12c), Cambridge students respond more favorably than those in all other cities in our study, for virtually all racial/ethnic groups. These indicators are of particular importance, because they ask specifically about how students' school experiences affected these important skills.

Table 12b

How do you believe your school experiences will affect your ability to work with members of other races and ethnic groups? (% indicating "helped somewhat" or "helped a lot")							
District	African Americans	Asians	Latinos	Whites	Other	Multiracial	Total
Cambridge	73	88	78	82	78	77	79
City A	72	78	54	71	70	70	71
City B	74		77	68	75		75
City C	71	73	73	71	73		70

Table 12c

To what extent have your teachers encouraged you to attend college? (% indicating "somewhat encouraged" or "strongly encouraged")							
District	African Americans	Asians	Latinos	Whites	Other	Multiracial	Total
Cambridge	78	80	86	89	80	69	82
City A	72	77	59	72	68	72	72
City B	75		78	74	66		74
City C	69	71	70	76	64		68

Conclusions

Students of all racial/ethnic backgrounds report similar views, almost identical, on some key questions on the Diversity Assessment Questionnaire. The similarity among students' reported attitudes and views suggests that the school is providing a broadly positive experience, which generally speaking, leaves no group feeling poorly treated or with negative attitudes towards relationships with other students. Cambridge students indicate a consistently high degree of comfort living and working with students from other groups. First, they feel well prepared for functioning as adults in a very diverse community. Second, students report their school experiences have increased their level of understanding of points of view different from their own and enhanced their understanding of the background of other groups. Third, students report they feel prepared to work in job settings with people who are different from themselves, and further report their school experiences will help them work with, and better understand people from racial and ethnic groups different from their own. Finally, they report positive support and encouragement from their teachers, both generally and specific to their higher education aspirations. In a country experiencing high levels of segregation in housing and schools, and in a world tormented by ethnic divisions, this is very positive news. The picture, however, shows that racial equity has not been fully achieved and there are still certain kinds of unequal treatment within the school that could be improved with appropriate school leadership and staff training. It is through the commitment of the Cambridge leadership to continue to maximize the benefits of diversity in the city's schools that will serve as the groundwork for addressing remaining concerns of racial/ethnic disparities in educational opportunities and in improving problems of understanding among students from an increasingly diverse set of backgrounds.

One of the limitations of studying Cambridge's only high school is that we cannot compare it with other more segregated or integrated schools within the city. We have conducted parallel studies in six other communities across the U.S., however. Although we cannot release the data from those other communities, which have not yet received similar reports, the level of positive response among Cambridge seniors on most of the survey questions is the highest we have seen among all of the students surveyed. In our studies across the nation we have also been able to compare segregated and integrated schools and we do see clear benefits in more integrated schools along many of these outcomes.

We believe that the detailed survey data available to the school district should help in policy and staff development strategies both to assist Cambridge staff in understanding how generally positive the results are and for identifying areas for leadership and further training.

A Personal Note

Those of us who worked on this study are very happy to be able to report such positive findings about our neighbors in this community, something that is far too rare in civil rights research. We greatly appreciate the cooperation of the school district and the active interest by Cambridge's leaders in this work and admire the commitment the school committee recently expressed in adopting an innovative new plan to continue diversity in the city's schools. As citizens in this community, as well as researchers, we are excited by the prospect of future collaborations with the Cambridge schools.

Gary Orfield, Co-Director, The Civil Rights Project

No Excuses

Closing the Racial Gap in Learning

Abigail Thernstrom
and Stephan Thernstrom

Simon & Schuster Paperbacks
New York London Toronto Sydney

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Nine: Racial Isolation

Throughout the desegregation cases, no one stopped to ask, "How are the kids doing?" What students learn is the issue. Not whether they're going to a racially identifiable school.

Robert Bartman, Missouri commissioner of education[1]

Throughout the Kansas City desegregation case, "no one stopped to ask, 'How are the kids doing?' " What a remarkable and sad statement. Two billion dollars spent to create more racially mixed schools, and, somehow, the question of student learning got lost. "Can't we at least look at whether they can read?" Justice Stephen Breyer asked when one phase of the case was argued before the U.S. Supreme Court in 1995. No, answered Missouri deputy attorney general John R. Munich. The academic achievement of the students was irrelevant.[2]

That had not been the view of the plaintiffs in the Kansas City case ten years earlier when Judge Russell G. Clark ruled that "segregation had caused a system-wide reduction in student achievement."[3] Judge Clark's order would help raise test scores to national norms within four years, predicted Arthur A. Benson II, the attorney who represented the black schoolchildren.[4] That the average school in the system was only 25 percent white explained the racial gap, in other words. Recruit more whites and the problem of disproportionately low black achievement would disappear, the attorneys assumed.

It was always a fantasy. We strongly prefer racially integrated classrooms ourselves, although we have never thought that denying parents access to neighborhood or other schools of choice was intelligent public policy. Nor have we believed that a black child must sit next to an Asian classmate in order to learn arithmetic. In the last chapter, we argued that inadequate funding does not explain the racial gap in academic achievement, and that pouring more money into schools with large enrollments of non-Asian minority students will not, in itself, accomplish any significant improvement. In

this chapter, we explore the relationship between "segregation" (as it's commonly defined) and student performance. Are black and Hispanic children typically learning less than they could and should because most are attending schools in which only a minority of pupils are white?

Apartheid in Our Schools?

American elementary and secondary schools are still "segregated," it is often said. Linda Darling-Hammond, professor of education at Stanford and an important voice in scholarly debates, has complained of "apartheid in American education," suggesting an analogy to one-race schools in South Africa under white rule.[5] A 2001 report by the U.S. Department of Education echoed this complaint, although less flamboyantly. The "segregation of black and Hispanic students," it charged, has deprived these students of the "opportunity to learn."[6]

The Department of Education based its claim entirely on the work of Gary Orfield, a professor of education at Harvard, who deserves credit for having monitored trends in the racial composition of schools more closely than any other investigator. Orfield insists that attending a segregated school—which he defines as a school in which minorities are in the majority—has terrible educational and social consequences.[7] In his view, segregation is a primary, perhaps *the* primary, source of the racial gap in school achievement.

But what, in fact, is a "segregated" school? Half a century ago, the answer was simple and unambiguous. Until the Supreme Court's 1954 decision in *Brown v. Board of Education*, southern states required that black and white children attend separate schools. It was the law, and it was indeed a system of apartheid. The High Court's decision had little immediate impact. In the eleven ex-Confederate states, a mere 1.2 percent of black public school pupils attended schools that had any white students at all during the 1963–1964 school year—nine years after *Brown*.[8] But brave children, their parents and attorneys, other civil rights activists, the federal courts, Congress, and successive presidential administrations finally destroyed the Jim Crow system and ended race-based school assignments.

The courts, however, could not create schools in every community that perfectly reflected the racial mix of the population—locally or nationally—and it has become common to call schools that fail that test "segregated." It is seriously misleading, however, to confuse racial imbalance with the legally enforced separation of the races, we will argue. The two are not comparable, which is why the Supreme Court has never ruled that racial imbalance, per

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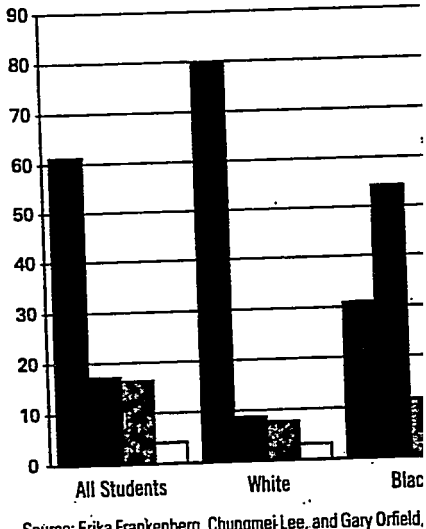

Source: Erika Frankenberg, Chungmei Lee, and Gary Orfield, *Dream?* (Cambridge, Mass.: Harvard Civil Rights Project, 20

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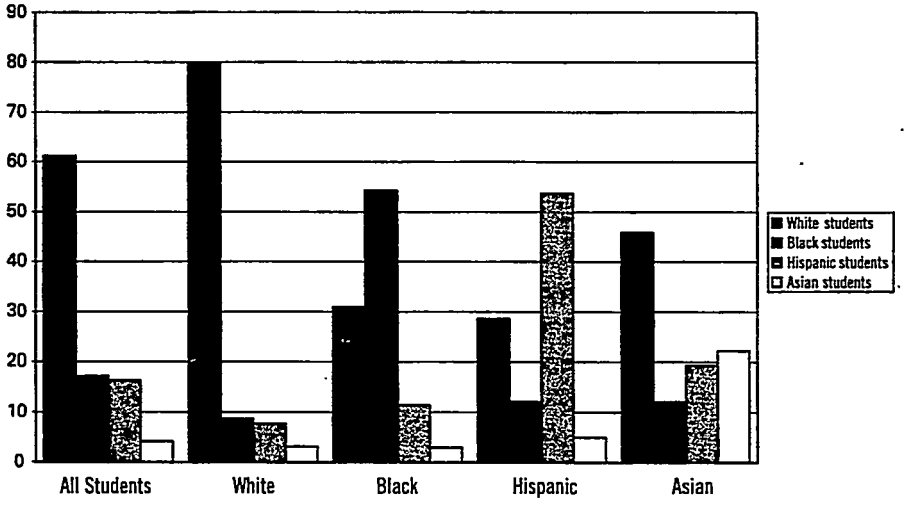
violates the equal protection clause of the Constitution. There is a constitutional obligation to remedy the deliberate separation of students on grounds of race; there is no mandate to create racially balanced schools. Racial imbalance may simply reflect residential patterns, which are beyond the purview of school authorities.

Just how racially imbalanced are schools? Figure 9-1 shows the racial composition of American public schools for 2000–2001, the most recent school year for which data are available.[9] The first group of columns, on the left of the figure, indicates the racial mix of the nation's public school population as a whole; the remaining clusters show the racial composition of the student bodies of the schools attended by the average white, black, Hispanic, or Asian student.

It's clear that whites, blacks, and Hispanics all typically attend schools in which students of their own race predominate. But there are differences. Whites are 61 percent of the nation's schoolchildren, but go to schools that are typically 80 percent white. The white concentration is disproportionately high, in other words. Blacks are 17 percent, Hispanics 16 percent, and Asians 4 percent of America's students. But these minority children are usually in much more integrated settings. Typically, around 30 percent of the classmates of both blacks and Hispanics are white. A tiny fraction are Asian-American.

Figure 9-1. Racial Composition of the Total Public School Population and of the School Attended by the Average Student from Each Racial Group, 2000–2001



Source: Erika Frankenberg, Chungmei Lee, and Gary Orfield, *A Multiracial Society with Segregated Schools: Are We Losing the Dream?* (Cambridge, Mass.: Harvard Civil Rights Project, 2003), 24, 27.

Those are only averages, of course. Other evidence compiled by Professor Orfield and his associates reveals that a little over a third of blacks and Hispanics attend schools that are less than 10 percent white. On the other hand, close to a third of blacks and a quarter of Latinos are in schools with white majorities.[10]

Imbalance: No Surprise

Is there something wrong when so many students go to schools in which most of their classmates belong to the same racial or ethnic group? That is certainly a common assumption. If America had a racially fair and open society, it is often said, group members would not cluster either in schools or the workplace. If blacks are 17 percent of the school population, they should be 17 percent of the typical school. "Institutional racism" explains the imbalance.

That might be true if blacks were randomly distributed across the nation—12 percent of the population in Detroit, in Salt Lake City, and in Montpelier, Vermont. But of course they're not. Like Italians, Poles, Jews, and members of every other racial or ethnic group, African Americans are more concentrated in some places than in others. This is true of virtually every group, however defined. And the local schools reflect that fact.

Take the group that the census refers to as "non-Hispanic white." These whites who do not consider themselves Hispanic are 61 percent of the country's total school enrollment. And yet in five states the student population is more than 90 percent white, while in fifteen more, there are white majorities of over 80 percent.[11] The typical school in those twenty states cannot possibly match the racial mix in the nation as a whole. In Vermont, Maine, North and South Dakota, Iowa, Indiana, Ohio, Wisconsin, and elsewhere, there are not enough black, Hispanic, and Asian school-age children to keep the white proportions down to the national average of roughly 60 percent.

Other states have relatively few whites, and a high proportion of minority children. In Hawaii, the most extreme case, barely one-fifth of public school students are white. In California, by far the most populous state in the nation, whites were only 37 percent of the public school student population in 1999. The figure is doubtless still lower by now, and if demographic change continues at its current pace, by 2010 only about a quarter of students in California's schools will be white. In Louisiana, Mississippi, New Mexico, and Texas, white schoolchildren are already a minority, and Arizona, Florida, Nevada, and New York are projected to join that list by the end of the decade.[12] In fact, about a third of America's public school students are in states

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The same is true for cities. Busing has been the standard remedy for racial and ethnic clustering in schools, but within school districts families make residential choices that result in a concentration of, say, Cambodians in one place, and Mexican Americans in another. Differences in family income also shape residential patterns. Whites have been moving into the suburbs for decades. To an increasing degree, blacks, Hispanics, and Asians are now leaving central cities as well, but they still remain much more strongly concentrated in inner-city neighborhoods. These demographic patterns have a profound effect on the racial makeup of schools and on the power of public authorities to engineer racial balance.

The high concentration of minority students in urban America is clear from the racial mix of students in the nation's twenty-six largest central-city school districts in the 2000–2001 academic year. These districts enroll about a tenth of all the public school pupils in the United States.[13] Although 61 percent of the nation's students are white, only one of these twenty-six districts (Salt Lake City) had a white majority, and just two more (Tucson and Albuquerque) were as much as 40 percent white. Seven of these giant school districts had white enrollments below 10 percent, and another ten were less than 20 percent white. In such districts, the most heroic efforts will not suffice to put the typical black or Hispanic pupil into a majority-white school. There simply aren't enough whites to go around. To transform all these central city schools to white-majority schools—avoiding allegedly harmful "segregation"—we would need to bus 1.7 million minority students out of these school districts and somehow replace them with whites.

Moreover, in many places it would not suffice to bus between the city and its nearby suburbs. In searching for whites, the net would have to be cast very widely—reaching far out into exurbia, because so many closer-in suburbs have large black and Hispanic populations. As the Kansas City case made clear, moreover, whites will not easily be persuaded to put their children voluntarily on buses heading for urban schools. "If spending a billion dollars in Kansas City does not win back the white middle class, then we will discover something very evil about America," Jonathan Kozol claimed a decade ago.[14] Actually $2 billion have now gone down the drain, and the parents who have wanted to stick with their neighborhood schools are not "evil." Suburban middle-class families—black, Hispanic, and Asian, too—make the same choice all the time: to educate their children in the communities in which they have chosen to live.

When white parents head for the lawns of suburbia, it is often said, they are attracted less by the green grass than by the color of their neighbors. This simplistic "white flight" argument does not stand up. Tens of millions of Americans have left central cities for more spacious homes in suburbia since the end of World War II. The desire to avoid contact with nonwhites can hardly have been the driving force; they were just as likely to depart from cities with few black residents as they were from those with a great many—as likely to leave Minneapolis or Seattle as Atlanta or Washington, D.C. Furthermore, African Americans, Latinos, and Asians have also been moving to green grass in very large numbers over the past three decades, and it is difficult to see how their migrations could be attributed to racial animosity.

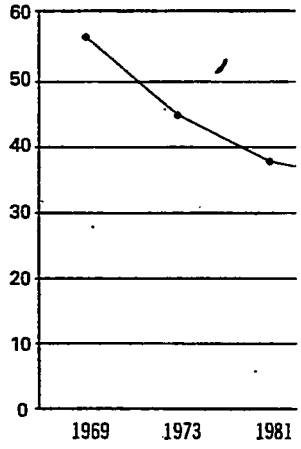
Resegregation?

Schools today are often racially imbalanced—but not because children are assigned to schools on the basis of their race. That was once the case in the South, but that terrible chapter in the American story has closed. Nevertheless, if the public schools aren't deliberately separating the races, have minority and white students become increasingly isolated from one another? Has the situation gotten worse? After years of desegregation, the trend reversed in the 1990s, Orfield argues. Schools are becoming "resegregated." In fact, the racial gap in academic achievement, he notes, narrowed in the years in which integration was on the rise, and has widened with "resegregation"; there must be a causal relationship.[15] Further progress in closing that gap thus requires action to reverse the trend toward racial isolation.

Are schools in fact becoming "resegregated," and if so, why? Perhaps the best single measure of the level of racial imbalance in schools is an index that measures how differently black and white students are distributed among schools within each school district in the United States. If all black and white children went to school only with peers of their same race (the situation in the South before the *Brown* decision) the index would be 100—complete imbalance. If the proportion of black and white students in each school precisely reflected the racial balance in the district as a whole, the index would be zero—perfect balance. Figure 9-2 shows how the Imbalance Index has changed over the past three decades. (Similar figures are not available for Hispanics, unfortunately.)

The Imbalance Index shows that black and white students in our public schools have become much less separated over the past thirty years or so. The figure dropped by nearly half between 1968 and 1997, from 56 to 30. The de-

Figure 9-2. Imbalance Index of School Se



Source: Imbalance Index calculated by David Armor and

cline was most rapid in the 1970s last demolished, but it has contin

This Imbalance Index is a st studying racial separation. Orfiel sessing the racial composition o not "resegregation."

Orfield employs a different m the proportion of whites enrollec Hispanic student (Figure 9-3). Fo whites from 1970 to 1986 and t years down to 1998. The shift do dramatic term "resegregation," b from that provided by the Imbal a bigger change for Hispanics, th 11 points from 1970 to 1986, a dozen years.

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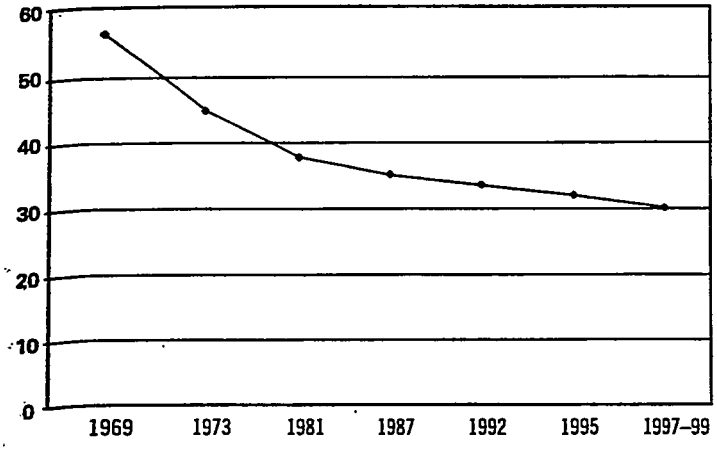

balance Index calculated by David Armor and Christine Rossell and supplied to us by the authors.

as most rapid in the 1970s, when the South's Jim Crow system was at
nolished, but it has continued steadily since then.
Imbalance Index is a standard measure used by social scientists in
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Asian, and American Indian students all belong to one undifferen-
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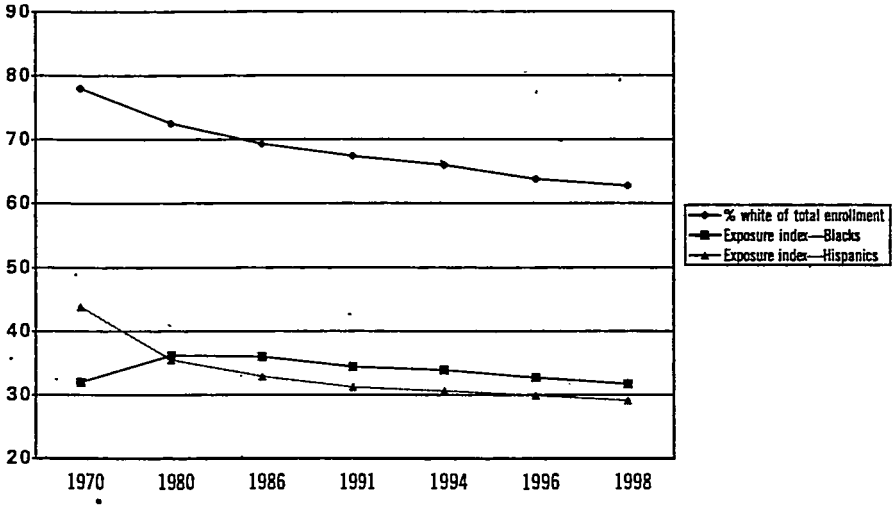
Figure 9-3. Exposure Index for Black and Hispanic Students, and Percent White of Total Public School Enrollments, 1970–1998



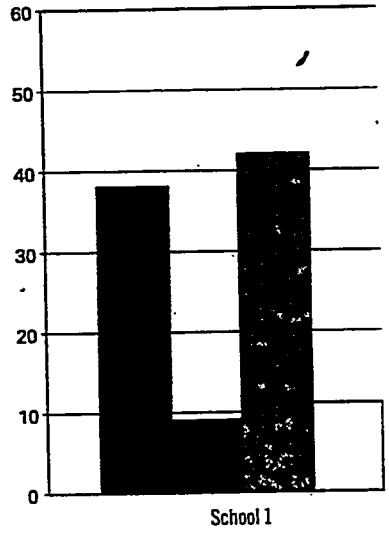
Source: Orfield, *Schools More Separate*, 37.

Figure 9-4 tries to show what this sole concern with exposure means in practice. It indicates the racial balance in two hypothetical schools. In the first, the student body is 38 percent white, 9 percent black, 41 percent Latino, 11 percent Asian American, and 1 percent American Indian. In the second, the student body is 50 percent white, 47 percent black, 1 percent Hispanic, 1 percent Asian, and 1 percent American Indian.

Most of us would think of the first school as clearly more racially integrated, more diverse, less "segregated" than the second. The second is roughly half white, half black, but it lacks the variety of cultural backgrounds and the opportunities for interracial contact contained in the first school. In the first, no one group is in the majority, and four groups are significantly represented. And yet this more diverse, ethnically rich school would register as more segregated on the Index of Exposure, because added all together, the students from the various minority groups are in the majority. And remember Orfield's sole measure of segregation is the proportion of whites in the student body, which is higher in the second school.[16]

It happens that the first hypothetical school has the same racial mix as California's public school population today, and the second exactly mirrors that of Louisiana. If every school in California and Louisiana had the same racial mix as the state's student population as a whole, Louisiana would have a higher Index of Exposure than California, simply because a slight majority of

Figure 9-4. Which School Is "Segregate



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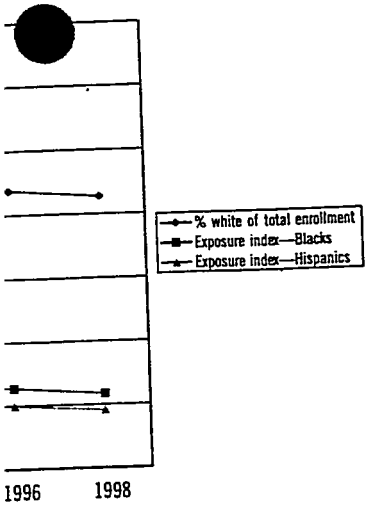

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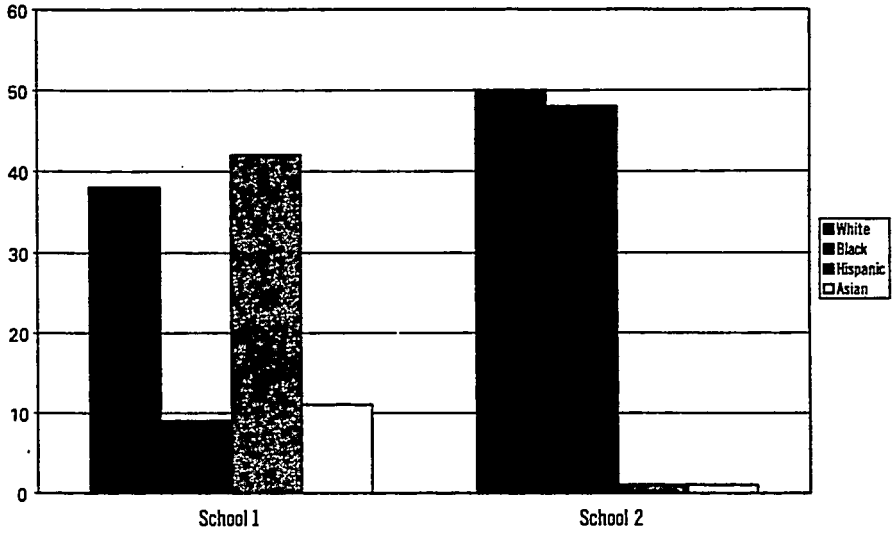
Figure 9-4. Which School Is "Segregated"? The Racial Composition of Two Hypothetical Schools



its students are white. The fact that California's schools contain a more complex racial mixture, with greater possibilities of interacting with students from several different groups, does not matter if we use Orfield's measure.

The Imbalance Index shows that over the past three decades our schools have become more racially balanced and less segregated. But the Exposure Index favored by Orfield suggests a basically unchanged level of exposure for blacks and a distinct decline for Hispanics. How can these opposed pictures be reconciled?

It is not difficult, because the two measures capture two quite different aspects of changing social reality. The Imbalance Index takes the racial composition of the public school student population of each district as a given, and asks how closely each school within it mirrors that mix. It focuses on matters that are partially within the control of local school authorities—how they assign students to particular schools within the district.

The Exposure Index, by contrast, measures the proportion of whites to be found in the school attended by the average black or Latino pupil—*without any regard to the availability of white students in the district.* If white students are only 3.9 percent of total enrollments in the Detroit Public Schools, as they are currently, then the level of exposure to whites inevitably will be close to zero. No pupil assignment policy (without somehow pulling suburban whites into city schools) can "integrate" the classrooms. The charge of "segregation" would seem to suggest a problem that has a remedy—a solution if there's

good will—and yet inevitably in such cities almost all black students will be sitting next to students who are also black.

Detroit is an extreme case, but the overall proportion of whites in America's public school population has declined substantially in recent decades, and especially so in central cities. The black, Hispanic, and Asian populations have grown, and the racial and ethnic composition of the population has thus changed. The natural result of this population shift has been rising "segregation" as measured by the Exposure Index. As the top line in Figure 9-3 shows, nearly four out of five public school students in 1970 were white; today the figure is only slightly more than three out of five. Even so, the Exposure Index dropped very little for African Americans and only moderately for Hispanics. That is because the distribution of students within schools in each district became more balanced—as the Imbalance Index reveals. More students have been going to schools with a diversity that reflects their local community.

The Exposure Index, as Orfield uses it, delivers bad news—more "segregation." But that same index could be turned around with quite different results. Why not measure the proportion of minority students in the classroom of the average white student—instead of the proportion of whites learning alongside blacks and Hispanics? If we looked at the exposure of whites to minority classmates, we would find declining segregation—more whites who go to school with nonwhites. If the proportion of minority students in the total population is rising, the exposure of whites to classmates from a variety of racial and ethnic backgrounds must be rising as well. It is the opposite side of the same coin, and just as important as the side emphasized by Orfield.

Most of the decline in the Exposure Index, as previously noted, has not been for blacks but for Hispanics. The figure for African Americans in 1998 was nearly identical to what it was in 1970, but the index for Latinos registered a drop of 15 points, from 44 to 29—which means fewer whites in the schools they attend. The reason is clear: The proportion of whites in the public school population has dropped 17 percent since 1968, while that of Latinos has soared 283 percent.[17]

The explosive growth of the Hispanic population—with proportionally fewer whites and many more Latinos enrolled in the schools—has inevitably meant declining exposure of Latino pupils to whites. But that declining exposure is also the consequence of the concentration of Hispanics in just a handful of states, and in large central cities within those states.

Immigrants from Mexico, Central America, and other Latin American nations—like the Irish, Germans, Italians, Poles, and all other earlier arrivals—have not scattered randomly across the American landscape. Today,

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remarkably, more than half of all the Hispanics live in just two states, California and Texas. It is hardly surprising that whites are already a minority of public school students in California and Texas. Add just five more states—New York, New Jersey, Florida, Illinois, and Arizona—and we have accounted for more than three-quarters of all Latinos. By 2010, minorities in schools in Arizona, Florida, and New York as well will likely be in the majority, chiefly because of continuing Hispanic immigration and the high birth rate of these immigrants.

Given these demographic trends, it is hardly surprising that the Index of Exposure for Latino pupils has been dropping sharply. It is impossible to see what could be done to reverse the trend, however, short of a moratorium on all Latino immigration or a major effort to force most of the Hispanics living in Los Angeles to move to Salt Lake City, Fargo, or Montpelier.

The Question of Harm

If a Mexican-American child goes to a school that has mostly Mexican-American students, will he or she learn less? Is a school academically better when black and Hispanic youngsters have lots of white classmates? (Since the focus of this book is on academic achievement, we do not discuss the nonacademic benefits of racially and ethnically mixed schools.) The whole effort to measure levels of minority exposure to whites assumes that the answer is unquestionably yes. But if the racial mix in schools really matters educationally, we're in deep trouble.

In much of America, there simply isn't a great deal that can be done to change that mix. Deep demographic and economic forces shape residential decisions, and it is hard to imagine a public policy that would break up the concentration of, say, Hispanics in Los Angeles, or blacks in Detroit. In theory, it is possible to bus millions of students from central cities to suburbs and vice versa each day, although the commute would often be long. But the Supreme Court has limited the circumstances under which judges can order such busing, and a large majority of Americans are strongly opposed to it.

In any case, the strategy of busing-for-better-schools has certainly been tried, although not on the scale that some would have preferred. As part of large-scale desegregation plans in Boston and other cities, children were assigned to schools far from the neighborhoods in which they lived. These children have been studied by an army of social scientists. The result: no scholarly consensus that a school's racial mix has a clear effect on how much children learn.

Indeed, a recent assessment of the huge body of research on the subject

concludes that "there is not a single example in the published literature of a comprehensive racial balance plan that has improved black achievement or that has reduced the black-white achievement gap significantly."[18] That judgment confirms an earlier study that the U.S. Department of Education called "the most comprehensive and rigorous analysis to date on the effect of desegregation on black student achievement." Moving to a racially integrated school had no significant effect on the mathematics achievement of black students, it concluded, and raised reading scores by the equivalent of two to six weeks of a school year at most.[19]

Busing plans have generally operated in cities with relatively few white school children, so the minority students who are bused for purposes of integration usually end up in schools that are still substantially nonwhite. Some of these cities—Boston among them—had a white majority in the school population when busing began but saw that majority quickly turned into a rapidly dwindling minority.

Not all black and Hispanic youngsters who attend heavily white schools in racially mixed suburbs and cities do so as a consequence of desegregation plans, of course. They live in residentially integrated neighborhoods or attend magnet schools that are predominantly white. In such settings, minority students typically do better academically, evidence suggests. And yet that does not mean that African-American and Latino pupils clearly learned more as a consequence of attending majority-white schools. The minority students whose families live in integrated communities or who have chosen magnet schools generally have parents who are relatively better educated or financially well off. They may have higher educational aspirations for their children. Those family characteristics may explain their higher levels of achievement.

Would a randomly selected cross section of black and Hispanic students show the same gains if they could be transported to heavily white schools? David Armor and Christine Rossell tried to answer the question by examining the 1992 NAEP reading and math scores of 13- and 17-year-olds and taking parental socioeconomic status into account. They adjusted the scores to reflect different levels of economic and educational advantage. By so doing, they could compare equally disadvantaged students in integrated and racially isolated settings, and were able to see how much difference the racial composition of the school makes.

Racial composition, in itself, makes almost no difference, they found. Whether African-American students attended schools that were 10 percent or 70 percent black, the racial gap remained roughly the same, as Figure 9-5 makes clear. If every school precisely mirrored the demographic profile of the

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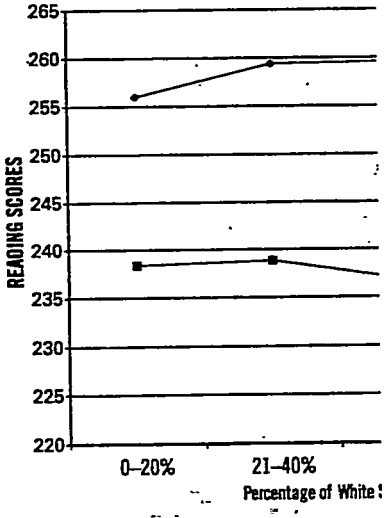

Source: David J. Armor and Christine Rossell, "Desegre
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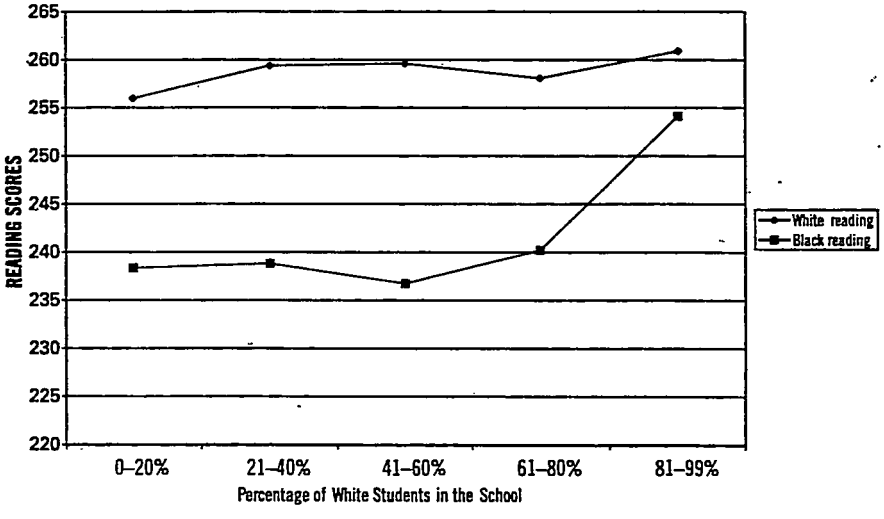
nation's entire student population, the level of black and Hispanic achievement would not change.

For one small group of students, however, the results were different. The tiny fraction of 13-year-old blacks in the NAEP sample who attended schools that were over 80 percent white did dramatically better in reading. In those schools, the black-white gap in performance was cut by about two-thirds. The pattern was similar, though less pronounced, for black 17-year-olds, and for Hispanics in both age groups. It did not, however, apply to math scores. These findings are intriguing but not necessarily generalizable. The number of black and Hispanic students in overwhelmingly white schools was too small to make the results statistically significant, and the difference might have been the result of self-selection or the inadequacy of the measures of socioeconomic status—the crude definitions of who was poor and who was affluent.

Research on fourth- to seventh-grade students in the unusually rich school records of Texas in the mid-1990s by economist Eric Hanushek and two colleagues sheds important light on this issue. After applying extensive controls for other variables, the authors concluded that attending schools with a high black enrollment had a negative effect on achievement for both blacks and whites, but the impact on blacks was about twice as large as that on whites.

Figure 9-5. NAEP Reading Scores of Black and White 13-Year-Olds, Adjusted for Family Socioeconomic Status, by Percent of White Students in the School, 1992



Source: David J. Armor and Christine Rossell, "Desegregation and Resegregation in the Public Schools," in Abigail Thernstrom and Stephan Thernstrom, *Beyond the Color Line: New Perspectives on Race and Ethnicity* (Stanford, Calif.: Hoover Institution Press, 2002), 243.

Furthermore, the negative effect was mainly felt by black students with above-average academic skills—those at the upper end of the black achievement distribution.[20] The lower the proportion of African Americans in their school, the better these gifted students did. The authors interpret this as a "peer effect," a view consistent with the cultural analysis we offered in Chapter 7.

If the findings of this research can be generalized beyond Texas and extended to older children, it would be a reason for creating more voluntary metropolitan school integration programs like the Boston area METCO plan, which buses inner-city black youngsters to predominantly white suburban schools.[21] However, METCO has never been subjected to a systematic evaluation that uses a control group, and we cannot be sure what such an evaluation would reveal. Shaker Heights, Cambridge, and similar suburbs, we have shown, do not have a proud record of African-American academic achievement.

In any event, there is no way to put all African-American and Latino students into schools that are more than 80 percent white. Even if every group was distributed across state and city lines in equal proportions, and we could engineer precise racial balance in every school, there just aren't enough whites in the school-age population to create an 80 percent or more white majority everywhere.

The racial composition of the school may matter, but the academic culture of the school matters more. Creating the right academic culture does not depend on the racial backgrounds of the students who attend it. The culture of greater engagement in school that we described in our chapter on Asians has been re-created, in effect, in KIPP, North Star, Amistad, and other successful schools, all of whose students are black or Hispanic. These schools are not working with a mysterious formula; in theory at least, there could be thousands of schools like them. But that would require clearing away the many roadblocks to change that we will discuss in a later chapter.

"Segregation" Within Schools

Insufficient racial and ethnic balance—the racial mix—does not explain much of the gap in academic achievement. But assume for the sake of argument that racial clustering is academically harmful, and that every public school could be racially balanced by some means. The problem of "segregation" would have been solved. Or would it?

Even within racially integrated schools, whites and Asians can be clustered

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in certain courses, blacks and Hispanics in others. The racial gap in academic achievement sorts students. That process becomes particularly apparent in the high school years when those who are better prepared sign up for honors and Advanced Placement (AP) courses, while the less academically skilled take easier classes. Integrated schools are not necessarily truly integrated—a problem that is arguably more depressing than that of racially identifiable schools in districts with few white students. The paucity of white kids in Boston schools is the inevitable result of demographic change; the near-absence of black and Hispanic faces in honors courses is an educational travesty that can be fixed by better preparing youngsters in the earlier grades.

Who completes AP courses and takes the exams? In 2001, 65 percent of the test-takers were non-Hispanic whites, just a shade above their share of the student population. Just 4 percent were African-American, though they comprised 17 percent of enrollments. Hispanics were 16 percent of the school population but only 9 percent of those examined. Asians were a mere 4 percent of all students but a striking 14 percent of those completing AP courses.[22] So blacks were at only one-quarter of parity in the AP competition, Hispanics just over half, and Asians had more than triple their expected share.

Is this form of "segregation" a major explanation for the racial gap in academic achievement? AP class-taking patterns look biased against blacks and Hispanics, neutral with respect to whites, and exceedingly partial to Asians. It is tempting to stare at the numbers and think they point to discrimination—to students kept out of high-level courses, which inevitably affects long-run academic success. But the discrimination argument would have to account for the seeming but implausible favoritism toward Asians.

Contemplating this pattern, the president of the school board in prosperous suburban Montgomery County, Maryland, has complained that sorting students into different classes means that "we're in effect running a segregated school system."[23] But the concentration of black and Hispanic students in less demanding classes does not seem mysterious when you recall, for example, that 35 percent of white and 41 percent of Asian eighth-graders score in NAEP's Proficient or Advanced category in mathematics, as compared with just 6 percent of African Americans and 10 percent of Hispanics. Students who don't have moderately high-level skills in the eighth grade lack the basic foundation in math to do AP work two or three years later. Again, it's a problem that needs to be addressed aggressively well before the eighth grade.

Data from large-scale national student surveys conducted by the National Center for Education Statistics reinforce the point. They reveal a clear pattern: Students with comparable academic records and tested skills, regardless

of race, take the same-level courses.[24] Moreover, most tracking is self-tracking. Over 80 percent of schools today allow students to choose the level of each course they take, so long as they have had the necessary prerequisites.[25]

Civil rights groups and others often argue that black and Hispanic students rarely take AP classes because their wretched big city schools don't offer them. "California is flunking out when it comes to educating . . . students, denying them intellectually challenging courses designed to prepare them for college and holding them back by squelching their competitive chances of acceptance at colleges and universities," Mark Rosenbaum, the legal director of the ACLU's Southern California office, said at a press conference in the summer of 1999 announcing a lawsuit against the Inglewood Unified School District. The charge was a paucity of AP courses.[26]

Inglewood offered only three AP courses, while ten miles away, in Beverly Hills, there were more than a dozen offerings. But was this a story of unequal opportunity, or were there simply too few Inglewood students academically prepared to complete such courses successfully? The ACLU won its case, but ironically none of the four successful plaintiffs actually went on to enroll in the new AP courses that were provided.[27] The number of AP courses at inner-city high schools is determined to a significant degree by the low level of demand for them. If demand for such courses were higher in inner-city schools, the existing AP classes would be overcrowded, a California research institute study pointed out in 2000. In fact, the classes tend to be smaller than at places like Beverly Hills.[28]

The ACLU wanted Inglewood and other school districts to offer more AP courses. The civil rights organization was right to be angry. But inadequate education in the early grades means that doors are already closed by the time many blacks and Hispanics reach high school. Inevitably, these poorly prepared students don't sign up for advanced courses. Academic "segregation," however, is not the cause of the racial gap in skills and knowledge, but one of its tragic results.

The Slowest Track

There is no good excuse for the magnitude of the racial gap in academic performance. That fundamental assumption informs this entire book. Schools and students can do better. But, inevitably, some youngsters in every racial and ethnic group will be academically less successful than others. Schools classify those with most serious academic, emotional, and behavioral prob-

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lems as eligible for "special education," a federal entitlement. Students who are so classified receive educational services tailored to address their special needs, at a per pupil cost that is at least double that of regular students.[29]

This is expensive schooling; for some students, it is also "segregated." That is, some of the children entitled to special education services are placed in autonomous classes that tend to be heavily black and Hispanic. Many of those youngsters, it is often said, have been misclassified, and that may be the case. A number of the successful charter schools we visited often ignore the label when it is attached to incoming students. Moreover, more attention to reading skills in the earliest grades might significantly reduce the number of children who later end up classified as learning-disabled. But there is a separate and important question: Do special education classes contribute to the racial gap in learning? Are they part of the explanation for the appalling disparities in skills and knowledge?

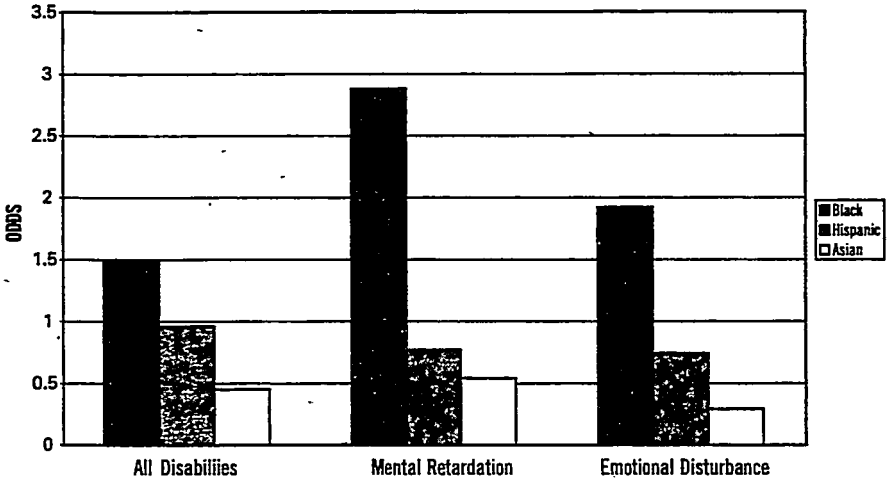
That is certainly the view of the Harvard Civil Rights Project, which held a conference in November 2000 on "Minority Issues in Special Education." "To the extent that minority children are misclassified, segregated or inadequately served," its executive summary stated, "special education can contribute to a denial of equality of opportunity, with devastating results . . ."

The Harvard Civil Rights Project referred to "minority" children, but in fact the issue is the disproportionately high number of black children in special education. In 1997, the executive summary of the conference findings noted, black children were "almost three times more likely" than those who were white "to be labeled 'mentally retarded,' " and were classified as emotionally disturbed nearly twice as often.[30]

The key statistical evidence on which the Harvard report relied is summarized in Figure 9-6. The analysis took the white share of the special education population as the baseline, and then calculated whether black, Hispanic, and Asian students were more or less likely to be classified as special education. Although the conference organizers denounced special education programs for having disproportionate numbers of "minorities," Figure 9-6 demonstrates that neither Hispanics nor Asians have more than their share of students classified as disabled. Hispanics were quite strongly underrepresented in the categories "mental retardation" and "emotional disturbance," and Asians were dramatically underrepresented across the board.

Civil rights advocacy groups, ever since the passage of the Education for All Handicapped Children Act in 1975, have been strong supporters of special education. (In 1990 it was renamed the Individuals with Disabilities Education Act.) And its steady and dramatic expansion over a quarter of a century has been welcomed by those especially concerned with the education of dis-

Figure 9-6. The Odds of Minority Students Being Classified as Learning-Disabled, 1997 (Whites = 1.0)



Source: Harvard Civil Rights Project, "Executive Summary: Conference on Minority Issues in Special Education," 1; available at www.civilrightsproject.harvard.edu and at www.law.harvard.edu/civilrights. The estimate for the emotionally disturbed is from table 2, "Odds Ratios for the U.S. and by State Across all Disabilities and for Selected Individual Disability Categories," from a paper by Tom Parrish called "Disparities in the Identification, Funding, and Provision of Special Education."

advantaged students.[31] Nevertheless, the codirectors of the Harvard project, Professors Gary Orfield and Christopher Edley, Jr., have been strongly critical of special education, a fact that led to the use of their research by opponents of additional federal funding—much to their dismay.[32]

In response, they refashioned a statement less sharply critical, while still expressing considerable concern. The project's work, they said, had revealed "serious civil rights problems in a limited number of special education programs." The central problem was the "egregious overrepresentation of African Americans," and the "widespread underrepresentation of Asian/Pacific Islanders."

Surely, they were not suggesting that Asians were being unfairly denied access to the program. Moreover, the disparate impact argument applies equally to Head Start, Title I, and bilingual education; they, too, are "segregated" programs in the sense that they disproportionately serve non-Asian minority children. The important question is whether these racially identifiable classrooms are helping or hurting the children in them.

With respect to special education, specifically, that is not a question that civil rights advocates have been willing to answer. They simultaneously object to the disparate impact of the program and seek to expand it.[33] And yet if

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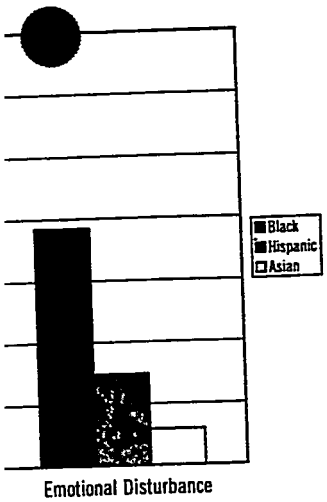

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the program perpetuates or enlarges—and thus helps explain—the racial gap in academic achievement, its funding should be significantly reduced. We are open to the argument that special education classifications are often not in the best academic interest of black students—particularly when they contribute to racial isolation. But that is not the unequivocal message of the civil rights community.

The Conventional Wisdom

We would prefer to see less "segregation" in schools altogether. Who wouldn't? Racial clustering—in housing, in the workplace, and in schools—is not good for the fabric of American society. But the question posed in this chapter is very specific: Does racial isolation at least partly explain the racial gap in academic achievement? And conversely, would greater integration raise the level of academic achievement among non-Asian minorities?

To begin with, we have argued, minority students are not becoming more racially isolated; white students typically attend schools that are much more racially and ethnically diverse than thirty years ago, and the modest decline in the exposure of black and Hispanic students to whites is solely due to the declining share of white children in the school age population. Moreover, schools are not "segregated." They are racially imbalanced, and that imbalance reflects the fact that members of racial and ethnic groups are not randomly distributed across the nation. Latinos are about 13 percent of the nation's population, but the Los Angeles Unified School District, for instance, is 70 percent Hispanic, 13 percent black, 10 percent white, and 6 percent Asian. The district's schools will remain overwhelmingly "segregated" unless children are "bused" in by airplane. In any case, desegregation programs have historically changed the racial composition of schools without changing the academic profile of the children attending them. Who sits next to whom in a classroom does not determine how much children learn. That is, there is no evidence that a Mexican-American child attending a Los Angeles school learns less than she would in, say, Salt Lake City, all other things being equal. The racial composition of schools does not explain the racial gap in academic achievement. What matters in a school is not the racial mix, but the academic culture, and a culture that nurtures learning can be created in schools like Newark's North Star that are entirely African-American.

Even if all schools could magically become racially balanced—solving the problem of racial and ethnic clustering—different classrooms within those schools would have different demographic profiles. No one should be com-

placent about the disproportionately high number of non-Asian minority kids in the lowest tracks, or the high number of black children in special education. It is powerful evidence of the problem to which we are calling attention. When students lack the foundation to do the work, they cannot take AP courses; as long as a glaring racial gap in academic achievement remains, such physics classes will be dominated by whites and Asians.[34] Closing that gap, however, will take better schools, and better schools means more good teachers. That is the topic to which we turn next.

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Running head: BENEFITS OF DIVERSITY IN EDUCATION

The Benefits of Diversity in Education for Democratic Citizenship

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Abstract

The social science statement in *Brown v. Board of Education* stressed that desegregation would benefit both African American and White children. Eventually, it was recognized that integration, rather than mere desegregation, was important for benefits to be realized. A parallel argument is made in the legal cases concerning affirmative action in higher education: educational benefits of diversity depend on curricular and co-curricular experience with diverse peers, not merely on their co-existence in the same institution (Gurin, 1999, Gurin, Dey, Hurtado, & Gurin, 2002). Positive benefits of diversity were demonstrated in a study comparing students in a curricular diversity program with students in a matched control group (n=174), and in a longitudinal survey of University of Michigan students (n=1670).

The Benefits of Diversity in Education for Democratic Citizenship

The controversies that have surrounded the Supreme Court ruling in *Brown v. Board of Education of Topeka, Kansas* (Zirkel & Cantor, this issue) apply as well to current debates about the educational value of racial and ethnic diversity, and the importance of diversity in defending affirmative action in higher education. One of the controversies concerns the difference between racial desegregation and racial integration, or the difference between mere contact and actual interaction between students of different racial backgrounds (Pettigrew, 1998). In current debates about the educational role of diversity, some argue that the mere presence on campus of students from varied racial backgrounds must be shown to *directly* foster educational benefits (Wood & Sherman, 2001). This argument mirrors the early assertion that mere contact of racially diverse students through school *desegregation* would be beneficial to all students. Eventually it became clear, however, that mere contact through desegregation was not sufficient to produce educational benefits (Zirkel & Cantor, this issue). Just as Allport (1954) had theorized, contact needed to occur under certain conditions – where there was equality in status, existence of common goals, and intimacy of interaction if it was to have positive effects. Educators needed to create a racially integrated learning environment that went far beyond simply putting diverse students together in the same classroom.

These conditions that make intergroup contact positive also help determine now when racial and ethnic diversity has educational benefits. As Orfield (2001) recently summarized in regard to K-12 public education, there is strong evidence of "instructional techniques that increase both the academic and human relations benefits of interracial schooling" (p. 9). Higher education institutions as well need to create curricular and co-curricular opportunities for students to experience genuine racial integration – to interact in meaningful ways and to learn from each other – if diversity is to have a positive educational impact. The presence of diverse

students on a campus is a necessary but certainly not sufficient condition for diversity to work in a positive manner. In this article we stress the importance of actual experiences with diversity through cross-racial interaction in classrooms, intergroup dialogues that bring students from diverse backgrounds together to discuss racial issues, and participation in multicultural campus events.

A second controversy that arose from *Brown v. Board of Education* concerns *what kind of benefits may stem from racial integration in education.* Many different outcomes have been studied in the fifty years since the *Brown* decision; many are analyzed in this volume. We focus on preparation for citizenship, which we argue is an important outcome of experience with racial and ethnic diversity just as it was seen as an important aspect of personal development at the time of *Brown v. Board of Education* (Clark & Clark, 1947; Deutscher & Chein, 1948). We argue that experiences with diversity educate and prepare citizens for a multicultural democracy.

We analyze the impact of curricular and co-curricular experience with racial and ethnic diversity on democratic sentiments and citizenship activities in two field studies: a quasi-experimental study comparing undergraduate participants in a curricular diversity program with a matched control group (n=87 in each group), and a longitudinal survey of University of Michigan students (n=1670).

Democratic Education and Diversity

How do diversity experiences affect the process of learning to become citizens? We contend that students who interact with diverse students in classrooms and in the broad campus environment will be more motivated and better able to participate in a heterogeneous and complex society. The congeniality of democracy and diversity, however, is not self-evident. Neither representational nor participatory conceptions of democracy deal with the issues raised

by multicultural educators, namely the cultural dimensions of citizenship and the central tension of modern social life – the tension between unity and diversity (Parker, 1996, p. 104). Critics of multicultural education worry that a focus on identities based on race, ethnicity, gender, class or other social categorizations are inimical to the unity needed for democracy. Critics of democratic citizenship education that ignores these small publics in an exclusive emphasis on a single unity worry that young people will be ill-prepared to be citizens and leaders of an increasingly ethnically and racially diverse nation.

This tension between diversity and unity, however politically charged it is in contemporary United States, is not new. Saxonhouse in *Fear of Diversity* (1992) describes how pre-Socratic playwrights, Plato, and Aristotle dealt with the fear that "differences bring on chaos and thus demand that the world be put into an orderly pattern." Plato, Saxonhouse says, envisioned a city in which unity and harmony would be based on the shared characteristics of a homogeneous citizenry (though even he warned against striving for too much unity). It was Aristotle, Saxonhouse (1992, p. 235) argues, who was able to overcome the fear and welcome the diverse. "Aristotle embraces diversity as the others had not." Aristotle, according to Saxonhouse, saw the city as made up of parts – families, owners, lovers – that would have different and often conflicting ideas about the good and the bad, the just and unjust. She concludes that anyone interested in politics must study, analyze, and incorporate those parts (Saxonhouse, 1992, p. 235). Pitkin and Shumer (1982) stress that what makes democracy work, in Aristotle's political theory, are two elements that bring those parts and multiple perspectives into political discussion: equality among citizens who are peers (admittedly only free men at the time, not women and not slaves), and relationships that are governed by freedom and discussion under rules of civil discourse. In this framework, multiplicity of perspectives and discourse over

conflict, rather than homogeneity and a single, unified perspective, help democracy thrive (Pitkin & Shumer, 1982).

Sociologist Coser (1975) emphasizes similar conditions in a theory of complex social structures. Complex social structures are social situations that are not familiar to us and are often quite discrepant with our past lives. Complex social structures are composed of many rather than a few people who have different, even contradictory, expectations of us. She argues that unfamiliarity, discrepancy, multiplicity, and potential conflict in the complex social structure require people to pay attention to the social situation and challenge them to think or act in new ways. People develop what Coser calls an outward orientation. She showed that people who function in complex social structures develop a deeper understanding of the social world and are better able to function as effective citizens.

Many cognitive developmental theories also emphasize discontinuity and discrepancy. Cognitive growth is fostered when individuals encounter experiences and demands that they cannot completely understand or meet, and thus must work to comprehend and master the new (or at least not completely familiar) and discontinuous demands. Piaget (1971,1975/1985) calls this optimal learning situation one of disequilibrium. Drawing on these theories, Ruble (1994), a developmental psychologist, theorizes that cognitive growth (and other developmental changes) will be stimulated by developmental transitions, such as going to college or taking a new job. Transitions are significant moments for development because they put individuals into new situations involving uncertainty and requiring new knowledge.

The University of Michigan's racial and ethnic composition presents discrepancy and discontinuity from the pre-college backgrounds of most of its students. At the time (during the 1990s) that the research reported here was conducted, approximately 90 percent of the White

students and 50 percent of the African American students attending the university had grown up in neighborhoods and attended high schools that were racially and ethnically homogenous (Gurin, G. 1992). Because of its discrepancy from their past experiences, racial and ethnic diversity offers students at the University of Michigan (and many other institutions that draw largely from racially/ethnically segregated locations) an opportunity for cognitive growth and preparation for citizenship.

Democracy and Diversity at Work: The Intergroup Relations Program

One such program at the University of Michigan is the Intergroup Relations Program (IGR). It offers a curricular program for first-year students that incorporates five conditions these theories suggest are important for making diversity and democracy compatible: the presence of diverse others; discontinuity from pre-college experiences; equality among peers; discussion under rules of civil discourse; and normalization and negotiation of conflict.

Program participants in the study presented here came from diverse backgrounds. Slightly over a quarter were students of color; a third were men; and, thirty percent grew up in states other than Michigan. For nearly all of the students, this amount of diversity was quite discrepant with their pre-college backgrounds. The design of the first course that students take in the program, in addition to lectures, readings, and papers, includes participation in intergroup dialogues. These groups bring together students from two different identity groups that have had a history of disagreement over group-relevant experiences and policy issues (Zuñiga, Nagda & Sevig, 2002). The groups are led by two trained co-facilitators, usually upper-division or graduate students. These groups are comprised of between twelve to fourteen students with roughly an equal number of students from each of two identity groups. Examples include people of color and White people; women and men; African Americans and Jews; gay men, lesbians,

bisexuals and heterosexuals; Anglos and Latinos. Students indicate demographic information about themselves and in which intergroup dialogue they would like to participate. Program coordinators assign students to specific groups based on their choices as well as keeping the groups balanced. For seven weeks, these groups engage in weekly two-hour discussions about policy issues that could divide the groups and individuals within the groups.

In the beginning of the groups, students commit themselves to clear ground rules for civil discourse to guide their discussion. They engage with each other in a truly public way that is needed for a diverse democracy to work. Barber (1989) defines public talk as entailing listening no less than speaking; affective as well as cognitive work; drawing people into the world of participation and action; and expressing ideas publicly rather than merely holding them privately. In these intergroup dialogues, students examine commonalities and differences between and within groups. They learn neither to ignore group differences, which some students do in the service of individualism or color-blindness, nor to privilege differences as an end in themselves. They read about and discuss theories of conflict and its impact on intergroup relationships. They engage in intergroup communication processes and practice skills to negotiate conflicts. They identify collaborative actions that the two groups could take by forming an intergroup alliance or coalition, though they do not actually carry out the action (see Zuñiga, et al., 2002).

Hypotheses

We hypothesized that participation in this multicultural program would help students learn sentiments and skills that will be needed in a plural democracy. Specifically, we predicted that first-year students who took the initial course in the Intergroup Relations Program, compared to a matched sample of non-participants, as seniors would show greater: perspective-taking; understanding that difference need not be divisive; perception of commonalities in values

between their own and other groups; mutuality in learning about their own and other groups; interest in politics; participation in campus politics; commitment to civic participation after college; and acceptance of conflict as a normal part of social life.

Study 1: The IGR Study

Method

This is a longitudinal field study in which two groups of students were surveyed at time of entrance to the University, and surveyed again at the end of the term when the participants took the initial course, and four years later in their senior year. The two groups of students are those who elected the first course in the IGR Program, and a control sample of non-participants matched one for one on gender, race/ethnicity, in-state v. out-of-state pre-college residency, and campus residency. This means that an in-state, African American female participant living in a particular residence hall was matched with an in-state, African American female non-participant in that same residence hall. The control students were drawn from a larger, comprehensive study of the class that entered the University of Michigan in 1990 (the Michigan Study; see Gurin, G, 1992). All of the course participants were also part of the Michigan Study sample. Thus, both the participants and control students had baseline measures that enabled us to control for self-selection in several analyses below. Altogether 174 students, 87 participants and 87 non-participants, were in the first-year study. In the senior year, students were mailed two questionnaires, one from the IGR program and the second from the Michigan Study. Eighty one percent of the sample (140 students) completed at least one of the surveys in their senior year; 70 percent (122 students) completed both senior year surveys. The data analyzed here come primarily from the two senior year surveys, with some responses from the entrance survey used as controls for self-selection.

Measures

Perspective-taking was measured with four items (Davis, 1983). An example is "I find it difficult to see things from the 'other person's' point of view." The response scale ranges from 1 (very much like me) to 5 (not at all like me) . This was measured at entrance and four years later. (Cronbach's α pre-test = .62, post-test = .68; M=3.80, SD=.70)

Non-divisiveness of difference was measured with four items written for the Michigan Student Study to assess how divisive students perceive the emphasis on diversity at the University of Michigan. An example is: "The University's emphasis on diversity fosters more intergroup division than understanding." The response scale ranges from 1 (strongly agree) to 5 (strongly disagree). (Cronbach's α: post-test only = .83; M=2.61, SD=.64).

Perception of commonalities in values across groups was measured specifically for the Michigan Student Study, and was described in the questionnaire as: "People often feel that some groups in our society share many common values, while other groups have few common values. For each of the groups listed below (African Americans, Asian Americans, Hispanics/Latinos, Native Americans, and White Americans), please indicate how their values and your group's values are similar or different." The index summing across these judgments of commonality with groups other than one's own ranges from 1 (much more different than similar) to 4 (much more similar than different). Commonalities in values were measured at entrance and four years later (Cronbach's α: pre-test =.84, post-test =.86; M=2.60, SD=.74).

Mutuality in learning about own and other groups was measured by agreement/disagreement with statements about one's own group, and with statements about groups other than one's own. These statements were positioned at different places in the questionnaire so that students would consider their own and other groups as independently as

possible. The response scale for each statement ranges from 1 (strongly disagree) to 4 (strongly agree). The statements about one's own groups include: "Since coming to college, I have gained greater knowledge of my racial/ethnic group's contributions to American society" (M=2.47, SD=.86), and "I have thought more about my memberships in different groups" (M=3.10, SD=.69). The statements about other groups are: "Since coming to college, I have enjoyed learning about the experiences and perspectives of other groups" (M=3.38, SD=.59), and "I have learned a great deal about other racial/ethnic groups and their contributions to American society" (M=2.86, SD=.73). These items were analyzed separately.

Acceptance of conflict as a normal part of social life was measured by asking students to evaluate conflict on eight statements. Factor analysis revealed two factors, a positive and a negative evaluation factor. An example of positive evaluation is: "Conflict and disagreements in classroom discussion enrich the learning process." An example of negative evaluation is: "The best thing is to avoid conflict." The response scale ranges from 1 (strongly agree) to 4 (strongly disagree). High scores represent high positive and high negative evaluations of conflict. (Cronbach's α for the positive index: post-test only = .70, M=3.21, SD=.42; α for the negative index: post-test only = .64, M=1.92, SD=.49).

Interest in politics was measured by agreement/disagreement with four statements that indicate low interest such as: "I do not enjoy getting into discussions about political issues," and "I do not try hard to keep up with current events." The response scale for each statement ranges from 1 (strongly agree) to 7 (strongly disagree). High scores indicated high interest in politics. (Cronbach's α = .67, M = 5.11, SD =1.18).

Participation in campus politics was measured by asking seniors how involved they had been during their years in college in "campus political activities." The response scale ranges

from 1 (not at all involved) to 4 (substantially involved), (M=1.24, SD=.58).

Participation in community service was measured by asking seniors how involved they had been during college in "community services activities on campus or off-campus, such activities as Big Brother/Big Sister, Project SERVE". The response scale ranges from 1 (not at all involved) to 4 (substantially involved), (M = 2.36, SD=1.10).

Commitment to post-college civic participation was measured by asking seniors how important the following activities would be after college: "influencing the political structure;" "helping my group or community;" "helping to promote racial/ethnic understanding." The response scale ranges from 1 (not at all important) to 5 (crucially important). (Cronbach's α =.61. M=2.41, SD=.68).

Analyses

The predictions were tested in three steps. First, a one-way multivariate analysis of variance (MANOVA) was conducted to determine if the IGR had a significant impact across the fourth-year outcomes. Results revealed significant differences between the participant and control groups on the multiple dependent measures of democratic sentiments and civic activities (Wilk's λ =.755, F (14,82) = 1.896, p = .039). Then t-tests were conducted to assess mean differences on these measures between participants and control students at the end of the 4th year. Finally, for those measures where we also had entrance scores, regressions were run using the pre-test entrance measure and a dummy variable of participation/non-participation as predictors. These regressions control for the possible role of self-selection into the IGR program.

B

Results

Senior Year Differences between Participants and Control Students

Nearly all of the predicted relationships between program participation and democratic sentiments as well as civic participation during college were supported by the senior comparisons of participants and control students (see Table 1).

The participants as seniors, compared to the matched control students, more frequently expressed democratic sentiments. They showed significantly greater motivation to take the perspective of others. They less often evaluated the University's emphasis on diversity as producing divisiveness between groups, and in fact showed greater mutuality in their involvements with their own groups and with other groups. During the college years they had thought more about their own group memberships *but* they had also enjoyed learning about the experiences and perspectives of other groups more than the control students. They also reported having learned more about other racial/ethnic groups and their contributions to American society. They expressed a greater sense of commonality in values about work and family with groups other than their own. In all of these ways, the IGR had fostered an appreciation of both group differences and commonalities. Finally, the participants normalized the role of conflict in social life to a greater extent than had the control students. They had significantly more positive views of conflict, as well as significantly less negative views.

Specifically on civic engagement, Table 1 further indicates that the participants were more interested in politics and also had participated more frequently in campus political activities. However, they had not taken part more frequently in community service activities during college. With respect to the importance they placed on post-college civic activities, the participants were more committed to helping their group or community and helping to promote

racial/ethnic understanding, although this proved to be the result of self-selection rather than an effect of the program (see below).

Controls for Possible Self-selection

It is possible that students who participated in IGR might have entered college with stronger democratic sentiments, and if so, the effects of IGR that we have discerned might result from these predispositions and not from the program itself. Our matching procedure controlled several sources of possible self-selection (gender, race/ethnicity, in/out state pre-college residence, and college residence hall). In addition, for eight of the senior questions (representing three concepts – perspective taking, perception of commonality in values, and commitment to post-college civic participation), it was possible to control for identical measures taken at the time students entered the University of Michigan four years earlier. Even after controlling for first year scores as covariates in analysis of variance, the participants as seniors had significantly higher scores than did the matched controls on the measure of perspective taking ($F\ (1,114) = 4.34, p = .04$). Similarly, the program is also associated with an increase in their sense of commonality in work and family values with groups other than their own after controlling for how much commonality the students had felt toward these groups when they entered college. Participants, as compared to the matched controls, judged themselves more similar in values to non-membership groups ($F\ (1,96) = 6.82, p = .01$). This analysis showed, however, that students who participated in the IGR program were already more disposed than the control students when they entered college toward post-college civic participation. Once their initial motivation to help their group or community and to promote racial/ethnic understanding was controlled, participation in the program had no effect, neither increasing nor decreasing these post-college civic commitments.

Finally, for four other senior measures (representing mutuality of own and other groups), we were able to use a related, though not identical, baseline measure to control for possible self-selection. At time of entrance students were asked how important various possible college experiences were to them personally. A high importance placed on two of these, "Learning about cultures different from my own," and "Getting to know people from backgrounds different from my own," might have predisposed students to take part in the IGR and might account for the apparent effect of the program on their involvement with their own and other groups as seniors. However, this proved not to be the case. After controlling for an index of these two first-year measures, the participants as seniors scored significantly higher than the controls on enjoying learning about the experiences and perspectives of other groups ($F\ (1,117) = 11.7, p = .001$), thinking about memberships in various groups ($F\ (1,117) = 11.2, p = .001$), and learning a great deal about other racial and ethnic groups and their contributions to American society ($F\ (1,114) = 9.9, p = .002$). Neither the predisposition measure nor program participation was significantly related to learning a great deal about the contributions of one's own group(s).

Study 2: The Michigan Student Study

The IGR was designed explicitly as a quasi-experimental field study of diversity and democracy. Other educational activities have also been created to help students make educational use of Michigan's ethnic and racial diversity. These activities share certain features of the IGR, although they are not part of a coherent undergraduate program. We were interested in whether or not these other educational activities have similar effects to the IGR in fostering democratic sentiments among undergraduates.

One activity, participation in intergroup dialogue, is closely aligned with and actually grew out of the IGR Program. On the Michigan campus, intergroup dialogues are offered within

courses beyond those that are offered in the IGR, and also within various campus organizations. They always meet over time, although the time varies from one month to ten weeks depending on the particular course or campus organization. A second activity is participation in campus-wide educational events about the cultures, histories, and politics of various groups in American society. These events expose students to knowledge about race and ethnicity in settings that draw highly diverse audiences. A third is exposure to knowledge about race and ethnicity in formal classrooms. All undergraduates in the College of Literature, Sciences, and the Arts are required to take at least one course before graduating that covers theories and research on race and ethnicity in American society. The Race and Ethnicity requirement (or sometimes called the diversity requirement) reflects the University's strong commitment to use its racial and ethnic diversity in an explicitly educational manner.

A value of examining the impact of these activities, although they were not part of a unified program, is that the Michigan Student Study (MSS) includes a large enough number of students to analyze data from four racial/ethnic groups (African American, Asian American, Latino, and White) separately. Thus, the MSS allows us to see if diversity activities have similar outcomes in all groups. The number of students in the IGR study was too small to allow analyses of separate groups.

Method

As indicated earlier, both the participants and the control students in the IGR were part of the larger, comprehensive study of the class that entered the University of Michigan in 1990 (see Gurin, G, 1992). This made it possible to explore the extent to which the effects of the IGR apply to other diversity experiences that a broader longitudinal sample of students had during the four years of college. The Michigan Student Study is a longitudinal study that followed students from

first year through the senior year. The data analyzed here comes from students who were measured both at entrance and at the end of the senior year: European Americans (n= 1129), African Americans (n=187), Latino(a)s (n=88), and Asian Americans (n=266).

Measures

Experience with Diversity. The survey instrument that was given to the students as seniors included reports of their experiences with diversity. Students were asked two questions about classes, namely how much exposure they had in classes to information and activities devoted to understanding other racial/ethnic groups and interracial/ethnic relationships, and if they had taken a course that had an important impact on their views of racial/ethnic diversity and multiculturalism. A third measure assessed the number of five annually-held multicultural events (Hispanic Heritage Month, Native American Month, Pow-Wow, Asian American Awareness Week, and Martin Luther King, Jr. Symposium) the student had attended during the four years of college. A fourth asked if the student had participated in an intergroup dialogue.

These indicators of experience with diversity in classrooms, multicultural events, and dialogues seem to capture fairly well the important features of the IGR Program. Accordingly, we formed a summary measure—by standardizing individual items and then averaging across them--of curricular and co-curricular diversity experiences for the students in the Michigan Student Study.

Democratic Sentiments. With only two exceptions, the same measures of democratic sentiments already described for the IGR study were available in the Michigan Student Study dataset as well. The two that were not available in the broader MSS sample are attitudes toward conflict and interest in politics.

Analyses

The relationship of this diversity experience measure to democratic sentiments and civic activities was analyzed separately for White, African American, Asian American, and Latino(a) students, using multiple regression. In the regression equation, initial position on outcome measures was controlled when available. Gender and in/out state pre-college residence were also controlled to make the analysis parallel to the analysis of the IGR program. [Post-test score = β_1(Diversity Experiences) + β_2(Pre-test score) + β_3(Gender) + β_4(In/out-state)+ β_5(Constant)]. Multicollinearity was not a problem as none of the intercorrelations among these predictors exceeded a correlation of .20.

Results

Table 2 shows the relationships between having had these diversity experiences and measures of democracy sentiments and citizen participation for each of the four groups of students. Several conclusions can be drawn from this analysis. First, the broader campus study clearly supports what we learned about the impact of IGR Program. Across the four groups, there is evidence of a fairly consistent effect of having been exposed to knowledge about racial/ethnic groups and to interaction with students from varied backgrounds in classrooms, events, and intergroup dialogues.

For White students, the index of these diversity experiences was significantly related to perspective taking and also to a sense of commonality in values with African Americans and Latinos, even after adjusting for entrance measures of these same sentiments. It was also significantly related to having learned about both other groups' and own group's contributions to American society, and to actual participation in the activities of both their own groups and of other cultural groups. This effect held even after adjusting for motivation to learn about other

backgrounds and cultures that the students expressed when they entered college. Furthermore, White students who had experienced diversity in classrooms, events and intergroup dialogues more often than other students who had not experienced such diversity contended that difference is not inevitably divisive but instead can be congenial to democracy. They had been more engaged in citizenship during college through community service campus political activities. They were not more active in student government, however.

For the three groups of color, Table 2 shows that these experiences were also influential in citizenship preparation. Nearly all of the predicted relationships were statistically reliable. One exception is the lack of relationship between this diversity index and perspective taking for the three groups of color. However, as noted in Table 2, there was a significant relationship for African American students between perspective taking and participation in dialogue groups, as well as participation in multicultural events. Thus, the aspect of the diversity experience index that most directly asks students to consider the perspectives of members of other groups did show the expected relationship between diversity and perspective taking for African American students (although not for Asian American or Latino students).

Finally, the broader study illuminates some subtlety in the impact of diversity experiences on perceived commonalities with other groups. It shows that diversity experiences increased the sense of commonality that White students perceived with both African American and Latino students, whereas diversity experiences were not significantly related to the expression of commonality with White students by the three groups of color. Because the sample size in the IGR study was too small to distinguish the sense of commonality different groups of students felt with particular other groups, the differential impact of experience with diversity on White students and students of color could not be discerned. It is important to note, however, that

these results from the broader study do *not* show a statistically significant negative relationship between diversity experiences of groups of color on their sense of commonality with White students. The broader Michigan Student study also shows consistent relationships for all groups between diversity experiences and involvement in their own groups, while the IGR study showed mixed results about this relationship.

Discussion

The results from both studies demonstrate important consistency in the effects of diversity experience across two situations (a multicultural educational program, and in the Michigan campus at large); across two longitudinal assessments; and across four groups of students (White, African American, Asian American, and Latino(a) students.) It might be asked if the similarity in results across studies is produced by including IGR participants and control students in both sets of analyses. We analyzed the broader campus data with and without the participants and control students of the IGR study, and found no differences in the results of the two analyses. That would be expected, of course, since the IGR students constituted a small proportion of the broader study.

A notable exception to the picture of consistency across groups is revealed in the analysis of perceptions of commonality in the Michigan Student Study where the results differ for White students and students of color. This difference raises the question of why diversity experience does not foster among students of color a stronger sense of commonality with White students. One possible reason is that experience with White students is less novel for students of color than experience with African American, Latino(a), and Asian American students is for White students (Gurin, Peng, Lopez, & Nagda, 1999). This may account for the different impact that diversity experience has. It is also important to stress that the *lack of relationship between*

the diversity experiences of students of color and perceived commonality with White students does not support the contention among conservative critics of multiculturalism that it fosters division among groups. Students of color with the greatest experience with diverse peers show greater, not less, interest in learning about groups other than their own and they perceive less, not more, division among different racial and ethnic groups.

We use the term *effects* in these conclusions because in many instances it was possible to control for self-selection by using identical measures of the outcomes that were collected when the students first entered college, and in the case of the IGR study by matching participants and non-participants on relevant demographic characteristics. In all instances except one (importance placed on post-college civic activities in the IGR study) where it was possible to control for the student's initial position on the outcome measures, the difference between the participants and controls, and the relationship between amount of diversity experience and outcomes in the MSS study was statistically reliable. Thus, we feel assured that these differences did not reflect *merely* a tendency of certain kinds of students to participate in the IGR program or in other diversity experiences on the Michigan campus that were measured in the MSS. A limitation of the studies is that we did not have college entrance measures for *all* of the outcomes. Moreover, controlling for self-selection by using pre-measures of outcomes as covariates is not the definitive test of causality that random assignment provides. In addition, future research should more closely study the experiences students of color (and specific ethnic groups) have with diversity in education, and when or how this may result in different types of outcomes related to democratic sentiments and participation (e.g., Gaines, this issue; Gurin, Peng, Lopez, & Nagda, 1999; Tatum, this issue).

In conclusion, these studies provide an examination of the potential impact, and promise, of diversity experiences, through curricular and co-curricular activities taking place in higher education today, for democratic citizenship. These studies support the claim by Guarasci and Cornwell (1997) in *Democratic Education in an Age of Difference* that democratic citizenship is "strengthened when undergraduates understand and experience social connections with those outside of their often parochial 'autobiographies,' and when they experience the way their lives are necessarily shaped by others" (Preface, p. xiii). The discrepancy that racial and ethnic diversity on college campuses offers students for personal development and preparation for citizenship in an increasingly multicultural society depends on actual experience that students have with diverse peers. Just as positive educational benefits of racial and ethnic desegregation depended on real integration of children from different backgrounds, higher education institutions have to make use of racial/ethnic diversity by creating educational programs that bring diverse students together in meaningful, civil discourse to learn from each other. In arguing in *Regents of the University of California v. Bakke* case that the use of race as one of many factors to achieve racial/ethnic diversity was constitutional, Supreme Court Justice Powell (1978) appears to have understood the critical importance of actual experience with diversity. He uses an article written by President Bowen of Princeton University that a great deal of learning occurs through interactions among students of both sexes; of different races, religions, and backgrounds; who come from cities and rural areas, from various states and countries; who have a wide variety of interests, talents, and perspectives; and who are able, directly or indirectly to learn from their differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world" (Powell, 1978, p. 412).

For diverse students to learn from each other and become culturally competent citizens and leaders of a diverse democracy, institutions of higher education have to go beyond simply increasing enrollment of student of different racial and ethnic backgrounds. These institutions must also attend to both the quality of campus racial climate and actual interactions among diverse students. As Gurin (1999, p. 41) conveyed in her testimony in support of the University of Michigan in the two legal challenges to its admission policies at the undergraduate level and in its School of Law, the onus is on higher education institutions:

> to make college campuses authentic public places, where students from different backgrounds can take part in conversations and share experiences that help them develop an understanding of the perspectives of other people. Formal classroom activities and interactions with diverse peers in the informal college environment must prompt students to think in pluralistic and complex ways, and to encourage them to become committed to life-long civic action. Otherwise, many students will retreat from the opportunities offered by a diverse campus to find settings within their institutions that are familiar and that replicate their home environments.

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Table 1

Democratic Sentiments and Civic Activities in the Fourth Year of College

	Participant *M*	Control *M*
Democratic Sentiments		
Perspective-taking (range: 1-5)	3.91 (.66)	3.71* (.73)
Non-divisiveness of difference (1-5)	2.71 (.57)	2.51* (.68)
Perceived commonality with other groups (1-4)	2.79 (.85)	2.44*** (.57)
Positive evaluations of conflict (1-4)	3.34 (.36)	3.09*** (.43)
Negative evaluations of conflict (1-4)	1.85 (.43)	1.99* (.54)
Mutuality in learning about own and other groups (1-4):		
• Enjoyed learning about experiences of other groups	3.56 (.50)	3.20*** (.62)
• Thought more about my memberships in different groups	3.31 (.53)	2.91*** (.75)
• Learned about other groups and contributions to society	3.05 (.65)	2.68*** (.75)
• Gained knowledge of my group's contributions to society	2.58 (.84)	2.38 (.87)
Civic Activities during College		
Interest in politics (1-7)	5.29 (1.12)	4.94*** (1.23)
Participation in campus politics (1-4)	1.34 (.72)	1.14* (.39)
Participation in community service (1-4)	2.49 (1.16)	2.25 (1.19)
Civic Activities Anticipated Post-College		
Helping my group or community (1-5)	4.06 (.90)	3.78**(.90)
Helping to promote racial/ethnic understanding (1-5)	3.43 (1.01)	3.16* (1.10)
Influencing political structure (1-5)	2.79 (.99)	2.70 (87)

Note. Standard deviations presented in parentheses. Higher scores indicate higher attribute.

Table 2

Regression analysis of the effects of diversity experiences on democratic sentiments and civic activities of college seniors (Michigan Student Study)

	B	SE *B*	Beta
Perspective Taking			
Whites (R^2=.280)	.135	.031	.132****
African Americans (R^2=.186)	.109	.102	.108[1]
Asian Americans (R^2=.273)	.049	.065	.049
Latino(a)s (R^2=.143)	.007	.139	.007
Sense of commonality: White students with groups of color			
With African Americans (R^2=.093)	.296	.038	.288****
With Asian Americans (R^2=.051)	.091	.072	.042
With Latino(a)s (R^2=.079)	.176	.071	.094**
Sense of commonality: Students of color with White students	.183	.221	.095
African Americans (R^2=.018)	.005	.128	.003
Asian Americans (R^2=.059)	-.313	.314	-.147
Latino(a)s (R^2=.125)			
Mutuality: Participate in own group activities			
Whites (R^2=.010)	.068	.020	.100***
African Americans (R^2=.076)	.356	.091	.276****
Asian Americans (R^2=.077)	.402	.086	.278****

Latino(a)s (R^2=.146)	.509	.135	.382***
Mutuality: Participate in other group's activities			
Whites (R^2=.061)	.171	.020	.247****
African Americans (R^2=.097)	.384	.088	.312****
Asian Americans (R^2=.053)	.251	.067	.230***
Latino(a)s (R^2=.130)	.445	.126	.361***
Mutuality: Learned about own group's contributions			
Whites (R^2=.044)	-.239	.039	-.209****
African Americans (R^2=.054)	-.288	.090	-.233***
Asian Americans (R^2=.098)	-.321	.065	-.312****
Latino(a)s (R^2=.143)	-.471	.131	-.378***
Mutuality: Learned about other group's contributions			
Whites (R^2=.117)	.553	.045	.341****
African Americans (R^2=.098)	.513	.115	.314****
Asian Americans (R^2=.125)	.514	.086	.348****
Latino(a)s (R^2=.133)	.540	.151	.364***
Non-divisiveness			
Whites (R^2=.050)	.273	.035	.233****
African Americans (R^2=.043)	.179	.063	.208**
Asian Americans (R^2=.031)	.192	.066	.176**
Latino(a)s (R^2=..032)	.193	.098	.180*
Political Participation: Student Government			
Whites (R^2=.003)	.048	.024	.050

African Americans (R^2=.013)	.098	.064	.113
Asian Americans (R^2=.007)	.053	.038	.86
Latino(a)s (R^2=.018)	.068	.055	.133
Political Participation: Campus political activities			
Whites (R^2=.043)	.175	.025	.206****
African Americans (R^2=.034)	.148	.059	.184**
Asian Americans (R^2=.125)	.295	.048	.354****
Latino(a)s (R^2=.042)	.203	.100	.205*
Political Participation: Community Service			
Whites (R^2=.033)	.386	.062	.183****
African Americans (R^2=.029)	.254	.110	.169*
Asian Americans (R^2=.094)	.455	.088	.307****
Latino(a)s (R^2=.020)	.209	.157	.143

$^{*}p < .05, ^{**}p < .01, ^{***}p < .001$

Note. The analyses of perspective taking and sense of commonality with members of other groups included pre-measures of these outcomes taken when the students entered college. The analysis of mutuality included the same pre-measure of motivation to learn about people from different backgrounds and cultures used in the IGR study. These pre-measures were used as controls in the analyses of these outcomes, thus these analyses provide a reasonable assessment of effects.

[1] The effects of dialogue and multicultural events, without classroom exposure, are statistically reliable for African American students. The relationship between perspective taking and an index with just those two diversity experiences has a B of .233, SE B of .101, and a *Beta* of .223*.

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ARTICLE: The End of School Desegregation and the Achievement Gap

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SUMMARY:
... The findings of Brown v. Board of Education greatly boosted the widespread view that school desegregation would enhance African American achievement and close the black-white achievement gap. ... I. DESEGREGATION AND THE ACHIEVEMENT GAP ... Note that the level of racial balance stayed relatively stable between 1982 and 1995, indicating that desegregation was not being dismantled to any significant degree. ... Desegregation can mean the act of creating a uniform program of education for all students, regardless of the degree of racial balance in each school building. ... In these cities even perfect racial balance meant that most schools were predominately minority, and hence not a valid test for the effect of desegregation. ... Chart 5 shows the achievement trends in Charlotte-Mecklenburg between 1978, a few years after desegregation (racial balance) started, and 1997. ... It is not clear what caused these gains, but since gains occurred for both groups it does not appear to be related to desegregation (racial balance) per se. ... It is quite clear, then, that a large academic achievement gap remains between black and white students despite many years of extensive desegregation. ... When desegregation failed to close the achievement gap, some social scientists and many educators changed their argument about the cause of the gap. ... For these reasons, I do not think the end of desegregation - if it comes - will have any substantial effect on the achievement gap. ...

TEXT:
[*629]

The findings of Brown v. Board of Education n1 greatly boosted the widespread view that school desegregation would enhance African American achievement and close the black-white achievement gap. Among other things, Brown held that official segregation created feelings of inferiority among black students that "may affect their hearts and minds in a way unlikely to ever be undone." n2 The Court said this finding was "amply supported by modern authority," n3 which consisted of a number of major social science studies cited in the famous Footnote 11, including a statement signed by thirty-two social scientists. A logical corollary to the harm finding is that desegregation should end the harmful effects of segregation and bring about educational and social benefits for black children. I have called these two postulates the original "harm and benefit" thesis. n4

Few legal scholars give weight to the harm and benefit thesis in the overall structure of the Brown decision, refusing to believe that the Justices relied on social science evidence as the primary basis of their conclusions. n5 Rather, most legal scholars believe the fundamental legal principal in Brown was the Court's other statement that "separate educational facilities are inherently unequal." n6 As such, laws or policies that separate students on the basis of race would [*630] be unconstitutional, regardless of whether segregation was harmful or whether desegregated schools produced better outcomes for black children.

The harm and benefit thesis, however, was strongly embraced by civil rights advocates as the cornerstone of Brown. It soon became clear why: if the constitutional objection is harm rather than unequal treatment, it was fairly easy to extend Brown to cover all types of segregation, such as the de facto school segregation brought about by a combination of geographic school assignment ("neighborhood schools") and private housing choices of parents. The constitutional wrong then became school segregation regardless of its causes, especially ones caused by housing segregation. Desegregation (i.e., the racial balancing of schools) could thus be elevated to a fundamental, permanent right rather than a temporary remedy to counteract the effects of Jim Crow laws. n7

The Supreme Court never accepted this logic, and in later decisions continued to emphasize that the constitutional offense was state-sanctioned segregation, not racial imbalance. n8 Indeed, the Swann decision explicitly disapproved the notion that "any particular degree of racial balance [was a] substantive constitutional right." n9 The insistence on state action as a requirement for illegal segregation was repeated in many later Supreme Court decisions. n10

The well-established de jure standard did not deter civil rights leaders and many social scientists from promoting school desegregation as a matter of permanent educational policy whether the policy was enacted by school boards, legislatures, or the courts. The fundamental rationale for the supporters of school desegregation continued to be the harm and benefit thesis, although the specifics of the thesis changed over time.

The best statement of the modern harm and benefit thesis is found in an amicus brief signed by fifty-two social scientists in Freeman. n11 For example, the harms of segregation and the benefits of desegregation have been extended to most students of color and to white students as well. Hispanics were included because they are [*631] disadvantaged and have also experienced discrimination; whites were added because segregation deprives them of the benefits of racial diversity, especially improving their attitudes and reducing racial prejudice. Desegregation itself has become a much broader concept than in Brown, requiring changes in attitudes, political support by all groups, and even classroom racial balance if its benefits are to be realized. This broader thesis also underlies the more recent "diversity" movement, which argues that social benefits accrue from maximizing racial and ethnic representation in all types of settings.

In my opinion, belief in the harm and benefit thesis is the main reason why civil rights leaders and some social scientists have been critical of the trend in unitary status decisions, whereby many school districts have been released from court supervision and allowed to return to non-racial student assignment to schools. n12 The fear is that a return to geographic school attendance zones ("neighborhood schools"), combined with housing patterns, will inevitably lead to de facto school "resegregation," and this resegregation in turn will mean a loss of educational benefits, particularly for minority students.

To what extent is this concern justified by current evidence? Has desegregation improved minority achievement, and is there reason to believe that a return to de facto segregated schools will actually reduce minority achievement? In short, will an end to desegregation prevent a closure of the current achievement gaps between white and minority groups? This paper will attempt to answer these questions using a variety of evidence, from national studies and case studies that I have conducted in desegregated school districts over the past decades.

I. DESEGREGATION AND THE ACHIEVEMENT GAP

There is a well-known substantial and persistent academic achievement gap between U.S. African American and white students. n13 The National Assessment of Educational Progress (NAEP), which has been administering achievement tests to American youth for over thirty years, has best documented this gap. n14

A sampling of this data is shown in Charts One and Two, which [*632] summarize the NAEP trends in math and reading scores for 8th graders over a period of nearly three decades. The math trends show a very large black-white gap in 1973, which was reduced appreciably by 1986. Since that time, white math scores have risen gradually while black scores have remained constant, so that the math gap has continued to widen for the past fifteen years or so. Likewise, the reading gap started out very large in 1971 and closed significantly by 1988. After 1988, white reading scores rose while black scores declined, so that by the end of the decade a large gap exists between black and white students in reading skills. Therefore, while these gaps in basic skills have diminished somewhat over this thirty-year period, black students still trail white students by nearly a full school year. Put in another way, the average black 8th grader is scoring at about the same level as the average white 7th grader.

What has caused this pattern of black achievement scores, first rising and then leveling off again or even declining? What role has desegregation played in this, if any? There are a number of potential explanations for these changes, and desegregation is only one of them. Substantial school desegregation did take place during this period, but other changes also occurred at the same time. State and federal compensatory education programs grew rapidly during this time frame, particularly Title 1 and Head Start, as well as a number of state and local funding programs aimed at helping minority and poor students. Certain minority socioeconomic characteristics also improved during (and just before) this period, and it is well established that the socioeconomic status of families has a strong effect on children's academic achievement. n15 Can we decide whether some of these factors are more or less important in explaining changes in the continuing black-white achievement gap?

[*633]

[SEE FIGURE IN ORIGINAL] [*634]

[SEE TABLE IN ORIGINAL] [*635] It is true that most desegregation plans were implemented during the 1970s and early 1980s, a period that coincides with the largest black achievement gains. n16 Using a summary index of racial balance, Chart 3 demonstrates that desegregation occurred rapidly between 1968 and 1972, when most Southern school systems implemented plans. Desegregation then progressed at a slower rate until about 1982, during which time most Northern systems adopted desegregation plans. n17 Note that the level of racial balance stayed relatively stable between 1982 and 1995, indicating that desegregation was not being dismantled to any significant degree.

The fact that black achievement rose while desegregation progressed led a number of early observers to conclude that school desegregation was an important cause of the black achievement gains. n18 Interestingly, most who speculated about this did not have any information about whether the gains occurred primarily in desegregated schools, which would seem important in deciding whether desegregation per se was the active causal factor. Later studies offered alternative explanations. n19

[*636]

[SEE FIGURE IN ORIGINAL] [*637] The relationship between black achievement and school desegregation in the NAEP data is clarified in Chart 4, which tracks changes in black 8th grade reading scores in schools that were desegregated (defined as less than one-half black) or segregated. While it is clear that reading achievement gains occurred in both desegregated and segregated schools, the gains were somewhat larger in desegregated schools. The pattern was similar for math scores. It is hard to conclude from this evidence that desegregation was the primary reason for black achievement gains during the 1970s and 1980s, when black achievement increased significantly in non-desegregated schools.

At this point a clarification is needed. The term "desegregation" can take on several meanings, only one of which is relevant to the evidence in Chart 4. Desegregation can mean the act of creating a uniform program of education for all students, regardless of the degree of racial balance in each school building. In this sense a desegregation plan might create equal programs where unequal programs were the rule before desegregation. This definition is closer to that implied in the original Brown decision.

But desegregation also means, especially after Swann, that the schools in a school system are racially balanced, in that each school has a racial composition approximating the overall system composition. Chart 4 looks only at the effect of racially balanced schools, but this is the most relevant definition for the debate over ending desegregation plans. Those who are critical of ending school desegregation worry primarily about the loss of racial balance and the return to racial isolation, and about the potential adverse effects of a predominately minority school environment on black achievement.

[*638]

[SEE FIGURE IN ORIGINAL] [*639] Another way of evaluating the effects of desegregation on academic achievement is to examine changes in achievement and the black-white gap in school systems that have undergone extensive desegregation. Although hundreds, if not thousands, of school systems throughout the nation have desegregated, certain school systems are better than others for testing the harm and benefit thesis.

Some school systems were desegregated after most middle class white families had left the public schools; Atlanta, Philadelphia, Chicago, Los Angeles, Detroit, and Cleveland are good examples. In these cities even perfect racial balance meant that most schools were predominately minority, and hence not a valid test for the effect of desegregation. Other school systems had only small fractions of minority students when desegregation took place, so that desegregation still meant predominately white school systems.

Two of the best examples of comprehensive and meaningful levels of desegregation are Charlotte-Mecklenburg, North Carolina, and Wilmington-New Castle County, Delaware. Charlotte-Mecklenburg is a county-wide school system where predominately black inner city schools were desegregated with predominately white suburban schools via busing. Because the county system was 80 percent white when desegregation began, it remained a majority white school system despite considerable white flight in the early 1970s. As recently as 1998 it was 40 percent black, 55 percent white, and about 5 percent Asian. Nearly all of its schools were racially balanced from the early 1970s to the early 1990s.

Chart 5 shows the achievement trends in Charlotte-Mecklenburg between 1978, a few years after desegregation (racial balance) started, and 1997. In 1978 the achievement gap was very large, a little over 40 percentile points. Interest-

ingly, the achievement of both black and white students rose between 1978 and 1982, and the achievement gap decreased slightly. It is not clear what caused these gains, but since gains occurred for both groups it does not appear to be related to desegregation (racial balance) per se. For example, teachers may have been doing a better job teaching the material covered by the tests, a practice that does not require racial balance. At any rate, a new test was introduced in 1986 and the scores of both groups fell, albeit not quite as low as the 1978 scores. The gap then widened somewhat so that by 1992 the gap nearly returned to what it was in 1978 - just under 40 percentile points. Then a new state test was introduced in 1994 which showed a continuing gap of nearly 40 [*640] percentile points. n20

[*641]

[SEE FIGURE IN ORIGINAL] [*642] The Wilmington-New Castle County system has a similar history and a similar pattern of achievement. Wilmington was a predominately black urban school system that was merged, by court order, with predominately white suburban school systems to form one large metropolitan school system (it was later broken up into four subsystems). n21 Starting in 1978, schools were racially balanced by having Wilmington black students attend schools in the suburbs for nine out of twelve years, and suburban white students attending Wilmington schools for three years (usually grades 4-6). Again, the consolidated district had about 80 percent white students to begin with so that, despite considerable white flight, Wilmington-New Castle still had a 65-35 white-black ratio as late as 1993.

The achievement trends in Chart 6 tell a story quite similar to that of Charlotte-Mecklenburg. Although there is no early increase in test scores for either group, the black-white achievement gap remains large and steady despite many years of "ideal" racial balance. A new test introduced in 1989 (the Stanford Achievement Test replaced the CAT test) shows a consistent achievement gap that is about the same magnitude as the national black-white achievement gaps documented in the NAEP studies.

It is quite clear, then, that a large academic achievement gap remains between black and white students despite many years of extensive desegregation. This gap is revealed both in national studies and in studies of individual school systems, and the gap exists regardless of the extent and duration of desegregation. Although the gap diminished somewhat during the 1970s and 1980s, it is still substantial. Most importantly, unlike the time of Brown, there is no reasonable way that school segregation can be invoked as a primary cause of this achievement gap, nor is there any credible evidence that school desegregation - in the form of racial balancing - has diminished the gap to any important degree.

[*643]

[SEE FIGURE IN ORIGINAL] [*644]

II. ALTERNATIVE EXPLANATIONS OF THE GAP

If segregation does not cause the achievement gap and desegregation has little impact on closing it, what are its causes? A complete critique of the harm and benefit thesis should be able to offer alternative explanations for the achievement gap. Education and social science researchers have offered at least two explanations. One explanation involves what we might call school factors, which include financial resources, staffing, curriculum, standards, and any other aspect of the school program. Another explanation involves non-school factors, of which a student's family background is the primary cluster.

When desegregation failed to close the achievement gap, some social scientists and many educators changed their argument about the cause of the gap. While not abandoning the segregation argument entirely, many began to blame the achievement gap on inadequate resources and lower-quality teachers, particularly in central-city school districts with high concentrations of poor and minority children. In these types of school systems, so the argument goes, black children are concentrated in schools with few resources and with unqualified teachers, at least as compared to schools attended by middle class white children. This argument was made most pointedly in a recent lawsuit in New York city, where a group called "Campaign for Fiscal Equity" sued the State of New York (in State court) on behalf of the city school system.

There is a large research literature on the impact of school resources on achievement, and it would be beyond the scope of this essay to review that material here. Suffice to say a lack of consensus exists about what kind of school resources can change achievement levels after students start school and by how much. There are also no agreements as to whether any combination of resources and programs can close the achievement gap. n22

If school factors are to explain the achievement gap, two relationships must be demonstrated. First, a school resource must be related to achievement, in that more of that resource (i.e., funding, teacher quality, smaller classes, etc.) can be shown to raise achievement. Second, there must be a difference in the allocation of that resource between black and white students - that is, black [*645] students must receive less of that resource. If this latter relationship is not demonstrated, then the first relationship is moot.

Chart 7 uses data from NAEP to compare the availability of seven commonly studied school resources between black and white 8th grade students; the teacher characteristics are computed for students' 8th grade math teachers. The resources examined are the percentage of math teachers with a Master's degree, number of years they have taught math, percentage of teachers with a junior high math certificate, percentage of teachers with a math major or minor in college, hours of class time spent on math instruction per week, number of students in the math class (class size), and per pupil instructional expenditures at the school district level.

There are no significant differences (or the differences favor black students) on five of the seven resource indicators: having an MA degree, teaching experience, hours of math instruction, class size, and instructional expenditures. Since there is no difference favoring white students on these school resources, the 8th grade math gap cannot be explained by differences in these resources - whether or not they are correlated with achievement.

Two school resources do show a disadvantage for black students. One is the percent of teachers with a certificate in junior high math: 75 percent of white 8th grade students have teachers with a junior high math certificate compared to 68 percent of black students, a difference of 7 percentage points. Another resource with an important difference is having majored or minored in math in college: 66 percent of white students have teachers with a college math background compared to only 52 percent of black students, a difference of 14 percentage points.

[*646]

[SEE FIGURE IN ORIGINAL]] [*647] The question now becomes: to what extent are these two resources correlated with student math achievement? In a separate analysis, black students with a certified math teacher score 5.5 points higher on the 8th grade math test (controlling for the student's socioeconomic background), and black students with a teacher who studied math in college scored six points higher than those without such teachers. The two teacher characteristics are highly correlated, in that most teachers with a junior high certificate majored or minored in math, and vice versa. Even if we assumed that these two characteristics were not correlated, the net effect of equalizing the certificate rate and the college math rate for black and white students would be to raise black math scores by 1.3 points. n23 Since the black-white 8th grade math gap is just over thirty points (see Chart 1), this school resource difference explains only a small portion of the gap.

I have done similar types of case studies in numerous school systems, examining the school resources available to black and white students within the same system (e.g., Charlotte-Mecklenburg, Wilmington-New Castle, Tampa, Dallas, and St. Louis to name just a few). Generally speaking, black students are exposed to the same school resources as white students in these systems, and frequently both expenditures and class sizes favor black students due to compensatory programs. To the extent that some school resources are lower for black students (e.g., teacher certification or education), the differences are usually small and, given the modest relationships between these resources and student achievement, the impact of equalizing the resources would be to raise black achievement by a very small amount. Thus, the distribution of school resources explains very little of the black-white achievement gap.

In light of this, we must look elsewhere for explanations of the achievement gap. The most likely explanation, in my opinion, is the socioeconomic differences between black and white families. The relationship between family socioeconomic factors and student achievement is one of the best-documented relationships in social science research, starting with the well-known Coleman report and ending with a recent study by Jencks and others. n24 The socioeconomic differences between black and white families is also well-established. Indeed, the relationships are so strong here that we can explain not [*648] only the gap but changes in the gap.

Regarding improvement in black achievement during the 1970s and 1980s, consider the trends in some Census data in Charts Eight and Nine. Chart Eight shows that the black-white gap has nearly closed in high school graduation rates, where blacks made the biggest gains relative to whites in the 1970s and 1980s. Another study has shown that the gap in the rate of having some college declined for parents of NAEP students during the 1970s and 1980s. n25 Chart Nine shows that the gap in family poverty has closed somewhat during the last thirty years. These improvements in black education and income relative to whites, along with related factors, can explain a significant portion of the reduced achievement gap. n26

A substantial gap remains, however, in black and white family income, amounting to nearly $ 20,000 per year, and the current poverty rate gap is equally serious - 9 percent for white families compared to thirty percent for black families in 1998. Perhaps more important, the improvement in high school graduation rates has not been replicated in college graduation rates. In fact, the black-white college graduation gap has actually widened somewhat, from about 5 percentage points in 1957 to 10 percentage points in 1998.

[*649]

[SEE FIGURE IN ORIGINAL] [*650]

[SEE FIGURE IN ORIGINAL] [*651] There are also serious black-white differences in other social characteristics related to academic achievement, some of which Chart Ten summarizes. n27 Of greatest concern is the enormous gap in family structure, where nearly 70 percent of black children are being raised by a single (and often never-married) parent, compared to less than 30 percent for white children. This gap has actually increased, and is one of the important reasons for the persistent gaps in family income and poverty rates. Because most white families with children have two parents, many more white than black families have two incomes. This clearly increases median family income for white families as compared to black families, most of whom are single parents.

Moreover, the average white family has a much smaller child-to-parent ratio than the black family. That is, the typical white family has one parent per child (two parents and two children), while the typical black family has one parent with either two or three children. This means black parents have less time and energy for parenting on an "effort per child" basis; some social scientists have called this "dilution of resources." n28

The dilution of parent resources shows up in the two lower sets of bars in Chart Ten. Black parents spend less time than white families on cognitive stimulation for their young children (e.g., reading, teaching words and numbers, etc.). They also have lower scores on emotional support (influenced heavily by the absence of a father figure). These two parenting characteristics are known to be among the most important influences on a young child's cognitive development and the child's later academic achievement in school. n29

[*652]

[SEE FIGURE IN ORIGINAL] [*653] While African American gains are impressive in certain areas, especially family income and completion of high school, the remaining socioeconomic gaps are equally imposing. The socioeconomic gains of blacks relative to whites in several areas may well have been sufficient to narrow the achievement gap to the extent shown in Charts One and Two, but the large socioeconomic gaps that persist and even continue to grow can also explain the large achievement differences that still exist.

III. CONCLUSION

The evidence is compelling that neither school segregation nor differences in school resources are responsible for the current achievement gap that exists between African American and white children. Black children achieve lower rates than white children whether a school system is desegregated or (de facto) segregated. Black children have similar school resources than white children, both nationally and locally, and yet black children still achieve at lower rates than white children, both nationally and locally. This achievement differential persists despite many special compensatory programs such as Head Start and Title 1.

For these reasons, I do not think the end of desegregation - if it comes - will have any substantial effect on the achievement gap. Black children in current desegregated schools are achieving at about the same level as black children in current de facto segregated schools.

Although desegregation may have contributed to the equality of school resources, at the present time black and white children have about the same level of resources, yet the achievement gap persists. Assuming that school boards continue their policies of equitable allocation of resources after the end of desegregation, there should be no change from the current pattern of equity of resources between black and white students.

The evidence is overwhelming, in my opinion, that the non-school factors of family socioeconomics explain most of the achievement gap. Despite improvements in black income and education levels, there are still large gaps remaining in income, poverty, and college graduation rates. There are even larger and growing gaps in the critical factors of family structure and family size, which lead to differences in parenting behaviors. All of these characteristics are strongly correlated with a child's academic skills, which means that a black-white skill gap already exists when children [*654]

start their schooling. Further reduction in the achievement gap will require increased parity between white and black children with regards to their family environments, especially two-parent families, poverty, and parenting behaviors, all of which are inextricably entwined. Without this parity, the achievement gap is likely to persist throughout the school years.

Legal Topics:

For related research and practice materials, see the following legal topics:
Education LawDiscriminationRacial DiscriminationDesegregationGeneral OverviewCopyright LawConstitutional ProtectionsGeneral OverviewCriminal Law & ProcedureSentencingCorrections, Modifications & ReductionsEligibility, Circumstances & Factors

FOOTNOTES:

n1. *347 U.S. 483 (1954).*

n2. *Id. at 494.*

n3. Id.

n4. See david j. armor, forced justice: school desegregation and the law 8 (1995).

n5. See frank i. goodman, de facto school desegregation: a consitutional and empirical analysis, 60 cal. l. rev. 275, 437 (1972).

n6. *347 U.S. at 495.*

n7. u.s. commission on civil rights, racial isolation in the public schools (1967).

n8. *Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 24 (1971).*

n9. Id.

n10. See, e.g., *Milliken v. Bradley, 418 U.S. 717 (1974); Spangler v. Pasadena Bd. of Educ., 427 U.S. 424 (1976); Freeman v. Pitts, 503 U.S. 467 (1992).*

n11. Brief for respondents, *Freeman, 504 U.S. 467.*

n12. See gary orfield & susan e. eaton, dismantling desegregation 19-22 (1996).

n13. See generally the black-white test score gap (Christopher Jencks & Meridith Phillips eds., 1998).

n14. j. r. campbell, et al., national ctr. for educ. stat., naep 1996 trends in academic progress (1997).

n15. Jencks & Phillips, supra note 13.

n16. Christine Rossell & David J. Armor, The Effectiveness of School Desegregation Remedies, 1968-1991, 24 Am. Pol. Q. 267, 267-302 (1996).

n17. The chart shows the index of dissimilarity, which attains a value of 1.0 when schools are perfectly segregated and zero when all schools are perfectly balanced. The data is from a national representative sample of school systems which was drawn in study sponsored by the U.S. Dept. of Education.

n18. See Greg Anrig, Test Scores on the Rise for Blacks, The Trenton Sunday Star-Ledger, May 27, 1984; see also Nancy W. Burton & Lyle V. Jones, Recent Trends in Achievement Levels of Black and White Youth, Educational Researcher 10 (1982); Common Destiny (G. D. Jaynes & R. M. Williams eds., 1989).

n19. See David J. Armor, Why is Black Educational Achievement Rising?, 108 The Public Interest 65, 65-80 (1992); see also David W. Grissmer, Student Achievement and the Changing American Family (1994).

n20. The McGraw Hill CAT test was used until 1985, and the CAT-5 was used between 1986 and 1992. The state test used from 1994 to 1997 is unique to North Carolina.

n21. *Evans v. Buchanan, 393 F. Supp. 428, 446-47 (1975),* aff'd, *423 U.S. 963 (1975),* rehearing denied, *423 U.S. 1080 (1976).*

n22. See generally Gary Burtless, Does money matter? The effect of school resources on student achievement and adult success (1996).

n23. The calculation is 5.5 x .07 + 6 x .14 = 1.3.

n24. James S. Coleman, et al., U.S. Dept. of Health, Educ. And Welfare, Equality of Educational Opportunity (1966); see generally Jencks & Phillips, supra note 13.

n25. Armor, supra note 19, at 77-78.

n26. David Grissmer et al., Why Did the Black-White Score Gap Narrow in the 1970s and 1980s?, in Jencks & Phillips, eds., supra note 13, at 182.

n27. These data are taken from the National Longitudinal Study of Youth (NLSY), 1994 panel.

n28. See Judith Blake, Family Size and Achievement (1989).

n29. Meredith Phillips, et al, Family Background, Parenting Practices, and the Black-White Test Score Gap, in Jencks & Phillips, eds., supra note 13 at 103, 126-130.

PARENTS INVOLVED IN COMMUNITY SCHOOLS, a Washington nonprofit corporation, Plaintiff-counter-defendant - Appellant, v. SEATTLE SCHOOL DISTRICT, NO. 1, a political subdivision of the State of Washington; JOESPH OLCHEFSKE, in his official capacity as superintendent; BARBARA SCHAAD-LAMPHERE, in her official capacity as President of the Board of Directors of Seattle Public Schools; DONALD NEILSON, in his official capacity as Vice President of the Board of Directors of Seattle Public Schools; STEVEN BROWN; JAN KUMASAKA; MICHAEL PRESTON; NANCY WALDMON, in their official capacities as members of the board of Directors, Defendants-counter-claimants - Appellees.

No. 01-35450

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

426 F.3d 1162; 2005 U.S. App. LEXIS 22515

June 21, 2005, Argued and Submitted En Banc, San Francisco, California
October 20, 2005, Filed

SUBSEQUENT HISTORY: US Supreme Court certiorari granted by *Parents Involved in Comm. Schs v. Seattle Sch. Dist. No. 1, 2006 U.S. LEXIS 4349 (U.S., June 5, 2006)*

PRIOR HISTORY: [**1] Appeal from the United States District Court for the Western District of Washington. D.C. No. CV-00-01205-BJR. Barbara Jacobs Rothstein, District Judge, Presiding. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1, 377 F.3d 949, 2004 U.S. App. LEXIS 15451 (9th Cir. Wash., 2004)*
Parents Involved in Cmty. Schs v. Seattle Sch. Dist. No. 1, 137 F. Supp. 2d 1224, 2001 U.S. Dist. LEXIS 4746 (W.D. Wash., 2001)

COUNSEL: Harry J.F. Korrell (argued) and Daniel B. Ritter, Davis Wright Tremaine LLP, Seattle, Washington, for the plaintiff-counter-defendant/appellant.

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Paul J. Lawrence, Preston Gates & Ellis LLP, Seattle, Washington, for the amicus curiae American Civil Liberties Union in support of defendants-counter-claimants/appellees.

JUDGES: Before: Mary M. Schroeder, Chief Judge, Harry Pregerson, Alex Kozinski, Andrew J. Kleinfeld, Michael Daly Hawkins, [**2] William A. Fletcher, Raymond C. Fisher, Richard C. Tallman, Johnnie B. Rawlinson, Consuelo M. Callahan and Carlos T. Bea, Circuit Judges. Opinion by Judge Fisher; KOZINSKI, Circuit Judge, concurring: BEA, Circuit Judge, with whom Circuit Judges KLEINFELD, TALLMAN and CALLAHAN join dissenting.

OPINIONBY: RAYMOND C. FISHER

OPINION: [*1166] RAYMOND C. FISHER, Circuit Judge, with whom Chief Judge Schroeder and Judges Pregerson, Hawkins, W. Fletcher and Rawlinson join concurring; Judge Kozinski, concurring in the result:

This appeal requires us to consider whether the use of an integration tiebreaker in the open choice, noncompetitive, public high school assignment plan crafted by Seattle School District Number 1 (the "District") violates the *federal Constitution's Equal Protection Clause*. Our review is guided by the principles articulated in the Supreme Court's recent decisions regarding affirmative action in higher education, *Grutter v. Bollinger, 539 U.S. 306, 156 L. Ed. 2d 304, 123 S. Ct. 2325 (2003)*, and *Gratz v. Bollinger, 539 U.S. 244, 156 L. Ed. 2d 257, 123 S. Ct. 2411 (2003)*, and the Court's directive that "context matters when reviewing race-based governmental action under the *Equal Protection* [**3] *Clause*." *Grutter, 539*

U.S. at 327. We conclude that the District has a compelling interest in securing the educational and social benefits of racial (and ethnic) diversity, and in ameliorating racial isolation or concentration in its high schools by ensuring that its assignments do not simply replicate Seattle's segregated housing patterns. n1 We also conclude that the District's Plan is narrowly tailored to meet the District's compelling interests.

n1 The terms "racial diversity," "racial concentration" and "racial isolation" have been used by the District to encompass racial *and* ethnic diversity, concentration and isolation. For the purposes of this opinion, we adopt this shorthand.

I. Background n2

n2 We draw the following restatement of facts largely from the district court opinion, *see Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 137 F. Supp. 2d 1224 (W.D. Wash. 2001)* ("*Parents I*"), and the Washington Supreme Court Opinion, *see Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 149 Wn.2d 660, 72 P.3d 151 (Wash. 2003)* ("*Parents IV*").

[**4]

A. Seattle Public Schools: A Historical Perspective

Seattle's historical struggle with the problem of racial isolation in its public school system provides the context for the District's implementation of the current challenged assignment plan. Seattle is a diverse community. Approximately 70 percent of its residents are white, and 30 percent are nonwhite. Seattle public school enrollment breaks down nearly inversely, with approximately 40 percent white and 60 percent nonwhite students. A majority of the District's white students live in neighborhoods north of downtown, the historically more affluent part of the city. A majority of the city's nonwhite students, including approximately 84 percent of all African-American students, 74 percent of all Asian-American students, 65 percent of all Latino students and 51 percent of all Native-American students, live south of downtown.

The District operates 10 four-year public high schools. Four are located north of downtown -- Ballard, Ingraham, Nathan Hale and Roosevelt; five are located south of downtown -- Chief Sealth, Cleveland, Franklin, Garfield and Rainier Beach; one is located west of downtown -- West Seattle. For over 40 years, [**5] the District has made efforts to attain and maintain desegregated schools and avoid the racial isolation or concentration that would ensue if school assignments replicated Seattle's segregated housing patterns. Since the 1960s, while courts around the country [*1167] ordered intransigent school districts to desegregate, Seattle's School Board voluntarily explored measures designed to end de facto segregation in the schools and provide all of the District's students with access to diverse and equal educational opportunities.

In the late 1950s and early 1960s, school assignments were made strictly on the basis of neighborhood. n3 In 1962, Garfield High School reported 64 percent minority enrollment and it accommodated 75 percent of all African-American students. Meanwhile, the eight high schools serving other major areas of the city remained more than 95 percent white.

n3 The history that follows comes principally from two documents in the district court record. One is a report entitled, "The History of Desegregation in Seattle Public Schools, 1954-1981," which was prepared by the District's desegregation planners. The other is the "Findings and Conclusions" adopted by the Board in support of the current assignment plan. (They are cited as *History of Desegregation* and *Findings and Conclusions*, respectively.)

[**6]

The District responded to this imbalance, and racial tensions in the de facto segregated schools, in various ways. In the early 1960s, the District first experimented with small-scale exchange programs in which handfuls of students switched high schools for five-week periods. In 1963, expanding on this concept, the District implemented a "Voluntary Racial Transfer" program through which a student could transfer to any school with available space if the transfer would improve the racial balance at the receiving school. In the 1970s, the District increased its efforts again, this time adopting a desegregation plan in the middle schools that requested volunteers to transfer between minority- and majority-dominated neighborhood schools and called for mandatory transfers when the number of volunteers was insufficient, though this portion of the plan was never implemented. The District also took steps to desegregate Garfield High School by changing its educational program, improving its facilities and eliminating "special transfers" that had previously allowed white students to leave Garfield. Finally, for the 1977-78 school year, the District instituted a magnet-school program. According [**7] to the District's history:

> While it appeared evident that the addition of magnet programs would not in itself desegregate the Seattle schools, there was supportive evidence that voluntary strategies, magnet and non-magnet, could be significant components of a more comprehensive desegregation plan.

History of Desegregation at 32.

By the 1977-78 school year, segregation had increased: Franklin was 78 percent minority, Rainier Beach 58 percent, Cleveland 76 percent and Garfield 65 percent. Other high schools ranged from 9 percent to 23 percent minority enrollment.

In the spring of 1977, the Seattle branch of the National Association for the Advancement of Colored People ("NAACP") filed a complaint with the United States Department of Education's Office of Civil Rights, alleging that Seattle's School Board had acted to further racial segregation in the city's schools. Several other organizations, principally the American Civil Liberties Union ("ACLU"), formally threatened to file additional actions if the District failed to adopt a mandatory desegregation plan. When the District agreed to develop such a plan, the Office of Civil Rights concomitantly agreed to delay [**8] its investigation, and the ACLU agreed to delay filing a lawsuit.

During the summer of 1977, the District and community representatives reviewed five model plans. Ultimately, the District [*1168] incorporated elements of each model into its final desegregation plan, adopted in December 1977 and known as the "Seattle Plan." The Seattle Plan divided the district into zones, within which majority-dominated elementary schools were paired with minority-dominated elementary schools to achieve desegregation. Mandatory high school assignments were linked to elementary school assignments, although various voluntary transfer options were available. With the Seattle Plan,

> Seattle became the first major city to adopt a comprehensive desegregation program voluntarily without a court order. By doing so the District maintained local control over its desegregation plan and was able to adopt and implement a plan which in the eyes of the District best met the needs of Seattle students and the Seattle School District.

History of Desegregation at 36-37. Opponents of the Seattle Plan immediately passed a state initiative to block its implementation, but the Supreme Court ultimately declared [**9] the initiative unconstitutional. *Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 470, 73 L. Ed. 2d 896, 102 S. Ct. 3187 (1982).*

The Seattle Plan furthered the District's school desegregation goals, but its operation was unsatisfactory in other ways. n4 In 1988, a decade after its implementation, the District abandoned the Seattle Plan and adopted a new plan that it referred to as "controlled choice." Under the controlled choice plan, schools were grouped into clusters that met state and district desegregation guidelines, and families were permitted to rank schools within the relevant cluster, increasing the predictability of assignments. Because of Seattle's housing patterns, the District's planners explained that "it was impossible to fashion clusters in a geographically contiguous manner"; some cluster schools were near students' homes, but others were in "racially and culturally different neighborhoods." *Findings and Conclusions* at 30-31. Although roughly 70 percent of students received their first choices, the controlled choice plan still resulted in mandatory busing for 16 percent of the District's students.

> n4 For example, the Seattle Plan was confusing, required mandatory busing of nonwhite students in disproportionate numbers, made facilities and enrollment planning difficult and contributed to "white flight" from the city schools. *Findings and Conclusions* at 30.

[**10]

In 1994, the Board directed District staff to devise a new plan for all grade levels to simplify assignments, reduce costs and increase community satisfaction, among other things. The guiding factors were to be choice, diversity and predictability. Staff developed four basic options, including the then-existing controlled choice plan, a regional choice plan, a neighborhood assignment plan with a provision for voluntary, integration-positive transfers and an open choice plan.

Board members testified that they considered all the options as they related to the District's educational goals -- with special emphasis, at the secondary school level, on the goals of choice and racial diversity. Neighborhood and regional plans were viewed as unduly limiting student choice, on which the District placed high value because student choice was seen to increase parental involvement in the schools and promote improvements in quality through a marketplace model. The District sought to maintain its commitment to racially integrated education by establishing diversity goals while moving away

from the rigid desegregation guidelines and mandatory assignments prevalent in the 1970s and 1980s.

The Board [**11] adopted the current open choice plan (the "Plan") for the 1998-99 [*1169] school year. Under the Plan, students entering the ninth grade may select any high school in the District. They are assigned, where possible, to the school they list as their first choice. If too many students choose the same school as their first choice, resulting in "oversubscription," the District assigns students to each oversubscribed school based on a series of tiebreakers. If a student is not admitted to his or her first choice school as a result of the tiebreakers, the District tries to assign the student to his or her second choice school, and so on. Students not assigned to one of their chosen schools are assigned to the closest school with space available; students who list more choices are less likely to receive one of these "mandatory" assignments. The most recent version of the Plan, which the School Board reviews annually, is for the 2001-02 school year and is the subject of this litigation.

B. The Plan

The District has sought to make each of its 10 high schools unique, with programs that respond to the continually changing needs of students and their parents. Indeed, the District implemented [**12] the Plan as part of a comprehensive effort to improve and equalize the attractiveness of all the high schools, including adoption of a weighted funding formula, a facilities plan and a new teacher contract that would make teacher transfers easier. Nevertheless, the high schools vary widely in desirability. Three of the northern schools -- Ballard, Nathan Hale and Roosevelt -- and two of the southern schools -- Garfield and Franklin -- are highly desirable and oversubscribed, meaning that more students wish to attend those schools than capacity allows. n5 The magnitude of the oversubscription is noteworthy: For the academic year 2000-01, approximately 82 percent of students selected one of the oversubscribed schools as their first choice, while only about 18 percent picked one of the undersubscribed high schools as their first choice. Only when oversubscription occurs does the District become involved in the assignment process.

n5 The current popularity of Ballard High School is illustrative of the constantly changing dynamic of Seattle's public high schools. In the fall of 1999, Ballard moved to a new facility under the leadership of a new principal. Prior to the move, Ballard was not oversubscribed; now it is one of the most popular high schools in Seattle.

Similarly, the popularity and demographics of Nathan Hale High School changed significantly when it acquired a new principal who instituted a number of academic innovations, including joining the "Coalition of Essential Schools" and instituting a "Ninth Grade Academy" and "Tenth Grade Integrated Studies Program." Prior to 1998, Nathan Hale, a north area high school, was not oversubscribed, and the student body was pre-dominantly nonwhite. Starting in 1998, the high school began to have a waitlist, and more white students, who had previously passed on Nathan Hale, wanted to go there. As a result, the number of nonwhite students declined dramatically between 1995 and 2000.

[**13]

If a high school is oversubscribed, all students applying for ninth grade are admitted according to a series of four tiebreakers, applied in the following order: First, students who have a sibling attending that school are admitted. In any given oversubscribed school, the sibling tiebreaker accounts for somewhere between 15 to 20 percent of the admissions to the ninth grade class.

Second, if an oversubscribed high school is racially imbalanced -- meaning that the racial make up of its student body differs by more than 15 percent from the racial make up of the students of the Seattle public schools as a whole -- and if the sibling preference does not bring the oversubscribed high school within plus or minus 15 percent of the District's demographics, the race-based tiebreaker [*1170] is "triggered" and the race of the applying student is considered. (For the purposes of the race-based tiebreaker, a student is deemed to be of the race specified in his or her registration materials.) Thus, if a 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 [**14] 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 imbalanced.

Originally, schools that deviated by more than 10 percent were deemed racially imbalanced. For the 2001-02 school year, however, the triggering number was increased to 15 percent, softening the effect of the tiebreaker. n6 For that year, the race-based tiebreaker was used in assigning entering ninth grade students only to three oversubscribed schools -- Ballard, Franklin and Nathan Hale. Accordingly, in seven of the 10 public high schools in 2001-02, race was not relevant in making admissions decisions.

n6 Although the record reflects the general effects of the tiebreaker in 2001-02, it does not include the specific number of students affected by the tiebreaker in the three oversubscribed schools where the tiebreaker applied. The record, however, does include these numbers for the 2000-01 school year. Although the tiebreaker operated differently in 2000-01, and applied to four schools rather than three, the 2000-01 numbers illustrate the general operation of the tiebreaker.

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The race-based tiebreaker is applied to both white and non-white students. For example, in the 2000-01 school year -- when the trigger point was still plus or minus 10 percent -- 89 more white students were assigned to Franklin than would have been assigned absent the tiebreaker, 107 more nonwhite students were assigned to Ballard than would have been assigned absent the tiebreaker, 82 more nonwhite students were assigned to Roosevelt than would have been assigned absent the tiebreaker and 27 more nonwhite students were assigned to Nathan Hale than would have been assigned absent the tiebreaker. n7 These assignments accounted for about 10 percent of admissions to Seattle's high schools as a whole. That is, of the approximately 3,000 incoming students entering Seattle high schools in the 2000-01 school year, approximately 300 were assigned to an oversubscribed high school based on the race-based tiebreaker.

n7 The Board's decision to change the trigger point for use of the tiebreaker from plus or minus 10 percent to plus or minus 15 percent, however, had the effect of rendering Roosevelt High School neutral for desegregation purposes. Thus, the tiebreaker did not factor into assignments to Roosevelt High School in the 2001-02 school year.

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In addition to changing the trigger point for the 2001-02 school year to plus or minus 15 percent, the District also developed a "thermostat," whereby the tiebreaker is applied to the entering ninth grade student population only until it comes within the 15 percent plus or minus variance. Once that point is reached, the District "turns-off" the race-based tiebreaker, and there is no further consideration of a student's race in the assignment process. The tiebreaker does not apply, and race is not considered, for students entering a high school after the ninth grade (e.g., by transfer).

As demonstrated in the chart below, the District estimates that without the race-based tiebreaker, the nonwhite populations of the 2000-01 ninth grade class at Franklin would have been 79.2 percent, at Hale 30.5 percent, at Ballard 33 percent and at Roosevelt 41.1 percent. Using the race-based [*1171] tiebreaker, the actual nonwhite populations of the ninth grade classes at the same schools respectively were 59.5 percent, 40.6 percent, 54.2 percent and 55.3 percent.

2000-01 DIFFERENCE IN PERCENTAGES OF NONWHITE STUDENTS IN NINTH GRADE WITH AND WITHOUT TIEBREAKER

SCHOOL	WITHOUT TIEBREAKER	WITH TIEBREAKER	PERCENT DIFFERENCE
FRANKLIN	79.2	59.5	- 19.7
NATHAN HALE	30.5	40.6	+ 10.1
BALLARD	33.0	54.2	+ 21.2
ROOSEVELT	41.1	55.3	+ 14.2

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In the third tiebreaker, students are admitted according to distance from the student's home to the high school. Distance between home and school is calculated within 1/100 of a mile, with the closest students being admitted first. In any given oversubscribed school, the distance-based tiebreaker accounts for between 70 to 75 percent of admissions to the ninth grade.

In the fourth tiebreaker, a lottery is used to allocate the remaining seats. Because the distance tiebreaker serves to assign nearly all the students in the District, a lottery is virtually never used.

C. Procedural History

Parents Involved in Community Schools ("Parents"), a group of parents whose children were not, or might not be, assigned to the high schools of their choice under the Plan, claimed that the District's use of the race-based

tiebreaker for high school admissions is illegal under the *Washington Civil Rights Act* ("Initiative 200"), n8 the *Equal Protection Clause of the Fourteenth Amendment* n9 and *Title VI of the Civil Rights Act of 1964*. n10

n8 *Wash. Rev. Code § 49.60.400* ("The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.").

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n9 *U.S. Const. amend. XIV, § 1* ("No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

n10 *42 U.S.C. § 2000d* ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."). Because "discrimination that violates the *Equal Protection Clause of the Fourteenth Amendment* committed by an institution that accepts federal funds also constitutes a violation of Title VI," we address the twin challenges to the racial tiebreaker simultaneously. *Gratz, 539 U.S. at 276 n.23.*

Both Parents and the District moved for summary judgment on all claims. In a published opinion dated April 6, 2001, the district court upheld the use of the racial tiebreaker under both state and federal law, granting the District's motion. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 137 F. Supp. 2d 1224, 1240 (W.D. Wash. 2001)* [**19] ("*Parents I*"). Parents timely appealed, and on April 16, 2002, a three-judge panel of this court issued an opinion reversing the district court's decision, holding that the Plan violated Washington state law and discussing federal law only as an aid to construing state law. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 285 F.3d 1236 (9th Cir. 2002)* ("*Parents II*"). The panel subsequently withdrew its opinion and certified the state law question to the Washington Supreme Court. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 294 F.3d 1084, 1085 (9th Cir. 2002)* ("*Parents III*"). The Washington Supreme Court disagreed with the panel's decision, holding that the open choice plan did not violate Washington law. *Parents Involved in* [*1172] *Cmty. Schs. v. Seattle Sch. Dist. No. 1, 149 Wn.2d 660, 72 P.3d 151, 166 (Wash. 2003)* ("*Parents IV*") (holding that Washington law "does not prohibit the Seattle School District's open choice plan tie breaker based upon race so long as it remains neutral on race and ethnicity and does not promote a less qualified minority applicant over a more qualified applicant"). Thereafter, [**20] a majority of the three-judge panel of this court held that although the District demonstrated a compelling interest in achieving the benefits of racial diversity, the Plan violated the *Equal Protection Clause* because it was not narrowly tailored. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist., No. 1, 377 F.3d 949 (9th Cir. 2004)* ("*Parents V*"). We granted en banc rehearing and now affirm the district court. n11

n11 We review the district court's resolution of cross-motions for summary judgment de novo. *United States v. City of Tacoma, 332 F.3d 574, 578 (9th Cir. 2003).*

II. Discussion

A. Strict Scrutiny

We review racial classifications under the strict scrutiny standard, which requires that the policy in question be narrowly tailored to achieve a compelling state interest. *See Johnson v. California, 543 U.S. 499, 160 L. Ed. 2d 949, 125 S. Ct. 1141, 1146 (2005)*; *Grutter, 539 U.S. at 326*; *Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 226-27, 132 L. Ed. 2d 158, 115 S. Ct. 2097 (1995).* [**21] n12 The strict scrutiny standard is not "strict in theory, but fatal in fact." *Adarand, 515* [*1173] *U.S. at 237* (internal quotation marks omitted). "Although all governmental uses of race are subject to strict scrutiny, not all are invalidated by it." *Grutter, 539 U.S. at 326-27.* We employ strict scrutiny to "smoke out" impermissible uses of race by ensuring that the government is pursuing a goal important enough to warrant use of a highly suspect tool. *Id. at 327* (internal quotation marks omitted). This heightened standard of review provides a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context. *Smith v. Univ. of Washington, 392 F.3d 367, 372 (9th Cir. 2004).* In evaluating the District's Plan under strict scrutiny, we also bear in mind the Court's directive that "context matters when reviewing race-based governmental action under the *Equal Protection Clause.*" *Grutter, 539 U.S. at 326.*

N12 Judge Kozinski's concurrence makes a powerful case for adopting a less stringent standard of review here because the Plan does not attempt to "benefit[] or burden[] any particular group;" therefore it "carries none of the baggage

the Supreme Court has found objectionable" in earlier equal protection cases. Kozinski, J., concurring, *infra* at 3 and 9. Recognizing the importance of context in the Supreme Court's equal protection jurisprudence, Judge Kozinski proposes "robust and realistic" rational basis rather than strict scrutiny review. *Id.* at 4. *Cf. Coalition for Economic Equity v. Wilson, 122 F.3d 692, 708 n.16 (9th Cir. 1997)* ("We have recognized . . . that 'stacked deck' programs trench on *Fourteenth Amendment* values in ways that 'reshuffle' programs do not. Unlike racial preference programs, school desegregation programs are not inherently invidious, do not work wholly to the benefit of certain members of one group and correspondingly to the harm of certain members of another group, and do not deprive citizens of rights.") (internal quotation marks, alterations and citations omitted).

Nonetheless, the Supreme Court in *Johnson v. California, 543 U.S. 499, 160 L. Ed. 2d 949, 125 S. Ct. 1141 (2005)*, 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." *Id. at 1147* (internal quotation marks omitted); *see also id. at 1146* (noting that all racial classifications "raise special fears that they are motivated by an invidious purpose" and that "absent 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" (internal quotation marks and citation omitted)). As Judge Kozinski aptly notes, *Johnson* is not entirely analogous to the instant case 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. Kozinski, J., concurring, *infra.* at 3-4. Nevertheless, like the First and Sixth Circuits - the only other 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 - we conclude that the Plan must be reviewed under strict scrutiny. *See Comfort v. Lynn School Committee, 418 F.3d 1, 6 (1st Cir. 2005)* (en banc); *McFarland v. Jefferson County Public Schools, 416 F.3d 513, 514 (6th Cir. 2005)* (per curiam).

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B. Compelling State Interest

Under strict scrutiny, a government action will not survive unless motivated by a "compelling state interest." *See id. at 325, 327.* Because strict scrutiny requires us to evaluate the "fit" between the government's means and its ends, *Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 280 n.6, 90 L. Ed. 2d 260, 106 S. Ct. 1842 (1986)*, it is critical to identify precisely the governmental interests - the ends - to which the government's use of race must fit. *See United States v. Paradise, 480 U.S. 149, 171, 94 L. Ed. 2d 203, 107 S. Ct. 1053 (1987)* (stating that, in order to determine whether an order was narrowly tailored, "we must examine the purposes the order was intended to serve").

Although the Supreme Court has never decided a case involving the consideration of race in a voluntarily imposed school assignment plan intended to promote racially and ethnically diverse secondary schools, its decisions regarding selective admissions to institutions of higher learning demonstrate that one compelling reason for considering race is to achieve the educational benefits of diversity. The compelling interest that the Court recognized in *Grutter* [**23] was the promotion of the specific educational and societal benefits that flow from diversity. *See Grutter, 539 U.S. at 330* (noting that the law school's concept of critical mass must be "defined by reference to the educational benefits that diversity is designed to produce"). In evaluating the relevance of diversity to higher education, the Court focused principally on two benefits that a diverse student body provides: (1) the learning advantages of having diverse viewpoints represented in the "robust exchange of ideas" that is critical to the mission of higher education, *id. at 329-30*; and (2) the greater societal legitimacy that institutions of higher learning enjoy by cultivating a group of national leaders who are representative of our country's diversity, *id. at 332-33.* The Court also mentioned the role of diversity in challenging stereotypes. *Id. at 330, 333.* The Court largely deferred to the law school's educational judgment not only in determining that diversity would produce these benefits, but also in determining that these benefits were critical to the school's educational mission. *Id. at 328-33.* [**24] n13

n13 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. *Grutter, 539 U.S. 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 diver-

sity."); *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* ("High-ranking retired officers and civilian leaders of the United States military assert that, 'based 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.'").

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[*1174] Against this background, we consider the specific interests that the District's Plan seeks to advance. These 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's commitment to the diversity of its schools and to the ability to voluntarily avoid racially concentrating enrollment patterns also helps ensure that all students have access to those schools, faculties, course offerings, and [**26] resources that will enable them to reach their full potential.
>
> Based on the foregoing rationale, the Seattle School District's commitment is that no student should be required to attend a racially concentrated school. The District is also committed to providing students with the opportunity to voluntarily choose to attend a school to promote integration. The District provides these opportunities for students to attend a racially and ethnically diverse school, and to assist in the voluntary integration of a school, because it believes that providing a diverse learning environment is educationally beneficial for all students.

The District's interests fit into two broad categories: (1) the District seeks the affirmative educational and social benefits that flow from racial diversity; and (2) the District seeks to avoid the harms resulting from racially concentrated or isolated schools.

1. Educational and Social Benefits that Flow from Diversity

The District has established that racial diversity produces a number of compelling educational and social benefits in secondary education. First, the District presented expert testimony that in racially diverse schools, "both white [**27] and minority students experienced improved critical thinking skills -- the ability to both understand and challenge views which are different from their own."

Second, the District demonstrated the socialization and citizenship advantages of racially diverse schools. School officials, relying on their experience as teachers and administrators, and the District's expert all explained these benefits on the record. According to the District's expert, the 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 . . . [*1175] 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." (Emphasis added.) Even Parents' expert conceded that "there 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 [**28] cultural and social differences among various racial and ethnic groups." n14 That is, diversity encourages students not only to think critically but also democratically.

> n14 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 Out-*

comes, 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).

Third, the District's expert 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 [**29] do not, and are more likely to have cross-race friendships later in life." n15

n15 The District's compelling interests in diversity have been endorsed by Congress. In the Magnet Schools Assistance Act, Congress found that "It 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)* (emphasis added).

The District's interests in the educational and social benefits of diversity are similar to those of a law school as articulated in *Grutter*. The contextual [**30] differences between public high schools and universities, however, make the District's interests compelling in a similar but also significantly different manner. *See Grutter, 539 U.S. at 330* (noting that the compelling state interest in diversity is judged in relation to the educational benefits that it seeks to produce).

The Supreme Court in *Grutter* noted the importance of higher education in "preparing students for work and citizenship." *539 U.S. at 331*. For a number of reasons, public secondary schools have an equal if not more important role in this preparation. First, underlying the history of desegregation in this country is a legal regime that recognizes the principle that public secondary education serves a unique and vital socialization function in our democratic society. As the 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." *457 U.S. 202, 221, 72 L. Ed. 2d 786, 102 S. Ct. 2382 (1982)* (internal quotation marks and citations omitted); *see* [**31] *Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683, 92 L. Ed. 2d 549, 106 S. Ct. 3159 (1986)* (stating that the inculcation of civic values is "truly the work of the schools") (internal quotation marks omitted)); *Plyler, 457 U.S. at 221-23* (noting that public [*1176] 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"); *Ambach v. Norwick, 441 U.S. 68, 76-77, 60 L. Ed. 2d 49, 99 S. Ct. 1589 (1979)* (observing 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"); *Brown v. Bd. of Educ., 347 U.S. 483, 493, 98 L. Ed. 873, 74 S. Ct. 686 (1954)* ("[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 preparing him for later professional training, and in helping him to adjust normally to his environment."). Under Washington law, such civic training is mandated by the [**32] state constitution: "Our constitution is unique in placing paramount value on education for citizenship." *Parents IV, 72 P.3d at 158.*

Second, although one hopes that all students who graduate from Seattle's public schools would have the opportunity to attend institutions of higher learning if they so desire, a substantial number of Seattle's public high school graduates do not attend college. n16 For these students, their public high school educational experience will be their *sole* opportunity to reap the benefits of a diverse learning environment. We reject the notion that only those students who leave high school and enter the elite world of higher education should garner the benefits that flow from learning in a diverse classroom. Indeed, it would be a perverse reading of the *Equal Protection Clause* that would allow a university, educating a relatively small percentage of the population, to use race when choosing its student body but not allow a public school district, educating all children attending its schools, to consider a student's race in order to ensure that the high schools within the district attain and maintain diverse student bodies.

n16 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.

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Third, the public school context involves students who, because they are younger and more impressionable, are more amenable to the benefits of diversity. *See Comfort, 418 F.3d at 15-16* ("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 School Committee, 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 "it 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"); *see also* Goodwin Liu, *Brown, Bollinger, and Beyond, 47 How. L.J. 705, 755 (2004)* ("If '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 [**34] and learn alongside peers from other racial groups.") (citing *Grutter, 539 U.S. at 333*) (emphasis added)).

The dissent insists that racial diversity in a public high school is not a compelling interest, arguing that *Grutter* endorsed a law school's compelling interest in diversity [*1177] only in some broader or more holistic sense. Bea, J., dissenting, *infra.* at 14-16. To attain this broader interest, the dissent contends, the District may only consider race along with other attributes such as socioeconomic status, ability to speak multiple languages or extracurricular talents. We read *Grutter*, however, to recognize that racial diversity, not some proxy for it, is valuable in and of itself. *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).

In short, the District has demonstrated that it has a compelling interest in the educational and social benefits of racial diversity similar to those articulated by the Supreme Court in *Grutter* as well as the additional compelling educational and social benefits [**35] of such diversity unique to the public secondary school context.

2. Avoiding the Harms Resulting from Racially Concentrated or Isolated Schools

The District's interest in achieving the affirmative benefits of a racially diverse educational environment has a flip side: avoiding racially concentrated or isolated schools. In particular, the District is concerned with making the educational benefits of a diverse learning environment available to all its students and ensuring that "no student should be required to attend a racially concentrated school." *See* "Board Statement Reaffirming Diversity Rationale," quoted *supra* p. 22. 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 - "with few exceptions, separate schools are still unequal schools." *See* Erica Frankenberg et al., *A Multiracial Society with Segregated Schools: Are We Losing the Dream?* 11 (The Civil Rights Project, Harvard Univ. Jan. 2003), *at* http://www.civilrightsproject.harvard.edu/ research/reseg03/AreWeLosingtheDream. [**36] pdf) (hereinafter "*Civil Rights Project*") (last visited October 11, 2005) (cited in *Grutter, 539 U.S. at 345* (Ginsburg, J., concurring)).

In Seattle, the threat of having to attend a racially concentrated or isolated school is not a theoretical or imagined problem. n17 As the district court found, the District "established that housing patterns in Seattle continue to be racially concentrated," and would result in racially concentrated or isolated schools if school assignments were based solely on a student's neighborhood or proximity to a particular high school. *Parents I, 137 F. Supp. 2d at 1235.* Accordingly, the District's Plan strives to ensure that patterns of residential segregation are not replicated in the District's school assignments. *Cf. Comfort, 418 F.3d at 29* ("The problem is that in Lynn, as in many other cities, minorities and whites often live in different neighborhoods. Lynn's aim is to preserve local schools as an option without having the housing pattern of *de facto* segregation projected into the school system.") (Boudin, C.J., concurring). Although Parents make much of the fact that "Seattle has never operated [**37] a [*1178] segregated school system," and allege that "this is not a school desegregation case," each court to review the matter has concluded that because of Seattle's housing patterns, high schools in Seattle would be highly segregated absent race conscious measures. *See Parents I, 137 F. Supp. 2d at 1237*; *Parents II, 285 F.3d at 1239-40*; *Parents III, 294 F.3d at 1085*; *Parents IV, 72 P.3d at 153.*

n17 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. *See Civil Rights Project* 4 ("At the beginning of the twenty-first century, American public schools are now twelve years in the process of continuous re-

segregation. The desegregation of black students, which increased continuously from the 1950s to the late 1980s, has now receded to levels not seen in three decades.").

The district court found that, "the circumstances [**38] that gave rise to the court-approved school assignment policies of the 1970s [e.g., Seattle's segregated housing patterns] continue to be as compelling today as they were in the days of the district's mandatory busing programs . . . . It would defy logic for this court to find that the less intrusive programs of today violate the *Equal Protection Clause* while the more coercive programs of the 1970s did not." *Parents I, 137 F. Supp. 2d at 1235*. Thus, it concluded that "preventing the resegregation of Seattle's schools is . . . a compelling interest." *Id. at 1237*; *see id. at 1233-35*. Several other courts have also conceived of a school district's voluntary reduction or prevention of de facto segregation as a compelling interest. *See Comfort, 418 F.3d at 14* (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); *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 [**39] 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)* ("We 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.") (citing *Parent Ass'n of Andrew Jackson High Sch. v. Ambach, 598 F.2d 705, 717-20 (2d Cir. 1979))*; *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)*. n18 We join these courts in recognizing that school districts have a compelling interest in ameliorating real, identifiable de facto racial segregation.

n18 Like the District, none of the school districts in the above-cited cases was subject to a court-ordered desegregation decree nor, with the exception of *Andrew Jackson*, did the schools face an imminent threat of litigation to compel desegregation. Like the District, they may have been vulnerable to litigation in decades past, but the districts' voluntary desegregation measures would make it difficult today to make the required showing that the districts *intended* to create segregated schools. *See, e.g., Comfort, 283 F. Supp. 2d at 390* (explaining that the district's vulnerability to litigation had been "headed off by the very Plan in contention here").

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The dissent, however, contends first that the District is not "desegregating" but rather is engaged in racial balancing. Bea, J., dissenting, *infra.* at 3-4. Further, for the dissent, segregation requires a state actor intentionally to separate the races; and in the absence of such offensive state conduct, the Supreme Court cases detailing the remedies for *Fourteenth Amendment* violations are of no relevance. Bea, J., dissenting, *infra.* at 29, n.17. Thus, without a court finding of de jure segregation the elected school board members of the District may not take voluntary, affirmative steps towards [*1179] creating a racially diverse student body. We disagree. The fact that de jure segregation is particularly offensive to our Constitution does not diminish the real harms of separation of the races by other means. "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is *greater* when it has the sanction of law. . . ." *Brown v. Bd. of Educ., 347 U.S. 483, 494, 98 L. Ed. 873, 74 S. Ct. 686 (1954)* (emphasis added). The benefits that flow from integration (or desegregation) exist whether or not a state actor was [**41] responsible for the earlier racial isolation. *Brown*'s statement that "in the field of public education. . . separate educational facilities are inherently unequal" retains its validity today. *Id. at 495*. The District is entitled to seek the benefits of racial integration and avoid the harms of segregation even in the absence of a court order deeming it a violator of the U.S. Constitution:

Support for this conclusion comes from statements in the Supreme Court's school desegregation cases, which repeatedly refer to the *voluntary integration* of schools as sound educational policy within the discretion of local school officials. n19 *See Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16, 28 L. Ed. 2d 554, 91 S. Ct. 1267 (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, 28 L. Ed. 2d 586, 91 S. Ct. 1284 (1971)* [**42] ("As 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."); *Bustop, Inc. v. Bd. of Educ. of Los Angeles, 439 U.S. 1380, 1383, 58 L. Ed. 2d 88, 99 S. Ct. 40 (1978)* (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, 37 L. Ed. 2d 548, 93 S. Ct. 2686 (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."); *Washington v. Seattle Sch. Dist. No. 1, 458 U.S. at 480, 487* (holding unconstitutional the state initiative that blocked the Seattle School District's use of mandatory busing to remedy de facto segregation).

N19 The dissent correctly notes that these decisions were rendered in the context of de jure segregation. But their import is also significantly compelling in the context of de facto segregation, as in Seattle. Indeed, in *Swann*, the Court further stated, "Our objective in dealing with the issues presented by these cases is to see that school authorities exclude no pupil of a racial minority from any school, directly *or indirectly*, on account of race..." *402 U.S. at 23* (emphasis added).

[**43]

In sum, we hold that the District's interests in obtaining the educational and social benefits of racial diversity in secondary education and in avoiding racially concentrated or isolated schools resulting from Seattle's segregated housing pattern are clearly compelling.

C. Narrow Tailoring

We must next determine whether the District's use of the race-based tiebreaker is narrowly tailored to achieve its compelling interests. *See Grutter, 539* [*1180] *U.S. at 333*. The narrow tailoring inquiry is intended to "'smoke out' illegitimate uses of race" by ensuring that the government's classification is closely fitted to the compelling goals that it seeks to achieve. *Richmond v. J.A. Croson Co., 488 U.S. 469, 493, 102 L. Ed. 2d 854, 109 S. Ct. 706 (1989)*. Here, our analysis is framed by the Court's narrow tailoring analysis in *Grutter* and *Gratz*, which, though informed by considerations specific to the higher education context, substantially guides our inquiry. *See Grutter, 539 U.S. at 334* (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 [**44] into account") (internal quotation marks omitted).

In *Gratz*, the Court held unconstitutional the University of Michigan's undergraduate admissions program, which automatically assigned 20 points on the admissions scale to an applicant from an underrepresented racial or ethnic minority group. *539 U.S. at 255, 272*. 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. *539 U.S. at 315-16, 340*. The law school's policy also attempted to ensure that a "critical mass" of underrepresented minority students would be admitted in order to realize the benefits of a diverse student body. n20 *Id. at 316*.

n20 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." *Grutter, 539 U.S. at 318* (internal quotation marks omitted).

[**45]

In its analysis, the Court identified five hallmarks of a narrowly tailored affirmative action plan: (1) individualized consideration of applicants; (2) the absence of quotas; (3) serious, good-faith consideration of race-neutral alternatives to the affirmative action 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. *Smith v. Univ. of Washington, 392 F.3d 367, 373 (9th Cir. 2004)*; *Comfort, 418 F.3d at 17* (characterizing *Grutter* as outlining a "four-part narrow tailoring inquiry").

Hallmarks two through five are applicable here despite significant differences between the competitive admissions plans at issue in *Gratz* and *Grutter* and the District's high school assignment Plan. The first hallmark, however, is less relevant to our analysis because of the contextual differences between institutions of higher learning and public high schools.

1. Individualized, Holistic Consideration of Applicants

a. An applicant's qualifications

In the context of university admissions, where applicants compete for a limited number of spaces in a class, the [**46] 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

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ARTICLE: The End of School Desegregation and the Achievement Gap

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SUMMARY:
... The findings of Brown v. Board of Education greatly boosted the widespread view that school desegregation would enhance African American achievement and close the black-white achievement gap. ... I. DESEGREGATION AND THE ACHIEVEMENT GAP ... Note that the level of racial balance stayed relatively stable between 1982 and 1995, indicating that desegregation was not being dismantled to any significant degree. ... Desegregation can mean the act of creating a uniform program of education for all students, regardless of the degree of racial balance in each school building. ... In these cities even perfect racial balance meant that most schools were predominately minority, and hence not a valid test for the effect of desegregation. ... Chart 5 shows the achievement trends in Charlotte-Mecklenburg between 1978, a few years after desegregation (racial balance) started, and 1997. ... It is not clear what caused these gains, but since gains occurred for both groups it does not appear to be related to desegregation (racial balance) per se. ... It is quite clear, then, that a large academic achievement gap remains between black and white students despite many years of extensive desegregation. ... When desegregation failed to close the achievement gap, some social scientists and many educators changed their argument about the cause of the gap. ... For these reasons, I do not think the end of desegregation - if it comes - will have any substantial effect on the achievement gap. ...

TEXT:
[*629]

The findings of Brown v. Board of Education n1 greatly boosted the widespread view that school desegregation would enhance African American achievement and close the black-white achievement gap. Among other things, Brown held that official segregation created feelings of inferiority among black students that "may affect their hearts and minds in a way unlikely to ever be undone." n2 The Court said this finding was "amply supported by modern authority," n3 which consisted of a number of major social science studies cited in the famous Footnote 11, including a statement signed by thirty-two social scientists. A logical corollary to the harm finding is that desegregation should end the harmful effects of segregation and bring about educational and social benefits for black children. I have called these two postulates the original "harm and benefit" thesis. n4

Few legal scholars give weight to the harm and benefit thesis in the overall structure of the Brown decision, refusing to believe that the Justices relied on social science evidence as the primary basis of their conclusions. n5 Rather, most legal scholars believe the fundamental legal principal in Brown was the Court's other statement that "separate educational facilities are inherently unequal." n6 As such, laws or policies that separate students on the basis of race would [*630] be unconstitutional, regardless of whether segregation was harmful or whether desegregated schools produced better outcomes for black children.

The harm and benefit thesis, however, was strongly embraced by civil rights advocates as the cornerstone of Brown. It soon became clear why: if the constitutional objection is harm rather than unequal treatment, it was fairly easy to extend Brown to cover all types of segregation, such as the de facto school segregation brought about by a combination of geographic school assignment ("neighborhood schools") and private housing choices of parents. The constitutional wrong then became school segregation regardless of its causes, especially ones caused by housing segregation. Desegregation (i.e., the racial balancing of schools) could thus be elevated to a fundamental, permanent right rather than a temporary remedy to counteract the effects of Jim Crow laws. n7

The Supreme Court never accepted this logic, and in later decisions continued to emphasize that the constitutional offense was state-sanctioned segregation, not racial imbalance. n8 Indeed, the Swann decision explicitly disapproved the notion that "any particular degree of racial balance [was a] substantive constitutional right." n9 The insistence on state action as a requirement for illegal segregation was repeated in many later Supreme Court decisions. n10

The well-established de jure standard did not deter civil rights leaders and many social scientists from promoting school desegregation as a matter of permanent educational policy whether the policy was enacted by school boards, legislatures, or the courts. The fundamental rationale for the supporters of school desegregation continued to be the harm and benefit thesis, although the specifics of the thesis changed over time.

The best statement of the modern harm and benefit thesis is found in an amicus brief signed by fifty-two social scientists in Freeman. n11 For example, the harms of segregation and the benefits of desegregation have been extended to most students of color and to white students as well. Hispanics were included because they are [*631] disadvantaged and have also experienced discrimination; whites were added because segregation deprives them of the benefits of racial diversity, especially improving their attitudes and reducing racial prejudice. Desegregation itself has become a much broader concept than in Brown, requiring changes in attitudes, political support by all groups, and even classroom racial balance if its benefits are to be realized. This broader thesis also underlies the more recent "diversity" movement, which argues that social benefits accrue from maximizing racial and ethnic representation in all types of settings.

In my opinion, belief in the harm and benefit thesis is the main reason why civil rights leaders and some social scientists have been critical of the trend in unitary status decisions, whereby many school districts have been released from court supervision and allowed to return to non-racial student assignment to schools. n12 The fear is that a return to geographic school attendance zones ("neighborhood schools"), combined with housing patterns, will inevitably lead to de facto school "resegregation," and this resegregation in turn will mean a loss of educational benefits, particularly for minority students.

To what extent is this concern justified by current evidence? Has desegregation improved minority achievement, and is there reason to believe that a return to de facto segregated schools will actually reduce minority achievement? In short, will an end to desegregation prevent a closure of the current achievement gaps between white and minority groups? This paper will attempt to answer these questions using a variety of evidence, from national studies and case studies that I have conducted in desegregated school districts over the past decades.

I. DESEGREGATION AND THE ACHIEVEMENT GAP

There is a well-known substantial and persistent academic achievement gap between U.S. African American and white students. n13 The National Assessment of Educational Progress (NAEP), which has been administering achievement tests to American youth for over thirty years, has best documented this gap. n14

A sampling of this data is shown in Charts One and Two, which [*632] summarize the NAEP trends in math and reading scores for 8th graders over a period of nearly three decades. The math trends show a very large black-white gap in 1973, which was reduced appreciably by 1986. Since that time, white math scores have risen gradually while black scores have remained constant, so that the math gap has continued to widen for the past fifteen years or so. Likewise, the reading gap started out very large in 1971 and closed significantly by 1988. After 1988, white reading scores rose while black scores declined, so that by the end of the decade a large gap exists between black and white students in reading skills. Therefore, while these gaps in basic skills have diminished somewhat over this thirty-year period, black students still trail white students by nearly a full school year. Put in another way, the average black 8th grader is scoring at about the same level as the average white 7th grader.

What has caused this pattern of black achievement scores, first rising and then leveling off again or even declining? What role has desegregation played in this, if any? There are a number of potential explanations for these changes, and desegregation is only one of them. Substantial school desegregation did take place during this period, but other changes also occurred at the same time. State and federal compensatory education programs grew rapidly during this time frame, particularly Title 1 and Head Start, as well as a number of state and local funding programs aimed at helping minority and poor students. Certain minority socioeconomic characteristics also improved during (and just before) this period, and it is well established that the socioeconomic status of families has a strong effect on children's academic achievement. n15 Can we decide whether some of these factors are more or less important in explaining changes in the continuing black-white achievement gap?

[*633]

[SEE FIGURE IN ORIGINAL] [*634]

[SEE TABLE IN ORIGINAL] [*635] It is true that most desegregation plans were implemented during the 1970s and early 1980s, a period that coincides with the largest black achievement gains. n16 Using a summary index of racial balance, Chart 3 demonstrates that desegregation occurred rapidly between 1968 and 1972, when most Southern school systems implemented plans. Desegregation then progressed at a slower rate until about 1982, during which time most Northern systems adopted desegregation plans. n17 Note that the level of racial balance stayed relatively stable between 1982 and 1995, indicating that desegregation was not being dismantled to any significant degree.

The fact that black achievement rose while desegregation progressed led a number of early observers to conclude that school desegregation was an important cause of the black achievement gains. n18 Interestingly, most who speculated about this did not have any information about whether the gains occurred primarily in desegregated schools, which would seem important in deciding whether desegregation per se was the active causal factor. Later studies offered alternative explanations. n19

[*636]

[SEE FIGURE IN ORIGINAL] [*637] The relationship between black achievement and school desegregation in the NAEP data is clarified in Chart 4, which tracks changes in black 8th grade reading scores in schools that were desegregated (defined as less than one-half black) or segregated. While it is clear that reading achievement gains occurred in both desegregated and segregated schools, the gains were somewhat larger in desegregated schools. The pattern was similar for math scores. It is hard to conclude from this evidence that desegregation was the primary reason for black achievement gains during the 1970s and 1980s, when black achievement increased significantly in non-desegregated schools.

At this point a clarification is needed. The term "desegregation" can take on several meanings, only one of which is relevant to the evidence in Chart 4. Desegregation can mean the act of creating a uniform program of education for all students, regardless of the degree of racial balance in each school building. In this sense a desegregation plan might create equal programs where unequal programs were the rule before desegregation. This definition is closer to that implied in the original Brown decision.

But desegregation also means, especially after Swann, that the schools in a school system are racially balanced, in that each school has a racial composition approximating the overall system composition. Chart 4 looks only at the effect of racially balanced schools, but this is the most relevant definition for the debate over ending desegregation plans. Those who are critical of ending school desegregation worry primarily about the loss of racial balance and the return to racial isolation, and about the potential adverse effects of a predominately minority school environment on black achievement.

[*638]

[SEE FIGURE IN ORIGINAL] [*639] Another way of evaluating the effects of desegregation on academic achievement is to examine changes in achievement and the black-white gap in school systems that have undergone extensive desegregation. Although hundreds, if not thousands, of school systems throughout the nation have desegregated, certain school systems are better than others for testing the harm and benefit thesis.

Some school systems were desegregated after most middle class white families had left the public schools; Atlanta, Philadelphia, Chicago, Los Angeles, Detroit, and Cleveland are good examples. In these cities even perfect racial balance meant that most schools were predominately minority, and hence not a valid test for the effect of desegregation. Other school systems had only small fractions of minority students when desegregation took place, so that desegregation still meant predominately white school systems.

Two of the best examples of comprehensive and meaningful levels of desegregation are Charlotte-Mecklenburg, North Carolina, and Wilmington-New Castle County, Delaware. Charlotte-Mecklenburg is a county-wide school system where predominately black inner city schools were desegregated with predominately white suburban schools via busing. Because the county system was 80 percent white when desegregation began, it remained a majority white school system despite considerable white flight in the early 1970s. As recently as 1998 it was 40 percent black, 55 percent white, and about 5 percent Asian. Nearly all of its schools were racially balanced from the early 1970s to the early 1990s.

Chart 5 shows the achievement trends in Charlotte-Mecklenburg between 1978, a few years after desegregation (racial balance) started, and 1997. In 1978 the achievement gap was very large, a little over 40 percentile points. Interest-

ingly, the achievement of both black and white students rose between 1978 and 1982, and the achievement gap decreased slightly. It is not clear what caused these gains, but since gains occurred for both groups it does not appear to be related to desegregation (racial balance) per se. For example, teachers may have been doing a better job teaching the material covered by the tests, a practice that does not require racial balance. At any rate, a new test was introduced in 1986 and the scores of both groups fell, albeit not quite as low as the 1978 scores. The gap then widened somewhat so that by 1992 the gap nearly returned to what it was in 1978 - just under 40 percentile points. Then a new state test was introduced in 1994 which showed a continuing gap of nearly 40 [*640] percentile points. n20

[*641]

[SEE FIGURE IN ORIGINAL] [*642] The Wilmington-New Castle County system has a similar history and a similar pattern of achievement. Wilmington was a predominately black urban school system that was merged, by court order, with predominately white suburban school systems to form one large metropolitan school system (it was later broken up into four subsystems). n21 Starting in 1978, schools were racially balanced by having Wilmington black students attend schools in the suburbs for nine out of twelve years, and suburban white students attending Wilmington schools for three years (usually grades 4-6). Again, the consolidated district had about 80 percent white students to begin with so that, despite considerable white flight, Wilmington-New Castle still had a 65-35 white-black ratio as late as 1993.

The achievement trends in Chart 6 tell a story quite similar to that of Charlotte-Mecklenburg. Although there is no early increase in test scores for either group, the black-white achievement gap remains large and steady despite many years of "ideal" racial balance. A new test introduced in 1989 (the Stanford Achievement Test replaced the CAT test) shows a consistent achievement gap that is about the same magnitude as the national black-white achievement gaps documented in the NAEP studies.

It is quite clear, then, that a large academic achievement gap remains between black and white students despite many years of extensive desegregation. This gap is revealed both in national studies and in studies of individual school systems, and the gap exists regardless of the extent and duration of desegregation. Although the gap diminished somewhat during the 1970s and 1980s, it is still substantial. Most importantly, unlike the time of Brown, there is no reasonable way that school segregation can be invoked as a primary cause of this achievement gap, nor is there any credible evidence that school desegregation - in the form of racial balancing - has diminished the gap to any important degree.

[*643]

[SEE FIGURE IN ORIGINAL] [*644]

II. ALTERNATIVE EXPLANATIONS OF THE GAP

If segregation does not cause the achievement gap and desegregation has little impact on closing it, what are its causes? A complete critique of the harm and benefit thesis should be able to offer alternative explanations for the achievement gap. Education and social science researchers have offered at least two explanations. One explanation involves what we might call school factors, which include financial resources, staffing, curriculum, standards, and any other aspect of the school program. Another explanation involves non-school factors, of which a student's family background is the primary cluster.

When desegregation failed to close the achievement gap, some social scientists and many educators changed their argument about the cause of the gap. While not abandoning the segregation argument entirely, many began to blame the achievement gap on inadequate resources and lower-quality teachers, particularly in central-city school districts with high concentrations of poor and minority children. In these types of school systems, so the argument goes, black children are concentrated in schools with few resources and with unqualified teachers, at least as compared to schools attended by middle class white children. This argument was made most pointedly in a recent lawsuit in New York city, where a group called "Campaign for Fiscal Equity" sued the State of New York (in State court) on behalf of the city school system.

There is a large research literature on the impact of school resources on achievement, and it would be beyond the scope of this essay to review that material here. Suffice to say a lack of consensus exists about what kind of school resources can change achievement levels after students start school and by how much. There are also no agreements as to whether any combination of resources and programs can close the achievement gap. n22

If school factors are to explain the achievement gap, two relationships must be demonstrated. First, a school resource must be related to achievement, in that more of that resource (i.e., funding, teacher quality, smaller classes, etc.) can be shown to raise achievement. Second, there must be a difference in the allocation of that resource between black and white students - that is, black [*645] students must receive less of that resource. If this latter relationship is not demonstrated, then the first relationship is moot.

Chart 7 uses data from NAEP to compare the availability of seven commonly studied school resources between black and white 8th grade students; the teacher characteristics are computed for students' 8th grade math teachers. The resources examined are the percentage of math teachers with a Master's degree, number of years they have taught math, percentage of teachers with a junior high math certificate, percentage of teachers with a math major or minor in college, hours of class time spent on math instruction per week, number of students in the math class (class size), and per pupil instructional expenditures at the school district level.

There are no significant differences (or the differences favor black students) on five of the seven resource indicators: having an MA degree, teaching experience, hours of math instruction, class size, and instructional expenditures. Since there is no difference favoring white students on these school resources, the 8th grade math gap cannot be explained by differences in these resources - whether or not they are correlated with achievement.

Two school resources do show a disadvantage for black students. One is the percent of teachers with a certificate in junior high math: 75 percent of white 8th grade students have teachers with a junior high math certificate compared to 68 percent of black students, a difference of 7 percentage points. Another resource with an important difference is having majored or minored in math in college: 66 percent of white students have teachers with a college math background compared to only 52 percent of black students, a difference of 14 percentage points.

[*646]

[SEE FIGURE IN ORIGINAL]] [*647] The question now becomes: to what extent are these two resources correlated with student math achievement? In a separate analysis, black students with a certified math teacher score 5.5 points higher on the 8th grade math test (controlling for the student's socioeconomic background), and black students with a teacher who studied math in college scored six points higher than those without such teachers. The two teacher characteristics are highly correlated, in that most teachers with a junior high certificate majored or minored in math, and vice versa. Even if we assumed that these two characteristics were not correlated, the net effect of equalizing the certificate rate and the college math rate for black and white students would be to raise black math scores by 1.3 points. n23 Since the black-white 8th grade math gap is just over thirty points (see Chart 1), this school resource difference explains only a small portion of the gap.

I have done similar types of case studies in numerous school systems, examining the school resources available to black and white students within the same system (e.g., Charlotte-Mecklenburg, Wilmington-New Castle, Tampa, Dallas, and St. Louis to name just a few). Generally speaking, black students are exposed to the same school resources as white students in these systems, and frequently both expenditures and class sizes favor black students due to compensatory programs. To the extent that some school resources are lower for black students (e.g., teacher certification or education), the differences are usually small and, given the modest relationships between these resources and student achievement, the impact of equalizing the resources would be to raise black achievement by a very small amount. Thus, the distribution of school resources explains very little of the black-white achievement gap.

In light of this, we must look elsewhere for explanations of the achievement gap. The most likely explanation, in my opinion, is the socioeconomic differences between black and white families. The relationship between family socioeconomic factors and student achievement is one of the best-documented relationships in social science research, starting with the well-known Coleman report and ending with a recent study by Jencks and others. n24 The socioeconomic differences between black and white families is also well-established. Indeed, the relationships are so strong here that we can explain not [*648] only the gap but changes in the gap.

Regarding improvement in black achievement during the 1970s and 1980s, consider the trends in some Census data in Charts Eight and Nine. Chart Eight shows that the black-white gap has nearly closed in high school graduation rates, where blacks made the biggest gains relative to whites in the 1970s and 1980s. Another study has shown that the gap in the rate of having some college declined for parents of NAEP students during the 1970s and 1980s. n25 Chart Nine shows that the gap in family poverty has closed somewhat during the last thirty years. These improvements in black education and income relative to whites, along with related factors, can explain a significant portion of the reduced achievement gap. n26

A substantial gap remains, however, in black and white family income, amounting to nearly $ 20,000 per year, and the current poverty rate gap is equally serious - 9 percent for white families compared to thirty percent for black families in 1998. Perhaps more important, the improvement in high school graduation rates has not been replicated in college graduation rates. In fact, the black-white college graduation gap has actually widened somewhat, from about 5 percentage points in 1957 to 10 percentage points in 1998.

[*649]

[SEE FIGURE IN ORIGINAL] [*650]

[SEE FIGURE IN ORIGINAL] [*651] There are also serious black-white differences in other social characteristics related to academic achievement, some of which Chart Ten summarizes. n27 Of greatest concern is the enormous gap in family structure, where nearly 70 percent of black children are being raised by a single (and often never-married) parent, compared to less than 30 percent for white children. This gap has actually increased, and is one of the important reasons for the persistent gaps in family income and poverty rates. Because most white families with children have two parents, many more white than black families have two incomes. This clearly increases median family income for white families as compared to black families, most of whom are single parents.

Moreover, the average white family has a much smaller child-to-parent ratio than the black family. That is, the typical white family has one parent per child (two parents and two children), while the typical black family has one parent with either two or three children. This means black parents have less time and energy for parenting on an "effort per child" basis; some social scientists have called this "dilution of resources." n28

The dilution of parent resources shows up in the two lower sets of bars in Chart Ten. Black parents spend less time than white families on cognitive stimulation for their young children (e.g., reading, teaching words and numbers, etc.). They also have lower scores on emotional support (influenced heavily by the absence of a father figure). These two parenting characteristics are known to be among the most important influences on a young child's cognitive development and the child's later academic achievement in school. n29

[*652]

[SEE FIGURE IN ORIGINAL] [*653] While African American gains are impressive in certain areas, especially family income and completion of high school, the remaining socioeconomic gaps are equally imposing. The socioeconomic gains of blacks relative to whites in several areas may well have been sufficient to narrow the achievement gap to the extent shown in Charts One and Two, but the large socioeconomic gaps that persist and even continue to grow can also explain the large achievement differences that still exist.

III. CONCLUSION

The evidence is compelling that neither school segregation nor differences in school resources are responsible for the current achievement gap that exists between African American and white children. Black children achieve lower rates than white children whether a school system is desegregated or (de facto) segregated. Black children have similar school resources than white children, both nationally and locally, and yet black children still achieve at lower rates than white children, both nationally and locally. This achievement differential persists despite many special compensatory programs such as Head Start and Title 1.

For these reasons, I do not think the end of desegregation - if it comes - will have any substantial effect on the achievement gap. Black children in current desegregated schools are achieving at about the same level as black children in current de facto segregated schools.

Although desegregation may have contributed to the equality of school resources, at the present time black and white children have about the same level of resources, yet the achievement gap persists. Assuming that school boards continue their policies of equitable allocation of resources after the end of desegregation, there should be no change from the current pattern of equity of resources between black and white students.

The evidence is overwhelming, in my opinion, that the non-school factors of family socioeconomics explain most of the achievement gap. Despite improvements in black income and education levels, there are still large gaps remaining in income, poverty, and college graduation rates. There are even larger and growing gaps in the critical factors of family structure and family size, which lead to differences in parenting behaviors. All of these characteristics are strongly correlated with a child's academic skills, which means that a black-white skill gap already exists when children [*654]

start their schooling. Further reduction in the achievement gap will require increased parity between white and black children with regards to their family environments, especially two-parent families, poverty, and parenting behaviors, all of which are inextricably entwined. Without this parity, the achievement gap is likely to persist throughout the school years.

Legal Topics:

For related research and practice materials, see the following legal topics:
Education LawDiscriminationRacial DiscriminationDesegregationGeneral OverviewCopyright LawConstitutional ProtectionsGeneral OverviewCriminal Law & ProcedureSentencingCorrections, Modifications & ReductionsEligibility, Circumstances & Factors

FOOTNOTES:

n1. *347 U.S. 483 (1954).*

n2. *Id. at 494.*

n3. Id.

n4. See david j. armor, forced justice: school desegregation and the law 8 (1995).

n5. See frank i. goodman, de facto school desegregation: a consitutional and empirical analysis, 60 cal. l. rev. 275, 437 (1972).

n6. *347 U.S. at 495.*

n7. u.s. commission on civil rights, racial isolation in the public schools (1967).

n8. *Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 24 (1971).*

n9. Id.

n10. See, e.g., *Milliken v. Bradley, 418 U.S. 717 (1974); Spangler v. Pasadena Bd. of Educ., 427 U.S. 424 (1976); Freeman v. Pitts, 503 U.S. 467 (1992).*

n11. Brief for respondents, *Freeman, 504 U.S. 467.*

n12. See gary orfield & susan e. eaton, dismantling desegregation 19-22 (1996).

n13. See generally the black-white test score gap (Christopher Jencks & Meridith Phillips eds., 1998).

n14. j. r. campbell, et al., national ctr. for educ. stat., naep 1996 trends in academic progress (1997).

n15. Jencks & Phillips, supra note 13.

n16. Christine Rossell & David J. Armor, The Effectiveness of School Desegregation Remedies, 1968-1991, 24 Am. Pol. Q. 267, 267-302 (1996).

n17. The chart shows the index of dissimilarity, which attains a value of 1.0 when schools are perfectly segregated and zero when all schools are perfectly balanced. The data is from a national representative sample of school systems which was drawn in study sponsored by the U.S. Dept. of Education.

n18. See Greg Anrig, Test Scores on the Rise for Blacks, The Trenton Sunday Star-Ledger, May 27, 1984; see also Nancy W. Burton & Lyle V. Jones, Recent Trends in Achievement Levels of Black and White Youth, Educational Researcher 10 (1982); Common Destiny (G. D. Jaynes & R. M. Williams eds., 1989).

n19. See David J. Armor, Why is Black Educational Achievement Rising?, 108 The Public Interest 65, 65-80 (1992); see also David W. Grissmer, Student Achievement and the Changing American Family (1994).

n20. The McGraw Hill CAT test was used until 1985, and the CAT-5 was used between 1986 and 1992. The state test used from 1994 to 1997 is unique to North Carolina.

n21. *Evans v. Buchanan, 393 F. Supp. 428, 446-47 (1975),* aff'd, *423 U.S. 963 (1975),* rehearing denied, *423 U.S. 1080 (1976).*

n22. See generally Gary Burtless, Does money matter? The effect of school resources on student achievement and adult success (1996).

n23. The calculation is 5.5 x .07 + 6 x .14 = 1.3.

n24. James S. Coleman, et al., U.S. Dept. of Health, Educ. And Welfare, Equality of Educational Opportunity (1966); see generally Jencks & Phillips, supra note 13.

n25. Armor, supra note 19, at 77-78.

n26. David Grissmer et al., Why Did the Black-White Score Gap Narrow in the 1970s and 1980s?, in Jencks & Phillips, eds., supra note 13, at 182.

n27. These data are taken from the National Longitudinal Study of Youth (NLSY), 1994 panel.

n28. See Judith Blake, Family Size and Achievement (1989).

n29. Meredith Phillips, et al, Family Background, Parenting Practices, and the Black-White Test Score Gap, in Jencks & Phillips, eds., supra note 13 at 103, 126-130.

PARENTS INVOLVED IN COMMUNITY SCHOOLS, a Washington nonprofit corporation, Plaintiff-counter-defendant - Appellant, v. SEATTLE SCHOOL DISTRICT, NO. 1, a political subdivision of the State of Washington; JOESPH OLCHEFSKE, in his official capacity as superintendent; BARBARA SCHAAD-LAMPHERE, in her official capacity as President of the Board of Directors of Seattle Public Schools; DONALD NEILSON, in his official capacity as Vice President of the Board of Directors of Seattle Public Schools; STEVEN BROWN; JAN KUMASAKA; MICHAEL PRESTON; NANCY WALDMON, in their official capacities as members of the board of Directors, Defendants-counter-claimants - Appellees.

No. 01-35450

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

426 F.3d 1162; 2005 U.S. App. LEXIS 22515

June 21, 2005, Argued and Submitted En Banc, San Francisco, California
October 20, 2005, Filed

SUBSEQUENT HISTORY: US Supreme Court certiorari granted by *Parents Involved in Comm. Schs v. Seattle Sch. Dist. No. 1, 2006 U.S. LEXIS 4349 (U.S., June 5, 2006)*

PRIOR HISTORY: [**1] Appeal from the United States District Court for the Western District of Washington. D.C. No. CV-00-01205-BJR. Barbara Jacobs Rothstein, District Judge, Presiding. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1, 377 F.3d 949, 2004 U.S. App. LEXIS 15451 (9th Cir. Wash., 2004)*
Parents Involved in Cmty. Schs v. Seattle Sch. Dist. No. 1, 137 F. Supp. 2d 1224, 2001 U.S. Dist. LEXIS 4746 (W.D. Wash., 2001)

COUNSEL: Harry J.F. Korrell (argued) and Daniel B. Ritter, Davis Wright Tremaine LLP, Seattle, Washington, for the plaintiff-counter-defendant/appellant.

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Sharon L. Browne, Pacific Legal Foundation, Sacramento, California, and Russell C. Brooks, Pacific Legal Foundation, Bellevue, Washington, for the amici curiae Pacific Legal Foundation, American Civil Rights Institute, American Civil Rights Union and Center for Equal Opportunity in support of plaintiff-counter-defendant/appellant.

Paul J. Lawrence, Preston Gates & Ellis LLP, Seattle, Washington, for the amicus curiae American Civil Liberties Union in support of defendants-counter-claimants/appellees.

JUDGES: Before: Mary M. Schroeder, Chief Judge, Harry Pregerson, Alex Kozinski, Andrew J. Kleinfeld, Michael Daly Hawkins, [**2] William A. Fletcher, Raymond C. Fisher, Richard C. Tallman, Johnnie B. Rawlinson, Consuelo M. Callahan and Carlos T. Bea, Circuit Judges. Opinion by Judge Fisher; KOZINSKI, Circuit Judge, concurring: BEA, Circuit Judge, with whom Circuit Judges KLEINFELD, TALLMAN and CALLAHAN join dissenting.

OPINIONBY: RAYMOND C. FISHER

OPINION: [*1166] RAYMOND C. FISHER, Circuit Judge, with whom Chief Judge Schroeder and Judges Pregerson, Hawkins, W. Fletcher and Rawlinson join concurring; Judge Kozinski, concurring in the result:

This appeal requires us to consider whether the use of an integration tiebreaker in the open choice, noncompetitive, public high school assignment plan crafted by Seattle School District Number 1 (the "District") violates the *federal Constitution's Equal Protection Clause*. Our review is guided by the principles articulated in the Supreme Court's recent decisions regarding affirmative action in higher education, *Grutter v. Bollinger, 539 U.S. 306, 156 L. Ed. 2d 304, 123 S. Ct. 2325 (2003)*, and *Gratz v. Bollinger, 539 U.S. 244, 156 L. Ed. 2d 257, 123 S. Ct. 2411 (2003)*, and the Court's directive that "context matters when reviewing race-based governmental action under the *Equal Protection* [**3] *Clause*." *Grutter, 539*

U.S. at 327. We conclude that the District has a compelling interest in securing the educational and social benefits of racial (and ethnic) diversity, and in ameliorating racial isolation or concentration in its high schools by ensuring that its assignments do not simply replicate Seattle's segregated housing patterns. n1 We also conclude that the District's Plan is narrowly tailored to meet the District's compelling interests.

n1 The terms "racial diversity," "racial concentration" and "racial isolation" have been used by the District to encompass racial *and* ethnic diversity, concentration and isolation. For the purposes of this opinion, we adopt this shorthand.

I. Background n2

n2 We draw the following restatement of facts largely from the district court opinion, *see Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 137 F. Supp. 2d 1224 (W.D. Wash. 2001)* ("*Parents I*"), and the Washington Supreme Court Opinion, *see Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 149 Wn.2d 660, 72 P.3d 151 (Wash. 2003)* ("*Parents IV*").

[**4]

A. Seattle Public Schools: A Historical Perspective

Seattle's historical struggle with the problem of racial isolation in its public school system provides the context for the District's implementation of the current challenged assignment plan. Seattle is a diverse community. Approximately 70 percent of its residents are white, and 30 percent are nonwhite. Seattle public school enrollment breaks down nearly inversely, with approximately 40 percent white and 60 percent nonwhite students. A majority of the District's white students live in neighborhoods north of downtown, the historically more affluent part of the city. A majority of the city's nonwhite students, including approximately 84 percent of all African-American students, 74 percent of all Asian-American students, 65 percent of all Latino students and 51 percent of all Native-American students, live south of downtown.

The District operates 10 four-year public high schools. Four are located north of downtown -- Ballard, Ingraham, Nathan Hale and Roosevelt; five are located south of downtown -- Chief Sealth, Cleveland, Franklin, Garfield and Rainier Beach; one is located west of downtown -- West Seattle. For over 40 years, [**5] the District has made efforts to attain and maintain desegregated schools and avoid the racial isolation or concentration that would ensue if school assignments replicated Seattle's segregated housing patterns. Since the 1960s, while courts around the country [*1167] ordered intransigent school districts to desegregate, Seattle's School Board voluntarily explored measures designed to end de facto segregation in the schools and provide all of the District's students with access to diverse and equal educational opportunities.

In the late 1950s and early 1960s, school assignments were made strictly on the basis of neighborhood. n3 In 1962, Garfield High School reported 64 percent minority enrollment and it accommodated 75 percent of all African-American students. Meanwhile, the eight high schools serving other major areas of the city remained more than 95 percent white.

n3 The history that follows comes principally from two documents in the district court record. One is a report entitled, "The History of Desegregation in Seattle Public Schools, 1954-1981," which was prepared by the District's desegregation planners. The other is the "Findings and Conclusions" adopted by the Board in support of the current assignment plan. (They are cited as *History of Desegregation* and *Findings and Conclusions*, respectively.)

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The District responded to this imbalance, and racial tensions in the de facto segregated schools, in various ways. In the early 1960s, the District first experimented with small-scale exchange programs in which handfuls of students switched high schools for five-week periods. In 1963, expanding on this concept, the District implemented a "Voluntary Racial Transfer" program through which a student could transfer to any school with available space if the transfer would improve the racial balance at the receiving school. In the 1970s, the District increased its efforts again, this time adopting a desegregation plan in the middle schools that requested volunteers to transfer between minority- and majority-dominated neighborhood schools and called for mandatory transfers when the number of volunteers was insufficient, though this portion of the plan was never implemented. The District also took steps to desegregate Garfield High School by changing its educational program, improving its facilities and eliminating "special transfers" that had previously allowed white students to leave Garfield. Finally, for the 1977-78 school year, the District instituted a magnet-school program. According [**7] to the District's history:

> While it appeared evident that the addition of magnet programs would not in itself desegregate the Seattle schools, there was supportive evidence that voluntary strategies, magnet and non-magnet, could be significant components of a more comprehensive desegregation plan.

History of Desegregation at 32.

By the 1977-78 school year, segregation had increased: Franklin was 78 percent minority, Rainier Beach 58 percent, Cleveland 76 percent and Garfield 65 percent. Other high schools ranged from 9 percent to 23 percent minority enrollment.

In the spring of 1977, the Seattle branch of the National Association for the Advancement of Colored People ("NAACP") filed a complaint with the United States Department of Education's Office of Civil Rights, alleging that Seattle's School Board had acted to further racial segregation in the city's schools. Several other organizations, principally the American Civil Liberties Union ("ACLU"), formally threatened to file additional actions if the District failed to adopt a mandatory desegregation plan. When the District agreed to develop such a plan, the Office of Civil Rights concomitantly agreed to delay [**8] its investigation, and the ACLU agreed to delay filing a lawsuit.

During the summer of 1977, the District and community representatives reviewed five model plans. Ultimately, the District [*1168] incorporated elements of each model into its final desegregation plan, adopted in December 1977 and known as the "Seattle Plan." The Seattle Plan divided the district into zones, within which majority-dominated elementary schools were paired with minority-dominated elementary schools to achieve desegregation. Mandatory high school assignments were linked to elementary school assignments, although various voluntary transfer options were available. With the Seattle Plan,

> Seattle became the first major city to adopt a comprehensive desegregation program voluntarily without a court order. By doing so the District maintained local control over its desegregation plan and was able to adopt and implement a plan which in the eyes of the District best met the needs of Seattle students and the Seattle School District.

History of Desegregation at 36-37. Opponents of the Seattle Plan immediately passed a state initiative to block its implementation, but the Supreme Court ultimately declared [**9] the initiative unconstitutional. *Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 470, 73 L. Ed. 2d 896, 102 S. Ct. 3187 (1982).*

The Seattle Plan furthered the District's school desegregation goals, but its operation was unsatisfactory in other ways. n4 In 1988, a decade after its implementation, the District abandoned the Seattle Plan and adopted a new plan that it referred to as "controlled choice." Under the controlled choice plan, schools were grouped into clusters that met state and district desegregation guidelines, and families were permitted to rank schools within the relevant cluster, increasing the predictability of assignments. Because of Seattle's housing patterns, the District's planners explained that "it was impossible to fashion clusters in a geographically contiguous manner"; some cluster schools were near students' homes, but others were in "racially and culturally different neighborhoods." *Findings and Conclusions* at 30-31. Although roughly 70 percent of students received their first choices, the controlled choice plan still resulted in mandatory busing for 16 percent of the District's students.

> n4 For example, the Seattle Plan was confusing, required mandatory busing of nonwhite students in disproportionate numbers, made facilities and enrollment planning difficult and contributed to "white flight" from the city schools. *Findings and Conclusions* at 30.

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In 1994, the Board directed District staff to devise a new plan for all grade levels to simplify assignments, reduce costs and increase community satisfaction, among other things. The guiding factors were to be choice, diversity and predictability. Staff developed four basic options, including the then-existing controlled choice plan, a regional choice plan, a neighborhood assignment plan with a provision for voluntary, integration-positive transfers and an open choice plan.

Board members testified that they considered all the options as they related to the District's educational goals -- with special emphasis, at the secondary school level, on the goals of choice and racial diversity. Neighborhood and regional plans were viewed as unduly limiting student choice, on which the District placed high value because student choice was seen to increase parental involvement in the schools and promote improvements in quality through a marketplace model. The District sought to maintain its commitment to racially integrated education by establishing diversity goals while moving away

from the rigid desegregation guidelines and mandatory assignments prevalent in the 1970s and 1980s.

The Board [**11] adopted the current open choice plan (the "Plan") for the 1998-99 [*1169] school year. Under the Plan, students entering the ninth grade may select any high school in the District. They are assigned, where possible, to the school they list as their first choice. If too many students choose the same school as their first choice, resulting in "oversubscription," the District assigns students to each oversubscribed school based on a series of tiebreakers. If a student is not admitted to his or her first choice school as a result of the tiebreakers, the District tries to assign the student to his or her second choice school, and so on. Students not assigned to one of their chosen schools are assigned to the closest school with space available; students who list more choices are less likely to receive one of these "mandatory" assignments. The most recent version of the Plan, which the School Board reviews annually, is for the 2001-02 school year and is the subject of this litigation.

B. The Plan

The District has sought to make each of its 10 high schools unique, with programs that respond to the continually changing needs of students and their parents. Indeed, the District implemented [**12] the Plan as part of a comprehensive effort to improve and equalize the attractiveness of all the high schools, including adoption of a weighted funding formula, a facilities plan and a new teacher contract that would make teacher transfers easier. Nevertheless, the high schools vary widely in desirability. Three of the northern schools -- Ballard, Nathan Hale and Roosevelt -- and two of the southern schools -- Garfield and Franklin -- are highly desirable and oversubscribed, meaning that more students wish to attend those schools than capacity allows. n5 The magnitude of the oversubscription is noteworthy: For the academic year 2000-01, approximately 82 percent of students selected one of the oversubscribed schools as their first choice, while only about 18 percent picked one of the undersubscribed high schools as their first choice. Only when oversubscription occurs does the District become involved in the assignment process.

n5 The current popularity of Ballard High School is illustrative of the constantly changing dynamic of Seattle's public high schools. In the fall of 1999, Ballard moved to a new facility under the leadership of a new principal. Prior to the move, Ballard was not oversubscribed; now it is one of the most popular high schools in Seattle.

Similarly, the popularity and demographics of Nathan Hale High School changed significantly when it acquired a new principal who instituted a number of academic innovations, including joining the "Coalition of Essential Schools" and instituting a "Ninth Grade Academy" and "Tenth Grade Integrated Studies Program." Prior to 1998, Nathan Hale, a north area high school, was not oversubscribed, and the student body was pre-dominantly nonwhite. Starting in 1998, the high school began to have a waitlist, and more white students, who had previously passed on Nathan Hale, wanted to go there. As a result, the number of nonwhite students declined dramatically between 1995 and 2000.

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If a high school is oversubscribed, all students applying for ninth grade are admitted according to a series of four tiebreakers, applied in the following order: First, students who have a sibling attending that school are admitted. In any given oversubscribed school, the sibling tiebreaker accounts for somewhere between 15 to 20 percent of the admissions to the ninth grade class.

Second, if an oversubscribed high school is racially imbalanced -- meaning that the racial make up of its student body differs by more than 15 percent from the racial make up of the students of the Seattle public schools as a whole -- and if the sibling preference does not bring the oversubscribed high school within plus or minus 15 percent of the District's demographics, the race-based tiebreaker [*1170] is "triggered" and the race of the applying student is considered. (For the purposes of the race-based tiebreaker, a student is deemed to be of the race specified in his or her registration materials.) Thus, if a 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 [**14] 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 imbalanced.

Originally, schools that deviated by more than 10 percent were deemed racially imbalanced. For the 2001-02 school year, however, the triggering number was increased to 15 percent, softening the effect of the tiebreaker. n6 For that year, the race-based tiebreaker was used in assigning entering ninth grade students only to three oversubscribed schools -- Ballard, Franklin and Nathan Hale. Accordingly, in seven of the 10 public high schools in 2001-02, race was not relevant in making admissions decisions.

n6 Although the record reflects the general effects of the tiebreaker in 2001-02, it does not include the specific number of students affected by the tiebreaker in the three oversubscribed schools where the tiebreaker applied. The record, however, does include these numbers for the 2000-01 school year. Although the tiebreaker operated differently in 2000-01, and applied to four schools rather than three, the 2000-01 numbers illustrate the general operation of the tiebreaker.

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The race-based tiebreaker is applied to both white and non-white students. For example, in the 2000-01 school year -- when the trigger point was still plus or minus 10 percent -- 89 more white students were assigned to Franklin than would have been assigned absent the tiebreaker, 107 more nonwhite students were assigned to Ballard than would have been assigned absent the tiebreaker, 82 more nonwhite students were assigned to Roosevelt than would have been assigned absent the tiebreaker and 27 more nonwhite students were assigned to Nathan Hale than would have been assigned absent the tiebreaker. n7 These assignments accounted for about 10 percent of admissions to Seattle's high schools as a whole. That is, of the approximately 3,000 incoming students entering Seattle high schools in the 2000-01 school year, approximately 300 were assigned to an oversubscribed high school based on the race-based tiebreaker.

n7 The Board's decision to change the trigger point for use of the tiebreaker from plus or minus 10 percent to plus or minus 15 percent, however, had the effect of rendering Roosevelt High School neutral for desegregation purposes. Thus, the tiebreaker did not factor into assignments to Roosevelt High School in the 2001-02 school year.

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In addition to changing the trigger point for the 2001-02 school year to plus or minus 15 percent, the District also developed a "thermostat," whereby the tiebreaker is applied to the entering ninth grade student population only until it comes within the 15 percent plus or minus variance. Once that point is reached, the District "turns-off" the race-based tiebreaker, and there is no further consideration of a student's race in the assignment process. The tiebreaker does not apply, and race is not considered, for students entering a high school after the ninth grade (e.g., by transfer).

As demonstrated in the chart below, the District estimates that without the race-based tiebreaker, the nonwhite populations of the 2000-01 ninth grade class at Franklin would have been 79.2 percent, at Hale 30.5 percent, at Ballard 33 percent and at Roosevelt 41.1 percent. Using the race-based [*1171] tiebreaker, the actual nonwhite populations of the ninth grade classes at the same schools respectively were 59.5 percent, 40.6 percent, 54.2 percent and 55.3 percent.

2000-01 DIFFERENCE IN PERCENTAGES OF NONWHITE STUDENTS IN NINTH GRADE WITH AND WITHOUT TIEBREAKER

SCHOOL	WITHOUT TIEBREAKER	WITH TIEBREAKER	PERCENT DIFFERENCE
FRANKLIN	79.2	59.5	- 19.7
NATHAN HALE	30.5	40.6	+ 10.1
BALLARD	33.0	54.2	+ 21.2
ROOSEVELT	41.1	55.3	+ 14.2

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In the third tiebreaker, students are admitted according to distance from the student's home to the high school. Distance between home and school is calculated within 1/100 of a mile, with the closest students being admitted first. In any given oversubscribed school, the distance-based tiebreaker accounts for between 70 to 75 percent of admissions to the ninth grade.

In the fourth tiebreaker, a lottery is used to allocate the remaining seats. Because the distance tiebreaker serves to assign nearly all the students in the District, a lottery is virtually never used.

C. Procedural History

Parents Involved in Community Schools ("Parents"), a group of parents whose children were not, or might not be, assigned to the high schools of their choice under the Plan, claimed that the District's use of the race-based

tiebreaker for high school admissions is illegal under the *Washington Civil Rights Act* ("Initiative 200"), n8 the *Equal Protection Clause of the Fourteenth Amendment* n9 and *Title VI of the Civil Rights Act of 1964.* n10

n8 *Wash. Rev. Code § 49.60.400* ("The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.").

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n9 *U.S. Const. amend. XIV, § 1* ("No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

n10 *42 U.S.C. § 2000d* ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."). Because "discrimination that violates the *Equal Protection Clause of the Fourteenth Amendment* committed by an institution that accepts federal funds also constitutes a violation of Title VI," we address the twin challenges to the racial tiebreaker simultaneously. *Gratz, 539 U.S. at 276 n.23.*

Both Parents and the District moved for summary judgment on all claims. In a published opinion dated April 6, 2001, the district court upheld the use of the racial tiebreaker under both state and federal law, granting the District's motion. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 137 F. Supp. 2d 1224, 1240 (W.D. Wash. 2001)* [**19] ("*Parents I*"). Parents timely appealed, and on April 16, 2002, a three-judge panel of this court issued an opinion reversing the district court's decision, holding that the Plan violated Washington state law and discussing federal law only as an aid to construing state law. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 285 F.3d 1236 (9th Cir. 2002)* ("*Parents II*"). The panel subsequently withdrew its opinion and certified the state law question to the Washington Supreme Court. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 294 F.3d 1084, 1085 (9th Cir. 2002)* ("*Parents III*"). The Washington Supreme Court disagreed with the panel's decision, holding that the open choice plan did not violate Washington law. *Parents Involved in* [*1172] *Cmty. Schs. v. Seattle Sch. Dist. No. 1, 149 Wn.2d 660, 72 P.3d 151, 166 (Wash. 2003)* ("*Parents IV*") (holding that Washington law "does not prohibit the Seattle School District's open choice plan tie breaker based upon race so long as it remains neutral on race and ethnicity and does not promote a less qualified minority applicant over a more qualified applicant"). Thereafter, [**20] a majority of the three-judge panel of this court held that although the District demonstrated a compelling interest in achieving the benefits of racial diversity, the Plan violated the *Equal Protection Clause* because it was not narrowly tailored. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist., No. 1, 377 F.3d 949 (9th Cir. 2004)* ("*Parents V*"). We granted en banc rehearing and now affirm the district court. n11

n11 We review the district court's resolution of cross-motions for summary judgment de novo. *United States v. City of Tacoma, 332 F.3d 574, 578 (9th Cir. 2003).*

II. Discussion

A. Strict Scrutiny

We review racial classifications under the strict scrutiny standard, which requires that the policy in question be narrowly tailored to achieve a compelling state interest. *See Johnson v. California, 543 U.S. 499, 160 L. Ed. 2d 949, 125 S. Ct. 1141, 1146 (2005); Grutter, 539 U.S. at 326; Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 226-27, 132 L. Ed. 2d 158, 115 S. Ct. 2097 (1995).* [**21] n12 The strict scrutiny standard is not "strict in theory, but fatal in fact." *Adarand, 515* [*1173] *U.S. at 237* (internal quotation marks omitted). "Although all governmental uses of race are subject to strict scrutiny, not all are invalidated by it." *Grutter, 539 U.S. at 326-27.* We employ strict scrutiny to "smoke out" impermissible uses of race by ensuring that the government is pursuing a goal important enough to warrant use of a highly suspect tool. *Id. at 327* (internal quotation marks omitted). This heightened standard of review provides a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context. *Smith v. Univ. of Washington, 392 F.3d 367, 372 (9th Cir. 2004).* In evaluating the District's Plan under strict scrutiny, we also bear in mind the Court's directive that "context matters when reviewing race-based governmental action under the *Equal Protection Clause.*" *Grutter, 539 U.S. at 326.*

N12 Judge Kozinski's concurrence makes a powerful case for adopting a less stringent standard of review here because the Plan does not attempt to "benefit[] or burden[] any particular group;" therefore it "carries none of the baggage

the Supreme Court has found objectionable" in earlier equal protection cases. Kozinski, J., concurring, *infra* at 3 and 9. Recognizing the importance of context in the Supreme Court's equal protection jurisprudence, Judge Kozinski proposes "robust and realistic" rational basis rather than strict scrutiny review. *Id.* at 4. *Cf. Coalition for Economic Equity v. Wilson, 122 F.3d 692, 708 n.16 (9th Cir. 1997)* ("We have recognized . . . that 'stacked deck' programs trench on *Fourteenth Amendment* values in ways that 'reshuffle' programs do not. Unlike racial preference programs, school desegregation programs are not inherently invidious, do not work wholly to the benefit of certain members of one group and correspondingly to the harm of certain members of another group, and do not deprive citizens of rights.") (internal quotation marks, alterations and citations omitted).

Nonetheless, the Supreme Court in *Johnson v. California, 543 U.S. 499, 160 L. Ed. 2d 949, 125 S. Ct. 1141 (2005)*, 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." *Id. at 1147* (internal quotation marks omitted); *see also id. at 1146* (noting that all racial classifications "raise special fears that they are motivated by an invidious purpose" and that "absent 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" (internal quotation marks and citation omitted)). As Judge Kozinski aptly notes, *Johnson* is not entirely analogous to the instant case 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. Kozinski, J., concurring, *infra.* at 3-4. Nevertheless, like the First and Sixth Circuits - the only other 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 - we conclude that the Plan must be reviewed under strict scrutiny. *See Comfort v. Lynn School Committee, 418 F.3d 1, 6 (1st Cir. 2005)* (en banc); *McFarland v. Jefferson County Public Schools, 416 F.3d 513, 514 (6th Cir. 2005)* (per curiam).

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B. Compelling State Interest

Under strict scrutiny, a government action will not survive unless motivated by a "compelling state interest." *See id. at 325, 327.* Because strict scrutiny requires us to evaluate the "fit" between the government's means and its ends, *Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 280 n.6, 90 L. Ed. 2d 260, 106 S. Ct. 1842 (1986)*, it is critical to identify precisely the governmental interests - the ends - to which the government's use of race must fit. *See United States v. Paradise, 480 U.S. 149, 171, 94 L. Ed. 2d 203, 107 S. Ct. 1053 (1987)* (stating that, in order to determine whether an order was narrowly tailored, "we must examine the purposes the order was intended to serve").

Although the Supreme Court has never decided a case involving the consideration of race in a voluntarily imposed school assignment plan intended to promote racially and ethnically diverse secondary schools, its decisions regarding selective admissions to institutions of higher learning demonstrate that one compelling reason for considering race is to achieve the educational benefits of diversity. The compelling interest that the Court recognized in *Grutter* [**23] was the promotion of the specific educational and societal benefits that flow from diversity. *See Grutter, 539 U.S. at 330* (noting that the law school's concept of critical mass must be "defined by reference to the educational benefits that diversity is designed to produce"). In evaluating the relevance of diversity to higher education, the Court focused principally on two benefits that a diverse student body provides: (1) the learning advantages of having diverse viewpoints represented in the "robust exchange of ideas" that is critical to the mission of higher education, *id. at 329-30*; and (2) the greater societal legitimacy that institutions of higher learning enjoy by cultivating a group of national leaders who are representative of our country's diversity, *id. at 332-33.* The Court also mentioned the role of diversity in challenging stereotypes. *Id. at 330, 333.* The Court largely deferred to the law school's educational judgment not only in determining that diversity would produce these benefits, but also in determining that these benefits were critical to the school's educational mission. *Id. at 328-33.* [**24] n13

n13 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. *Grutter, 539 U.S. 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 diver-

sity."); *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* ("High-ranking retired officers and civilian leaders of the United States military assert that, 'based 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.'").

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[*1174] Against this background, we consider the specific interests that the District's Plan seeks to advance. These 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's commitment to the diversity of its schools and to the ability to voluntarily avoid racially concentrating enrollment patterns also helps ensure that all students have access to those schools, faculties, course offerings, and [**26] resources that will enable them to reach their full potential.
>
> Based on the foregoing rationale, the Seattle School District's commitment is that no student should be required to attend a racially concentrated school. The District is also committed to providing students with the opportunity to voluntarily choose to attend a school to promote integration. The District provides these opportunities for students to attend a racially and ethnically diverse school, and to assist in the voluntary integration of a school, because it believes that providing a diverse learning environment is educationally beneficial for all students.

The District's interests fit into two broad categories: (1) the District seeks the affirmative educational and social benefits that flow from racial diversity; and (2) the District seeks to avoid the harms resulting from racially concentrated or isolated schools.

1. Educational and Social Benefits that Flow from Diversity

The District has established that racial diversity produces a number of compelling educational and social benefits in secondary education. First, the District presented expert testimony that in racially diverse schools, "both white [**27] and minority students experienced improved critical thinking skills -- the ability to both understand and challenge views which are different from their own."

Second, the District demonstrated the socialization and citizenship advantages of racially diverse schools. School officials, relying on their experience as teachers and administrators, and the District's expert all explained these benefits on the record. According to the District's expert, the 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 . . . [*1175] 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." (Emphasis added.) Even Parents' expert conceded that "there 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 [**28] cultural and social differences among various racial and ethnic groups." n14 That is, diversity encourages students not only to think critically but also democratically.

> n14 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 Out-*

comes, 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).

Third, the District's expert 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 [**29] do not, and are more likely to have cross-race friendships later in life." n15

n15 The District's compelling interests in diversity have been endorsed by Congress. In the Magnet Schools Assistance Act, Congress found that "It 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)* (emphasis added).

The District's interests in the educational and social benefits of diversity are similar to those of a law school as articulated in *Grutter*. The contextual [**30] differences between public high schools and universities, however, make the District's interests compelling in a similar but also significantly different manner. *See Grutter, 539 U.S. at 330* (noting that the compelling state interest in diversity is judged in relation to the educational benefits that it seeks to produce).

The Supreme Court in *Grutter* noted the importance of higher education in "preparing students for work and citizenship." *539 U.S. at 331*. For a number of reasons, public secondary schools have an equal if not more important role in this preparation. First, underlying the history of desegregation in this country is a legal regime that recognizes the principle that public secondary education serves a unique and vital socialization function in our democratic society. As the 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." *457 U.S. 202, 221, 72 L. Ed. 2d 786, 102 S. Ct. 2382 (1982)* (internal quotation marks and citations omitted); *see* [**31] *Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683, 92 L. Ed. 2d 549, 106 S. Ct. 3159 (1986)* (stating that the inculcation of civic values is "truly the work of the schools") (internal quotation marks omitted)); *Plyler, 457 U.S. at 221-23* (noting that public [*1176] 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"); *Ambach v. Norwick, 441 U.S. 68, 76-77, 60 L. Ed. 2d 49, 99 S. Ct. 1589 (1979)* (observing 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"); *Brown v. Bd. of Educ., 347 U.S. 483, 493, 98 L. Ed. 873, 74 S. Ct. 686 (1954)* ("[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 preparing him for later professional training, and in helping him to adjust normally to his environment."). Under Washington law, such civic training is mandated by the [**32] state constitution: "Our constitution is unique in placing paramount value on education for citizenship." *Parents IV, 72 P.3d at 158*.

Second, although one hopes that all students who graduate from Seattle's public schools would have the opportunity to attend institutions of higher learning if they so desire, a substantial number of Seattle's public high school graduates do not attend college. n16 For these students, their public high school educational experience will be their *sole* opportunity to reap the benefits of a diverse learning environment. We reject the notion that only those students who leave high school and enter the elite world of higher education should garner the benefits that flow from learning in a diverse classroom. Indeed, it would be a perverse reading of the *Equal Protection Clause* that would allow a university, educating a relatively small percentage of the population, to use race when choosing its student body but not allow a public school district, educating all children attending its schools, to consider a student's race in order to ensure that the high schools within the district attain and maintain diverse student bodies.

n16 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.

[**33]

Third, the public school context involves students who, because they are younger and more impressionable, are more amenable to the benefits of diversity. *See Comfort, 418 F.3d at 15-16* ("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 School Committee, 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 "it 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"); *see also* Goodwin Liu, *Brown, Bollinger, and Beyond, 47 How. L.J. 705, 755 (2004)* ("If '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 [**34] and learn alongside peers from other racial groups.") (citing *Grutter, 539 U.S. at 333*) (emphasis added)).

The dissent insists that racial diversity in a public high school is not a compelling interest, arguing that *Grutter* endorsed a law school's compelling interest in diversity [*1177] only in some broader or more holistic sense. Bea, J., dissenting, *infra.* at 14-16. To attain this broader interest, the dissent contends, the District may only consider race along with other attributes such as socioeconomic status, ability to speak multiple languages or extracurricular talents. We read *Grutter*, however, to recognize that racial diversity, not some proxy for it, is valuable in and of itself. *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).

In short, the District has demonstrated that it has a compelling interest in the educational and social benefits of racial diversity similar to those articulated by the Supreme Court in *Grutter* as well as the additional compelling educational and social benefits [**35] of such diversity unique to the public secondary school context.

2. Avoiding the Harms Resulting from Racially Concentrated or Isolated Schools

The District's interest in achieving the affirmative benefits of a racially diverse educational environment has a flip side: avoiding racially concentrated or isolated schools. In particular, the District is concerned with making the educational benefits of a diverse learning environment available to all its students and ensuring that "no student should be required to attend a racially concentrated school." *See* "Board Statement Reaffirming Diversity Rationale," quoted *supra* p. 22. 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 - "with few exceptions, separate schools are still unequal schools." *See* Erica Frankenberg et al., *A Multiracial Society with Segregated Schools: Are We Losing the Dream?* 11 (The Civil Rights Project, Harvard Univ. Jan. 2003), *at* http://www.civilrightsproject.harvard.edu/research/reseg03/AreWeLosingtheDream. [**36] pdf) (hereinafter "*Civil Rights Project*") (last visited October 11, 2005) (cited in *Grutter, 539 U.S. at 345* (Ginsburg, J., concurring)).

In Seattle, the threat of having to attend a racially concentrated or isolated school is not a theoretical or imagined problem. n17 As the district court found, the District "established that housing patterns in Seattle continue to be racially concentrated," and would result in racially concentrated or isolated schools if school assignments were based solely on a student's neighborhood or proximity to a particular high school. *Parents I, 137 F. Supp. 2d at 1235.* Accordingly, the District's Plan strives to ensure that patterns of residential segregation are not replicated in the District's school assignments. *Cf. Comfort, 418 F.3d at 29* ("The problem is that in Lynn, as in many other cities, minorities and whites often live in different neighborhoods. Lynn's aim is to preserve local schools as an option without having the housing pattern of *de facto* segregation projected into the school system.") (Boudin, C.J., concurring). Although Parents make much of the fact that "Seattle has never operated [**37] a [*1178] segregated school system," and allege that "this is not a school desegregation case," each court to review the matter has concluded that because of Seattle's housing patterns, high schools in Seattle would be highly segregated absent race conscious measures. *See Parents I, 137 F. Supp. 2d at 1237; Parents II, 285 F.3d at 1239-40; Parents III, 294 F.3d at 1085; Parents IV, 72 P.3d at 153.*

n17 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. *See Civil Rights Project* 4 ("At the beginning of the twenty-first century, American public schools are now twelve years in the process of continuous re-

segregation. The desegregation of black students, which increased continuously from the 1950s to the late 1980s, has now receded to levels not seen in three decades.").

The district court found that, "the circumstances [**38] that gave rise to the court-approved school assignment policies of the 1970s [e.g., Seattle's segregated housing patterns] continue to be as compelling today as they were in the days of the district's mandatory busing programs . . . . It would defy logic for this court to find that the less intrusive programs of today violate the *Equal Protection Clause* while the more coercive programs of the 1970s did not." *Parents I, 137 F. Supp. 2d at 1235.* Thus, it concluded that "preventing the resegregation of Seattle's schools is . . . a compelling interest." *Id. at 1237*; *see id. at 1233-35.* Several other courts have also conceived of a school district's voluntary reduction or prevention of de facto segregation as a compelling interest. *See Comfort, 418 F.3d at 14* (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); *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 [**39] 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)* ("We 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.") (citing *Parent Ass'n of Andrew Jackson High Sch. v. Ambach, 598 F.2d 705, 717-20 (2d Cir. 1979))*; *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).* n18 We join these courts in recognizing that school districts have a compelling interest in ameliorating real, identifiable de facto racial segregation.

n18 Like the District, none of the school districts in the above-cited cases was subject to a court-ordered desegregation decree nor, with the exception of *Andrew Jackson*, did the schools face an imminent threat of litigation to compel desegregation. Like the District, they may have been vulnerable to litigation in decades past, but the districts' voluntary desegregation measures would make it difficult today to make the required showing that the districts *intended* to create segregated schools. *See, e.g., Comfort, 283 F. Supp. 2d at 390* (explaining that the district's vulnerability to litigation had been "headed off by the very Plan in contention here").

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The dissent, however, contends first that the District is not "desegregating" but rather is engaged in racial balancing. Bea, J., dissenting, *infra.* at 3-4. Further, for the dissent, segregation requires a state actor intentionally to separate the races; and in the absence of such offensive state conduct, the Supreme Court cases detailing the remedies for *Fourteenth Amendment* violations are of no relevance. Bea, J., dissenting, *infra.* at 29, n.17. Thus, without a court finding of de jure segregation the elected school board members of the District may not take voluntary, affirmative steps towards [*1179] creating a racially diverse student body. We disagree. The fact that de jure segregation is particularly offensive to our Constitution does not diminish the real harms of separation of the races by other means. "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is *greater* when it has the sanction of law. . . ." *Brown v. Bd. of Educ., 347 U.S. 483, 494, 98 L. Ed. 873, 74 S. Ct. 686 (1954)* (emphasis added). The benefits that flow from integration (or desegregation) exist whether or not a state actor was [**41] responsible for the earlier racial isolation. *Brown*'s statement that "in the field of public education. . . separate educational facilities are inherently unequal" retains its validity today. *Id. at 495.* The District is entitled to seek the benefits of racial integration and avoid the harms of segregation even in the absence of a court order deeming it a violator of the U.S. Constitution.

Support for this conclusion comes from statements in the Supreme Court's school desegregation cases, which repeatedly refer to the *voluntary integration* of schools as sound educational policy within the discretion of local school officials. n19 *See Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16, 28 L. Ed. 2d 554, 91 S. Ct. 1267 (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, 28 L. Ed. 2d 586, 91 S. Ct. 1284 (1971)* [**42] ("As 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."); *Bustop, Inc. v. Bd. of Educ. of Los Angeles, 439 U.S. 1380, 1383, 58 L. Ed. 2d 88, 99 S. Ct. 40 (1978)* (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, 37 L. Ed. 2d 548, 93 S. Ct. 2686 (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."); *Washington v. Seattle Sch. Dist. No. 1, 458 U.S. at 480, 487* (holding unconstitutional the state initiative that blocked the Seattle School District's use of mandatory busing to remedy de facto segregation).

N19 The dissent correctly notes that these decisions were rendered in the context of de jure segregation. But their import is also significantly compelling in the context of de facto segregation, as in Seattle. Indeed, in *Swann*, the Court further stated, "Our objective in dealing with the issues presented by these cases is to see that school authorities exclude no pupil of a racial minority from any school, directly *or indirectly*, on account of race..." *402 U.S. at 23* (emphasis added).

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In sum, we hold that the District's interests in obtaining the educational and social benefits of racial diversity in secondary education and in avoiding racially concentrated or isolated schools resulting from Seattle's segregated housing pattern are clearly compelling.

C. Narrow Tailoring

We must next determine whether the District's use of the race-based tiebreaker is narrowly tailored to achieve its compelling interests. *See Grutter, 539* [*1180] *U.S. at 333.* The narrow tailoring inquiry is intended to "'smoke out' illegitimate uses of race" by ensuring that the government's classification is closely fitted to the compelling goals that it seeks to achieve. *Richmond v. J.A. Croson Co., 488 U.S. 469, 493, 102 L. Ed. 2d 854, 109 S. Ct. 706 (1989).* Here, our analysis is framed by the Court's narrow tailoring analysis in *Grutter* and *Gratz*, which, though informed by considerations specific to the higher education context, substantially guides our inquiry. *See Grutter, 539 U.S. at 334* (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 [**44] into account") (internal quotation marks omitted).

In *Gratz*, the Court held unconstitutional the University of Michigan's undergraduate admissions program, which automatically assigned 20 points on the admissions scale to an applicant from an underrepresented racial or ethnic minority group. *539 U.S. at 255, 272.* 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. *539 U.S. at 315-16, 340.* The law school's policy also attempted to ensure that a "critical mass" of underrepresented minority students would be admitted in order to realize the benefits of a diverse student body. n20 *Id. at 316.*

n20 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." *Grutter, 539 U.S. at 318* (internal quotation marks omitted).

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In its analysis, the Court identified five hallmarks of a narrowly tailored affirmative action plan: (1) individualized consideration of applicants; (2) the absence of quotas; (3) serious, good-faith consideration of race-neutral alternatives to the affirmative action 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. *Smith v. Univ. of Washington, 392 F.3d 367, 373 (9th Cir. 2004)*; *Comfort, 418 F.3d at 17* (characterizing *Grutter* as outlining a "four-part narrow tailoring inquiry").

Hallmarks two through five are applicable here despite significant differences between the competitive admissions plans at issue in *Gratz* and *Grutter* and the District's high school assignment Plan. The first hallmark, however, is less relevant to our analysis because of the contextual differences between institutions of higher learning and public high schools.

1. Individualized, Holistic Consideration of Applicants

a. An applicant's qualifications

In the context of university admissions, where applicants compete for a limited number of spaces in a class, the [**46] 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 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." *Grutter, 539 U.S. at 337* (emphasis added) (internal quotation marks omitted); *see Adarand, 515 U.S. at 211* ("The injury in cases of this kind is that a discriminatory classification prevent[s] the plaintiff from *competing* on an *equal footing*.") (emphasis added) (internal quotation marks omitted). [*1181] The focus on fair competition is due, in part, to the stigma that may attach if some individuals are viewed as unable to achieve success without special protection. *See Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 298, 57 L. Ed. 2d 750, 98 S. Ct. 2733 (1978)* (Powell, J., concurring) ("preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special [**47] protection based on a factor having no relationship to individual worth"); *Croson, 488 U.S. at 493* ("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.").

In *Grutter* and *Gratz*, in order to prevent race from being used as a mechanical proxy for an applicant's qualifications, the Court required individualized, holistic consideration of each applicant across a broad range of factors (of which race may be but one). *Grutter, 539 U.S. at 336-37*; *see Gratz, 539 U.S. at 272* (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") (emphasis added). This focus on an applicant's qualifications - whether these qualifications are such things as an applicant's test scores, grades, artistic or athletic ability, musical talent or life experience - is not applicable [**48] when there is no competition or consideration of qualifications at issue.

All of Seattle's high school students must and will be placed in a Seattle public school. n21 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; no assignment to any of the District's high schools is tethered to a student's qualifications. Thus, no stigma results from any particular school assignment. n22 Accordingly, the dangers that are present in the university context -- of substituting racial preference for qualification-based competition -- are absent here. *See Comfort, 418 F.3d at 18* ("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*).

n21 Parents do not claim that their children have a right to attend a particular school, nor could they. *See Bustop Inc., 439 U.S. at 1383* (rejecting any legally protected right to have children attend their nearest school). In any case, under the current Plan, all students can attend a school close to their home. Because there are multiple schools in the north and south of Seattle, students for whom proximity is a priority may elect as their first choice one of the schools in their residential area that is not oversubscribed and be guaranteed an assignment to that school. [**49]

n22 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 respondent 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 301 n.39.* 39

b. Differences in compelling interests

The Court's requirement of individualized, holistic review in *Grutter* is also more [*1182] relevant to the compelling interest advanced by the law school ("the robust exchange of ideas" fostered by viewpoint diversity) than it is to the District's (racial diversity and avoiding racially concentrated or isolated schools). *See Grutter, 539 U.S. at 337.* The 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." *Id. at 338.* [**50] To this end, the law school's policy made clear that "there are many possible bases for diversity admissions, and provided examples of admittees who have lived or trav-

eled 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." *Id.* (internal quotation marks and citations omitted). 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." *Id. at 330* (internal citations omitted).

Although the District's Plan, like the plan in *Grutter*, is designed to achieve the educational and social benefits of diversity, including bringing "different viewpoints and experiences to classroom discussions," *see* "Statement Reaffirming Diversity Rationale," viewpoint diversity in the law school and high school contexts serves different albeit overlapping ends. In the law school setting, viewpoint diversity fosters the "robust exchange of ideas." *Grutter, 539 U.S. at 324*; [**51] *see Comfort, 418 F.3d at 16* ("Lively classroom discussion is a more central form of learning in law schools (which prefer the Socratic method) than in a K-12 setting."). In the high school context, viewpoint diversity fosters racial and civic understanding. n23 For example, Eric Benson, the principal of Nathan Hale High School, one of the District's most popular schools, testified that as a result of racial diversity in the classroom, "students of different races and backgrounds tend to have significant interactions both in class, and outside of class. When I came to Nathan Hale, there were racial tensions in the school, reflected in fighting and disciplinary problems. These kind of problems have, to a large extent, disappeared."

> n23 The dissent believes that "the educational benefits from diversity, if any, are much greater at the higher educational level because such benefits are greatly magnified by the learning that takes place outside the classroom . . . ." Bea, J., dissenting, *infra.* at 27. This belittles the substantial role of high school classroom discussions in contributing to the educational development of our young citizens. "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." *Tinker v. Des Moines Independent Community Sch. Dist., 393 U.S. 503, 512, 21 L. Ed. 2d 731, 89 S. Ct. 733 (1969)* (internal quotation marks omitted).

[**52]

In addition, the law school takes other diversity factors, besides race and ethnicity, into consideration in order to achieve its other compelling interest -- cultivating a group of national leaders. For example, extensive travel, fluency in foreign languages, extensive community service and successful careers in other fields demonstrate that a candidate is somehow exceptional or out of the ordinary. *cf. Gratz, 539 U.S. at 273* (disapproving of the undergraduate admissions plan, in part, because of its failure to consider whether an applicant was extraordinary and noting that "even if [a] student['s] 'extraordinary artistic talent' rivaled that of Monet or Picasso, the applicant would receive, at most, five points" as opposed to [*1183] the automatic 20 points given to an applicant from an underrepresented minority). In contrast, the District is required to educate all high school age children, both the average and the extraordinary, regardless of individual leadership potential.

The District also has a second compelling interest that is absent from the university context -- ensuring that its school assignments do not replicate Seattle's segregated housing patterns. The holistic [**53] review necessary to achieve viewpoint diversity in the university context, across a broad range of factors (of which race may be but one), is not germane to the District's compelling interest in preventing racial concentration or racial isolation. Because race itself is the relevant consideration when attempting to ameliorate de facto segregation, the District's tiebreaker must necessarily focus on the race of its students. *See Comfort, 418 F.3d at 18* (holding that when racial diversity is the compelling interest - "the 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 at 752* ("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."). We therefore conclude that if a noncompetitive, voluntary student assignment plan is otherwise narrowly tailored, a district need not consider each student in a individualized, holistic manner. n24

> n24 The dissent calculates that individualized consideration would be administratively feasible because only 300 students would need to be considered holistically. Though it is true that 300 students were subject to the race-based tiebreaker, it does not follow that only those 300 would require individualized consideration. Under the dissent's view of the way the District should operate, all 3,000 students would have to be subject to holistic consideration to determine their proper school assignment. Whether or not this is administratively feasible is not clear in the record, but we believe it is ultimately irrelevant

because individualized consideration is not required in the context presented here.

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The dissent insists that absent such individualized consideration, the District's plan cannot serve a compelling interest and is not narrowly tailored to protect individuals from group classifications by race. Bea, J., dissenting, *infra.* at 32. This is a flawed reading of the *Fourteenth Amendment.* n25 The District's compelling interest is to avoid the harms of racial isolation for all students in the Seattle school district. As we have explained, to accomplish that objective the District may look to the racial consequences of honoring the preferred choices of individual students (and their parents). It is true that for some students their first choice of school, based on geographical proximity, will be denied because other students' choices are granted in order to advance the overall interest in maintaining racially diverse school enrollments. The *Fourteenth Amendment* in this context does not preclude the District from honoring racial diversity at the expense of geographical proximity. We must not forget that "race unfortunately still matters," *Grutter, 539 U.S. at 333*, and it is race that is the relevant consideration here.

n25 Reliance on group characteristics is not necessarily constitutionally infirm under *Fourteenth Amendment* jurisprudence. *See, e.g., Kimel v. Florida Bd. of Regents, 528 U.S. 62, 84, 145 L. Ed. 2d 522, 120 S. Ct. 631 (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.")

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[*1184] In sum, the contextual differences between public high schools and selective institutions of higher learning make the first of the *Grutter* hallmarks ill-suited for our narrow tailoring inquiry. n26 The remaining hallmarks, however, are relevant and control our analysis.

n26 The dissent's alternative proposals to achieve the District's interests in diversity illustrate the difficulty of individualized consideration in the high school context. For example, the dissent offers socioeconomic status as a more narrowly tailored and acceptable form of diversifying the District's schools. However, socioeconomic status does nothing more than substitute a number from a family's tax return for race. There is no holistic, individualized consideration under such an approach.

2. Absence of Quotas

In *Grutter*, the Court approved the law school's plan, in part, because it did not institute a quota, whereby a fixed number of slots are reserved exclusively for minority groups, thereby insulating members of those [**56] groups from competition with other candidates. n27 *539 U.S. at 335*. Although the law school's plan did not seek to admit a set number or percentage of minority students, during the height of the admission's season, the law school would consult "daily reports" that kept track of the racial composition of the incoming class. *Id. at 318.* The 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." *Id.* Similarly, we conclude that the District's 15 percent plus or minus variance is not a quota because it does not reserve a fixed number of slots for students based on their race, but instead it seeks to enroll a critical mass of white and nonwhite students in its oversubscribed schools in order to realize its compelling interests. n28

n27 Much like the rationale underlying the Court's requirement of individualized, holistic review, the rationale underlying the Court's prohibition of quotas does not apply to the race-based tiebreaker. In paradigmatic affirmative action settings -- employment and admissions to institutions of higher learning -- the Court disapproves of quotas because they are viewed as insulating minority candidates from competition with nonminority candidates for scarce government resources usually awarded on the basis of an applicant's qualifications -- jobs, promotions or places in a law school class. *See Bakke, 438 U.S. at 317* (opinion of Powell, J.). This is objectionable because no "matter how strong their qualifications," nonminority candidates are never afforded the chance to compete with applicants from the preferred groups for the set-aside. *Id. at 319.* Because noncompetitive assignment to Seattle's public high schools is not based on a student's relative qualifications, the dangers that are presented by a quota - of substituting racial prefer-

ence for qualification-based competition -- are absent here.

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n28 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." *Grutter, 539 U.S at 334* (internal quotation marks and citation omitted). The tiebreaker's broad, 30 range and the District's willingness to turn off the use of the tiebreaker after the ninth grade are consistent with a goal as opposed to a rigid ratio.

a. No fixed number of slots

The 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. 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 [*1185] percent variance has not been satisfied. That is, if the applicant pool has been [**58] 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. n29 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. n30 The tiebreakers come into play in the assignment process only when a school is oversubscribed. 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."

n29 Notably, the District's percentage of white and nonwhite enrollment is significantly more varied than the percentage of underrepresented minorities admitted to the University of Michigan's Law School, which remained relatively consistent. From 1995 to 1998, the percentage of minority students enrolled in the law school was 13.5 percent, 13.8 percent, 13.6 percent and 13.8 percent. *Grutter, 539 U.S. at 389-90* (Kennedy, J., dissenting). In contrast, the District's percentage of white and nonwhite enrollment encompasses a wide range. For example, for the 2000-01 school year, the percentage of nonwhite students in the ninth grade classes of the four oversubscribed public high schools after the racial tiebreaker was applied, varied from 54.2 percent at Ballard, to 59.5 percent at Franklin, to 40.6 percent at Nathan Hale to 55.3 percent at Roosevelt.

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n30 Slightly more than 80 percent of all entering ninth grade students were assigned to their first choice school. 47

b. Critical mass

Within this flexible system, where parental and student choices drive the assignments to particular schools, the District seeks to enroll and maintain a relatively stable critical mass of white and nonwhite students in each of its oversubscribed high schools in order to achieve its compelling interest in racial diversity and to prevent the assignments from replicating Seattle's segregated housing patterns. Faced with the question of what constituted a critical mass of students in this particular context, the District determined that a critical mass was best achieved by adopting the 15 percent plus or minus variance tied to demographics of students in the Seattle public schools. Thus, when 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 [**60] 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 critical mass of students needed "to realize the educational benefits of a diverse student body."

Parents attack the District's use of the 15 percent plus or minus variance tied to the District's school population demographics because they believe that the District cannot use race *at all* in its assignment process. We have rejected this argument, however, applying *Grutter* and *Gratz*. *See supra* Part II.B. Alternatively, Parents contend that the District's goal of enrolling between 75

and 45 percent nonwhite [*1186] students and between 25 and 55 percent white students in its oversubscribed schools establishes a quota, not a critical mass. They note that the critical mass sought by the law school in *Grutter* was smaller, consisting of between 12 and 20 percent of underrepresented minority students in each law school class.

Parents' argument, however, ignores *Grutter*'s admonition that the narrow tailoring inquiry be context-specific. First, like the District's enrollment goals, which [**61] are tied to the demographics of the Seattle schools' total student population, the law school's goal of enrolling between 12 to 20 percent of underrepresented minorities in a given year was tied to the demographics of *its* applicant pool. n31 Second, in tying the use of the tiebreaker to the District's demographics with a 15 percent plus or minus trigger point, the District adopted a common benchmark in the context of voluntary and court-ordered school desegregation plans. As the 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, tried 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.

Even Parents' expert testified that school districts throughout the country determine whether a district is sufficiently desegregated by looking to the "population of the district" in question. *See also Comfort, 418 F.3d at 21* [**62] (holding 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 to a book written by David J. Armor, Parents' expert, *Forced Justice: School Desegregation and the Law* 160 (1995), which observed that over 70 percent of the school districts with desegregation plans use a variance of plus or minus 15 percent or greater); *cf. 34 C.F.R. § 280.4(b)* (defining "minority group isolation" as a "condition in which minority group children constitute more than 50 percent of the enrollment of [a] school"). Given this empirically and time-tested notion of critical mass in the public high school desegregation context, it would make little sense to force the District to utilize the same percentages that constituted a critical mass in the elite law school context to determine what constitutes a critical mass for Seattle public high schools. *See Grutter, 539 U.S. at 336* [**63] ("Some attention to numbers, without more, does not transform a flexible admissions system into a rigid quota.") (internal quotation marks and citations omitted).

> n31 For example, in 1995, 662 (approximately 16 percent) of the 4147 law school applicants were underrepresented minorities; in 1996, 559 (approximately 15 percent) of the 3677 law school applicants were underrepresented minorities; in 1997, 520 (approximately 15 percent) of the 3429 law school applicants were underrepresented minorities. *See Grutter, 539 U.S. at 384* (Rehnquist, C.J., dissenting).

Accordingly, we conclude that the District's 15 percent plus or minus trigger point tied to the demographics of the Seattle school population is not a quota. It is a context-specific, flexible measurement of racial diversity designed to attain and maintain a critical mass of white and nonwhite students in Seattle's public high schools.

[*1187] *3. Necessity of the Plan and Race-Neutral Alternatives*

Narrow tailoring also requires us to consider [**64] the necessity of the race-based plan or policy in question and whether there are equally effective, race-neutral alternatives.

a. Necessity of the Plan

The District argues that the compelling interests that it seeks are directly served by the race-based tiebreaker. The tiebreaker allows the District to balance students' and parents' choices among high schools with its broader compelling interests -- achieving the educational and social benefits of diversity and the benefits specific to the secondary school context, and discouraging a return to enrollment patterns based on Seattle's racially segregated housing pattern.

i. Need for race-based tiebreaker

When the District moved from its controlled choice plan to the current Plan, *see supra* Part I.A, it predicted that families would tend to choose schools close to their homes. Indeed, this feature was seen as a positive way to increase parental involvement. However, unfettered choice -- especially with tiebreakers based on neighborhood or distance from a school -- created the risk that Seattle's high school enrollment would again do no more

than reflect its segregated housing patterns. *See supra* Part II.C.2.

It is this [**65] de facto residential segregation across a white/nonwhite axis that the District has battled historically and that it seeks to ameliorate by making the integration tiebreaker a part of its open choice Plan. n32 The District, mindful of both Seattle's history and future, appropriately places its focus here. In the 2001-02 school year, the integration tiebreaker operated in three high schools (that is, three high schools were oversubscribed and deviated by more than 15 percent from the ratio of white to nonwhite students district-wide). The integration tiebreaker served to alter the imbalance in the schools in which it operated in a minimally intrusive manner. The tiebreaker, therefore, successfully achieved the District's compelling interests.

n32 Although we characterize it as de facto residential segregation, we are mindful of Justice Marshall's dissent in *Board of Education v. Dowell*, "The . . . conclusion that the racial identity of the northeast quadrant now subsists because of 'personal preference[s]' pays insufficient attention to the roles of the State, local officials, and the Board in creating what are now self-perpetuating patterns of residential segregation." *498 U.S. 237, 263, 112 L. Ed. 2d 715, 111 S. Ct. 630 (1991)* (internal citation omitted).

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ii. White/Nonwhite distinction

Parents argue that the District paints with too broad a brush by distinguishing only between white and nonwhite students, without taking into account the diversity within the "nonwhite" group. However, the District's choice to increase diversity along the white/nonwhite axis is rooted in Seattle's history and current reality of de facto segregation resulting from Seattle's segregated housing patterns. The white/nonwhite distinction is narrowly tailored to prioritize movement of students from the north of the city to the south of the city and vice versa. This white/nonwhite focus is also consistent with the history of public school desegregation measures throughout the country, as reflected in a current federal regulation defining "minority group isolation" as "a condition in which minority group children constitute more than 50 percent of the enrollment of the school," without distinguishing among the various categories included within the definition of "minority group." *34 C.F.R. § 280.4(b)*; *see Grutter, 539 U.S. at 316* [*1188] (noting that the law school sought to enroll a critical mass of "minority students," a [**67] category that included African Americans, Hispanics and Native Americans); *Comfort, 418 F.3d at 22* ("By increasing diversity along the white/nonwhite axis, the Plan reduced racial tensions and produced positive educational benefits. *Narrow tailoring does not require that Lynn ensure diversity among every racial and ethnic subgroup as well.*") (emphasis added).

b. Race-neutral alternatives

In *Grutter*, the Court explained that narrow tailoring "require[s] serious, good faith consideration of *workable* race-neutral alternatives *that will achieve the diversity the university seeks.*" *539 U.S. at 339* (emphasis added). On the other hand, "narrow tailoring does not require exhaustion of every conceivable race-neutral alternative." *Id.* Furthermore, the Court made clear that the university was not required to adopt race-neutral measures that would have forced it to sacrifice other educational values central to its mission. *Id. at 340.* Implicit in the Court's analysis was a measure of deference toward the university's identification of those values. n33 *See id. at 328, 340.* Here, the record reflects that the [**68] District reasonably concluded that a race-neutral alternative would not meet its goals.

n33 The Supreme Court repeatedly has shown deference to school officials at the intersection between constitutional protections and educational policy. *See generally* Wendy Parker, *Connecting the Dots:* Grutter, *School Desegregation, and Federalism, 45 Wm. & Mary L. Rev. 1691 (2004).* The theme of local control over public education has animated Supreme Court jurisprudence. *See, e.g., Brown v. Board of Educ., 349 U.S. 294, 299, 99 L. Ed. 1083, 75 S. Ct. 753, 71 Ohio Law Abs. 584* (directing local school officials, with court oversight, to devise remedies for segregation in the light of "varied local school problems"); *Milliken v. Bradley, 418 U.S. 717, 741-42, 41 L. Ed. 2d 1069, 94 S. Ct. 3112 (1974)* ("No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process."); *Freeman v. Pitts, 503 U.S. 467, 490, 118 L. Ed. 2d 108, 112 S. Ct. 1430* ("As we have long observed, 'local autonomy of school districts is a vital national tradition.'" (quoting *Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 410, 53 L. Ed. 2d 851, 97 S. Ct. 2766 (1977)*); *see also Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 683, 92 L. Ed. 2d 549, 106 S. Ct. 3159 (1986)* ("The determination of what manner of speech in the classroom or

in the school assembly is inappropriate properly rests with the school board."); *Lavine v. Blaine School District, 257 F.3d 981, 988 (9th Cir. 2001)* ("In the school context, we have granted educators substantial deference as to what speech is appropriate.") (citing and quoting *Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 267, 98 L. Ed. 2d 592, 108 S. Ct. 562 (1988)).* These Supreme Court decisions suggest that secondary schools occupy a unique position in our constitutional tradition. For this reason, we afford deference to the District's judgment similar to that which *Grutter* afforded the university. *See Grutter, 539 U.S. at 328-29.*

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i. Using poverty as an alternative measure of diversity

The record demonstrates that the School Board considered using a poverty tiebreaker in place of the race-based tiebreaker. It concluded, however, that this proxy device would not achieve its compelling interest in achieving racial diversity, and had other adverse effects. Although there was no formal study of the proposal by District staff, Board members' testimony revealed two legitimate reasons why the Board rejected the use of poverty to reach its goal of racial diversity. First, the Board concluded that it is insulting to minorities and often inaccurate to assume that poverty correlates with minority status. Second, for the group of students for whom poverty would correlate with minority [*1189] status, the implementation would have been thwarted by high school students' understandable reluctance to reveal their socioeconomic status to their peers.

Because racial diversity is a compelling interest, the District may permissibly seek it if it does so in a narrowly tailored manner. We do not require the District to conceal its compelling interest of achieving racial diversity and avoiding racial concentration or isolation through [**70] the use of "some clumsier proxy device" such as poverty. *See Comfort, 418 F.3d at 29* (Boudin, C.J., concurring).

ii. The Urban League plan

Parents also assert that the District should have more formally considered an Urban League proposal, which did not eliminate the integration tiebreaker but merely considered it after other factors. The Urban League plan was a comprehensive plan seeking to enhance the quality of education in Seattle's schools by focusing on educational organization, teacher quality, parent-teacher interaction, raising curricular standards, substantially broadening the availability of specialized and magnet programs (which could attract a broader cross-section of students to undersubscribed schools) and supporting extra-curricular development. The plan proposed decreasing the School District's reliance on race in the assignment process by pairing neighborhoods with particular schools and creating a type of neighborhood/regional school model. Under the Urban League plan, preference initially would be given to students choosing a school in their paired region, and the existing racial tiebreaker would be demoted from second to third in the process [**71] of resolving any remaining oversubscription. The plan also suggested adding an eleventh high school.

Board members testified that they rejected the plan because of the high value the District places on parental and student choice. Moreover, given Seattle's segregated housing patterns, by prioritizing a neighborhood/regional school model where students are assigned to schools close to their homes, the Urban League plan did not sufficiently ensure the achievement of the District's compelling interests in racial diversity and avoidance of racial concentration or isolation. As one member of the School Board testified, "[it] would become Controlled Choice all over again. That's basically what Controlled Choice was, [] a regional plan; it controlled your options by using regions or geography." It was therefore permissible for the District to reject a plan that neither comported with its priorities nor achieved its compelling interests.

iii. Lottery

Parents additionally contend in this court that the District should have considered using a lottery to assign students to the oversubscribed high schools. As an initial matter, we note that Parents did not argue before the district [**72] court that a lottery was a workable race-neutral alternative that would achieve the Districts' compelling interests. Parents now argue on appeal, however, that a lottery would achieve the District's compelling interests without having to resort to the race-based tiebreaker. They ask us to assume that because approximately 82 percent of all students want to attend one of Seattle's oversubscribed schools, the makeup of this 82 percent, as well as that of the applicant pool for each school, mirrors the demographics of the District (60 percent white and 40 percent nonwhite). Employing this assumption, Parents also ask us to assume that a random lottery drawing from this pool would produce a student body in each of the oversubscribed schools that falls within the District's 15 percent plus or minus variance. These assumptions, however, are not supported -- indeed, are undercut -- by [*1190] the factual record. For example, Superintendent Olchefske explained that District patterns indicate that more people choose schools close to home. That would mean that the pool of applicants would be skewed in favor of the demographic of the surrounding residential area. That is, the applicant pool for the north [**73] area oversubscribed high

schools would have a higher concentration of white students and the applicant pool for the south area oversubscribed high school would have a higher concentration of nonwhite students. Thus, random sampling from such a racially skewed pool would produce a racially skewed student body. As one 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."

Although the District has the burden of demonstrating that its Plan is narrowly tailored, *see Gratz, 539 U.S. at 270*, it need not "exhaust[] every conceivable race-neutral alternative." *Grutter, 539 U.S. at 339*. Parents' belated and bald assertion that a lottery could achieve the District's compelling interests, without any evidence to support their claim, fails to demonstrate that a lottery is a viable race-neutral alternative. *See id. at 340* (dismissing the race-neutral alternative of "percentage plans," advocated by the United States in an amicus brief, because the [**74] "United States [did] not . . . explain how such plans could work for graduate and professional schools"); *Comfort, 418 F.3d at 23* (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).

c. The District's use of race

The dissent posits variables the District could use instead of race, for example, embracing the San Francisco school district's approach as a possible model for integration that would meet the dissent's criteria. Bea, J., dissenting, *infra.* at 45, n.24. Perhaps San Francisco has experienced success (however that school district defines it) in its multi-variable plan -- the details and evaluations of which are not in the record. The District is free to consider the San Francisco model when it engages in the annual review of its own Plan. However, even assuming that San Francisco's plan is working, that does not mean that it must be used by other cities in other states. Much can be gained from the various states [**75] employing locally appropriate means to achieve desirable ends. In our system, where states are considered laboratories to be used to experiment with myriad approaches to resolving social problems, we certainly should not punish one school district for not adopting the approach of another. Justice Brandeis said it well,

> There must be power in the States and the Nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs . . . . To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

[*1191] *New State Ice Co. v. Liebmann, 285 U.S. 262, 311, 76 L. Ed. 747, 52 S. Ct. 371 (1932)* (Brandeis, J., dissenting).

In sum, the District made a good faith effort to consider feasible race-neutral alternatives and permissibly rejected them in favor of a system involving a sibling preference, [**76] a race-based tiebreaker and a proximity preference. Over the long history of the District's efforts to achieve desegregated schools, it has experimented with many alternatives, including magnet and other special-interest programs, which it continues to employ, and race-conscious districting. But when a racially diverse school system is the goal (or racial concentration or isolation is the problem), there is no more effective means than a consideration of race to achieve the solution. Even Parents' expert conceded that, "if you don't consider race, it may not be possible to offer an integrated option to students. . . . If you want to guarantee it you have to consider race." 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." 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. n34 *Cf. Hunter v. Regents of Univ. of Cal., 190 F.3d 1061, 1067 (9th Cir. 1999)* [**77] (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).

> n34 The dissent urges, "The way to end discrimination is to stop discriminating by race." Bea, J., dissenting, *infra.* at 60. More properly stated, the way to end segregation is to stop separation of the races. The Seattle school district is attempting to do precisely that.

4. Undue Harm

A narrowly tailored plan ensures that no member of any racial group is unduly harmed. *Grutter, 539 U.S. at 341.* Parents argue that every student who is denied his or her choice of schools because of the integration tiebreaker suffers a constitutionally significant burden. We agree with the Supreme Court of Washington, however, in its assessment that the District's Plan imposes a minimal burden that is shared equally by all of the District's students. *Parents IV, 72 P.3d at 159-60* (noting [**78] that the burden of not being allowed to attend one's preferred school is shared by all students equally). 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." *Id. at 159.* n35 Indeed, public schools, unlike universities, have a tradition of compulsory assignment. *See Bazemore v. Friday, 478 U.S. 385, 408, 92 L. Ed. 2d 315, 106 S. Ct. 3000 (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"). When an applicant's qualifications are not under consideration at all, there is no notion that one student is entitled to a place at any particular school. *See 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.").

n35 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, 28 L. Ed. 923, 5 S. Ct. 357 (1884)* (describing the states' traditional police powers).

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[*1192] Moreover, it is undisputed that the race-based tiebreaker does not uniformly benefit one race or group to the detriment of another. At some schools, white students are given preference over nonwhite students, and, at other schools, nonwhite students are given preference over white students. For example, in 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. n36

n36 As detailed earlier, the Board's decision to change the trigger point for use of the tiebreaker from plus or minus 10 percent to plus or minus 15 percent had the effect of rendering Roosevelt High School neutral for desegregation purposes. Thus, the tiebreaker did not factor into assignments to Roosevelt High School in the 2001-02 school year.

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In sum, because (1) the District is entitled to assign all students to any of its schools, (2) no student is entitled to attend any specific school and (3) the tiebreaker does not uniformly benefit any race or group of individuals to the detriment of another, the tiebreaker does not unduly harm any students in the District.

5. Sunset Provision

A narrowly tailored plan must be limited not only in scope, but also in time. *Grutter, 539 U.S. at 342.* The Court held in *Grutter* that this durational requirement can be met by "periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity." *Id.* The District's Plan includes such reviews. It revisits the Plan annually and has demonstrated its ability to be responsive to parents' and students' choice patterns and to the concerns of its constituents. For example, in 2000, when a higher than normal number of students selected the same schools, the Board responded by increasing the race-based trigger from 10 percent to a 15 percent deviation from the school population, adopting the thermostat that turns off the tiebreaker as soon as the school has come within the 15 [**81] percent plus or minus trigger point and by using the tiebreaker solely for the incoming ninth grade class.

With respect to the dissent's concern for a "logical end point," Bea, J., dissenting, *infra.* at 51, like Justice O'Connor this court shares in the hope that "25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." *Grutter, 539 U.S. at 343.* We expect that the District will continue to review its Plan, and we presume, as did the Court in *Grutter*, that school officials will demonstrate a good faith commitment to monitoring the continued need for the race-based tiebreaker and terminating its use when that need ends. n37 *See 539 U.S. at 343.*

N37 It is worth noting that plans like the District's may actually contribute to achieving the

> Court's vision in *Grutter* that racial preferences will no longer be necessary in 25 years -- or even sooner. As Justice Ginsburg observed, "As lower school education in minority communities improves, an increase in the number of [highly qualified and competitive] students may be anticipated." *Grutter, 539 U.S. at 346* (Ginsburg, J., concurring).

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III. Conclusion

For the foregoing reasons, we hold that the Plan adopted by the Seattle School [*1193] District for high school assignments is constitutional and the use of the race-based tiebreaker is narrowly tailored to achieve the District's compelling interests. Accordingly, we **AFFIRM** the district court's judgment.

AFFIRMED.

CONCURBY: Alex Kozinski

CONCUR: KOZINSKI, Circuit Judge, concurring:

My colleagues in the majority and the dissent have written extensively and well. Given the exacting standard they are attempting to apply, I cannot say that either is clearly wrong. But there is something unreal about their efforts to apply the teachings of prior Supreme Court cases, all decided in very different contexts, to the plan at issue here. I hear the thud of square pegs being pounded into round holes. Ultimately, neither analysis seems entirely persuasive.

I start as did our eminent colleague Chief Judge Boudin of the First Circuit, in commenting on a highly-analogous plan adopted by the city of Lynn, Massachusetts:

> [The] plan at issue in this case is fundamentally different from almost anything that the Supreme Court has previously addressed. It is not, [**83] like old-fashioned racial discrimination laws, aimed at oppressing blacks, e.g., *Brown v. Bd. of Educ., 347 U.S. 483, 98 L. Ed. 873, 74 S. Ct. 686 (1954)*; *Strauder v. West Virginia, 100 U.S. 303, 25 L. Ed. 664 (1880)*; nor, like modern affirmative action, does it seek to give one racial group an edge over another (either to remedy past discrimination or for other purposes). E.g., *Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 132 L. Ed. 2d 158, 115 S. Ct. 2097 (1995)*. By contrast to *Johnson v. California, 543 U.S. 499, 160 L. Ed. 2d 949, 125 S. Ct. 1141 (2005)*, the plan does not segregate persons by race. See also *Loving v. Virginia, 388 U.S. 1, 18 L. Ed. 2d 1010, 87 S. Ct. 1817 (1967)*. Nor does it involve racial quotas. E.g., *Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 57 L. Ed. 2d 750, 98 S. Ct. 2733 (1978)*.
>
> *Comfort v. Lynn Sch. Comm., 418 F.3d 1, 27 (1st Cir. 2005)* (Boudin, C.J., concurring).

These are meaningful differences. When the government seeks to use racial classifications to oppress blacks or other minorities, no conceivable justification will be sufficiently compelling. [**84] See, e.g., *Yick Wo v. Hopkins, 118 U.S. 356, 374, 30 L. Ed. 220, 6 S. Ct. 1064 (1886)*. Similarly, when lawyers use peremptory challenges to exclude jurors of a particular race, thereby denying them the right to participate in government service, they must justify their challenges based on objective, non-racial considerations; justifications based on race will be rejected out of hand, no matter how compelling they might seem. See *Batson v. Kentucky, 476 U.S. 79, 85-88, 90 L. Ed. 2d 69, 106 S. Ct. 1712 (1986)*. When government seeks to segregate the races, as in Johnson, the courts will look with great skepticism at the justifications offered in support of such programs, and will reject them when they reflect assumptions about the conduct of individuals based on their race or skin color. See *Johnson, 125 S. Ct. at 1154* (Stevens, J., dissenting) (concluding that California's policy of racially segregating inmates "supports the suspicion that the policy is based on racial stereotypes and outmoded fears about the dangers of racial integration"). When the government engages in racial gerrymandering, it not only keeps the races apart, but exacerbates [**85] racial tensions by making race a proxy for political power. See *Shaw v. Reno, 509 U.S. 630, 648, 125 L. Ed. 2d 511, 113 S. Ct. 2816 (1993)* ("When a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary [*1194] obligation is to represent only the members of that group, rather than their constituency as a whole."). Programs seeking to help minorities by giving them preferences in contracting, see, e.g., Adarand, and education, see, e.g., Bakke, benign though they may be in their motivations, pit the races against each other, and cast doubts on the ability of minorities to compete with the majority on an equal footing.

The Seattle plan suffers none of these defects. It certainly is not meant to oppress minorities, nor does it have

that effect. No race is turned away from government service or services. The plan does not segregate the races; to the contrary, it seeks to promote integration. There is no attempt to give members of particular races political power based on skin color. There is no competition between the races, and no race is given a preference over [**86] another. That a student is denied the school of his choice may be disappointing, but it carries no racial stigma and says nothing at all about that individual's aptitude or ability. The program does use race as a criterion, but only to ensure that the population of each public school roughly reflects the city's racial composition.

Because the Seattle plan carries none of the baggage the Supreme Court has found objectionable in cases where it has applied strict scrutiny and narrow tailoring, I would consider the plan under a rational basis standard of review. By rational basis, I don't mean the standard applied to economic regulations, where courts shut their eyes to reality or even invent justifications for upholding government programs, see, e.g., *Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 99 L. Ed. 563, 75 S. Ct. 461 (1955)*, but robust and realistic rational basis review, see, e.g., *City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1985)*, where courts consider the actual reasons for the plan in light of the real-world circumstances that gave rise to it.

Under this standard, I have no trouble finding the [**87] Seattle plan constitutional. Through their elected officials, the people of Seattle have adopted a plan that emphasizes school choice, yet tempers such choice somewhat in order to ensure that the schools reflect the city's population. Such stirring of the melting pot strikes me as eminently sensible.

The record shows, and common experience tells us, that students tend to select the schools closest to their homes, which means that schools will reflect the composition of the neighborhood where they are located. Neighborhoods, however, do not reflect the racial composition of the city as a whole. In Seattle, "as in many other cities, minorities and whites often live in different neighborhoods." *Comfort, 418 F.3d at 29* (Boudin, C.J., concurring). To the extent that students gravitate to the schools near their homes, the schools will have the same racial composition as the neighborhood. This means that student patterns of interacting primarily with members of their own race that are first developed by living in racially isolated neighborhoods will be continued and exacerbated by the school experience.

It is difficult to deny the importance of teaching children, during [**88] 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.

[*1195] 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 [**89] 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.

To borrow Judge Boudin's words once again, the plan here is "far from the original evils at which the *Fourteenth Amendment* was addressed. . . . This is not a case in which, against the background of core principles, all doubts should be resolved against constitutionality." *Comfort, 418 F.3d at 29* (Boudin, C.J., concurring). I am acutely mindful of the Supreme Court's strong admonition only last Term that any and all racial classifications must be adjudged under the strict scrutiny standard of review. See *Johnson, 125 S. Ct. at 1146* (citing cases). [**90] But the Supreme Court's opinions are necessarily forged by the cases presented to it; where the case at hand differs in material respects from those the Supreme Court has previously decided, I would hope that those seemingly categorical pronouncements will not be applied without consideration of whether they make sense beyond the circumstances that occasioned them.

When the Supreme Court does review the Seattle plan, or one like it, I hope the justices will give serious thought to bypassing strict -- and almost always deadly -- scrutiny, and adopt something more akin to rational basis review. Not only does a plan that promotes the mixing of races deserve support rather than suspicion and hostility from the judiciary, but there is much to be said for returning primacy on matters of educational policy to local

officials. Long past is the day when losing an election or a legislative vote on a hotly contested issue was considered the end of the matter -- at least until the next election when the voters might "throw the rascals out." Too often nowadays, an election or a vote is a mere precursor to litigation, with the outcome of the dispute not known until judges decide the case many years [**91] later.

Whatever else the strict scrutiny standard of review may do, it most certainly encourages resort to the courts and often delays implementation of a program for years. The more complex and exacting the standard of review, the more uncertain the outcome, and the greater are the incentives for the parties to bloat the record with depositions, expert reports, exhibits, documents and various other materials they hope will catch the eye of the judges who ultimately decide the issue. This is a perfectly fine example, the litigation having taken over five years so far, generating 11 published opinions from the 24 judges who have considered the matter in the federal and state courts. In the meantime, the plan was put on hold, and at least one class has entered and will have completed its entire high school career without ever being affected by it.

[*1196] While it's tempting to adopt rules of law that give us the ultimate say on hotly contested political questions, we should keep in mind that we are not infallible, nor are we the repository of ultimate wisdom. Elected officials, who are much closer to ground zero than we are -- and whose political power ebbs and flows with the approval of [**92] the voters -- understand the realities of the situation far better than we can, no matter how many depositions and expert reports we may read in the quiet of our chambers. It therefore behooves us to approach issues such as those presented here with a healthy dose of modesty about our ability to understand the past or predict the future. It should make us chary about use of the strict scrutiny standard of review, which proclaims us the ultimate arbiters of the issue and gives those who oppose the policy in question every incentive to turn litigation, to paraphrase Clausewitz, into a continuation of politics by other means.

To resort to Chief Judge Boudin's words one last time, "we are faced with a local experiment, pursuing plausible goals by novel means that are not squarely condemned by past Supreme Court precedent. The problems that the . . . plan addresses are real, and time is more likely than court hearings to tell us whether the solution is a good one . . . ." *Comfort, 418 F.3d at 29* (Boudin, C.J., concurring). I share Judge Boudin's preference for resolving such difficult issues by trial and error in the real world, rather than by experts jousting in the courtroom. [**93] When it comes to a plan such as this -- a plan that gives the American melting pot a healthy stir without benefitting or burdening any particular group -- I would leave the decision to those much closer to the affected community, who have the power to reverse or modify the policy should it prove unworkable. It is on this basis that I would affirm the judgment of the district court.

DISSENTBY: Carlos T. Bea

DISSENT: BEA, Circuit Judge, with whom Circuit Judges KLEINFELD, TALLMAN and CALLAHAN join dissenting:

I respectfully dissent.

At the outset, it is important to note what this case is *not* about. 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. n1 But that is not the issue here. The issue here is whether this idea may be imposed by government coercion, rather than societal conviction; whether students and their parents may choose, or whether their government may choose for them. n2

n1 For a dissenting view, *see infra* pp. 20-22. [**94]

n2 Because of our country's struggle with racial division and the injustices of compelled government *de jure* segregation, we must be especially suspicious of any compulsive government program based upon race, even when such a program is supposedly beneficial. Good intentions cannot insulate the government's use of race from the commands of the *Equal Protection Clause*; history is rife with examples of well-intentioned government programs which later caused grievous harm to society and individuals. *See Adarand Constructors v. Pena, 515 U.S. 200, 226, 132 L. Ed. 2d 158, 115 S. Ct. 2097 (1995)* ("More than good motives should be required when government seeks to allocate its resources by way of an explicit racial classification system."); *Olmstead v. United States, 277 U.S. 438, 479, 72 L. Ed. 944, 48 S. Ct. 564 (1928)* (Brandeis, J., dissenting) ("Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.").

[**95]

In the Seattle School District ("District"), some schools are oversubscribed [*1197] and in higher demand than others, so the District uses a tiebreaker to assign some ninth-grade students, and not others, to those schools. The tiebreaker operates solely on the basis of the student's race. In fact, rather than differentiating between African-American, Asian-American, Latino, Native American, or Caucasian students, the tiebreaker classifies students only as "white" or "nonwhite." n3 The District seeks a racially balanced student body of 40% white, 60% nonwhite children; the tiebreaker excludes white or nonwhite students from an oversubscribed school if their admission will not further that preferred ratio.

n3 This makes all the more puzzling the majority's assertion that "that the District has a compelling interest in securing the educational and social benefits of racial (and ethnic) diversity." Majority op. 2 (emphasis added). There simply is no ethnic tiebreaker.

Notwithstanding the majority's fervent defense [**96] of that plan, the District is engaged in simple racial balancing, which the *Equal Protection Clause* forbids. The majority can arrive at the opposite conclusion only by applying a watered-down standard of review -- improperly labeled "strict scrutiny" -- which contains none of the attributes common to our most stringent standard of review. I respectfully disagree with the majority's gentle endorsement of the racial tiebreaker and would instead hold the District violates the *Equal Protection Clause* whenever it excludes a student from a school solely on the basis of race.

I.

As an introductory note, I call attention to the majority's frequent misuse of the terms "segregation," "segregated schools," and "segregated housing patterns." *See, e.g.*, Majority op. at 2, 3, 5. As a perfectly understandable rhetorical ploy, the majority continually uses those charged terms when there has been no such segregation in the Seattle schools in any textual or legal sense. n4 Throughout the desegregation cases, the U.S. Supreme Court stated that only the remediation of *de jure* segregation justified the use of racial classifications. *Freeman v. Pitts, 503 U.S. 467, 494, 118 L. Ed. 2d 108, 112 S. Ct. 1430 (1992).* [**97] "The differentiating factor between *de jure* segregation and so-called *de facto* segregation . . . is *purpose* or *intent* to segregate." *Keyes v. School Dist. No. 1, 413 U.S. 189, 208, 37 L. Ed. 2d 548, 93 S. Ct. 2686 (1973)* (emphasis in original); *see Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 17, 28 L. Ed. 2d 554, 91 S. Ct. 1267 (1971)* ("'Desegregation' means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, *but 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance.*") (emphasis added).

n4 Remediation of *de jure* segregation is not at issue here; the parties concede the District's schools have never been *de jure* segregated. No one even suggests that Seattle's housing market has ever been affected by *de jure* segregation.

"Segregate" is a transitive verb. It requires an actor to do an act which effects segregation. *See* [**98] OXFORD ENGLISH DICTIONARY (2d ed. 1989) ("segregate, *v.* 1. a. *trans.*: To separate (a person, a body or class of persons) from the general body, or from some particular class; to set apart, isolate, seclude"). n5 Instead of *de jure* segregation, what the majority describes is racial imbalance in the District's schools and Seattle's residential makeup.

n5 Indeed, the term "*de facto* segregation" is somewhat of an oxymoron. That is perhaps why the Supreme Court preceded the term with the qualifier "so-called." *See Keyes, 413 U.S. at 208.*

[*1198] Of course, it is much easier to argue for measures to end "segregation" than for measures to avoid "racial imbalance." Especially is this so in view of the U.S. Supreme Court's frequent pronouncements that "racial balancing" violates the *Equal Protection Clause. See Grutter v. Bollinger, 539 U.S. 306, 330, 156 L. Ed. 2d 304, 123 S. Ct. 2325 (2003)* ("Outright racial balancing . . . is patently unconstitutional."); *Freeman, 503 U.S. at 494* [**99] ("Racial balance is not to be achieved for its own sake."); *Regents of the Univ. of Calif. v. Bakke, 438 U.S. 265, 307, 57 L. Ed. 2d 750, 98 S. Ct. 2733 (1978)* (Powell, J.) ("If petitioner's purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial but as facially invalid. Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids.").

It should be remembered by the reader of the majority opinion that one can no more "segregate" without a

person actively doing the segregation than one can separate an egg without a cook.

Like Judge Boudin, n6 in his concurring opinion Judge Kozinski tries to distinguish past Supreme Court cases involving racial discrimination by focusing on the effects of the discrimination, rather than the fact of the discrimination.

n6 *See Comfort v. Lynn Sch. Comm., 418 F.3d 1, 27 (1st Cir. 2005)* (Boudin, C.J., concurring).

[**100]

This creates for them two categories different from the effects of the Seattle plan: (1) the effects of other race discrimination plans were much *worse* than Seattle's and (2) the effects were visited on *certain races.*

But the difference reflected in these two categories are irrelevant. "There is no *de minimis* exception to the *Equal Protection Clause.* Race discrimination is never a 'trifle.'" *Monterey Mechanical Co. v. Wilson, 125 F.3d 702, 712 (9th Cir. 1997).* Second, the *Fourteenth Amendment* protects individual rights, not the rights of certain races or groups.

Further, that a "plan does not segregate persons by race" n7 does not justify it in refusing school admission to a qualified scholar because he does not belong to a particular race. There was no segregation by race at Cal Davis medical school, when Bakke was improperly refused admission. *See Bakke, 438 U.S. 265, 57 L. Ed. 2d 750, 98 S. Ct. 2733.*

n7 *Id.*

Also, it is quite accurate to say the Seattle plan does not [**101] "involve racial quotas." n8 The numerical quota is the percentage by which the school in question's racial composition differs from the school district's target. n9 Not calling it a quota, does not make it something other. "A rose by any other name...etc."

n8 Concurrence at 1 (citing *Comfort, 418 F.3d at 27* (Boudin, C.J., concurring).

n9 *See infra* pp. 39-43 (discussion of why the racial tiebreaker used by Seattle is a quota).

Perhaps the Supreme Court will adopt a "rational relation" basis for review of race-based discrimination by government, based on the concurrence's view of what is "realistic" or what are "real-world circumstances." n10 As indicated above, however, it certainly has given no such indication. n11 [*1199] But if it does, one doubts that it will do so based on a "melting pot" metaphor.

n10 What is "the reality" or "realistic" or "real-world" is usually a rhetorical tool for dressing up one's own view as objective and impartial, and therefore, more presentable.

[**102]

n11 *See e.g. Adarand, 515 U.S. at 224, Gratz v. Bollinger, 539 U.S. 244, 270, 156 L. Ed. 2d 257, 123 S. Ct. 2411 (2003), Johnson v. California, 543 U.S. 499, 160 L. Ed. 2d 949, 125 S. Ct. 1141, 1146 (2005).* On this point, the majority agrees. *See* Majority op. pp. 17-18 n.12.

Up to now, the American "melting pot" has been made up of people voluntarily coming to this country from different lands, putting aside their differences and embracing our common values. To date it has not meant people who are told whether they are white or non-white, and where to go to school based on their race.

The suggestion that local political forces should decide when to employ racial discrimination in the allocation of governmental resources is certainly nothing new in American history. Such "local option" discrimination was adopted in the Missouri Compromise of 1820, which established the Mason-Dixon line, and the Compromise of 1850. But since then, the Civil War, the post-war Amendments to the Constitution and *Brown v. Bd. of Ed. of Topeka, Shawnee County, Kan., 347 U.S. 483, 98 L. Ed. 873, 74 S. Ct. 686 (1954)* [**103] have made racial discrimination a matter of national concern and national governance.

As noted in the opening lines of this dissenting opinion, it certainly is rational to believe that racial balancing in schools achieves better racial socialization and, as a result, better citizens. The issue is not that, but whether what is rational can be achieved by compulsory racial discrimination by the State.

II.

I agree with the majority that the District's use of the racial tiebreaker is a racial classification, and all racial classifications are subject to "strict scrutiny" review under the *Equal Protection Clause. See* Majority op. at 19.

Yet the majority conceives of strict scrutiny as some type of relaxed, deferential standard of review. I view it differently.

"No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." *U.S. Const., amend. XIV, § 1.* The right to equal protection is an individual one, and so where federal or state governments classify a person according to race -- "a group classification long recognized as in most circumstances irrelevant and therefore prohibited" -- we review such state action under the most "detailed judicial [**104] inquiry" -- that is, under strict scrutiny. *Grutter, 539 U.S. at 326*; *see Miller v. Johnson, 515 U.S. 900, 911, 132 L. Ed. 2d 762, 115 S. Ct. 2475 (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.)" (internal quotation marks omitted).

The right to equal protection is held equally among all individuals. "*All* racial classifications reviewable under the *Equal Protection Clause* must be strictly scrutinized." *Adarand, 515 U.S. at 224 (1995)* (emphasis added). Strict scrutiny applies regardless whether the racial classifications are invidious or benign and "is not dependent on the race of those burdened or benefited by a particular classification." *Gratz, 539 U.S. at 270*; *see Johnson, 125 S. Ct. at 1146* ("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 [**105] to improve minority representation.") (internal citations omitted). We require such a demanding inquiry "to 'smoke out' illegitimate uses of race by assuring [*1200] that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool." *Adarand, 515 U.S. at 226.*

The right to equal protection provides a liberty; it represents freedom from government coercion based upon racial classifications. *See Miller, 515 U.S. at 904* (the *Equal Protection Clause*'s "central mandate is racial neutrality in governmental decisionmaking"). Thus, under strict scrutiny, all racial classifications by the government, regardless of purported motivation, are "inherently suspect," *Adarand, 515 U.S. at 223*, and "presumptively invalid," *Shaw v. Reno, 509 U.S. 630, 643-44, 125 L. Ed. 2d 511, 113 S. Ct. 2816 (1993)*. They are permissible only where the government proves their use is "narrowly tailored to further compelling governmental interests." *Grutter, 539 U.S. at 326.*

It follows, then, that the government carries the burden of proving that its use of racial classifications satisfies strict scrutiny. *Johnson, 125 S. Ct. at 1146 n.1* [**106] ("We put the burden on state actors to demonstrate that their race-based policies are justified."); *Gratz, 539 U.S. at 270*; *W. States Paving Co., Inc. v. Wash. State Dep't of Transp., 407 F.3d 983, 990 (9th Cir. 2005)* ("The burden of justifying different treatment by ethnicity . . . is always on the government.") (quoting *Monterey Mech. Co. v. Wilson, 125 F.3d 702, 713 (9th Cir. 1997)*.

Despite this formidable standard of review, the majority does not hesitate to endorse the District's use of the racial tiebreaker. Rather than recognizing the protections of the individual against governmental racial classifications, the majority instead endorses a rigid racial governmental grouping of high school students for the purpose of attaining racial balance in the schools. For the reasons expressed below, I do not share in the majority's confidence that such a plan is constitutionally permissible.

III.

I consider first whether the District has asserted a "compelling governmental interest," the first element of the strict scrutiny test. The District contends it has a valid compelling governmental interest in using racial balancing to achieve [**107] "the educational and social benefits of racial . . . diversity" within its high schools and avoid "racially concentrated" schools. The District argues its interest will enhance student discussion of racial issues in high school and will foster cross-racial socialization and understanding, both in school and later in the students' lives.

The U.S. Supreme Court has "declined to define compelling interest or to tell [the lower courts] how to apply that term." *Hunter v. Regents of the Univ. of Calif., 190 F.3d 1061, 1070 n.9 (9th Cir. 1999)* (Beezer, J., dissenting); Mark R. Killenbeck, *Pushing Things Up to Their First Principles: Reflections on the Values of Affirmative Action, 87 Calif. L. Rev. 1299, 1349 (1999)* (the definition of a compelling interest "is admittedly imprecise. The Supreme Court has never offered a workable definition of the term . . . and is unlikely ever to do so, preferring to approach matters on a case-by-case basis").

The majority is correct in noting the U.S. Supreme Court has never endorsed "racial balancing" as a "compelling interest." Indeed, throughout the history of strict scrutiny, the Supreme Court has rejected as invalid [**108] all such asserted compelling interests, save for two exceptions. With respect, the majority errs in creating a third.

A.

The Court has endorsed two race-based compelling governmental interests in the public education context. First, the Court [*1201] has allowed racial classifications to remedy past racial imbalances in schools resulting from past *de jure* segregation. *Freeman, 503 U.S. at 494*. Second, the Court has allowed undergraduate and graduate universities to consider race as part of an overall, flexible assessment of an individual's characteristics to attain student body diversity. *Grutter, 539 U.S. at 328*; *Gratz, 539 U.S. at 268-69*.

Besides those two valid compelling interests, the Court has struck down every other asserted race-based compelling interest that has come before it. *See Shaw v. Hunt, 517 U.S. 899, 909-12, 135 L. Ed. 2d 207, 116 S. Ct. 1894 (1996)* (rejecting racial classifications to "alleviate the effects of societal discrimination" in the absence of findings of past discrimination, and to promote minority representation in Congress); *Richmond v. J.A. Croson Co., 488 U.S. 469, 511, 102 L. Ed. 2d 854, 109 S. Ct. 706 (1989)* [**109] (plurality) (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, 90 L. Ed. 2d 260, 106 S. Ct. 1842 (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); *Bakke, 438 U.S. at 310-11 (Powell, J.)* (rejecting the application of race-conscious measures to improve "the delivery of health-care services to communities currently underserved"). A crucial guiding point here -- and one elided entirely by the majority -- is the Court's consistent reiteration that "outright racial balancing . . . is patently unconstitutional." *See, e.g., Grutter, 539 U.S. at 330*.

Thus, we face a landscape littered with rejected asserted "compelling interests" requiring race-based determinations, but with two exceptions still standing. The first exception is inapplicable here because the Seattle schools have never been *de jure* segregated. *See Freeman, 503 U.S. at 494*. [**110]

The second exception is also inapplicable, albeit not so directly acknowledged. At oral argument, the District conceded that it is not asserting the *Grutter* "diversity" interest; the majority recognizes this in stating the District's asserted interest is "significantly different" in some ways from the interest asserted in *Grutter*. Majority op. at 26. Nonetheless, the majority concludes those differences are inconsequential because of the different "context" n12 between high schools and universities, [*1202] and the District's asserted interest is a compelling governmental interest in its own right.

n12 The majority cites often to *Grutter*'s statement that "context matters" in reviewing racial classifications under the *Equal Protection Clause. See 539 U.S. at 327* ("Context matters when reviewing race-based governmental action under the *Equal Protection Clause.*"). There, the Court counseled that strict scrutiny was to take "relevant differences" into account. *Id.*

Indeed, "context" does matter; context *always* matters in the application of general rules of law to varied factual settings. *See Gomillion v. Lightfoot, 364 U.S. 339, 343-44, 5 L. Ed. 2d 110, 81 S. Ct. 125 (1960)* ("Particularly in dealing with claims under broad provisions of the Constitution, which derive content by an interpretive process of inclusion and exclusion, it is imperative that generalizations, based on and qualified by the concrete situations that gave rise to them, must not be applied out of context in disregard of variant controlling facts."). In *Grutter*, the "context" was a public law school's race-conscious, individualized consideration of applicants for purposes of admissions, designed to achieve diversity. Here, the context is different; we consider a rigid racial tiebreaker, which considers only race, designed to avoid racial imbalance in the schools. And so, as we do for all cases, we look to general principles of law and apply them through the correct standard of review, cognizant of the different results reached in other cases because of different facts and the "context" in which the cases arose. But what must be remembered is that a different "context" does not change the general rules of law, nor does a different "context" change the applicable standard of review (at least for government-imposed racial classifications).

Yes, "context" matters, but the mention of "context" should not be a talisman to banish further enquiry. The "context" of the Michigan Law School is different from the District's schools. But the difference is in the age of the students, their number and the obligation of the District to admit all students. Does that change the fact that some students are sent to certain schools solely because of their races?. How does "context" change that? Let us not succumb to the use of an abstraction ("context") to invoke "sensitivity" to "nuances," thus to attempt to change the bald fact of selection based on race.

[**111]

Not so. The very differences between the *Grutter* "diversity" interest and the District's asserted interest

illustrate why the latter violates the *Equal Protection Clause* as opposed to the former. The *Grutter* "diversity" interest focuses upon the individual, of which race plays a part, but not the whole. The District's asserted interest, however, focuses only upon race, running afoul of equal protection's focus upon the individual.

B.

In *Grutter* and *Gratz*, the Court made clear that the valid compelling interest in "diversity" does *not* translate into a valid compelling interest in "racial diversity." The "diversity" interest

> is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups . . . . Rather, the diversity that furthers a compelling state interest encompasses *a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.*

Grutter, 539 U.S. at 324-25 (emphasis added); *see Gratz, 539 U.S. at 272-73* ("The critical criteria [in [**112] a permissible race-conscious admissions program] are often individual qualities or experiences not dependent upon race but sometimes associated with it.").

The *Grutter* "diversity" interest focuses upon the individual, which can include the applicant's race, but also includes other factors, such as the applicant's family background, her parent's educational history, whether she is fluent in other languages, whether she has overcome adversity or hardship, or whether she has unique athletic or artistic talents. *See 539 U.S. at 338*. Such a focus is consistent with the *Equal Protection Clause*, which protects the individual, not groups.

But here, the District's operation of the racial tiebreaker does not consider the applicant as an individual. To the contrary, the racial tiebreaker considers only whether the student is white or nonwhite. While the *Grutter* "diversity" interest pursues *genuine* diversity in the student body (of which race is only a single "plus" factor), the District pursues an interest which considers only *racial* diversity, *i.e.*, a predefined grouping of races in the District's schools. n13 Such an interest is not a valid [*1203] compelling [**113] interest; it is simple racial balancing, forbidden by the *Equal Protection Clause*. *See id. at 330* (stating a government institution's interest "to assure within its student body some specified percentage of a particular group merely because of its race . . . would amount to outright racial balancing, which is patently unconstitutional").

> n13 The majority fails to recognize this distinction. For example, comparing the District's claimed interest with those endorsed in *Grutter*, the majority reasons high schools "have an equal if not more important role" in preparing students for work and citizenship, and concludes "it would be a perverse reading of the *Equal Protection Clause* that would allow a university, educating a relatively small percentage of the population, to use race when choosing its student body but not allow a public school district, educating all children attending its schools, to consider a student's race in order to ensure that the high schools within the district attain and maintain diverse student bodies." Majority op. at 24, 26. Yet *Grutter* did *not* allow universities to consider race in admissions to achieve racial balancing. The whole point of *Grutter* and *Gratz* was that universities may consider race, but only as part of the overall individual. I see nothing perverse in recognizing the *Equal Protection Clause* to be the protector of the individual, whether he be among the few at an elite law school, or among the many in a public high school.

[**114]

Grutter emphasized the dangers resulting from lack of an individualized consideration of each applicant. Observing that the Michigan Law School sought an unquantified "critical mass" of minority students to avoid only token representation, rather than some defined balance, *id. at 330*, the Court reasoned the law school's individualized focus on students forming that "critical mass" would avoid perpetuating the stereotype that all "minority students always . . . express some characteristic minority viewpoint on any issue," *id. at 333*.

But here, the District's concept of racial diversity is a predetermined, defined ratio of white and nonwhite children. The racial tiebreaker works to exclude white students from schools that have a 50-55% white student body (depending on the tiebreaker trigger used in a particular year), and works to exclude nonwhite students from schools with a 70-75% nonwhite student body (depending on the tiebreaker trigger used). Thus, the District's concept of racial diversity does not permit a school with a student body that is *too* white, or a school with a student body that is *too* nonwhite.

The District argues its [**115] concept of racial diversity is necessary to foster classroom discussion and cross-racial socialization. That argument, however, is

based on the stereotype that all white children express traditional white viewpoints and exhibit traditional white mannerisms; all nonwhite children express opposite nonwhite viewpoints and exhibit nonwhite mannerisms, and thereby white and nonwhite children will better understand each other. Yet there is nothing in the racial tiebreaker to ensure such viewpoints and mannerisms are represented within the preferred student body ratio. As noted in *Grutter*, the only way to achieve diverse viewpoints and mannerisms is to look at the individual student. White children have different viewpoints and backgrounds than other white children; the same goes for nonwhite children; and some white children have the same viewpoints and backgrounds as some nonwhite children. The assumption that there is a difference between individuals just because there is a difference in their skin color is a stereotype in itself, nothing more. n14

n14 Again, there is nothing illegal in freely choosing to believe in this stereotype and to act upon it as a private citizen in sending one's child to a particular school. The case changes when such racial stereotype is accepted by the state, and is the basis for the imposition of racial discrimination.

[**116]

The District also claims it must use the racial tiebreaker to avoid racially imbalanced schools, which may result in schools with large white or nonwhite student bodies and in which the supposed benefits from the District's concept of racial diversity will not occur. This theory, however, presents another racial stereotype, which assumes there is something wrong with a school that has a heavy nonwhite student body population, or something better [*1204] about a school that has a heavy white student body population. *See Missouri v. Jenkins, 515 U.S. 70, 122, 132 L. Ed. 2d 63, 115 S. Ct. 2038 (1995)* (Thomas, J., concurring) ("After all, if separation itself is a harm, and if integration therefore is the only way that blacks can receive a proper education, then there must be something inferior about blacks. Under this theory, segregation injures blacks because blacks, when left on their own, cannot achieve. To my way of thinking, that conclusion is the result of a jurisprudence based upon a theory of black inferiority.").

Besides the District's reliance on racial stereotypes, there is good reason categorically to forbid racial balancing. The process of classifying children in groups of color, [**117] rather than viewing them as individuals, encourages "notions of racial inferiority" in both white and nonwhite children and incites racial hostility. *See Grutter, 539 U.S. at 328*. Indeed, those risks are particularly great here because of the blunt nature of the racial tiebreaker. The District's racial grouping of students, either as white or nonwhite, assumes that each minority student is the same, regardless whether he is African-American, Asian-American, Latino, or Native American; the only difference noted by the District is that the minority student is not white. n15 The District thus "conceives of racial diversity in simplistic terms as a dichotomy between white and nonwhite, as if to say all nonwhites are interchangeable." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist., No. 1, 149 Wn.2d 660, 72 P.3d 151, 169 n.5 (Wash. 2003)* (Sanders, J., dissenting). I join my colleague on the Washington Supreme Court in observing that "as a theory of racial politics, this view is patently offensive and as a policy to promote racially diverse schools, wholly inadequate." *Id.*

n15 The majority notes that for purposes of the racial tiebreaker, "a student is deemed to be of the race specified in his or her registration materials." Majority op. at 11. That generalization declines to note a particularly overbearing facet of the racial tiebreaker. Although the District encourages the students' parents to identify the race of their student in the registration materials, if a parent or student chooses to follow the example of Tiger Woods and refuses to identify his or her race, the District then engages in a visual inspection of the student or parent and will decide the child's color notwithstanding the parent's or student's choice.

[**118]

Unlike a voluntary decision by parents to expose their children to individuals of different races or background, the District classifies each student by skin color and excludes certain students from particular schools -- solely on the basis of race -- to ensure those schools remain racially balanced. Even if well intentioned, the District's use of racial classifications in such a stark and compulsory fashion risks perpetuating the same racial divisions which have plagued this country since its founding:

> Race is perhaps the worst imaginable category around which to organize group competition and social relations more generally. At the risk of belaboring the obvious, racial categories in law have played an utterly pernicious and destructive role throughout human history. This incontrovertible fact should arouse won-

> der . . . at the hubris of those who imagine that we can distinguish clearly enough between invidious and benign race discrimination to engrave this distinction into our constitutional order. Vast human experience mocks this comforting illusion, as does the fact that most Americans, including many minorities, think racial preferences are invidious, not benign. Whether [**119] benignly intended or not, using the category of race -- which affirmative action proponents oddly depict as socially constructed and primordial and immutable -- to [*1205] distribute advantage and disadvantage tends to ossify the fluid, forward-looking political identities that a robust democratic spirit inspires and requires.

Peter H. Schuck, *Affirmative Action: Past, Present, and Future, 20 Yale L. & Pol'y Rev. 1, 92-93 (2002).*

We should not minimize these shadows that are cast over the supposed benefits of the District's asserted interest. The District's stark racial classifications not only offend intrinsic notions of individuality, they even suggest principles opposite to what the District claims to seek. Although the District contends it uses the racial tiebreaker for good, *i.e.*, to foster cross-racial socialization and understanding, the District's concept of racial diversity also suggests other principles which many may find objectionable, especially when taught to children:

> While a public law preference does express a certain kind of compassion for and commitment to the preferred groups, other signals dominate its message - among them, that American [**120] society thinks it just to group people by race and ethnicity, to treat those groups monolithically, and to allocate precious resources and opportunities accordingly; that it holds equal treatment and individual merit as secondary, dispensable ideals; that the preferred groups cannot succeed without special public favors; that such favors do not stigmatize them in the minds of fair-minded others; that those who oppose preferences thereby oppose the aspirations of the preferred groups; and that society can assuage old injustices by creating new ones. When public law says such things, it speaks falsely, holds out vain promises, and brings itself into disrepute.

Id. at 87-88.

The District's asserted interest may be supported by noble goals. But the stereotypes on which it is based, and the risks that it presents, make that interest far from compelling.

C.

The sociological evidence presented by the District, relied upon strongly by the majority, does not change my view. The majority discusses much of the evidence that supports the District's position that racially balanced schools foster cross-racial socialization and understanding in school and later in the [**121] students' lives. Majority op. at 22-24. Yet the majority puts aside the other evidence suggesting there is no definitive agreement as to the beneficial effects of racial balance in K-12 schools, that the benefits attributed to racially balanced schools are often weak, and that any benefits do not always have a direct correlation to racial balance. Yet again, a private citizen is free to accept one body of opinion and reject another in deciding to send his child to a particular school. Is the state similarly privileged when required to determine that its claimed goal is a "compelling interest"? One would think that to be "compelling" there would be no room for doubt of the need for the measure. That is certainly not the case here.

For example, a source provided by the District states that "family background has a significantly stronger effect on student achievement than any other single school factor or constellation of school factors, including school racial and ethnic composition." [SER 182.] Another source presented by the District states that court-ordered desegregation (*i.e.*, a court-ordered breakup of a *de jure* segregated student body) resulted in only minimal benefits: [**122]

> Research suggests that desegregation has had some positive effect on the reading skills of African American youngsters. The effect is not large, nor does it occur in all situations, but a modest measurable effect does seem apparent. [*1206] Such is not the case with mathematical skills, which seem generally unaffected by desegregation. Second, there is some evidence that desegregation may help to break what can be thought of as a generational cycle of segregation and racial isolation. Although research on this topic is scant and often marred by unavoidable flaws, evidence has begun to accumulate

> that desegregation may favorably influence such adult outcomes as college graduation, income, and employment patterns. The measured effects are often weak . . . .

[SER 205, 207-208.]

That source concludes that "the evidence regarding the impact of desegregation on intergroup relations is generally held to be inconclusive and inconsistent." [SER 208.]. *See Grutter, 539 U.S. at 364-65* (Thomas, J., dissenting) (collecting studies suggesting black students perform at higher levels of achievement at historically black colleges); David I. Levine, *Public School Assignment* [**123] *Methods after Grutter and Gratz: The View from San Francisco, 30 Hastings Const. L.Q. 511, 536 (2003)* (noting that a high school's focus on racial balance misses the "key element" in the context of education, *i.e.*, that "the life chances of students are improved only with economic integration"). n16

> n16 *See also* David J. Armor & Christine H. Rossell, *Desegregation and Resegregation in the Public Schools*, in *Beyond the Color Line: New Perspectives on Race and Ethnicity in America* 251 (Abigail Thernstrom & Stephan Thernstrom eds., 2002) ("Racial composition by itself has little effect on raising the achievement of minority students or on reducing the minority-white achievement gap. Some studies show that there is no relationship at all between black achievement and racial composition . . ., and other studies show that there is no relationship between the black-white achievement gap and racial composition. In either case, though there is some evidence here that achievement can be affected by programmatic changes, there is no evidence that it responds to improved racial balance by itself."); *id. at 252* ("The evidence on the benefit of school desegregation for race relations is probably the weakest of all. Indeed, there are more studies showing harmful effects than studies showing positive effects. This led to another and more recent reviewer of the race relations literature to conclude, somewhat generously: "'In general, the reviews of desegregation and intergroup relations were unable to come to any conclusion about what the probable effects of desegregation were. . . . Virtually all of the reviewers determined that few, if any, firm conclusions about the impact of desegregation on intergroup relations could be drawn. The reluctance of reviewers to draw conclusions about the benefits of school desegregation for race relations or self-esteem only reinforces our conclusion that the psychological harm theory of de facto segregation and the social benefit theory of desegregation are clearly wrong, at least when applied to desegregation as a racial balance policy.'").

[**124]

The serious risks presented by racial classifications counteract the marginal benefits provided by racial balancing. Courts have long recognized racial classifications promote "notions of racial inferiority and lead to a politics of racial hostility." *See Grutter, 539 U.S. at 328*; Michael Perry, *Modern Equal Protection*, 79 Colum. L. Rev. 1023, 1048 (1979) ("Affirmative action "'inevitably foments racial resentment and thereby strains the effort to gain wider acceptance for the principle of moral equality of the races.'"). Other studies suggest that where racial classifications are a means of achieving racial balance, academic achievement by minorities is hindered, and racial tensions are riled:

> In a culture that ardently affirms the principles of individual freedom, merit, and equality of opportunity, [the] demoralization and anger [precipitated by being victim to government-imposed racial classifications] must be counted as a very large social cost. It is no less a [*1207] cost because it is borne by whites, and often less privileged whites at that. If these principles make it unfair to impose this cost, the fact that the unfairness is spread [**125] across a large group of people may not make it any more palatable. In fact, diffusing the unfairness in this way will simply increase the number of people who feel themselves aggrieved.

Schuck, supra, at 69.

But despite the inconsistencies in the sociological evidence and the vivid risks of the District's asserted interest, the majority implicitly defers to the District's position. *Grutter* took a similar approach, emphasizing that its endorsement of the "diversity" interest relied in large part upon deference to the educational judgment of the Michigan Law School. *539 U.S. at 330.*

Yet perhaps to steal a line from the majority, the "context" here is different. We are not faced with a university's "academic freedom," which arises from "a constitutional dimension, grounded in the *First Amendment*,

of educational autonomy," and which includes the freedom to select its student body. *Id.* We instead consider a public high school's admissions plan which admits or excludes students from particular schools solely on the basis of their race. For several reasons, we should not defer to such a plan.

First, other than for race-conscious university admissions based [**126] on holistic diversity, deference to a government actor is inconsistent with strict scrutiny. *See Johnson, 125 S. Ct. at 1146 n.1* (stating generally that "deference [by the courts in applying strict scrutiny] is fundamentally at odds with our equal protection jurisprudence"); *id. at 1150* (stating the Supreme Court has "refused to defer to state officials' judgments on race . . . where those officials traditionally exercise substantial discretion."). In *Grutter*, the Court deferred to the Michigan Law School's "diversity" interest because of the law school's "academic freedom" -- grounded in the *First Amendment* and including the law school's freedom to select its own student body -- and the law school's asserted need for diversity to achieve a "robust exchange of ideas" within its classrooms, a vital part of the law school's mission. *539 U.S. at 330.*

None of those same issues are implicated here. The "academic freedom" of a university allows it "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Bakke, 438 U.S. at 312 (Powell, J.)*. High schools [**127] do not have such similar freedoms. They cannot determine who may teach, at least when that determination is based upon racial grounds. *See Wygant, 476 U.S. at 274-76*. They also cannot determine who may be admitted to study; when the government chooses to provide public education in secondary schools, it "must be made available to all on equal terms." *See Plyler v. Doe, 457 U.S. 202, 221-23, 72 L. Ed. 2d 786, 102 S. Ct. 2382 (1982)*. Further, there is no comparable line of U.S. Supreme Court cases affording high schools the special "Academic freedom[s]" granted to universities by the *First Amendment. See United States v. Fordice, 505 U.S. 717, 728-29, 120 L. Ed. 2d 575, 112 S. Ct. 2727 (1992)* ("a state university system is quite different in very relevant respects from primary and secondary schools."); Jay P. Lechner, *Learning From Experience: Why Racial Diversity Cannot Be a Legally Compelling Interest in Elementary and Secondary Education, 32 SW. U. L. Rev. 201, 215 (2003)* (stating the Supreme Court "has been less deferential to the discretion of elementary or secondary school officials in Equal Protection cases, in part because the Court has [**128] viewed school desegregation as serving social rather than educational goals. The Court has acknowledged that [*1208] even the most important, delicate, and highly discretionary functions of state educators are subject to the limits of the *Bill of Rights* and subordinate to the Constitutional freedoms of the individual. Moreover, the educational benefits from diversity, if any, are much greater at the higher educational level because such benefits are greatly magnified by the learning that takes place outside the classroom -- in dormitories, social settings, and extracurricular activities -- as students must learn to live and work with persons of other races and ethnic backgrounds.") (internal quotation marks omitted).

Moreover, there is a crucial difference between the "robust exchange of ideas" theory referenced in *Grutter* and the District's claim that its interest "brings different viewpoints and experiences to classroom discussions and thereby enhances the educational process." [ER 237.] The District applies the racial tiebreaker only to entering ninth-grade students. [ER 253, 308.] It is self-evident that classroom discussion plays a significantly more vital role in universities [**129] with their typical dialectic or Socratic teaching method, than in ninth-grade high school courses with their typical didactic or rote teaching method.

Last, the District's claim that its asserted interest helps to foster cross-racial socialization and understanding later in the students' lives is a sociological judgment outside the expertise of the District's educators. Those external benefits are diffuse, manifest long after students leave the classroom, and cannot be measured with skills possessed uniquely by educators. Unlike *Grutter*, which deferred to the Law School on the basis that diversity in the classroom was vital to its educational mission during the three-year law school curriculum, here, the District's asserted interest depends upon benefits only loosely linked to the District's educational mission and to take effect years after its schooling of the children, or entirely outside the expertise of its educators. Here, high school administrators and teachers are predicting what sociologists will find years later.

Strict scrutiny cannot remain strict if we defer to judgments not even within the particular expertise or observation of the party being scrutinized. Hence, [**130] deference is not due to the District regarding the benefits the District contends are attributable to its claimed interest. n17

n17 The majority states that *Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 28 L. Ed. 2d 554, 91 S. Ct. 1267 (1971)*, supports the proposition that the District has broad discretion to engage in racial balancing as an "educational policy." In *Swann*, the Supreme Court stated: "School authorities are traditionally charged with broad power to formulate and implement educa-

tional policy and might well conclude, for example, 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. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court." *Id. at 16*; *see also North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43, 45, 28 L. Ed. 2d 586, 91 S. Ct. 1284 (1971)* (same, citing *Swann, 402 U.S. at 16*).

Swann's passage seems to provide powerful language for the majority's position, but alas, the majority takes the passage out of context. *Swann* considered the remedies available to a federal court to combat past *de jure* segregation. The Court never considered whether a school district could use racial classifications to achieve racial balance absent *de jure* segregation. Indeed, the Court stated: "We are concerned in these cases with the elimination of the discrimination inherent in the dual school systems, not with myriad factors of human existence which can cause discrimination in a multitude of ways on racial, religious, or ethnic grounds. . . . Our objective in dealing with the issues presented by these cases is to see that school authorities exclude no pupil of a racial minority from any school, directly or indirectly, on account of race; *it does not and cannot embrace all the problems of racial prejudice, even when those problems contribute to disproportionate racial concentrations in some schools*." *Id. at 22-23* (emphasis added).

Swann was also decided decades before the Court resolved the issue of the level of scrutiny to apply to "benign" racial classifications, vis-a-vis "invidious" racial classifications. Thus, *Swann*'s dictum cannot shelter the District's use of the racial tiebreaker from the searching inquiry required by strict scrutiny.

The majority similarly errs in relying on *Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 73 L. Ed. 2d 896, 102 S. Ct. 3187 (1982)*. There, the Court also specifically stated it did not reach the issue of the constitutionality of "race-conscious student assignments for the purpose of achieving integration, even absent a finding of prior *de jure* segregation." *Id. at 472 n.15*.

[**131]

[*1209] In the absence of deference to the District's sociological evidence, the faults of the District's asserted interest come into sharper focus. It has none of the saving graces present in the *Grutter* holistic diversity interest. It perpetuates racial stereotypes and risks fomenting racial hostility. Last, the District enforces the interest through government compulsion in the starkest black and white terms, espousing the principle that race trumps the individual.

The sociological evidence presented by the District suggests that *some* benefits will accrue from racial balancing. To me, evidence of *some* benefits does not satisfy the District's burden of proving a compelling governmental interest, especially in light of the Supreme Court's frequent pronouncements that racial balancing itself is unconstitutional. Thus, viewed under the lens of strict scrutiny, and without the deference invoked in *Grutter*, the District's interest is simply not a compelling governmental interest. Hence, I would hold that the District's operation of the racial tiebreaker is an impermissible racial classification and violates the *Equal Protection Clause*.

IV.

Even if the District's asserted [**132] interest were a compelling governmental interest, the means used by the District must still be narrowly tailored to serve that interest. *See Grutter, 539 U.S. at 333*. For argument's sake, I here assume, without conceding, the District has asserted a valid compelling governmental interest in using racial balancing to achieve "the educational and social benefits of racial . . . diversity" within its high schools and to avoid "racially concentrated" schools. Yet even under that assumption, the District's use of the racial tiebreaker is not narrowly tailored to serve that interest.

The majority notes that *Grutter* set forth "five hallmarks of a narrowly tailored affirmative action plan: (1) individualized consideration of applicants; (2) the absence of quotas; (3) serious, good-faith consideration of race-neutral alternatives to the affirmative action 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." Majority op. at 36. I agree with that general formulation. Yet the majority's application of those factors again evinces an improper deference to the District; such deference is [**133] ill suited for the searching inquiry needed under the narrow-tailoring prong of strict scrutiny. *See Johnson, 125 S. Ct. at 1146 n.1*. I consider below whether the District's use of the racial tiebreaker is narrowly tailored to its asserted interest, and conclude that racial tiebreaker is *not* narrowly tailored.

[*1210] A.

The first narrow-tailoring factor requires the District to engage in an individualized consideration of each applicant's characteristics and qualifications. *See Grutter, 539 U.S. at 337*. The importance of this factor is self-evident; individualized consideration serves the primary purpose of the *Equal Protection Clause*, which protects the individual from group classifications, especially those by race. *See id. at 326*.

Yet the majority concludes that individualized consideration of each applicant is irrelevant here "because of the contextual differences between institutions of higher learning and public high schools." Majority op. at 36. I could not disagree more. n18 By removing consideration of the individual from the narrow tailoring analysis, the majority threatens to read the *Equal Protection Clause* out of the [**134] Constitution. It is the very nature of equal protection to require individualized consideration when the government uses racial classifications: "the *Fourteenth Amendment* "protects *persons*, not *groups*." *Grutter, 539 U.S. at 326* (quoting *Adarand, 515 U.S. at 227*) (emphasis in original). *Grutter* emphasized the importance of the individualized consideration of each applicant: 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. *The importance of this individualized consideration in the context of a race-conscious admissions program is paramount.*

Id. at 337 (emphasis added). The differences between university and secondary education do not justify denial of individualized equal protection of the law to secondary school students.

> n18 *See supra* pp.13-14 n.12 (explaining why the talismanic use of "context" can not alter the fact of racial discrimination).

[**135]

Individualized consideration of an applicant does not require an admissions program to be oblivious 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." *Id. at 334*. 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." *Id. at 337*.

Here, the racial tiebreaker works to admit or exclude high school students from certain oversubscribed schools solely on the basis of their skin color. No other consideration affects the operation of the racial tiebreaker; when it operates, it operates to admit or exclude either a white or nonwhite student, depending upon how the admission will affect the preferred balance at the oversubscribed school. Such a program is precisely what *Grutter* warned against, and what *Gratz* held unconstitutional: [**136] a mechanical, predetermined policy "of automatic acceptance or rejection based on a[] single 'soft' variable," that being the student's skin color.

See id.

The racial tiebreaker's overbroad classification of students as "white" or "nonwhite" also runs counter to the required individualized consideration of each applicant. The District does not even consider the student's actual race. Instead, the [*1211] District presumably places all Caucasian students into the "white" category, and then places all African-American, Latino, Asian-American, Pacific Islander and Native Americans into the "nonwhite" category. This puts aside the categorization of any individuals whose skin color does not correlate directly with the classifications. Although parents and students may identify their particular group on the registration materials, if they do not, the District will make the racial identification itself through visual inspection of the parent or student. Thus, a fair-skinned minority may wind up in the "white" category, or a darker-skinned Caucasian may wind up in the "nonwhite" category.

Courts have often recognized that the inclusion of all minorities within a "nonwhite" classification [**137] suggests the operation of a racial classification is not narrowly tailored. *See Wygant, 476 U.S. at 284 n.13* (noting the "definition of minority to include blacks, Orientals, American Indians, and persons of Spanish descent further illustrates the undifferentiated nature of the plan"); *Monterey Mech. Co., 125 F.3d at 714* (noting the inclusion of all minority races within a broad "minority" category serves as a "red flag[] signaling that the statute is not, as the *Equal Protection Clause* requires, narrowly tailored"). At the very least, a narrowly tailored program would require an individualized focus which would separate the student according to his or her correct race, rather than as a process of simple pigmental matching.

The majority concludes, however, that individualized consideration of each applicant is unnecessary because the District does not exclude any student from a public education by operation of the racial tiebreaker. The majority reasons that because all students are entitled to a public education in one of the District's schools, there is no competition in the District for admission to any of those schools, and thus no racial [**138] stigma could attach when a student is excluded from admission to one of the schools on the basis of his race. Majority op. at 37-39.

Yet the majority offers no explanation why, in the 2000-01 school year, 82% of the students selected one of the oversubscribed schools (*i.e.*, the schools subject to the racial tiebreaker) as their first choice, while only 18% picked one of the undersubscribed schools as their first choice. Majority op. at 10-11. Clearly, the students' and their parents' "market" appraise some of the schools as providing a better education than the others. Even the District's superintendent confirmed that the students' parents considered some of the schools to be of higher quality. [ER 534.]

It is common sense that some public schools are better than others. Parents often move into areas offering better school districts, and ubiquitous research guides compare the quality of public schools according to standardized test scores, program offerings, and the sort. It may be that soothing, if self-interested, bureaucratic voices sing a lullaby of equal educational quality in the District's schools. But the facts show that parents and children have voted with their feet [**139] in choosing some schools rather than others. The verdict of that "market" makes a hash out of such assurances by the District.

Thus, the District's operation of the racial tiebreaker in reality does limit access to a governmental benefit among certain students. The District insulates applicants belonging to certain racial groups from competition for admission to those schools perceived to be of higher quality. A narrowly tailored race-conscious admissions program "cannot insulate each category of applicants with certain desired [racial] qualifications from competition with all other applicants." *Grutter, 539 U.S. at* [*1212] *334.* The racial tiebreaker fails that test.

Yet the majority insist that because the District seeks to avoid racially concentrated schools, "the District's tiebreaker must necessarily focus on the race of its students." Majority op. at 42-43. Again, the majority misses the crucial protection provided by the *Equal Protection Clause.* The District's narrow-tailoring obligation does not prohibit it from considering race; it just cannot consider *only* race. The constitutional guarantee of equal protection requires the District to focus upon the individual's [**140] whole make up, rather than just a group's skin color; this protects *each* student's right to equal protection under the law. *See Grutter, 539 U.S. at 326.*

The counter-argument, of course, is that administrative inconveniences would prohibit the District from examining each student's file for individual characteristics, of which race may be a part. To the contrary, the record shows such an effort is certainly feasible.

First, thirteen-or fourteen-year-old students n19 are not so young that they have not yet developed unique traits to set themselves apart from other students and add greater diversity to the student body. The students's race is a factor in assessing the student as an individual, but the student may also speak English as a second language, come from a different socioeconomic stratum than other students, have overcome adversity, be a talented baseball player, musician, or have participated in community service.

> n19 As noted, the District applies the racial tiebreaker only to entering ninth-grade students (presumably around thirteen to fourteen years old).

[**141]

Second, as noted by the majority, in the 2000-01 school year, approximately 3,000 students entered the District's high schools as ninth graders. Ten percent of those students were subject to the racial tiebreaker. Majority op. at 13. 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. n20

> n20 Three hundred applications seem like only a minor administrative challenge, but the Supreme Court's admonition bears repeating nonetheless: "The fact that the implementation of a program capable of providing individualized consideration might present administrative challenges does not render constitutional an otherwise problematic system." *Gratz, 539 U.S. at 275.*

Thus, rather than providing an individualized consideration [**142] of applicants, the District is engaged in a "*de jure* [policy] of automatic acceptance or rejection based on a[] single 'soft' variable." *See Grutter, 539 U.S. at 337.* Such inflexibility shows the racial tiebreaker

is not "narrowly tailored to any goal, except perhaps outright racial balancing." *See Croson, 488 U.S. at 507* (plurality).

B.

The second narrow-tailoring factor prohibits the use of quotas based upon race. *Grutter, 539 U.S. at 334.* 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." *Id. at 335* (internal quotation marks and citations omitted).

[*1213] Here, when a 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) n21 of the preferred 40% white/60% nonwhite ratio -- the District uses the racial tiebreaker to admit students whose presence will move the overall student body closer [**143] to the preferred ratio. Using the 2000-2001 school year as an example, the District would employ the racial tiebreaker to exclude white students and admit nonwhite students where the white student body population exceeded 50%. The District would also employ the racial tiebreaker to exclude nonwhite students and admit white students where the nonwhite student body population in a particular school exceeded 70%.

n21 In 2000-01, the District used a 10 deviation trigger, but increased the trigger to 15 for the 2001-02 school year.

By its nature, the tiebreaker aims for a rigid, predetermined ratio of white and nonwhite students, and thus operates to reach "a fixed number or percentage." (emphasis supplied). *Gratz* specifically rejected such a plan as not narrowly tailored. *See 539 U.S. at 270* ("The University's policy, which automatically distributes [20%] . . . of the points needed to guarantee admission, to every single 'underrepresented minority' applicant solely because of race, is [**144] not narrowly tailored . . . ."); *id. at 271-72* ("The only consideration that accompanies this distribution of points is a factual review of an application to determine whether an individual is a member of one of these minority groups.").

Yet the majority argues no quota exists here because the racial tiebreaker "does not set aside a fixed number of slots for nonwhite or white students," nor is the 10 or 15% variance always satisfied (generally because there are insufficient numbers of white or nonwhite students needed to balance the school). Majority op. at 46. n22 With respect, the majority misses the point. A quota does not become less of a quota because there are an insufficient number of whites or nonwhites to fill the preselected spots. The District created a quota when it established the 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 [**145] "goal," such a

> 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.

[*1214] *Bakke, 438 U.S. at 289 (Powell, J.).*

n22 Although the majority concludes a quota does not exist here, it also concludes "the rationale underlying the . . . prohibition of quotas does not apply" here. Majority op. at 45 n.27. The majority reasons that because there is no competition in assignment to the District's schools, the dangers presented by a quota -- *i.e.*, insulating applicants from competition on the basis of race -- are absent here. Majority op. at 45 n.27. But saying it does not make it so, whether it is said by the District or by the majority. As explained above, there is clearly a "market" for higher quality schools in the District, and there is competition for the schools the parents and students view to be the better schools.

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The majority makes a further attempt to avoid *Grutter*'s admonition against quotas by attempting to classify the District's predetermined ratio as a "critical mass." The District's preferred ratio could not be further from the definition of a "critical mass." *Grutter* recognized that a "critical mass" had no quantified definition; instead, it was generally referred to as "meaningful num-

bers" or "meaningful representation" of minorities. *539 U.S. at 318*. The Court expressly stated that a "critical mass" was not a means "simply to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin." *Id. at 329* (internal quotation marks omitted).

But unlike the unquantified "critical mass" from *Grutter*, the District's preferred ratio is firmly set at 40% white, 60% nonwhite. When the 15% deviation trigger is used with the racial tiebreaker, the District seeks to enroll between 75% and 45% nonwhite students and 25% to 55% of white students. The District's admissions plan clearly seeks to assure a specified percentage of white or nonwhite students in its schools; rather than seeking a "critical [**147] mass," the District instead seeks racial balance. Thus, the District's operation of the racial tiebreaker fails this factor as well.

C.

The third narrow-tailoring factor requires the District to have engaged in a "serious, good-faith consideration of workable race-neutral alternatives." *See id. at 339*. The majority concludes the District made such an effort. Majority op. at 54-55. For several reasons, I disagree.

First, the District's superintendent flatly admitted the District did not engage in a serious, good-faith consideration of race-neutral alternatives. When asked whether the District "gave any serious consideration to the adoption of a plan for the assignment of high school students that did not use racial balancing as a factor or goal," the District's superintendent stated: "I think the general answer to that question is no . . . I don't remember a significant body of work being done. I mean it's possible informally ideas were floated here or there, but I don't remember any significant staff work being done." [ER 521.]

The record supports this concession. The District never asked its demographer to conduct any analysis regarding the effect of using a [**148] race-neutral lottery. [ER 483.] The District also never asked its demographer to conduct any analysis regarding a diversity program with non-racial indicia such as a student's eligibility for free lunch or the students's socioeconomic background. n23 [ER 481-82.]

n23 The majority makes the conclusory statement that the District's "white/nonwhite distinction is narrowly tailored to prioritize movement of students from the north of the city to the south of the city and vice versa" as an effort to combat Seattle's racially imbalanced residential patterns. Majority op. at 54. Yet the District's attempt to balance students from north Seattle and south Seattle strongly suggests a less-restrictive, race-neutral approach to achieve such balancing: socioeconomic balancing. As the majority notes, the northern Seattle area contains a majority of "white" students and is "historically more affluent." Majority op. at 3. This would mean the southern Seattle area is less affluent. Thus, moving more affluent students south, and less affluent students north, could possibly provide a more diverse student body. At the very least, serious consideration would have been warranted into this race-neutral alternative. *See Levine, supra, at 536* (noting the key element to successfully integrating students of different backgrounds and race is not racial balance, but "economic integration").

Yet the majority accepts the District's rejection of the use of socioeconomic factors, reasoning that "although there was no formal study of the proposal by District staff, Board members' testimony revealed two legitimate reasons" for rejecting the socioeconomic alternative: (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. Majority op. at 56. Such analysis seems far from the "serious, good-faith consideration of workable race-neutral alternatives" demanded by *Grutter*. *See 539 U.S. at 339*. First, without formal studies (or indeed any earnest consideration of the alternatives), we have no way of knowing whether the District actually seriously considered, and rejected for valid reasons, less-restrictive race-neutral alternatives. In *Croson*, the Court emphasized the importance of a satisfactory record to determine whether race-neutral alternatives were considered. *See Croson, 488 U.S. at 498-511* (plurality) (detailing the government actor's failure to document the basis for its use of a racial quota and stressing the need to do so). Second, the majority's insistence that the District's consideration of poverty would be "insulting" ignores the demeaning -- and indeed, constitutionally objectionable -- effect of placing persons into groups solely by their skin color for the purpose of receiving or being denied a governmental benefit. *See Loving v. Virginia, 388 U.S. 1, 11, 18 L. Ed. 2d 1010, 87 S. Ct. 1817 (1967)* ("This Court has consistently repudiated distinctions between citizens solely because of their ancestry as being odious to a free people whose institutions are founded upon the doctrine of equality."). Even if a sole focus on poverty might be insulting to some minorities, socioeconomic con-

siderations need not inquire only into poverty status; eligibility for free lunch, the parents' levels of education, or whether English is a second language for the child are also relevant determinations in evaluating diversity. Third, there is no reason students would have to reveal their socioeconomic status to their peers; the District could, of course, keep such information confidential.

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[*1215] Also, in 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, avocational and vocational magnet programs." 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." n24

n24 Similar race-neutral alternatives are common throughout the United States. For example, the San Francisco, 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 "Diversity Index" handles further assignments. "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." David I. Levine, *Public School Assignment Methods after Grutter and Gratz: The View from San Francisco, 30 HASTINGS CONST. L.Q. 511, 528-31 (2003).* Notably, the San Francisco system "does not use race as an express criterion for school assignments" and thus avoids the sharp focus of strict scrutiny. *Id. at 531.*

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Despite the majority's assertion, the record suggests the District did not seriously consider this plan. The District did not ask its demographer to conduct any analysis as to the effect or workability of the plan [ER 504]; one District board member stated [*1216] the District "didn't deal with" the plan [ER 514]; another board member stated the District didn't consider the plan [ER 643]; and last, another board member stated he refused to read the proposal because he would "rather play with my bass lunker fishing game." [ER 573.]

Of course, "narrow tailoring does not require exhaustion of every conceivable race-neutral alternative," *Grutter, 539 U.S. at 339*, but it does require an earnest, good-faith consideration of the alternatives. Here, the District made no such attempt, and thus the District's use of the racial tiebreaker fails this narrow-tailoring factor. n25

n25 In assessing whether the District seriously considered race-neutral alternatives, the majority applies deference to the District's consideration (or lack thereof) and rejection of the various alternatives. Majority op. at 55 n.33. With respect, the majority errs in two respects. First, as previously noted, deference to local officials' use of race is generally barred in the application of strict scrutiny. *See Johnson, 125 S. Ct. at 1146 n.1.* Second, if the majority is attempting to apply the deference invoked in *Grutter*, the Court there applied deference in determining whether the Law School asserted a compelling governmental interest, not whether the means used to achieve that interest were narrowly tailored. *See 539 U.S. at 328* ("The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer.").

The pattern now established by the majority seems suspicious. Out of five narrow-tailoring factors, the majority has concluded two are inapplicable, and now a third is entitled to deference. I find it difficult to understand how such analysis could truly be considered strict scrutiny as to the narrowing requirement.

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D.

The fourth narrow-tailoring factor requires that the District's use of the racial tiebreaker "must not unduly burden individuals who are not members of the favored racial and ethnic groups." *See Grutter, 539 U.S. at 341.* The majority adjusts this test slightly to consider "any racial group," rather than just members of the disfavored

group. Majority op. at 35. Because the racial tiebreaker disadvantages both white and nonwhite children, I agree that the modification is valid. But unlike the majority, I conclude the District's operation of the racial tiebreaker fails this factor as well.

The racial tiebreaker unduly burdens thirteen- and fourteen-year-old school children by (1) depriving them of their choice of school, and (2) imposing on them tedious cross-town commutes, solely upon the basis of their race.

First, as recognized above, the "good" schools in Seattle are a limited government benefit. Thus, the racial tiebreaker burdens white or nonwhite students, and often deprives them of the opportunity to enroll at what are considered the better schools, solely on the basis of race.

Second, the children of plaintiff members Jill Kurfurst and Winnie Bachwitz [**152] were denied admission to Ballard High School based on their race and instead were forced to attend Ingraham, a school on the other side of Seattle from their home. To attend that school, the two white students faced a daily multi-bus round-trip commute of over four hours. The parents instead enrolled their children in private schools. Those children were not only deprived of the school of their choice, they were effectively denied a public education (surely at much lower cost than private tuition), based on nothing but their race.

A look at the operation of the tiebreaker provides further evidence of the injury the District inflicts on both white *and* nonwhite students. As noted by the majority, [*1217] in the 2000-01 school year, 89 more white students were assigned to Franklin than would have occurred absent the tiebreaker; 107 more nonwhite students were admitted to Ballard; 82 more nonwhite students were admitted to Roosevelt; and Twenty-seven more nonwhite students were admitted to Nathan Hale. Majority op. at 12-13. To place the racial tiebreaker into proper perspective, in the 2000-01 school year, 89 *nonwhite, minority* students were denied admission to Franklin, and had [**153] to attend what to them was a less desirable school, solely because of their skin color. One hundred-seven *white* students were denied admission to Ballard, and had to attend what to them was a less desirable school, solely because of their skin color. Eighty-two *white* students were denied admission to Roosevelt, and had to attend what to them was a less desirable school, solely because of their skin color. Twenty-seven *white* students were denied admission to Nathan Hale, and had to attend what to them was a less desirable school, solely because of their skin color.

Yet the majority discounts the burdens imposed by the racial tiebreaker, concluding that (1) the "minimal burden" of the tiebreaker is shared equally among white and nonwhite students; (2) no student is entitled to attend any specific school in any event; and (3) the tiebreaker does not uniformly benefit one race over the other because the tiebreaker operates against both whites and nonwhites. Majority op. at 63-64. Regarding the first point, the U.S. Supreme Court has long rejected the notion that a racial classification which burdens races equally is any less objectionable under the *Equal Protection Clause.* [**154] In *Loving v. Virginia, 388 U.S. 1, 18 L. Ed. 2d 1010, 87 S. Ct. 1817 (1967)*, the U.S. Supreme Court held a Virginia statute criminalizing interracial marriages was unconstitutional under the *Equal Protection Clause. Id. at 12.* The Court rejected the state's argument that the miscegenation statute did not discriminate on the basis of race because it "punished equally both the white and the Negro participants in an interracial marriage." *Id. at 8.* The Court reasoned: "In the case at bar . . . we deal with statutes containing racial classifications, and the fact of equal application does not immunize the statute from the very heavy burden of justification which the *Fourteenth Amendment* has traditionally required of state statutes drawn according to race." *Id. at 9.* Hence, it is irrelevant whether the racial tiebreaker disadvantages both races equally.

Second, I think I have already disposed of the majority's argument that no student is entitled to attend any specific District school. The students and parents clearly value some of the District's schools above the others, and limiting access to those higher quality schools on the basis [**155] of race is just the same as any other preferential racial classification.

Third, I agree the tiebreaker does not uniformly benefit one race over the other and can exclude both white and nonwhite students from the preferred schools. Yet that does not lessen the injury of being subject to a racial classification. Equal protection is an individual right, and whenever the District tells one student, whether white or nonwhite, he or she cannot attend a particular school on the basis of race, that action works an injury of constitutional proportion. *See Adarand, 515 U.S. at 230* ("Any individual suffers an injury when he or she is disadvantaged by the government because of his or her race, whatever that race may be."); *Monterey Mech. Co., 125 F.3d at 712* ("Race discrimination is never a 'trifle.'").

The District's use of the racial tiebreaker thus unduly burdens members of the disfavored class, and the tiebreaker fails this narrow-tailoring factor as well.

[*1218] E.

The fifth and final narrow-tailoring factor requires the District's use of the racial tiebreaker to "be limited in time," and "have a logical end point." *See Grutter, 539 U.S. at 342.* [**156] 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.

Id. at 341-42 (internal quotation marks and alterations omitted).

Citing *Grutter*, the majority contends the racial tiebreaker satisfies this factor because "this durational requirement can be met by periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity," and the District engages in such periodic reviews. Majority op. at 65. Yet citing *Grutter* in full shows that "the durational requirement can be met by sunset provisions in race-conscious admissions policies *and* periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity." *539 U.S. at 342* [**157] (emphasis added). Periodic reviews are not enough; there must be some "durational requirement," some "logical end point," to the racial classifications.

The District argued the end point is in the "thermostat" to the tiebreaker, in which the District ceases to use the racial tiebreaker at any school for the year once its use had brought the school into racial balance. Yet it is undisputed that the District has never been segregated by law; the racial imbalance in its schools results from Seattle's racially imbalanced housing patterns. If Seattle's children were simply assigned to the high schools nearest their homes, those schools supposedly would tend to reflect such imbalance.

Because there is no reason -- much less *evidence* -- to conclude Seattle's housing patterns will change, or that the District's student assignment program will affect such patterns, I must respectfully disagree that such a provision satisfies the "sunset provision" requirement enunciated in *Grutter*. Presumably, where the District employs the racial tiebreaker, the schools will become racially balanced, that is 40% white, 60% nonwhite (plus or minus a few percentage points, depending on the particular [**158] percentage deviation triggering the tiebreaker that year). Pursuant to the "thermostat," the District would then stop using the racial tiebreaker. But because Seattle's residential makeup is racially imbalanced n26 (and remains so despite the use of the racial tiebreaker), assignment to the oversubscribed schools would then occur only with use of (1) the sibling tiebreaker; and (2) the distance tiebreaker. Assuming that not every student also has a sibling attending one of the District's schools, the schools will inevitably become racially imbalanced again because of the racially imbalanced residential makeup, thus rendering the thermostat useless as a "sunset provision."

> n26 About 70 of the residents of Seattle, Washington are white, and 30 of the residents are nonwhite. Sixty-six percent of white students live in the northern part of Seattle, while 75 of nonwhite students live in the southern part of Seattle.

One could argue, then, that this result supports the need for use of the racial tiebreaker. Not necessarily [**159] so. If the racial imbalance in the schools is caused [*1219] not by the students, but by the choices of the parents as to where to live, then why not put the onus of remedying that imbalance on the parents rather than the students? Seattle's city council could create "incentives" for whites to move into nonwhite areas, and for nonwhites to move into white areas. And if incentives do not accomplish the task, well, why not use compulsion, as the District does to high school children? The city council could take measures to prevent new persons taking up residence in Seattle from living in areas where their presence might otherwise alter the sought-after racial balance. This would protect the racial balance within the schools and squarely put the burden of remedying the racial imbalance upon the parents, rather than the students.

Of course, less political resistance can be expected from choosing students for social engineering experiments in racial balancing, than in telling everyone -- including voters -- into which neighborhood they can move. Further, regulation of residence by race might run afoul of *Shelley v. Kraemer, 334 U.S. 1, 92 L. Ed. 1161, 68 S. Ct. 836 (1948)*, although it is difficult [**160] to distinguish why the "compelling interest" of socialization among the races could not as easily be pressed in housing regulation as it is in schooling regulation.

The simple truth is that some people choose to live near members of their own ethnic or racial group.

> There is no denying that American blacks often live in their own residential enclaves, especially in our big cities. But the

same is true of whites and of every other racial and ethnic group -- Jews, Chinese, Cambodians, Cubans, Arabs. Such racial and ethnic clustering means that a third of non-Asian minorities attend schools that are less than 10-percent white. And even though whites constitute just over 60 percent of the nation's schoolchildren, the average white student goes to a school that is 80-percent white.

But why should we expect identical proportions of blacks and whites to live in each and every neighborhood? People like to live near others with whom they identify, and the schools mirror their choices. When asked about their residential preferences, only about 5 percent of blacks said they wished to live on an entirely or almost entirely white block. The vast majority preferred neighborhoods that were [**161] half or more than half African-American -- in other words, neighborhoods in which the black concentration was "disproportionately" high. According to the 2000 census, this happens to correspond closely to the actual distribution of black city-dwellers.

In a complex, heterogenous society, it is only natural that people should sort themselves out in urban space along lines of race as well as of religion and social class. This pattern was firmly established in the U.S. by the European immigrants who landed in the cities of the North in the 19th and early 20th centuries. The sociologists who studied these settlements recognized the important social functions served by "Little Italies" and "Poletowns.

Abigail Thernstrom n27 & Stephan Thernstrom, *Have We Overcome?*, Commentary, Nov. 2004, at 51-52. n28

n27 Mrs. Thernstrom is presently the Vice Chair of the U.S. Commission on Civil Rights.

n28 Further evidence that such self-selection results is submitted by this year's Nobel Laureate, Thomas C. Schelling, by application of game theory in chapter four of his book Micromotives and Macrobehavior (1978). Schelling employs an exercise using coins to demonstrate how an integrated neighborhood can become largely segregated as long as each resident desires at least one third of his or her neighbors to be of his or her race. When one person moves to get a preferred set of neighbors, it causes a chain reaction which settles down only when the neighborhood is effectively segregated.

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Of course, the continuing racial imbalance in some residential areas is in significant [*1220] part a byproduct of past efforts to exclude minority groups from predominately white areas. Yet as racial tolerance and enforcement of civil rights laws have increased, neighborhoods are becoming more racially balanced. *Id.* In 1960, 15% of African-Americans lived in suburbs. In 2004, 36% live in suburbs. *Id.* African-Americans account for 9% of the total suburban population, "surprisingly close to proportionality for a group that constitutes only 12 percent of the American population." *Id.* Moreover, from 1960 to 2000, the proportions of African-American living in census tracts that were over 80% black fell from 47% to under 30%. *Id.* During that same period, the proportion residing in census tracts that were over 50% black fell from 70% to 50%. *Id.* Most importantly, this balancing takes place without any government coercion, except perhaps by the enforcement of fair housing laws which prevent racial discrimination such as California's Unruh Civil Rights Act, *CAL. CIV. CODE § 51* (West 2001).

> No one who understands what makes America great can quarrel [**163] with ethnic pride. At home, on the weekend, in the family and the neighborhood, Jews will be Jews, Italians Italian - and there is no reason blacks should be any different. Religion and ethnicity are essential parts of our lives, and government should not curtail how we express them in the private sphere. But when it comes to public life, even the benevolent color coding of recent decades has proved a recipe for alienation and resentment. Society need not be color-blind or color-less, but the law cannot work unless it is color-neutral, and the government should not be in the business of abetting or paying for the cultivation of group identity.

Schuck, supra, at 88 (quoting Tamar Jacoby, *Someone Else's House: America's Unfinished Struggle for Integration* 541 (1998)) (internal alteration omitted).

The racial imbalance in Seattle's schools results not from *de jure* segregation nor from any invidious exclusion of nonwhite minorities from the schools. Instead, it results from racially imbalanced residential housing patterns, an issue which the District does not even contend it can alter. Hence, the method chosen by the District to impose racially balanced schools is [**164] fatally flawed. Because it does not respond to the racial imbalances in Seattle's residential makeup, and instead only attempts to fix it within the schools, there will be no sunset to the use of the racial tiebreaker. *See Grutter, 539 U.S. at 343* ("It would be a sad day indeed were America to become a quota-ridden society, with each identifiable minority assigned proportional representation in every desirable walk of life. But that is not the rationale for programs of preferential treatment; the acid test of their justification will be their efficacy in eliminating the need for any racial or ethnic preferences at all."). Thus, the District's operation of the racial tiebreaker fails this factor as well.

V.

As pointed out in the majority opinion, other courts have concluded that a school district's use of a racial tiebreaker in search of racial balance in the student body passes muster under the *Equal Protection Clause*. n29 I respectfully disagree. [*1221] The District's use of the racial tiebreaker to achieve racial balance in its high schools infringes upon each student's right to equal protection and tramples upon the unique and valuable nature of each individual. We are [**165] not different because of our skin color; we are different because each one of us is unique. That uniqueness incorporates our opinions, our background, our religion (or lack thereof), our thought, *and* our color. *Grutter* attempted to strike a balance between the individual protections of equal protection and being conscious of race even when looking at the individual. The District's use of the racial tiebreaker, however, attempts no such balance; it instead classifies each ninth-grade student solely by race. Because of that, I must conclude such a program violates the *Equal Protection Clause*.

n29 *Cf. Comfort v. Lynn Sch. Comm., 418 F.3d 1, 2005 WL 1404464, at *1 (1st Cir. 2005)* (en banc) (holding a public high school district had a compelling interest, in the absence of *de jure* segregation, in using race-based assignments to "secure the educational benefits of racial diversity," and the means used to serve that interest were narrowly tailored); *McFarland v. Jefferson County Pub. Sch., 330 F. Supp. 2d 834, 850 (W.D. Ky. 2004)* (holding a public high school district had a compelling interest in using race-based assignments to maintain racially integrated schools, and the means used to serve that interest were narrowly tailored), *aff'd, 416 F.3d 513, 2005 WL 1693700 (6th Cir. 2005)*; *Brewer v. W. Irondequoit Central Sch. Dist., 212 F.3d 738, 752 (2d Cir. 2000)* (holding a public middle school district had a compelling interest, in the absence of *de jure* segregation, in using race-based assignments to reduce "racial isolation" in its schools).

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The majority's decision risks unfortunate repercussions. On the short-term, the specter of "white flight" (a recurring issue in the aftermath of the elimination of *de jure* desegregation) manifests itself here. The racial balancing of students will require busing and long-distance transportation to schools outside of some students' neighborhoods. Parental involvement in those distant schools (such as with the PTA) will undoubtedly decrease. Parents who can afford private education (such as those in the more affluent northern part of Seattle) may very well choose to pull their children from the District schools and enroll them elsewhere, much like the Kurfurst and Bachwitz children. On the long-term, such an exodus could result in a decreased tax base and public support for the District schools and may result in the exact opposite the District hopes to achieve-a loss of white students from their school campuses.

One of the greatest stains upon the history of our country is our struggle with race discrimination. Perhaps that stain would not be so deep had we chosen a different approach to our equal protection jurisprudence, an approach often- quoted:

> Our Constitution is [**167] color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.

Plessy v. Ferguson, 163 U.S. 537, 559, 41 L. Ed. 256, 16 S. Ct. 1138 (1896) (Harlan, J., dissenting).

Or, as more recently said by the late Justice Stanley Mosk of the California Supreme Court:

> Racism will never disappear by employing devices of classifying people and of thus measuring their rights. Rather, wrote Professor Van Alstyne, 'one gets beyond racism by getting beyond it now: by a complete, resolute, and credible commitment never to tolerate in one's own life or in the life or practices of one's government the differential treatment of other human beings by race. Indeed, that is the great lesson for government itself to teach: in all we do in [*1222] life, whatever we do in life, to treat any person less well than another or to favor any more than another for being black or white or brown or red, is wrong. Let that be our [**168] fundamental law and we shall have a Constitution universally worth expounding.'

Price v. Civil Serv. Comm., 26 Cal. 3d 257, 604 P.2d 1365, 1391, 161 Cal. Rptr. 475 (Cal. 1980) (Mosk, J., dissenting) (quoting William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775, 809-10 (1979)).

The way to end racial discrimination is to stop discriminating by race.

For the reasons expressed above, I respectfully dissent and would reverse the judgment of the district court, holding the District's use of the racial tiebreaker in its high school admissions program violates the equal protection rights of each student excluded from a particular school solely on the basis of that student's race.

LEXSEE 395 F.3D 1168

PARENTS INVOLVED IN COMMUNITY SCHOOLS, a Washington nonprofit corporation, Plaintiff-counter-defendant-Appellant, v. SEATTLE SCHOOL DISTRICT, NO. 1, a political subdivision of the State of Washington; JOSEPH OLCHEFSKE, in his official capacity as superintendent; BARBARA SCHAAD-LAMPHERE, in her official capacity as President of the Board of Directors of Seattle Public Schools; DONALD NEILSON, in his official capacity as Vice President of the Board of Directors of Seattle Public Schools; STEVEN BROWN; JAN KUMASAKA; MICHAEL PRESTON; NANCY WALDMAN, in their official capacities as members of the board of Directors, Defendants-counter-claimants-Appellees.

No. 01-35450

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

395 F.3d 1168; 2005 U.S. App. LEXIS 1554

February 1, 2005, Filed

PRIOR HISTORY: [**1] D.C. No. CV-00-01205-BJR. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1, 377 F.3d 949, 2004 U.S. App. LEXIS 15451 (9th Cir. Wash., 2004)*

JUDGES: Before: SCHROEDER, Chief Judge.

OPINION:

[*1168] ORDER

Upon the vote of a majority of nonrecused regular active judges of this court n1, it is ordered that this case be reheard by the en banc court pursuant to *Circuit Rule 35-3*. The three-judge panel opinion shall not be cited as precedent by or to this court or any district court of the Ninth Circuit, except to the extent adopted by the en banc court.

n1 Judges McKeown and Gould are recused.

LEXSEE 377 F.3D 949

PARENTS INVOLVED IN COMMUNITY SCHOOLS, a Washington nonprofit corporation, Plaintiff-Counter-Defendant-Appellant, v. SEATTLE SCHOOL DISTRICT, NO. 1, a political subdivision of the State of Washington; JOSEPH OLCHEFSKE, in his official capacity as superintendent; BARBARA SCHAAD-LAMPHERE, in her official capacity as President of the Board of Directors of Seattle Public Schools; DONALD NIELSEN, in his official capacity as Vice President of the Board of Directors of Seattle Public Schools; STEVEN BROWN; JAN KUMASAKA; MICHAEL PRESTON; NANCY WALDMAN, in their official capacities as members of the Board of Directors, Defendants-Counter-Claimants-Appellees.

No. 01-35450

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

377 F.3d 949; 2004 U.S. App. LEXIS 15451

December 4, 2001, Argued and Submitted, Seattle, Washington, Reargued and Resubmitted December 15, 2003, Portland, Oregon
July 27, 2004, Filed

SUBSEQUENT HISTORY: [**1] Opinion Filed April 16, 2002, Opinion Withdrawn and Question Certified June 17, 2002, Certificate of Finality Received September 8, 2003. Rehearing granted by, Vacated by *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1, 395 F.3d 1168, 2005 U.S. App. LEXIS 1554 (9th Cir., 2005)* Different results reached on rehearing at *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1, 2005 U.S. App. LEXIS 22515 (9th Cir. Wash., Oct. 20, 2005)*

PRIOR HISTORY: Appeal from the United States District Court for the Western District of Washington. D.C. No. CV-00-01205-BJR. Barbara Jacobs Rothstein, District Judge, Presiding. *Parents Involved in Cmty. Schs v. Seattle Sch. Dist. No. 1, 137 F. Supp. 2d 1224, 2001 U.S. Dist. LEXIS 4746 (W.D. Wash., 2001)*

DISPOSITION: Reversed and remanded with instructions.

COUNSEL: Daniel B. Ritter and Harry J.F. Korrell (argued), Davis Wright Tremaine LLP, Seattle, Washington, for the plaintiff-appellant.

Michael Madden (argued) and Carol Sue Janes, Bennett Bigelow & Leedom, P.S., Seattle, Washington, and Mark S. Green, Office of the General Counsel, Seattle School District No. 1, Seattle, Washington, for the defendant-appellees.

Sharon L. Browne, Pacific Legal Foundation, Sacramento, California, and Russell C. Brooks, Pacific Legal Foundation, Bellevue, Washington, for amici curiae Pacific Legal Foundation, American Civil Rights Institute, American Civil Rights Union, and Center for Equal Opportunity.

Paul J. Lawrence, Preston Gates & Ellis LLP, Seattle, Washington, for amicus curiae American Civil Liberties Union of Washington.

JUDGES: Before: Thomas M. Reavley, * Diarmuid F. O'Scannlain, and Susan P. Graber, Circuit Judges. Opinion by Judge [**2] O'Scannlain; Dissent by Judge Graber.

* The Honorable Thomas M. Reavley, Senior United States Circuit Judge for the Fifth Circuit, sitting by designation.

OPINIONBY: Diarmuid F. O'Scannlain

OPINION: [*953] O'SCANNLAIN, Circuit Judge:

Following the Washington Supreme Court's resolution of certified state-law questions, we must decide whether the use of race in determining which students will be admitted to oversubscribed high schools in Seattle, Washington violates the *federal Constitution's Equal Protection Clause*.

I

This opinion marks the fourth time a federal court has addressed the Seattle Public Schools' use of an explicit "racial tiebreaker" in choosing which student applicants it will admit to the City's most popular public high schools. *See Parents Involved in Cmty. Schs v. Seattle Sch. Dist. No. 1, 137 F. Supp. 2d 1224 (W.D. Wash. 2001) [Parents Involved I], rev'd, 285 F.3d 1236 (9th Cir. 2002) [Parents Involved II], withdrawn, 294 F.3d 1084 (9th Cir. 2002), certifying questions, 294 F.3d 1085 (9th Cir.* [*954] *2002) [Parents Involved III]*. We draw the following restatement of facts largely [**3] from *Parents Involved II*.

A

Seattle School District Number 1 (the "School District") operates ten public high schools: Ballard, Chief Sealth, Cleveland, Franklin, Garfield, Ingraham, Nathan Hale, Rainier Beach, Roosevelt, and West Seattle. Four of these (Ballard, Ingraham, Nathan Hale, and Roosevelt) are located north of downtown Seattle; of the remaining six, five (Chief Sealth, Cleveland, Franklin, Garfield, and Rainier Beach) are located south of downtown, and one (West Seattle) is located directly west of downtown.

These schools vary widely in quality, as measured by such factors as standardized test scores, n1 numbers of college preparatory and Advanced Placement (AP) courses offered and the availability of an Internal Baccalaureate (IB) program, percentages of students taking AP courses and SATs, percentages of graduates who attend college, *Seattle Times* college-preparedness rankings, University of Washington rankings, and disciplinary statistics. Moreover, some of the schools offer unique educational programs or opportunities not offered in other schools. n2

n1 For instance, year 2000 data indicates that the average combined score on the Scholastic Achievement Tests (SATs) at Garfield was 1208 -- some 154 points above the state average, -- while at Cleveland it was 838, some 216 points below the state average. Similarly, while just one-quarter of students at Roosevelt scored below the 25th percentile on the Iowa Tests of Educational Development, more than three-quarters of Rainier Beach students scored below the 25th percentile. [**4]

n2 For instance, Ballard High School offers a unique "Biotech Academy." Ballard describes its Biotech program as "[a] specialized learning program that brings together science, mathematics and language arts to prepare students for advanced study and a career in science." Ballard Biotech Academy Website <http://ballard.seattleschools.org/academics/academies/ biotech.html> (visited Mar. 24, 2004). The program has its own separate admissions procedure with required prerequisite classes. Admission to the program does not, however, guarantee admission to Ballard -- which is governed by the School District's open enrollment plan.

The School District has never been segregated by law. However, due to Seattle's racially imbalanced housing patterns, n3 if Seattle's children were simply assigned to the high schools nearest their homes, those schools would tend to reflect such imbalance. That is, the demographic profile of the individual high schools would not mirror the demographic makeup of the city's student population as a whole. n4 As part of its continuing efforts to prevent such imbalance [*955] and [**5] to promote racial diversity in its high schools, the School District has adopted an open choice plan instead of simply assigning students to the high schools nearest their homes. Pursuant to this system, each student may choose to attend any of the ten high schools in the city, so long as there is room available in that school.

n3 For graphic representations of the racial and ethnic dispersion within Seattle's population, interested readers may wish to consult the various thematic maps derived from year 2000 U.S. Census data and made available by the City of Seattle at: <http://www.cityofseattle.net/DCLU/demographics/data_census.asp> (visited March 29, 2004). They indicate that census tracts north of Seattle's downtown and those along the City's waterfronts tend to be predominantly white, while those south of downtown (and particularly in the City's southeast quadrant) tend to reflect more substantial non-white populations.

n4 Seattle's student population is approximately 40 percent white and 60 percent non-white. Splitting Seattle along a north-south axis, data introduced by the School District indicates that 74.2 percent of the District's Asian students, 83.6 percent of its black students, 65.0 percent of its Hispanic students, and 51.1 percent of its Native American students live in the southern half of the city. By contrast, 66.8 percent of the District's white student population lives in the northern half of the city. Overall, approximately 77.2 percent of students in the southern half of the

city, and just 35.7 percent of students in the northern half of the city, are non-white.

[**6]

The District's open choice plan provides for a multi-step application process. Each student is first asked to rank the high schools he or she would like to attend. If a student is not admitted to his or her first-choice school because that school is full, the School District attempts to assign him or her to his or her second-choice school, and so on. If a student is not admitted to any of his or her chosen schools, he or she receives a mandatory assignment to a school with available space.

Not surprisingly, a significant problem arises when a school becomes "oversubscribed" -- that is, when more students want to attend that school than there are spaces available. For the academic year 2000-01, five of the School District's high schools were oversubscribed and five were undersubscribed. n5 The magnitude of oversubscription during the 2000-01 school year underscores its problematic nature: Approximately 82 percent of students selected one of the oversubscribed high schools as their first choice, while only about 18 percent picked one of the undersubscribed high schools as their first choice.

n5 Oversubscription was apparently not tied to geographic location. The oversubscribed schools included three high schools north of downtown (Ballard, Nathan Hale, and Roosevelt) and two high schools south of downtown (Garfield and Franklin). The undersubscribed schools included one north of downtown (Ingraham), three south of downtown (Chief Sealth, Cleveland, and Rainier Beach), and one west of downtown (West Seattle).

[**7]

To resolve the dilemma of oversubscription, the School District's high school assignment plan uses a series of four "tiebreakers" to determine which students will be admitted to each oversubscribed school. The first tiebreaker gives a preference to students with siblings already attending the requested school. This tiebreaker accounts for somewhere between 15 percent and 20 percent of high school assignments. If a school is still oversubscribed after applying this first tiebreaker, the School District proceeds to a second tie-breaker, which is based entirely on race. For purposes of the racial tiebreaker, students are deemed to be of the race specified in their registration forms, which ask parents to identify their child's race. Because registration must be completed in person by a parent, if a parent declines to specify a racial category, the School District assigns the student a category based on a visual inspection of the parent (and, if present, the student) at the time of registration. It is this second -- racial -- tiebreaker that spawned the present suit.

Use of the racial tiebreaker is designed to balance the racial makeup of the city's public high schools. Accordingly, [**8] if an oversubscribed school's demographic profile deviates from the overall demography of Seattle's student population (approximately 40 percent white and 60 percent non-white) by more than a set number of percentage points, the School District designates that school "integration positive." The racial tiebreaker is then applied in the course of determining admissions to such schools, so that students whose race (coded by the School District simply as white or non-white) will push an integration positive school closer to the desired racial ratio are [*956] automatically admitted. n6 Thus, at Franklin (for instance), whites are admitted preferentially because they *are* white; and at Ballard, non-whites are admitted preferentially because they *are not* white. n7 Ultimately, the School District's use of this racial tiebreaker determines where about 10 percent of applicants will be admitted.

n6 During the 2000-01 school year, the acceptable deviation (called "the band") was fixed at +/- 10 percent. Thus, if an oversubscribed school had fewer than 31 percent or more than 51 percent white students, the tie-breaker would operate. Between the 2000-01 and 2001-02 school years -- while this litigation was pending -- the school board expanded the band to +/- 15 percent, meaning that the tiebreaker would operate only if an oversubscribed school had fewer than 26 percent or more than 56 percent white students. During the 2000-01 school year, four of the city's five oversubscribed schools were considered integration positive and therefore employed the tiebreaker: Ballard, Franklin, Nathan Hale, and Roosevelt. With the expansion of the band to +/- 15 percent prior to the 2001-02 school year, the tiebreaker ceased to operate at Roosevelt.

Two further changes were made to the program prior to the 2001-02 school year. First, a so-called "thermostat" was added to the plan: The School District would cease to use the racial tiebreaker for the year at any school once its use had brought the school into racial balance. Second, the integration tiebreaker would be used only in determining the makeup of entering ninth grade classes, but would not be applied to assignments involving the limited number of students seeking

to transfer high schools before the tenth, eleventh, or twelfth grades.

[**9]

n7 Of course, this also means that at Franklin, non-whites are denied admission because they *are not* white; and at Ballard, whites are denied admission because they *are* white.

Once all students of the preferred racial category are admitted to an oversubscribed high school, any remaining "ties" are broken by resort to a third variable: distance. Quite simply, applicants are admitted on the basis of the mileage between their homes and the school to which they seek admission, with those who live closest admitted first. Although a fourth tiebreaker exists -- a random lottery -- it rarely is invoked because distances are calculated to one hundredth of a mile for purposes of the preceding tiebreaker.

B

Parents Involved in Community Schools ("Parents") is "a nonprofit corporation formed by parents whose children have been or may be denied admission to the high schools of their choosing solely because of race." It commenced this legal action in July of 2000, contending that the School District's use of the racial tiebreaker for high school admissions is illegal under both state and federal [**10] law. Specifically, Parents alleged that by using race to decide who will be admitted to the oversubscribed high schools, the School District engages in illegal racial discrimination prohibited by the *Washington Civil Rights Act* ("Initiative 200"), n8 the *Equal Protection Clause of the Fourteenth Amendment*, n9 and *Title VI of the Civil Rights Act of 1964*. n10

n8 *Wash. Rev. Code § 49.60.400* ("The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.").

n9 *U.S. Const. amend. XIV, § 1* ("No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

n10 *42 U.S.C. § 2000d* ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."). Title VI has long been held to be essentially co-extensive with the guarantees of the *Equal Protection Clause of the Fourteenth Amendment* and the equal protection component of the *Fifth Amendment*. *See Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 287, 57 L. Ed. 2d 750, 98 S. Ct. 2733 (1978)* (Powell, J., concurring) ("Title VI must be held to proscribe only those racial classifications that would violate the *Equal Protection Clause* or the *Fifth Amendment*."); *id. at 329* ("Title VI prohibits only those uses of racial criteria that would violate the *Fourteenth Amendment* if employed by a State or its agencies. . . .") (Brennan, White, Marshall, and Blackmun, JJ., concurring in part); *see also Alexander v. Sandoval, 532 U.S. 275, 280-81, 149 L. Ed. 2d 517, 121 S. Ct. 1511 (2001)*.

[**11]

[*957] Both Parents and the School District moved for summary judgment on all claims; neither contended that genuine issues of material fact precluded summary judgment. In a published opinion dated April 6, 2001, the district court upheld the use of the racial tiebreaker under both state and federal law, granting the School District's motion and denying the Parents's. *See Parents Involved I, 137 F. Supp. 2d at 1240*. Parents timely filed an appeal in this court and, on April 16, 2002, we issued an opinion reversing the district court's decision. Acting "in our constitutionally ordained role as oracles of Washington law," *Parents Involved II, 285 F.3d at 1243*, we prophesied that the School District's use of the racial tie-breaker violated Initiative 200. *Id. at 1244*. n11 Simultaneously, we enjoined the School District from using the racial tiebreaker in its system of high school admissions pending further order from this court. *Id. at 1257*.

N11 Specially concurring in the court's decision, Judge Graber likewise divined that "the racial tiebreaker that Seattle School District No. 1 uses to assign some public high school students to desirable schools plainly 'grants preferential treatment' to those students on the basis of their race, in violation of Initiative 200." *Parents II, 285 F.3d at 1253* (Graber, J., specially concurring).

[**12]

While the School District's petitions for rehearing and rehearing en banc were pending before us, it "bec[a]me clear that [we could not] provide a definitive [legal] answer before assignments [were to] be made for the 2002-03 year, and therefore, . . . that our sole reason

for not certifying this question to the Washington Supreme Court ha[d] dissolved." *Parents Involved III, 294 F.3d at 1086*. Consequently, we granted the petition for rehearing, withdrew our opinion, and vacated our injunction. *See id.* Simultaneously, we entered an order certifying to the Supreme Court of Washington the question whether

> [b]y using a racial tiebreaker to determine high school assignments, [the] Seattle School District Number 1 "discriminate[s] against, or grant[s] preferential treatment to, any individual or group on the basis of race, . . . color, ethnicity, or national origin in the operation of public education" in violation of Initiative 200. . . . ?

Id. at 1087.

The Supreme Court of Washington accepted certification, heard oral argument in the matter, and on June 26, 2003 issued an opinion concluding that I-200 "does not [**13] prohibit the Seattle School District's open choice plan tie breaker based upon race so long as it remains neutral on race and ethnicity and does not promote a less qualified minority applicant over a more qualified applicant." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 149 Wn.2d 660, 72 P.3d 151, 166 (Wash. 2003)*. It therefore "return[ed] the case to the federal court for further proceedings consistent with [its] resolution of the questions of Washington law," *id. at 167*, and formally notified this court of its actions by delivery of a Certificate of Finality on September 8, 2003.

All state law issues having been definitively decided, the parties prepared supplemental briefing on the remaining federal [*958] constitutional question in light of the Supreme Court's intervening decisions in the University of Michigan affirmative actions cases -- *Gratz v. Bollinger, 539 U.S. 244, 156 L. Ed. 2d 257, 123 S. Ct. 2411 (2003)*, and *Grutter v. Bollinger, 539 U.S. 306, 156 L. Ed. 2d 304, 123 S. Ct. 2325 (2003)* -- followed by reargument.

II

As a preliminary matter, we must address whether the passage of time has mooted Parents's action. Article III's case-or-controversy [**14] requirement mandates that the parties to a federal court action must "continue to have a personal stake in the outcome of the lawsuit" at all stages of the proceedings. *United States v. Verdin, 243 F.3d 1174, 1177 (9th Cir. 2001)* (internal quotation marks and citation omitted). "This means that, throughout the litigation, the plaintiff must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." *Spencer v. Kemna, 523 U.S. 1, 7, 140 L. Ed. 2d 43, 118 S. Ct. 978 (1998)* (quoting *Lewis v. Cont'l Bank Corp., 494 U.S. 472, 477-478, 108 L. Ed. 2d 400, 110 S. Ct. 1249 (1990)*). As with any jurisdictional inquiry -- and notwithstanding the parties' unhesitating agreement that Parents's action remains a live controversy appropriately subject to federal adjudication on the merits -- we are charged with an independent constitutional responsibility to verify our authority to resolve their litigation. *See Dittman v. California, 191 F.3d 1020, 1025 (9th Cir. 1999)*.

Initially, we have little doubt that the associational aspect of Parents's standing has not been mooted. At reargument, counsel for [**15] Parents informed us that several of the association's members have children who, over the course of the next several years, will be applying for admission to the School District's public high schools and who thus will be subject to the admissions policies established by the School Board. Because "some members of the [association] [c]ould [continue to] have . . . standing to bring this suit in their own right," *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Brock, 477 U.S. 274, 286, 91 L. Ed. 2d 228, 106 S. Ct. 2523 (1986)*, and because the passage of time has not called into question Parents's satisfaction of the other requirements for associational standing, *see Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 181, 145 L. Ed. 2d 610, 120 S. Ct. 693 (2000)*, we are satisfied that the associational aspect of Parents's standing has continued vitality.

Perhaps more troubling, however, is the disclosure that the School District is not currently employing -- and has not since the 2001-02 school year employed -- the racial tiebreaker that Parents challenge in this litigation. As noted earlier, we enjoined the School District's [**16] use of the racial tiebreaker with our initial disposition of this case. *See Parents Involved II, 285 F.3d at 1257*. And although we vacated that injunction with the withdrawal of our initial opinion, *see Parents Involved III, 294 F.3d at 1086*, the School District has voluntarily declined to reinstate its racial tiebreaker during the pendency of this litigation. With the passage of time, the voters of Seattle have elected a new School Board, n12 and there is at least a remote possibility that the new Board will opt not [*959] to resume its use of the racial tiebreaker that prompted this lawsuit.

n12 *See* Deborah Bach, *New School Board Must Work Together, Observers Say*, Seattle Post-Intelligencer, Nov. 6, 2003, at B1; David

Postman, *Incumbents Hammered: 3 on Seattle School Board Out; 3 on Council Headed There*, Seattle Times, Nov. 5, 2003, at A1.

Nonetheless, it is beyond cavil that "'a defendant's voluntary cessation of a challenged practice does not deprive a federal court [**17] of its power to determine the legality of the practice' unless it is '*absolutely clear* that the allegedly wrongful behavior *could not reasonably be expected to recur*.'" *Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 609, 149 L. Ed. 2d 855, 121 S. Ct. 1835 (2001)* (emphases added) (quoting *Friends of the Earth, 528 U.S. at 189*, with internal quotation marks and citations omitted). Indeed, in these circumstances, a "heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again *lies with the party asserting mootness*." *Adarand Const., Inc. v. Slater, 528 U.S. 216, 222, 145 L. Ed. 2d 650, 120 S. Ct. 722 (2000)* (emphasis in original) (internal quotation marks and citations omitted). The problem here, of course, is that *neither party* has asserted that this case is moot: When asked at oral argument about the possibility that we lack jurisdiction over Parents's action, counsel for the School District not only maintained that this controversy remains live, but questioned whether the Board would have him defend the racial tie-breaker if it did not intend to reinstate the challenged [**18] policy in the future. n13

n13 We note further that the School District's 2004-05 secondary education "Enrollment Guide" continues to describe the operation of the racial tiebreaker as part of its open choice assignment program, explaining that "The integration positive tiebreaker has been *suspended for the 2004-2005 assignment period* due to the pendency of a lawsuit challenging its use." *See* Seattle Public Schools, *Middle and High School Choices 2004-2005: Enrollment Guide for Parents* 44, *available at* http://www.seattleschools.org/area/eso/secondary_guide_04_05.pdf (last visited June 8, 2004) (emphasis added).

Indeed, where a court must address *sua sponte* the possibility that the passage of time has mooted litigation *on alternative grounds* (for instance, that the associational aspect of a plaintiff's standing no longer satisfies Article III jurisdictional requirements), we find it hard to imagine that a defendant's *voluntary cessation* could *ever* operate itself to moot the underlying [**19] litigation. By virtue of the fact that neither party will have alleged mootness in the first instance, there is no one to "satisfy the heavy burden of persuasion" that well-established doctrinal precepts require *a party* to demonstrate before voluntary cessation can be held to moot a once live case or controversy. *See United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199, 203, 21 L. Ed. 2d 344, 89 S. Ct. 361 (1968)*. We therefore conclude that the present case remains live.

III

We now turn to the heart of Parents's claim: that the School District's use of race to determine who will be admitted to its oversubscribed public high schools constitutes illegal racial discrimination in violation of both the *Fourteenth Amendment* and Title VI. n14

n14 Because "discrimination that violates the *Equal Protection Clause of the Fourteenth Amendment* committed by an institution that accepts federal funds also constitutes a violation of Title VI," we address Parents's twin challenges to the racial tiebreaker simultaneously. *See Gratz, 539 U.S. at 276 n.23.*

As with any grant or denial of summary judgment, the district court's resolution of cross-motions for summary judgment is reviewed *de novo*. *United States v. City of Tacoma, 332 F.3d 574, 578 (9th Cir. 2003)*. Because "neither side contends that there are any genuine issues of material fact. . ., our task is to determine whether the district court correctly applied the relevant substantive law." *Ar v. Hawaii, 314 F.3d 1091, 1094 (9th Cir. 2002)*. Such purely legal determinations are, of course, subject to *de novo* review on appeal.

[**20]

[*960] A

Forged in the crucible of Reconstruction and "[p]urchased at the price of immeasurable human suffering," *Adarand Const., Inc. v. Pena, 515 U.S. 200, 240, 132 L. Ed. 2d 158, 115 S. Ct. 2097 (1995)* (Thomas, J., concurring), the *Equal Protection Clause of the Fourteenth Amendment* mandates that "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." *U.S. Const. amend. XIV, § 1*. "Because the *Fourteenth Amendment* 'protects *persons*, not *groups*,' all governmental action based on race -- a *group* classification long recognized as in most circumstances irrelevant and therefore prohibited -- should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed." *Grutter, 539 U.S. at 326* (quoting *Adarand, 515 U.S. at*

227 (1995) (quoting *Hirabayashi v. United States, 320 U.S. 81, 100, 87 L. Ed. 1774, 63 S. Ct. 1375 (1943)))* (emphasis in original); *see also Ho v. S.F. Unified Sch. Dist., 147 F.3d 854, 865 (9th Cir. 1998)* ("It is as a person that each of us has these rights that are so majestically secured."). Therefore, [**21] "any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest of judicial scrutiny." *Adarand, 515 U.S. at 224*; *see also Coalition for Econ. Equity v. Wilson, 122 F.3d 692, 702* ("The standard of review under the *Equal Protection Clause* does not depend on the race or gender of those burdened or benefitted by a particular classification. . . . '[A]ny individual suffers an injury when he or she is disadvantaged by the government because of his or her race.'") (quoting *Adarand, 515 U.S. at 230*).

For race-based educational policies "[t]o withstand strict scrutiny analysis, respondents must demonstrate that the[ir] use of race in [their] current admission program employs 'narrowly tailored measures that further compelling governmental interests.'" *Gratz, 539 U.S. at 270* (quoting *Adarand, 515 U.S. at 227*); *see also Hunter v. Regents of Univ. of Calif., 190 F.3d 1061, 1063 (9th Cir. 1999)* ("To meet the strict scrutiny test, *the Regents* [**22] must demonstrate that . . . consideration of race/ethnicity is *narrowly tailored* to serve a *compelling governmental interest*.") (first emphasis added); *Ho, 147 F.3d at 865* ("Once the plaintiffs established the School District's use of racial classifications . . . the School District has the duty to justify them. . . . At trial, *the School District will bear the burden* of proving that [its use of race] is a 'narrowly tailored measure that furthers compelling government interests.'") (quoting *Adarand, 515 U.S. at 227*) (emphasis added); *Monterey Mech. Co. v. Wilson, 125 F.3d 702, 713 (9th Cir. 1997)* ("The burden of justifying different treatment by ethnicity or sex is always on the government."). Notwithstanding its remarkable assertions to the contrary, it is thus quite plainly the School District which bears the weighty burden of demonstrating that its use of the racial tiebreaker in its open choice admissions program satisfies the "most searching examination" demanded by strict scrutiny, *Gratz, 539 U.S. at 270* (quotations and citations omitted): that is, that the racial tiebreaker is designed to further [**23] a compelling [*961] governmental interest, and that the manner in which it does so is narrowly tailored to achieve that interest.

B

In papers prepared for purposes of this litigation, the School District has proffered an array of interrelated and putatively compelling interests in pursuit of which it seeks to employ the racial tiebreaker in its open choice high school admissions program. These myriad interests include the School District's desires to achieve: "the educational benefits of attending a racially and ethnically diverse school"; "integration of schools which, as a result of housing patterns and the tendency of many parents to choose schools close to home, would otherwise tend to become racially isolated"; "ensuring that public institutions are open and available to all segments of American society"; "alleviating de facto segregation"; "increasing racial and cultural understanding"; "avoiding racial isolation"; fostering "cross-racial friendships"; and "reduc[ing] prejudice and increas[ing] understanding of cultural differences." Perhaps its most articulate statement supporting use of the racial tiebreaker is the School Board's policy "Statement Reaffirming [the] Diversity [**24] Rationale." It explains:

> 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.
>
> Based on the foregoing rationale, the Seattle School District's commitment is that no student should be required to attend a racially concentrated school. The District is also committed to providing students with the opportunity to voluntarily choose to attend a school to promote integration. The District provides these opportunities for students to attend a racially and ethnically diverse school, and to assist [**25] in the voluntary integration of a school, because it believes that providing a diverse learning environment is educationally beneficial for all students.

To the extent Parents once may have been able to make out a colorable claim that the only interest suffi-

ciently compelling to justify the use of racial classifications is the remediation of past official discrimination, n15 such an argument no longer obtains. [*962] In *Smith v. University of Washington*, this court followed Justice Powell's solo concurrence in *Regents of the University of California v. Bakke, 438 U.S. 265, 57 L. Ed. 2d 750, 98 S. Ct. 2733 (1978)*, observing that "educational diversity is a compelling governmental interest that meets the demands of strict scrutiny of race-conscious measures." *233 F.3d 1188, 1201 (9th Cir. 2000)*. And in its landmark 2003 opinion in *Grutter*, the Supreme Court settled any debate over the validity of employing racial preferences for non-remedial purposes by asserting that it had "never held that the only governmental use of race that can survive strict scrutiny is remedying past discrimination." *Grutter, 539 U.S. at 328 (O'Connor, J.)*. n16 Indeed, it expressly [**26] sanctioned the so-called "diversity rationale" articulated by the University of Michigan in support of employing such preferences in determining which applicants would be offered admission to its selective law school. *See id. 328-33*. It is upon Justice O'Connor's elaboration of the diversity rationale that we now focus our attention.

n15 *See, e.g., Freeman v. Pitts, 503 U.S. 467, 494, 118 L. Ed. 2d 108, 112 S. Ct. 1430 (1992)* ("Racial balance is not to be achieved for its own sake. It is to be pursued when racial imbalance has been caused by a constitutional violation."); *Metro Broad., Inc. v. FCC, 497 U.S. 547, 612, 111 L. Ed. 2d 445, 110 S. Ct. 2997 (1990)* ("Under the appropriate standard, strict scrutiny, only a compelling interest may support the Government's use of racial classifications. Modern equal protection doctrine has recognized only one such interest: remedying the effects of racial discrimination.") (O'Connor, J., joined by Rehnquist, C.J., Scalia and Kennedy, JJ., dissenting); *Richmond v. J.A. Croson Co., 488 U.S. 469, 493, 102 L. Ed. 2d 854, 109 S. Ct. 706 (1989)* (O'Connor, J., joined by Rehnquist, C.J., and White and Kennedy, JJ.) ("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."); *id. at 524* (Scalia, J., concurring) ("There is only one circumstance in which the States may act *by race* to 'undo the effects of past discrimination': where that is necessary to eliminate their own maintenance of a system of unlawful racial classification.") (emphasis in original); *Fullilove v. Klutznick, 448 U.S. 448, 489, 65 L. Ed. 2d 902, 100 S. Ct. 2758 (1980)* (Burger, C.J., joined by White and Powell, JJ.) ("That the use of racial and ethnic criteria is premised on assumptions rebuttable in the administrative process gives reasonable assurance that application of the [contracting set-aside] program will be limited to accomplishing the remedial objectives contemplated by Congress . . . ."); *id. at 530* (Stewart, J., joined by Rehnquist, J., dissenting) ("Since the [set-aside] provision was in whole or in part designed to effectuate objectives other than the elimination of the effects of racial discrimination, it cannot stand as a remedy that comports with the strictures of equal protection, even if it otherwise could."); *Ho, 147 F.3d at 864* ("The Supreme Court has not banished race altogether from our governmental systems. The concept, so long the instrument of governmental evil, so fraudulently promoted by pseudo-science, so corrosive of the rights of the person, may still be employed if its use is found to be necessary as the way of repairing injuries inflicted on persons because of race. Deployed for that limited purpose. . . ."); *Monterey Mech., 125 F.3d at 713* ("For a racial classification to survive strict scrutiny in the context before us, it must be a narrowly tailored remedy for past discrimination, active or passive, by the governmental entity making the classification."); *Coral Constr. Co. v. King County, 941 F.2d 910, 920 (9th Cir. 1991)* ("Race-based classifications must be reserved strictly for remedial settings."); *see also Hopwood v. State of Texas, 78 F.3d 932, 944 (5th Cir. 1996)*; *Contractors Ass'n v. City of Phila., 91 F.3d 586, 596 (3d Cir. 1996)*; *Aiken v. City of Memphis, 37 F.3d 1155, 1162-63 (6th Cir. 1994)*; *In re Birmingham Reverse Discrimination Employment Litig., 20 F.3d 1525, 1544 (11th Cir. 1994)*; *O'Donnell Constr. Co. v. District of Columbia, 295 U.S. App. D.C. 317, 963 F.2d 420, 424 (D.C. Cir. 1992)*; *Podberesky v. Kirwan, 956 F.2d 52, 56 (4th Cir. 1992)* (en banc); *Cunico v. Pueblo Sch. Dist. No. 60, 917 F.2d 431, 437 (10th Cir. 1990)*. [**27]

n16 *But cf. Metro Broad., 497 U.S. at 612-13* (O'Connor, J., dissenting) (condemning the majority's decision to apply intermediate scrutiny to racial classifications on grounds that doing so "too casually extends the justifications that might support racial classifications, beyond that of remedying past discrimination"); *cf. also Croson, 488 U.S. at 493* (plurality op. by O'Connor, J.).

In part due to a recognition that the diversity rationale had often been criticized as "amorphous," "abstract," "malleable," and "ill-defined," *see, e.g., Metro Broad., 497 U.S. at 612* (O'Connor, J., dissenting); *Wessmann v. Gittens, 160 F.3d 790, 796 (1st Cir. 1998)*; *Lutheran Church-Missouri Synod v. FCC, 329 U.S. App. D.C. 381, 141 F.3d 344, 354* [*963] *(D.C. Cir. 1998)*; *Johnson v. Bd. of Regents, 106 F. Supp. 2d 1362, 1371 (S.D. Ga. 2000)*; *Tracy v. Bd. of Regents, 59 F. Supp. 2d 1314, 1321 (S.D. Ga. 1999)*; *cf. Grutter, 539 U.S. at 350 & 354* n.3 (Thomas, J., dissenting) (deriding the interest in "diversity" [**28] as "a faddish slogan of the cognoscenti" and describing the concept as being "more a fashionable phrase than it is a useful term"), the University of Michigan and its aligned amici mounted a concerted effort to bring much-needed clarity. In a remarkable series of briefs, these groups assembled both social scientific evidence and observational reports from business, industry, and military leaders regarding the "substantial" educational and societal benefits that flow from an educational institution's "enroll[ment of] a critical mass of minority students." *Grutter, 539 U.S. at 330* (citation and quotation omitted).

Among the benefits attributed by the University and its amici to the enrollment of a minimal core of minority students, and embraced by the Court under the broad rubric of the diversity rationale, are the promotion of "cross-racial understanding," the "break[ing] down of racial stereotypes," and the fact that "classroom discussion is livelier, more spirited, and simply more enlightening and interesting when the students have the greatest possible variety of backgrounds." *Id. at 330* (citations and quotations omitted). Justice O'Connor's [**29] opinion for the Court also explained that "student body diversity promotes better learning outcomes, and better prepares students for an increasingly diverse workforce and society," and noted "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.*; *see also* Brief for Respondents at 11, *Gratz v. Bollinger, 539 U.S. 244, 156 L. Ed. 2d 257, 123 S. Ct. 2411 (2003)*.(No. 02-516) ("Racial and ethnic diversity is educationally important because, notwithstanding decades of progress, there remain significant differences in our lives and perceptions that are undeniably linked to the realities of race. Continuing patterns of residential segregation, for example, mean that the daily events and experiences that make up most Americans' lives take place in strikingly homogenous settings. As a result, most students entering college have had few opportunities for meaningful interactions across lines of race and ethnicity. This separation . . . provides little opportunity to disrupt racial stereotypes . . . .").

Finally, the majority emphasized testimony that, in the absence of race-conscious [**30] admissions, "underrepresented minority students would have comprised 4 percent of the [school's] entering class in 2000, instead of the actual figure of 14.5 percent," *id. at 320*, and that a principal aim of the program was to prevent racial isolation. *Id. at 318 & 319*; *see also id. at 380-81* (Rehnquist, C.J., dissenting) (noting that the university's focus on achieving a "critical mass" of minority students was premised on "enroll[ing] enough minority students to provide meaningful integration of its classrooms and residence halls" and reducing the effects of "isolat[ion] by racial barriers") (quoting Brief for Respondents at 5).

2

Recognizing that each of the School District's proffered interests in using its racial tiebreaker falls comfortably within the diversity rationale as that justification's aims and benefits were articulated to (and embraced by) the Court, *see supra* at 10003-04, Parents and their amici seek to cabin *Grutter*'s reach by contending that the [*964] Court's compelling interest analysis was expressly limited to the use of race in admissions in the context of "the expansive freedoms of speech and thought associated [**31] with the university environment." *Grutter, 539 U.S. at 330*. We of course acknowledge that *Grutter* addressed the use of racial classifications in higher education, and that language in the Court's opinion reflects that factual underpinning. n17 But we cannot identify a principled basis for concluding that the benefits the Court attributed to the existence of educational diversity in universities cannot similarly attach in high schools. We simply do not see how the government's interest in providing for diverse interactions among 18 year-old high school seniors is substantially less compelling than ensuring such interactions among 18 year-old college freshmen. *Cf. Grutter, 539 U.S. at 347* (Scalia, J., dissenting) ("The 'educational benefit' that the University . . . seeks to achieve by racial discrimination consists, according to the Court, of 'cross-racial understanding,' and 'better preparation of students for an increasingly diverse workforce and society,' all of which is necessary not only for work, but also for good 'citizenship.' This is not, of course, an 'educational benefit' [but] the same lesson taught to . . . people three feet shorter [**32] and twenty years younger . . . in institutions ranging from Boy Scout troops to public-school kindergartens.") (quoting *Grutter, 539 U.S. at 331*) (citations and alterations omitted).

n17 *See, e.g., Grutter, 539 U.S. at 322* ("We granted certiorari to resolve . . . whether diversity is a compelling interest that can justify the narrowly tailored use of race in selecting applicants

> for admission to public universities.") (citation omitted); *id. at 325* ("Today we endorse Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions."); *id. at 331* ("The diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all . . . ."); *id. at 331-32* ("Ensuring that public institutions are open and available to all segments of American society, including people of all races and ethnicities, represents a paramount government objective. Nowhere is the importance of such openness more acute than in the context of higher education.") (quoting Brief of the United States); *id. at 332* ("Universities, and in particular, law schools, represent the training ground for a large number of our Nation's leaders.").

[**33]

3

At bottom, *Grutter* plainly accepts that constitutionally compelling internal educational and external societal benefits flow from the presence of racial and ethnic diversity in educational institutions. In support of its racial tiebreaker, the School District invokes precisely the interest sanctioned by the Supreme Court: securing those benefits. Those benefits are as compelling in the high school context as they are in higher education. We therefore conclude that the District has satisfied its first burden under strict scrutiny: It has articulated a compelling interest in pursuit of which it seeks to use a racial classification. n18

> n18 We express no opinion on the extent to which the diversity rationale extends beyond the secondary educational context. *Cf. Petit v. City of Chicago, 352 F.3d 1111 (7th Cir. 2004)* (addressing the diversity rationale in the context of race-conscious promotions within a police department)."

C

Of course, to hold that the School District has invoked a [**34] compelling interest in pursuit of which it seeks to employ the racial tiebreaker is merely to begin our inquiry. Because "'racial classifications are simply too pernicious to permit [*965] any but the most exact connection between justification and classification,'" *Gratz, 539 U.S. at 270* (quoting *Fullilove, 448 U.S. at 537* (Stevens, J., dissenting)), the School District also bears the burden of demonstrating that its use of the racial tie-breaker is narrowly-tailored to further that interest. *See Hunter, 190 F.3d at 1063*; *Ho, 147 F.3d at 865*. As with respect to compelling interest analysis, *Grutter* and *Gratz* shed much-needed light on the once crepuscular contours of the narrow tailoring test applicable to the non-remedial use of racial preferences in educational admissions. Careful attention to these decisions -- and the ways they addressed the divergent undergraduate and law school admissions schemes at the University of Michigan -- is especially warranted.

1

As *Grutter* outlined, the admissions process at the University of Michigan Law School functions roughly as follows. Every completed application received [**35] by the Law School is both read and considered holistically by admissions officials. A significant focus of the decisionmakers is on an applicant's academic ability, as measured by his or her undergraduate grade point average and score on the Law School Admissions Test (LSAT). Even so, these "hard" measures are insufficient to resolve admissions decisions: Just as "the highest score does not guarantee admission[, neither] does a low score disqualify an applicant." *Grutter, 539 U.S. at 315*. Instead, admissions officials must look beyond those measures to "soft" variables, including "the enthusiasm of the [applicant's] recommenders, the quality of the undergraduate institution, the quality of the applicant's essay, and the areas and difficulty of undergraduate course selection," which in turn are used to help measure "an applicant's likely contributions to the intellectual and social life of the institution." *Id.* (internal quotations omitted).

This focus on "soft" variables aims to ensure that the Law School can "'achieve that diversity which has the potential to enrich everyone's education and thus make a law school class stronger than the sum of its parts. [**36] '" *Id.* (quoting the Law School's written admissions policy). While recognizing that there are "'many possible bases for diversity admissions,'" the admissions policy

> "reaffirm[s] the Law School's longstanding commitment to 'one particular type of diversity,' that is, 'racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against . . ., who without this commitment might not be represented in our student body in meaningful numbers.'"

Id. at 316 (quoting policy). Of note, the policy seeks to ensure the enrollment of a "critical mass" of underrepresented minority students through the use of a calibrated racial preference -- in the absence of which such students would comprise just 4 percent of the law school's entering class, and thereby be less likely as a group fully to "'make unique contributions to the character of the Law School.'" *Id.* (quoting policy). Crucially, "[t]he policy does not define diversity 'solely in terms of racial and ethnic status,'" *id.* (quoting policy), but rather gives "serious consideration to all the ways an applicant might contribute [**37] to a diverse educational environment." *Id. at 337.*

Turning to the constitutionality of the program, Justice O'Connor immediately honed in on its core features: its flexibility and breadth. In concert with the baseline constitutional prohibition against quotas, *id. at 334* ("[A] race-conscious [*966] admissions program cannot use a quota system -- it cannot 'insulate each category of applicants with certain desired qualifications from competition with all other applicants.'") (quoting *Bakke, 438 U.S. at 315* (Powell, J., concurring)), the law school "consider[s] race [and] ethnicity more flexibly as a 'plus' factor in the context of individualized consideration of each and every applicant." *Id.* Moreover, she explained, the Law School's policy strenuously avoids evaluating individual applicants "in a way that makes [their] race or ethnicity the defining feature of [their] application." *Id. at 337.* Conforming to the "paramount" constitutional requirement of truly "individualized consideration in the context of a race-conscious admissions program," *id. at 337*, the Law School's admissions officers [**38] shun a "policy, either *de jure* or *de facto*, of automatic acceptance or rejection based on any 'soft' variable," and awards "no mechanical, predetermined diversity 'bonuses' based on race or ethnicity." *Id.*

Quite in contrast, the school refuses to "limit in any way the broad range of qualities and experiences that may be considered valuable contributions to student body diversity," *id. at 338*, and illustrates the strength of its commitment to that principle by highlighting a variety of non-racial criteria the institution considers valuable -- for instance, that an applicant has lived or traveled abroad, speaks more than one language, has overcome personal adversity, or has a strong record of community service or even a prior career in a non-legal profession. *Id.* (discussing policy). And the Law School pays more than mere lip service to this commitment: It "actually gives substantial weight to diversity factors besides race," allowing those factors to "make a real and dispositive difference for non-minority applicants as well." *Id.* In short, the law school's admissions program "considers race as one factor among many, in an effort to assemble a student [**39] body that is diverse in ways broader than race," *id. at 340*, and as a consequence, "does not unduly harm nonminority applicants." *Id. at 341.*

Finally, the Court observed that the Law School has "sufficiently considered workable race-neutral alternatives," *id. at 340*, and that periodic reviews (along with an eventual legal cutoff) ensure that the Law School's use of race will be time-limited, in concert with the Constitution's demand that any "'deviation from the norm of equal treatment of all racial groups [be] a temporary matter, a measure taken in the service of the goal of equality itself.'" *Id. at 342* (quoting *Croson, 488 U.S. at 510* (plurality opinion)). In light of the policy's careful design and its adherence to the strict limits placed on the nonremedial use of race, the Court upheld the Law School's program as narrowly tailored.

2

At issue in *Gratz*, however, the undergraduate admissions program at the University's College of Literature, Sciences, and the Arts (LSA) -- though purportedly pursuing the same benefits from diversity as the Law School -- had structured its admissions program [**40] around such a crude racial classification that the school had not even come close to satisfying the narrow tailoring requirement. n19 Prior to its 1998 [*967] admissions cycle, LSA developed an admissions "selection index" that assigned each applicant a score of up to 150 points based on his or her grades, test scores, high school quality and curricular rigor, in-state residency, legacy status, personal essay, and personal achievement or leadership. The index was then divided into strict dispositional bands: students scoring 100-150 points were admitted; students scoring 95-99 points were either admitted or had consideration of their application postponed; students scoring 90-94 points either had consideration of their application postponed or were admitted; students scoring 75-89 points were delayed or postponed; and students scoring fewer than 75 points were delayed or rejected. *Gratz, 539 U.S. at 255.*

n19 For present purposes, we focus on the University's post-1998 admissions program rather than its more troubling predecessors. *See Gratz v. Bollinger, 122 F. Supp. 2d 811, 831-33 (E.D. Mich. 2000)* (describing the myriad constitutional defects of the 1995-98 program).

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Although the LSA system superficially appeared to provide for individualized consideration of each applicant -- at least to the extent that each application was reviewed to ascertain the presence of various "soft" variables for mechanical scoring -- such a rosy portrait was

belied by the underlying reality of the policy. Tucked into a "'miscellaneous' category, an applicant was entitled to 20 points based upon his or her membership in an under-represented racial or ethnic minority group." *Id.* Indeed, during 1999 and 2000, "every applicant from an underrepresented racial or ethnic group was awarded 20 points," *id. at 256*, at least one-fifth of the points necessary to secure admission to LSA. n20

> n20 In actuality, LSA's mechanical award of 20 points may have been worth more than one-fifth of the points necessary to secure admission. In 1999, LSA also established a discretionary review process in which individual applications would be given special additional consideration from the Admissions Review Committee (ARC) if the applicant met a threshold selection index score (80 points for Michigan residents, 75 points for out-of-state residents) and was selected by an admissions officer. *Id. at 256-57* & n.8. If chosen, ARC would consider whether the applicant "possesses a quality or characteristic important to the University's composition of its freshman class" -- including race and ethnicity -- and could then choose to admit such students outside the strictures of the normal selection index grid. *Id.* Thus, under LSA's plan, membership in an underrepresented racial group would secure an applicant at least one-fifth of the points necessary to ensure admission, as well as one-quarter of the points necessary for an individualized review that, by facilitating the double-counting of race, could lead to admission.

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It therefore is not surprising that the Court rejected LSA's program on narrow tailoring grounds. Put simply, the program provided no serious individualized consideration of the applicant's potential contributions to educational diversity.

> The LSA's policy automatically distributes 20 points to every single applicant from an 'underrepresented minority' group, as defined by the University. The only consideration that accompanies this distribution of points is a factual review of an application to determine whether an individual is a member of one of these minority groups. Moreover, unlike Justice Powell's example, where the race of a 'particular black applicant' could be considered without being decisive, the LSA's automatic distribution of 20 points has the effect of making 'the factor of race . . . decisive' for virtually every minimally qualified underrepresented minority applicant.

Id. at 272 (quoting *Bakke, 438 U.S. at 317* (Powell, J., concurring)); *see also id. at 273* ("[A]s the University has conceded, the effect of automatically awarding 20 points is that virtually every qualified underrepresented minority applicant is [**43] admitted."). Having so easily concluded that the LSA policy was not narrowly tailored, the Court concluded by swiftly rejecting [*968] the University's lame suggestion that "'the volume of applications and the presentation of applicant information make it impractical'" to predicate admissions on individualized consideration. *Id. at 275* (quoting LSA's Brief). "[T]he fact that the implementation of a program capable of providing individualized consideration might present administrative challenges does not render constitutional an otherwise problematic system." *Id.* (citing *Croson, 488 U.S. at 508*). n21

> N21 Of some note, Justice O'Connor's concurrence (joined by Justice Breyer) highlighted key distinctions between the Law School and undergraduate programs:
>
> > The law school considers the various diversity qualifications of each applicant, including race, on a case-by-case basis. By contrast, the Office of Undergraduate Admissions relies on the selection index to assign *every* underrepresented minority applicant the same, *automatic* 20-point bonus without consideration of the particular background, experiences, or qualities of each individual applicant. And this mechanized selection index score, by and large, automatically determines the admissions decision for each applicant. The selection index thus precludes admissions counselors from conducting the type of individualized consideration the Court's opinion in *Grutter* requires: consideration of each applicant's individualized qualifications, including the contribution each individual's race or ethnic identity will make to the diversity of the stu-

> dent body, taking into account diversity within and among all racial and ethnic groups.
>
> *Gratz, 539 U.S. at 276-77* (O'Connor, J., concurring, joined by Breyer, J.) (emphases in original).

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3

From the Court's decisions in *Grutter* and *Gratz* -- and drawing upon well-established narrow tailoring principles -- we derive the following governing constraints. First, where an institution pursues non-remedial objectives, *racial quotas are strictly prohibited. Gratz, 539 U.S. at 293* (Souter & Ginsburg, JJ., dissenting) ("Justice Powell's opinion in [*Bakke*] rules out a racial quota or set-aside, in which race is the sole fact of eligibility for certain places in a class."); *Grutter, 539 U.S. at 334.*

Second, any consideration of race for non-remedial purposes must be *flexible*; an educational institution may not treat an applicant's race or ethnicity as the touchstone of his or her individual identity, but instead must meaningfully evaluate each applicant's potential diversity contributions in light of all pertinent factors. *Gratz, 539 U.S. at 271-74*; *id. at 279* (O'Connor, J., concurring); *Grutter, 539 U.S. at 337-39*; *Bakke, 438 U.S. at 315 & 317-18*; *Belk v. Charlotte-Mecklenburg Bd. of Educ., 269 F.3d 305, 345 (4th Cir. 2001)* (Traxler, J. [**45] , concurring); *Wessmann, 160 F.3d at 798 & 800*; *Eisenberg v. Montgomery Cty. Pub. Schs., 197 F.3d 123, 132-33 (4th Cir. 1999)*; *Tuttle v. Arlington Cty. Sch. Bd., 195 F.3d 698, 707 (4th Cir. 1999).*

Third, it follows that an institution's use of race must be *neither mechanical nor conclusive. Gratz, 539 U.S. at 271-72*; *id. at 278-79* (O'Connor, J., concurring); *Grutter, 539 U.S. at 336-37.* After all, automatically awarding a fixed racial preference to every single racially-preferred applicant signals an institutional disregard for the far broader array of diversity characteristics that produce the educational and social benefits deemed compelling by the Court. *Bakke, 438 U.S. at 317* (Powell, J., concurring). And any racial preference that necessarily results in the admission of an applicant demonstrates the pursuit of prohibited racial balancing [*969] *simpliciter. See, e.g., Grutter, 539 U.S. at 337* ("There is no policy, either *de jure* or *de facto*, of automatic acceptance . . . ."); *Wessmann, 160 F.3d at 799*; *cf. Eisenberg, 197 F.3d at 131*; [**46] *Tuttle, 195 F.3d at 707.*

Fourth, narrow tailoring demands that the institution seeking to employ racial preferences at the very least demonstrate an *earnest consideration of race-neutral alternatives. Grutter, 539 U.S. at 339-40*; *Wygant v. Jackson Bd. of Education, 476 U.S. 267, 280 n.6, 90 L. Ed. 2d 260, 106 S. Ct. 1842*; *Tuttle, 195 F.3d at 706*; *Podberesky v. Kirwan, 38 F.3d 147, 160-61.*

Fifth, serious efforts must be made to *minimize the adverse impact* of racial preferences on non-preferred group members; a programmatic use of race should be no more potent than necessary to achieve the compelling interest being pursued. *Grutter, 539 U.S. at 341*; *Wygant, 476 U.S. at 287* (O'Connor, J., concurring in part and dissenting in part); *Bakke, 438 U.S. at 308, 311, 314-15* (Powell, J., concurring); *Wessmann, 160 F.3d at 798.*

Sixth, and finally, any program of racial preferences, regardless of its ultimate aspirations, must be *time-limited. Grutter, 539 U.S. at 342*; *Croson, 488 U.S. at 510* (plurality opinion by O'Connor, J.); *Hayes v. N. State Law Enforcement Ass'n, 10 F.3d 207, 216 (4th Cir. 1993).* [**47]

4

The School District's racial tiebreaker fails virtually every one of the narrow tailoring requirements.

a

First (and second), in contrast to the "flexible, non-mechanical," evaluation of race employed by the University of Michigan Law School in the course of a "highly individualized, holistic review" which scrupulously "ensure[s] 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," *Grutter, 539 U.S. at 337*, the School District's racial tiebreaker is virtually indistinguishable from a pure racial quota. As *Grutter* defined that forbidden fruit of non-remedial racial preferences, "Quotas impose a fixed number or percentage which must be attained, or which cannot be exceeded, and insulate the individual from comparison with all other candidates for the available seats." *Grutter, 539 U.S. at 335* (citations and quotations omitted). Yet this is almost precisely how the District *itself* has described the operation of its program -- with a single variance: rather than impose a racial floor *or* ceiling, the School District's racial tiebreaker [**48] establishes both a floor *and* a ceiling.

> [I]f an oversubscribed school has fewer than 45 [percent] students of color/more than 55 [percent] whites, students of color will be assigned ahead of white students who live closer to the school. Conversely, if an oversubscribed school has fewer than 25 [percent] white students/more than 75 [percent] students of color, white

students will be assigned ahead of students of color who live closer.

b

Indeed, to an even greater degree than the University of Michigan's undergraduate admissions program, the School District -- third -- automatically and mechanically admits, using a computer algorithm designed to implement the ceilings and floors framing its racial tiebreaker, hundreds of white and non-white applicants solely because of their race. *Cf. Gratz, 539 U.S. 244, 156 L. Ed. 2d 257, 123 S. Ct. 2411* ("[T]he University's [*970] policy, which automatically distributes . . . *one-fifth of the points needed to guarantee admission* . . . to every single 'underrepresented minority' applicant solely because of race, is not narrowly tailored . . . .") (emphasis added); *id. at 271-72* ("The only consideration [**49] that accompanies this distribution of points is a factual review of an application to determine whether an individual is a member of one of these minority groups."). Thus, in stark contrast to the program sanctioned by *Grutter*, the racial tiebreaker not only fails to "serious[ly] consider[] all the ways an applicant might contribute to a diverse educational environment," but is in fact a "*de jure* [policy] of automatic acceptance or rejection based on a[] single 'soft' variable." *Grutter, 539 U.S. at 337.* This the Constitution categorically forbids; such an impliably reflexive use of race "cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing." *Croson, 488 U.S. at 507* (plurality opinion). n22

n22 Although we admire the School District's use of a "thermostat" designed to curtail the deleterious impact of its racial tiebreaker once the requisite racial proportion is attained in a given school, the fact that it turns the tiebreaker on and off with such numerical precision ultimately helps confirm that the School District's aim is simple proportional representation by race. *Cf. Eisenberg, 197 F.3d at 132* ("The fact that the . . . diversity profile for each school is reviewed and adjusted each year to avoid the facilitation and the creation of a racially isolated environment does not make the policy narrowly tailored. Instead, it manifests Montgomery County's attempt to regulate transfer spots to achieve the racial balance or makeup that most closely reflects the percentage of the various races in the county's public school population.").

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c

Fourth, although numerous alternative admissions structures have been proposed to solve the School District's oversubscription dilemma without so prominently featuring race in the equation, not all have been (or ever were) seriously considered by the Board. n23 Three such alternatives stand out.

n23 Indeed, when asked whether the District gave "any serious consideration to the adoption of a plan for the assignment of high school students that did not use racial balancing as a factor or goal," Superintendent Olchefske responded: "I think the general answer to your question is no. . . . I mean it's possible informal ideas were floated here or there, but I don't remember any significant staff work being done." When asked whether he could "ever recall the board considering any race neutral plans," John Vacchiery (who heads the District's Facilities, Planning, and Enrollment Department) answered simply "No." And responding to inquiries regarding the possibility of using a "system kind of similar to the one you have now but without race as a tiebreaker," Board member Don Nielsen replied that "It's never been considered."

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i

First, the School Board has never seriously considered the use of a citywide high school admissions lottery. Though perhaps not palatable to the electorate -- a consideration that cannot justify the use of race in its stead -- a randomized lottery would necessarily produce levels of school diversity statistically comparable to (and perhaps even more proportional than) the District's racial tiebreaker. Yet, when asked about using a lottery to meet the District's diversity targets, Board member Barbara Schaad-Lamphere actually argued that a lottery would *not* result in racially proportional representation "because of probabilities, the law of probabilities." Let us be clear: We are not forcing the School District to *adopt* a random assignment lottery. But given its evident commitment to achieving diversity, there is [*971] no question but that the Board should have *earnestly appraised* such a program's costs and benefits. Whatever reasons there may be to reject a lottery, the demonstrably false pretext that "the law of probabilities" would render it ineffectual is not one.

The dissent takes us to task for suggesting that the School District must seriously consider using a [**52] lottery to achieve its diversity goals when *Grutter* itself explicitly rejected the plaintiffs' claim that Michigan's Law School should have considered a lottery. *See post* at

10091-93. We find such criticism unavailing. *Grutter* rejected the plaintiffs' demand that the Law School consider a lottery because such a program would necessarily diminish the quality of its admitted students and might not produce adequate educational diversity due to potential under-representation of various (not necessarily racial) kinds of diversity in its limited applicant pool. n24 Yet as the dissent *itself* notes, the School District's adoption of a lottery is subject to neither of these potential pitfalls. *Post* at 10076 (noting that in this case "there is absolutely no competition or consideration of merit . . . . *All* high school students must and will be placed in a Seattle public school. The students' relative merit is irrelevant.") (emphasis in original). As a result, the District's unconstrained applicant pool is not subject to a possible demographic skew, and there is absolutely no possibility that a lottery would diminish the quality of admitted students. Thus, neither of [**53] *Grutter*'s grounds for rejecting consideration of a lottery is present here.

n24 As the Court explained:

> The Law School[] . . . considers race as one factor among many, in an effort to assemble a student body that is diverse in ways broader than race. Because a lottery would make that kind of nuanced judgment impossible, it would effectively sacrifice all other educational values, not to mention every other kind of diversity.

Grutter, 539 U.S. at 340.

Ii

Second, the School District could have considered adopting a diversity-oriented policy that does not rely exclusively on race, but which instead accounts for the wider array of characteristics that comprise the kind of true diversity lauded by Justice Powell in *Bakke* and by the Court in *Grutter* and *Gratz*. In this respect, we observe that -- for purposes of its internal school funding formula -- the School District already collects a much wider array of data on students and families than merely their racial [**54] and ethnic identities. Among that data is information on whether a child lives at home or in "an agency"; if she lives at home, with whom; whether the child's home and most proficient languages are English or some other language; and the child's eligibility for free or reduced price lunch. Yet, the District considers none of those factors in admissions, and although individual Board members have occasionally suggested using one or more of those factors as an alternative tiebreaker, the Board has declined even to study how such an alternative would impact school diversity. n25

n25 In particular, the School District's data expert, Morgan Lewis, testified that although Board member Don Nielsen once suggested instituting an income-based tiebreaker, "that particular proposal never went anywhere, in terms of assessing how you would implement it" and that School District staff was never asked to (and so never did) examine the effect that such a tiebreaker would have on the demographic composition of the District's high schools.

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The dissent once again strays in its criticism of this suggestion. It first suggests that a programmatic focus on "true diversity" is no alternative at all "because it is [*972] not directed toward achieving the District's interest in a racially integrated learning environment." *Post* at 10090. But this claim is fundamentally mistaken. A programmatic focus on true diversity -- within which race is one of many factors considered by the School District -- *subsumes* the District's interest in achieving racial diversity: It does not *supplant* it. Indeed, such a focus may not only help the District achieve the racial diversity it desires, *see infra* at 10078 n.26, but might actually serve the District's socialization interests to a far greater degree than its presently narrow focus on race alone. For, if the District's fundamental interest is, as the dissent characterizes it, "to prepare children to be good citizens -- to socialize children and to inculcate civic values," *see post* at 10061, and to achieve "a more democratic and inclusive experience for all citizens," *id.* at 10061-62 n.9 (quoting one of the District's expert witnesses), then accounting for factors other than [**56] race -- like socioeconomic status -- would bolster the District's "democratic" mission by fostering, for instance, cross-class (and not just cross-racial) interaction. *See* Richard D. Kahlenberg, *All Together Now: Creating Middle-Class Schools Through Public School Choice (2001)* (documenting the civic and educational benefits of socioeconomically integrated schooling).

The dissent also errs in suggesting that "even though there has been no formal study of [this] proposal," the deposition testimony of a few Board members is sufficient to demonstrate "legitimate reasons why the majority of the Board rejected the use of poverty measures . . .

." *Post* at 10090. We disagree. The Board members' blithe dismissal of a sincerely presented proposal simply cannot satisfy the constitutional requirement that the government earnestly appraise race-minimal alternatives prior to adopting race-conscious policies. Matters not formally evaluated cannot be "rejected" in a constitutionally-relevant sense: Such appraisal -- whether with regard to the need for race-based action, or to the shape such action is to take -- must be conducted "on the record." *See, e.g., Croson, 488 U.S. at 498-511* [**57] (chronicling Richmond's failure adequately to document the basis for its use and design of a racial quota and stressing the constitutional demand that it do so); *see also Shaw v. Hunt, 517 U.S. 899, 909-10, 135 L. Ed. 2d 207, 116 S. Ct. 1894 (1999)*; *Fullilove, 448 U.S. at 533-35* (Stevens, J., dissenting); *Rothe Dev. Corp. v. United States Dep't of Def., 262 F.3d 1306, 1322-28 (Fed. Cir. 2001)*; *Associated Gen. Contractors of Ohio, Inc. v. Drabik, 214 F.3d 730, 735-37 (6th Cir. 2000)* (Boggs, J.); *WH Scott Constr. Co. v. City of Jackson, 199 F.3d 206, 217-19 (5th Cir. 1999)* (King, C.J.); *H.K. Porter Co. v. Metro. Dade County, 975 F.2d 762 (11th Cir. 1992)*. n26

n26 Even beyond this evidentiary inadequacy, we observe that *the individual Board members'* post-hoc litigation rationales for *the Board's* allegedly having "rejected" the use of broader diversity considerations do not withstand even limited scrutiny. Whether it is "often inaccurate" to assume that poverty and race are "coextensive" and "insulting to minorities" to suggest they may be, *see post* at 10090, it is beyond dispute that despite remarkable racial progress during the past century, *see generally* Stephan and Abigail Thernstrom, *America in Black and White* (1997), race and socioeconomic status remain correlated, so that the latter *might* serve as a workable race-neutral alternative satisfying the District's interest in obtaining the benefits of enrolling an otherwise diverse student population. (Of course, we can only determine whether it *would* do so if the School District would evaluate it.) Likewise, it is beyond dispute that any insult generated by recognizing the opportunity presented by this sad reality pales in comparison to the insult of rejecting an applicant solely because of the color of her skin (whether they are white *or minority* -- as in this case, *see supra* at 9994-95 & n.7).

Finally, we find unsupportable the individual Board members' suggestion that socioeconomic integration would not result in appreciable socialization advantages because "implementation would be thwarted by high school students' reluctance to reveal their socioeconomic status to their peers." *Post* at 10090. For if the theory underpinning integrated schooling is (quite accurately) that it will foster cross-bounded friendships, it is inevitable that students of varying backgrounds will not only interact in the classroom, but outside it -- where exposure to their peers' varying communities, families, and lifestyles will almost certainly reveal their divergent socioeconomic experiences.

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[*973] iii

Third (and at least for the moment, finally), acting in response to Parents's filing of this lawsuit, the Seattle Urban League convened a working group which included, among others, a representative from the NAACP, one of the Parents, a former member of the School Board, a retired high school principal, the then-current President of the Seattle Council Parent Teacher Student Association (PTSA), and a former PTSA President. In September 2000, they developed -- and then formally proposed to the School Board -- a comprehensive plan that would seek to enhance the quality of education in the City's schools by focusing on educational organization, teacher quality, parent-teacher interaction, raising curricular standards, substantially broadening the availability of specialized and magnet programs (which could attract a broader cross-section of students to undersubscribed schools), and supporting extra-curricular development. n27

n27 As their report put the point, "With quality high schools throughout the city, assignment issues will disappear."

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At the same time, their plan proposed decreasing the School District's reliance on race in the admissions process by adding a new, primary tiebreaker based on pairing neighborhoods with particular schools and structuring the scope and size of the component residential areas such that no single region would contain enough students to fill its linked high school to capacity. Under the plan, preferences initially would be given to students choosing a school in their paired region, and the existing racial tiebreaker would be dropped from second to third in the process of resolving any remaining over-subscription (and any residual racial concentration not already solved by improving the attractiveness of previously racially concentrated schools). Finally, the Urban League working group proposed that the School District add an elev-

enth public high school, and that it strenuously market to the public the existing (and proposed additional) specialty programs throughout the City's other high schools. n28

n28 Of note, the report also concluded by discussing four additional alternatives that it ultimately declined to propose to the Board -- but nonetheless deemed worthy of consideration.

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We cannot know whether its proposed reforms would have been successful in achieving the working group's ambitious goals, but there is no doubt that the Urban League presented the Board with an especially thoughtful proposal for addressing the dilemmas plaguing contemporary urban education n29 while simultaneously striving [*974] to attain educational diversity without unduly relying on the use of crude racial preferences. Yet, this proposal was never formally discussed at a Board meeting. Indeed, some members of the Board even refused to read it. Consider the following remarkable deposition testimony by Board member Michael Preston:

> Q: Are you familiar with the plan proposed by the ad hoc work group of the Urban League?
>
> A: Somewhat.
>
> Q: Did you ever consider that plan as a viable alternative to the current assignment plan?
>
> A: No.
>
> Q: Why not?
>
> A: I thought they hadn't done their homework. And yeah, they seemed too liberal and unbusinesslike. But it didn't recognize the legitimate concerns that the people of Ballard and Magnolia have about the school.
>
> Q: What in particular do you believe are the shortcomings of that Urban League plan that caused you not [**61] to consider it to be a viable alternative?
>
> A: That it came from the Urban League. Even though [Urban League President and CEO] James Kelly is a good friend of mine, the Urban League has not been a bastion of enlightened thought, in my view, historically.
>
> Q: Did you read the proposal?
>
> A: No. I heard it characterized and summarized.
>
> Q: By whom?
>
> A: By the superintendent. I have a copy of it. I chose not to read it. I'd rather play with my bass lunker fishing game.
>
> Q: Than consider the Urban League's proposal?
>
> A: Well.
>
> Q: That might give some offense to the people who spent a good deal of time working that proposal up.
>
> A: Okay.
>
> Q: We don't need to show them a copy of the deposition transcript.
>
> A: I'm sure it will eventually fall into their hands. . . .
>
> ***
>
> Q: Are you familiar with the broad outlines of how that proposal was structured?
>
> A: Yeah.
>
> Q: What's your understanding of that? Not necessarily the minutia, but what's your understanding of the general way that the Urban League's proposal would have worked?
>
> A: I don't understand the relevance of the Urban League's proposal, because it wasn't considered, it [**62] wasn't used. I [*975] don't understand what difference it makes.
>
> Q: Well, I'm just -- in all honesty, one of the issues in the case, as I see it, is what alternatives were available to the school board.

A: Well, that wasn't an alternative.

Q: Why is that?

A: Well, the Urban League is not the school board, it's not the administration, it's not the superintendent. . . .

n29 Our nation's public schools, especially those in central cities, currently face a crisis of epic proportions. Although black and Latino students made substantial educational gains following the demise of legalized governmental segregation, the best data on educational attainment demonstrates that no further progress has been made in the past fifteen years - and indeed that the gap between white and Asian students' educational achievement and that of blacks and Latinos has actually expanded on some measures during that period. See Stephan Thernstrom & Abigail Thernstrom, No Excuses: Closing the Racial Gap in Learning 18-21 (2003); see also John E. Chubb and Tom Loveless, eds., Bridging the Achievement Gap 1-2 (2002); David Grissmer, Ann Flanagan, and Stephanie Williamson, Why Did the Black-White Test Score Gap Narrow in the 1970s and 1980s?, in Christopher Jencks & Meredith Phillips, eds., The Black-White Test Score Gap 185-91 (1998). As the Thernstroms poignantly observe:

> Racial progress on many fronts has been enormously heartening. But in a society committed to equal opportunity, we still have a racially identifiable group of educational have-nots -- young African-Americans and Latinos whose opportunities in life will almost inevitably be limited by their inadequate education. . . . [Such] [o]ngoing racial inequality is not only morally unacceptable; it corrupts the fabric of American society and endangers our future.

Id. at 271-72.

[**63]

Without belaboring the point, this is not exactly the stuff from which narrow tailoring is made. While it may be the case that educational institutions need not *exhaust* every conceivable alternative to the use of racial classifications to satisfy strict scrutiny, narrow tailoring at least demands that schools *earnestly consider* using race-neutral and race-limited alternatives in order to provide for the kind of diversity that, properly constituted, can further compelling educational and social interests. *Grutter, 539 U.S. at 339*. Given the tragic history of race in our country, the Constitution demands no less -- our education policymakers' enthusiasm for handheld electronically simulated "bass lunker fishing game[s]" notwithstanding.

d

Fifth, the School District's racial tiebreaker is not designed to minimize its adverse impact on third parties; the extent to which it uses race is not calibrated to the benefits sought. Over time, "the band," *see supra* n.6, has ranged from as much as +/- 25 percent to as little as +/- 10 percent, and it currently sits at +/- 15 percent. And while such variances conceivably could be interpreted to suggest that the School [**64] District is carefully trying to optimize its realization of diversity's benefits, the record belies such an interpretation. In October 2000, School Superintendent Joseph Olchefske formally recommended that the band be expanded from +/- 10 percent to +/- 20 percent because "[a]fter review and 2 years experience, there was not strong evidence that utilizing a +/- 10 [percent] band provided a materially better educational experience than would a band of +/- 20 [percent]. Accordingly, in order to fulfill our narrow tailoring obligation, staff is recommending a +/- 20 [percent] band." n30 Yet, even after its chief educator and his staff twice had reported that twice as much of an adjustment would have no adverse impact on the diversity payoff, the Board adjusted the band by just 5 percentage points. This is not the measure of tailored proportionality. Instead, it represents a stubborn adherence to the use of race for race's sake, with the effect that some non-preferred student applicants will be displaced solely because of their racial and ethnic identities -- to no benefit at all. n31

n30 Indeed, Olchefske also recommended expanding the band in 1999.

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n31 The dissent suggests that even though schools "may well have been sufficiently diverse to promote interaction across the white/nonwhite axis and to prevent the tokenization of nonwhite students" had the District used a 20 percent band

(or, in something of a surprising concession, had it used no integration tiebreaker at all), *see post* at 10087 & 10095, the District's selection of a 15 percent band was appropriate because it would facilitate greater movement of students between the south end of the District and the north. *Id.* Given Superintendent Olchefske's statement that the District's interests in the tiebreaker would *not* be served by setting the band at 15 percent instead of 20 percent, we find it hard to credit the assertion that those interests must have included such movement of students. In any event, we hardly think that non diversity-enhancing north-south integration is sufficiently compelling to justify the use of a racial classification.

[*976] Taken alone, any of these shortcomings would doom the School District's program. Together, they reveal an unadulterated pursuit [**66] of racial proportionality that cannot possibly be squared with the demands of the *Equal Protection Clause*. n32

n32 The only narrow tailoring requirement the School District's racial tie-breaker even arguably satisfies is the final one -- that the institutional use of race be time-limited. Addressing temporal limitations in *Grutter*, the Court explained that "in the context of higher education, the durational requirement can be met by sunset provisions *in* race-conscious admissions policies *and* periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity." *539 U.S. at 342* (emphases added). Yet, notwithstanding the conjunctive nature of its stated requirements and in spite of the fact that Michigan's policy did not *itself* contain a sunset provision, the Court held the policy to be adequately limited after unhesitatingly crediting the University's pledge "that it would like nothing better than to find a race-neutral admissions formula," *id.* (quotation omitted), and stating that "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." *Id. at 343*. Whether that vague assertion represented a "holding that racial discrimination in higher education admissions will be illegal in 25 years," *id. at 351* (Thomas, J., dissenting), or merely a "hope, but not afirm[] forecast, that over the next generation's span, progress . . . will make it safe to sunset affirmative action" in accordance with the ever-powerful "international understanding of the office of affirmative action," *id. at 344 & 346* (Ginsburg, J., concurring), we cannot say. But the School District's annual review of the racial tiebreaker and the at least theoretical availability of a judicially-enforceable end-point to the School District's racially discriminatory admissions program may well bring the policy into line with the durational limits required by strict scrutiny.

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5

In an effort to evade the clear import of the narrow tailoring analysis applied by *Grutter*, *Gratz*, and their progenitors, the School District argues that such analysis simply does not apply in the K-12 context: "[T]he Michigan decisions have meaning only in the context of selective admissions and other 'zero sum' programs. . . . [The] argument that race may be considered [only] in a holistic individualized review as one factor among many contributing to diversity is not applicable to non-selective school assignments." n33 Indeed, they argue, the use of racial classifications in their allegedly "non-zero sum" open choice high school admissions process "is narrowly tailored, as a matter of law."

n33 Of course, the School District makes this bold assertion only when pressed by the full gravity of the Court's pronouncements. Where otherwise convenient, the School District argues that "the Michigan decisions do provide crucial guidance to this Court," and claims that beyond illuminating the contours of the compelling interest test, those decisions "also provide considerable assistance in applying the narrow tailoring element of strict scrutiny."

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For support, they unearth language from *Associated General Contractors of California v. San Francisco Unified School District*, a 1980 case in which we addressed a challenge to a School Board policy requiring that "bidders for construction contracts . . . must be minority general contractors or must utilize minority subcontractors for 25 [percent] in dollar volume of the contract work." *616 F.2d 1381, 1383 (9th Cir. 1980)*. At the heart of their challenge, the contractors asserted that the quota violated California law requiring that all school contracts (except those involving *de minimis* expenditures) be awarded solely to "the lowest responsible bidder." *Id. at 1385* (discussing and quoting *Cal. Educ. Code § 39640*). In defense, the School Board asserted not only that its policy was *permissible*, but that the policy was *required* in order to remedy [*977] past discrimination -- and therefore that insofar as it would prevent maintenance of such

a policy, California's low-bid law violated the *Supremacy Clause, U.S. Const. art. VI, § 2. Id. at 1386.*

We flatly rejected that argument, drawing a distinction [**69] between "reshuffle programs" and "stacked deck programs," *id. at 1386*, and placing the Board's quota in the latter category of race-based policies. We explained the central difference between these two categories as follows: While reshuffle programs "neither give[] to nor withhold[] from anyone any benefits because of that person's group status, but rather ensure[] that everyone in every group enjoys the same rights in the same place," so-called stacked deck programs "specifically favor[] members of minorities in the competition with members of the majority for benefits that the state can give to some citizens but not to all." *Id.* In passing, we twice suggested that programs designed to desegregate schools are reshuffle programs, *see id. at 1386 & 1387*, and elsewhere stated "that 'stacked deck' programs trench on *Fourteenth Amendment* values in ways that 'reshuffle' programs do not." *Id. at 1387.*

Ultimately, we held simply that although "the state has an affirmative constitutional duty to use 'reshuffle' programs to cure the effects of past or present *de jure* segregation . . ., there is no constitutional duty to [**70] engage in 'stacked deck' affirmative action." *Id.* Of particular import, we never reached the *Fourteenth Amendment* question squarely implicated by this case: whether notwithstanding the absence of an obligation to adopt such a policy, its implementation of such a program was permissible. Instead, given our resolution of an underlying state law question, our assessment of that law's constitutionality, and the fact that the Court recently had granted certiorari in *Fullilove*, we *explicitly* declined to "test the policy itself against the standard of the United States Constitution." *Id. at 1391.*

Although it might seem obvious that a case cannot control the resolution of an issue it expressly declined to confront, the School District nonetheless grasps at *Associated General*'s furtive references to school desegregation. n34 It argues that its racial classification is equivalent to the programs arguably favored by *Associated General*, and thus (reading that opinion at the highest level of generality) not violative of the *Fourteenth Amendment*. n35 We disagree.

n34 To its credit, the dissent declines to follow the School District's lead.

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n35 We emphasize the District's overreading of *Associated General* at the outset because -- even beyond our *express* failure to address the issue joined here -- it is not clear that *Associated General implicitly* suggested that reshuffle programs do not violate the Constitution. There is a world of difference between stating that "'stacked deck' programs trench on *Fourteenth Amendment* values *in ways that* 'reshuffle' programs do not," *Associated General, 616 F.2d at 1387* (emphasis added), and holding that reshuffle programs designed to integrate schools cannot violate the *Fourteenth Amendment* at all.

Let us begin with two interrelated observations. First, *Associated General* addressed neither school desegregation nor the use of race in educational admissions; it assessed a mechanical set-aside governing distribution of construction projects. Second, *Associated General* did not even purport to apply strict scrutiny to a particular racial classification (or, more specifically, an actual school desegregation program). Its *Fourteenth Amendment* analysis assessed [**72] only whether the use of certain types of classifications is required to remediate prior official race discrimination -- not whether constitutional limits circumscribe [*978] the use of such classifications for non-remedial purposes, what those limits might be, and how they might affect the constitutionality of a particular policy.

Two conclusions follow. First, *Associated General* sheds no light on how we are to apply the narrow tailoring analysis rendered applicable to *any* racial classification by *Croson, 488 U.S. 469 at 493, 102 L. Ed. 2d 854, Adarand, 515 U.S. at 224, Grutter, 539 U.S. at 326*, and *Gratz, 539 U.S. at 270*, n36 to the tiebreaker at issue in this case. And second, *Associated General's* assertions about the nature of school desegregation programs are -- however one defines the term -- *obiter dicta.* n37

n36 *See also Shaw v. Hunt, 517 U.S. 899, 904-05, 135 L. Ed. 2d 207, 116 S. Ct. 1894 (1996); Miller v. Johnson, 515 U.S. 900, 904, 132 L. Ed. 2d 762, 115 S. Ct. 2475; Shaw v. Reno, 509 U.S. 630, 643, 125 L. Ed. 2d 511, 113 S. Ct. 2816 (1993).*

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n37 *Compare Miller v. Gammie, 335 F.3d 889, 902 (9th Cir. 2003)* (en banc) (Tashima, J., concurring) (citing *Best Life Assurance Co. v. Comm'r, 281 F.3d 828, 834 (9th Cir. 2002)*, for the proposition that "dictum is a statement made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the

case and therefore not precedential.") (citations and quotations omitted) *with Miranda B. v. Kitzhaber, 328 F.3d 1181, 1186 (9th Cir. 2003)* (per curiam) ("'Where a panel confronts an issue germane to the eventual resolution of the case, and resolves it after reasoned consideration in a published opinion, that ruling becomes the law of the circuit, regardless of whether doing so is necessary in some strict logical sense.'") (*quoting United States v. Johnson, 256 F.3d 895, 914 (9th Cir. 2001)* (Kozinski, J., concurring)) *with United States v. Crawley, 837 F.2d 291, 292-93 (7th Cir. 1988)* (Posner, J.) (suggesting that rather than define *dicta*, courts should look to the "reasons there are against . . . giving weight to a passage found in a previous opinion[:] One is that the passage was unnecessary to the outcome of the earlier case and therefore perhaps not as fully considered as it would have been if it were essential . . . . A closely related reason is that the passage was not an integral part of the earlier opinion -- it can be sloughed off without damaging the analytical structure of the opinion, and so it was a redundant part of that opinion . . . . Still another reason is that the passage was not grounded in the facts of the case and the judges may therefore have lacked an adequate experiential basis for it; another, that the issue addressed in the passage was not presented as an issue, hence was not refined by the fires of adversary presentation. All these are reasons for thinking that a particular passage was not a fully measured judicial pronouncement . . . .").

[**74]

Insofar as the School District argues that because reshuffle programs may be less invidious than stacked deck programs and thus, as a constitutional matter, somehow not subject to the stringencies of the narrow tailoring requirement -- a proposition never embraced by this court n38 and certainly not one reconcilable with binding [*979] Supreme Court holdings n39 -- it misapprehends the concept of narrow tailoring. The contours of narrow tailoring do not turn on the importance of the interest supporting the government's use of a racial classification (though such analysis, whatever its shape, surely is triggered by use of a racial classification in pursuit of a compelling interest), nor on the asserted degree of the intrusion that a particular use of race might render. The personal right to equal treatment is implicated any time the government employs race for any reason. *See Coalition, 122 F.3d at 702* (quoting *Adarand, 515 U.S. at 230*)).

n38 In our intervening 24 years of jurisprudence addressing the use of race, we have referenced *Associated General* just once for the proposition that reshuffles are less suspect than stacked deck programs, and we did so only in discussing the interaction between a state ballot initiative and the Court's political structure doctrine, *see Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 73 L. Ed. 2d 896, 102 S. Ct. 3187 (1982)*; *Hunter v. Erickson, 393 U.S. 385, 21 L. Ed. 2d 616, 89 S. Ct. 557 (1969)*, rather than in applying the narrow tailoring requirement of the *Fourteenth Amendment* to a particular race-based program. *Coalition, 122 F.3d at 707 n.16.* To the limited extent that *Coalition*'s passing reference to school desegregation programs might bear on the Equal Protection inquiry at issue here, we note simply that -- among other crucial differences -- the desegregation program referred to in the *Coalition* footnote "based student assignments on attendance zones rather than on race," *Seattle, 458 U.S. at 461*, and thus would not even be necessarily subject to the tailoring analysis we must apply here (and to the use of all racial classifications). *Adarand, 515 U.S. at 224*; *Croson, 488 U.S. 469 at 493, 102 L. Ed. 2d 854.*

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n39 We recognize that more than 30 years ago the Court -- in what is well recognized as *dicta*, *see, e.g., Brewer v. W. Irondequoit Cent. Sch. Dist., 212 F.3d 738, 750 (2d Cir. 2000)* -- suggested that school districts may pursue a measure of racial balance independent of constitutional requirements to remedy past discrimination. *Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16, 28 L. Ed. 2d 554, 91 S. Ct. 1267 (1971).* In contrast to the dissent, which recognizes that "these statements must be considered in the light of the Court's later decisions . . . establishing that the government may not act in furtherance of racial balance without a compelling nonracial reason" but then declines to so read those statements, we do not feel free to privilege a gratuitous statement over the Court's clear holdings.

Instead, narrow tailoring analysis focuses only upon the fit between the ends in pursuit of which a racial classification is used, the particular way in which the policy at issue uses that racial classification, and the baseline legal limits placed upon the use [**76] of racial classifications -- and it does so because any policy using race,

for any reason and in any way, is "inherently suspect," "by [its] very nature odious to a free people," and simply "too pernicious to permit any but the most exact connection between justification and classification." *Adarand, 515 U.S. at 223* (quoting *Fullilove, 448 U.S. at 523* (Stewart, J., dissenting)); *id. at 224* (quoting *Hirabayashi, 320 U.S. at 100*); *id. 229* (quoting *Fullilove, 448 U.S. at 537* (Stevens, J., dissenting)). It is for those reasons that, as Judge Selya -- in typically perspicuous fashion -- has observed, a court applying strict scrutiny must focus on "whether the concrete workings of the Policy merit constitutional sanction. Only by such particularized attention can we ascertain whether the Policy bears any necessary relation to the noble ends it espouses. In short, the devil is in the details." *Wessmann, 160 F.3d at 798.* Under strict scrutiny, no racial classification, no matter its context and no matter the nature or strength of the interest it serves, is exempt from the strictures of narrow tailoring, [**77] and this program plainly fails to satisfy them.

Finally, even if were we to accept that *Associated General* bears on this case, we observe that the School District's racial tiebreaker operates as a "stacked deck" program. Quite simply, it "specifically favors members of [some races] in the competition with members of [other races] for benefits that the state can give to some citizens but not to all," *Associated General, 616 F.2d at 1386* -- here, of course, admission to particular high schools. n40 As noted [*980] earlier, operation of the tie-breaker at Franklin causes whites to be admitted preferentially because they *are* white, and its operation at Ballard causes non-whites to be admitted preferentially simply because they *are not* white. To the argument that this program is "non-selective," we can only express bewilderment: The racial tie-breaker is used to determine student admissions solely to oversubscribed -- *and thus necessarily selective* -- schools. n41 Whatever *Associated General* says about school desegregation programs, this is not the programmatic design that we had in mind.

n40 Although *Associated General* describes stacked deck programs as "specifically favoring *members of minorities* in the competition with *members of the majority*," *616 F.2d at 1386*, it is beyond any serious dispute that such a distinction is utterly bereft of force in the post-*Croson*, post-*Adarand* world -- where our focus is on the use of racial classifications *per se*, rather than upon the race of those who are benefitted or burdened by the operation of the classification. *Grutter, 539 U.S. at 326*; *Gratz, 539 U.S. at 270*; *Adarand, 515 U.S. at 224*; *Croson, 488 U.S. at 493-95, 102 L. Ed. 2d 854*; *see also Shaw II, 517 U.S. at 904-05*; *Miller, 515 U.S. at 904*; *Shaw I, 509 U.S. at 643*; Jed Rubenfeld, *Affirmative Action, 107 Yale L.J. 427, 434* ("The critical holding of *Adarand* was that all laws employing a racial classification must undergo strict scrutiny, with no exception made on the basis of allegedly benign intentions. The classification itself is the constitutionally suspect feature of the law, the feature that triggers heightened scrutiny, regardless of which race happens to be burdened, and regardless of the particular burdens imposed.").

[**78]

n41 Indeed, the oversubscribed Seattle high schools to which children of the Parents members seek admittance are "selective" in precisely the same way as the University of Michigan: Due to the quality of the education they provide, the availability of special academic programs, and their location, more students than can be accommodated seek admission -- and the District must therefore determine which applicants will be offered a coveted seat in a more desirable school. We simply disagree with the dissent's assertion, *post* at 10098, that school quality exists in some objective vacuum distinct from market assessment.

Having accepted the School District's invocation of *Grutter* and *Gratz* in support of the proposition that racial and ethnic diversity can generate constitutionally compelling benefits within the educational setting itself and our society at large, we ultimately are compelled to reject the School District's strained efforts both to eat its cake and have it too. Its racial tiebreaker -- though enlisted in the service of admittedly worthy ends -- plainly fails the narrow [**79] tailoring component of the Constitution's strict scrutiny test. n42

n42 We further hold that the School District's racial tiebreaker violates Title VI. *See Gratz, 539 U.S. at 275* & n.23.

IV

Approaching this case from a fundamentally divergent perspective, the dissent offers a spirited and thoughtful defense of the School District's racial tiebreaker. Although we have responded to a few of its more specific criticisms, we see little to gain from the kind of note-by-note combat so pervasive in modern judicial opinions. Rather, given the thoroughness with which we have articulated our respective analyses of the

racial tiebreaker, we think there is more to gain by elucidating the core foundations of our dispute. We perceive three significant points of departure, and address each in turn.

A

The dissent repeatedly suggests that we should simply defer to the School District's decision to employ its tiebreaker in pursuing racial proportionality. *Post* at 10065 n.13, 10068, 10069-72 & 10089. Indeed, [**80] the dissent gradually shifts from noting how "compelling" the District's policy is to focusing on its "reasonable[ness]," "legitima[cy]," and "permissi[bility]." *Id.* at 10065 n.13, 10085, 10090, 10090, 10091, 10099. We believe such unfettered deference is inconsistent with our obligations under strict scrutiny -- and, contrary to the dissent, that it is especially inconsistent with constitutional demands in this context. [*981] Because *Grutter*'s decision to accord universities a measure of deference occasioned a sharp debate over this issue, careful attention to its rationale for doing so is in order.

1

After identifying the Law School's "compelling interest in attaining a diverse student body," *Grutter, 539 U.S. at 328*, the Court promptly stated:

> The Law School's *educational judgment* that such diversity is essential to its educational mission is one to which we defer. . . . Our scrutiny of the interest asserted by the Law School is no less strict for taking into account complex *educational judgments* in an area that lies primarily within the expertise of the university. Our holding today is in keeping with our tradition of giving a degree of [**81] deference to a university's *academic decisions* . . . .

Id. at 328-30 (citations omitted) (emphases added).

In developing its rejection of the dissenting Justices' charge that such deference was indeed at odds with strict scrutiny, *see id. at 379-86* (Rehnquist, J., dissenting); *id. at 387-94* (Kennedy, J., dissenting); *id. at 362-67* (Thomas, J., dissenting), the Court began by reiterating its "long recogni[tion] that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition." *Id. at 330*. It then expressly sanctioned Justice Powell's statement in *Bakke* that, given these unique *First Amendment* interests, universities have a "right to select those students who will contribute the most to the 'robust exchange of ideas.'" *Id.* (quoting *Bakke, 438 U.S. at 313* (Powell, J., concurring)).

Deference thus was due to the University not because its interest was "simply to assure within its student body some specified percentage [**82] of a particular group merely because of its race or ethnic origin . . . but [because it] was defined by reference to the educational benefits that [such] diversity is designed to produce," *id.* (quotations and citations omitted) -- and of crucial importance, because *those* "educational benefits" were not merely socially compelling, *id. at 330-33*, but fundamentally *internal* to the university's "academic" mission. *Id. at 328*. The Court emphasized: "The benefits are important and laudable, because classroom discussion is livelier, more spirited, and simply more enlightening and interesting when the students have the greatest possible variety of backgrounds." *Id. at 330* (quotations and citations omitted).

2

Beyond the fact that *Grutter* deferred only to the Law School's identification of its interests as compelling -- and, contrary to the dissent here, not to its tailoring analysis -- neither of *Grutter*'s grounds for affording deference is present here. First, secondary schools do not occupy the same "special niche in our constitutional tradition" as higher education, and the Court has never held they possess a [**83] similar *First Amendment* right of academic freedom. Indeed, while the Court has been willing to afford secondary schools some limited leeway to enable them to meet their most basic need (pre-serving the orderly school environment necessary to enable academic [*982] learning n43), the Court has never suggested that public secondary schools have a constitutional right to select their student body, much less that such a right entails selecting students based solely on their race -- a power that not even universities enjoy, despite *their* uniquely privileged status. Quite in contrast, the Court has repeatedly condemned racial balancing, held that a State's creation of a system of compulsory public education endows *students* (not schools) with a constitutionally-protected interest, and has pointedly reminded school authorities that "'[t]he *Fourteenth Amendment* . . . protects the citizen against the State itself and all of its creatures -- Boards of Education not excepted.'" *Goss v. Lopez, 419 U.S. 565, 574, 42 L. Ed. 2d 725, 95 S. Ct. 729* (quoting *W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 637, 87 L. Ed. 1628, 63 S. Ct. 1178 (1943)*); *see also Grutter, 539 U.S. at 330 & 336.*

N43 *See generally* Abigail Thernstrom, *Where Did All the Order Go? School Discipline and the Law, in* Diane Ravitch, ed., *Brookings*

Papers on Education Policy: 1999, 299-314 (1999).

[**84]

Second, the principal benefits the School District seeks through its pursuit of racial proportionality are neither internal to the school environment nor within the special expertise of school administrators. For although the District's asserted interests in the educational and societal benefits derivable from diverse schools mirror those embraced by *Grutter*, *see supra* at 10003-10, the dissent quite properly notes that the School District has an appreciably different focus. Rather than primarily seeking the *internal academic benefits* of diversity, the District's chief focus is on the *broader social benefits* diversity can stimulate. *See post* at 10061.

We do not believe this divergent emphasis changes the nature of the District's interests; they remain compelling, and thus can justify an appropriately limited use of race. *See supra* Sections III.B.3 & III.C.3. But it does affect the degree to which the District can claim deference. With regard to its secondary pursuit of diversity's internal academic benefits, we believe that while limited deference to educational institutions arguably could be due when they pursue core goals, such deference is entirely unwarranted [**85] when they court tangential ones. Having proceeded from the premise that the internal academic benefits of diversity are secondary to the District's socialization mission, it is at best curious that the dissent nonetheless maintains we should defer to the District's particularly crude use of a most disfavored classification in their pursuit. n44

n44 We offer another basis for declining to defer to the District's pursuit of racial proportionality in seeking diversity's benefits, *infra* at 10046 n.49.

Far more important, we see a crucial difference between a school's pursuit of the internal academic benefits of diversity and its pursuit of diversity's external social benefits. For although the former manifest within the District's school-houses, and thus are susceptible to ready appraisal exclusively by education policymakers, the "democratic" benefits attributable to classroom diversity are diffuse, manifest long after students leave the classroom, do so in contexts not subject to the exclusive oversight of [**86] teachers, and cannot be measured with skills possessed uniquely by educators. That is to say: While it is clear that educators are uniquely positioned to gauge how classroom discussions respond to shifts in classroom racial composition, they are not similarly well-positioned to assess how marginal changes in schoolhouse racial demographics affect how students interact with each other years after they leave school for the "real world." [*983] And to the limited extent they may have such insight, the record does not suggest the District *ever* sought to appraise the long-term social effects of engineering proportional demographic changes in connection with its design of the tiebreaker.

B

Beyond the dissent's unfettered deference to the School District -- a constitutional departure that we think undermines its supposed "strict scrutiny" of the tiebreaker -- one of its most striking features is its lack of focus on the data. For if it is true that a picture is worth a thousand words, there are times when statistics give Proust a run for his money. n45

n45 *See* Marcel Proust, *A la recherche du temps perdu* [*Remembrance of Things Past*, or *In Search of Lost Time*] (1913-27).

[**87]

1

The dissent simply seems to assume that absent the racial tiebreaker, Seattle's public high schools would be "racially concentrated, or racially isolated," and thus unable to attain diversity's benefits. *Post* at 10064; *id.* at 10077-78, 10092-93, 10095 & n.39. The record belies its assumption. Uncontroverted data produced by the School District during this litigation and contained in the record indicate that, in the absence of the racial tiebreaker, 2000-2001 school year enrollments at Seattle's public schools would have been as follows:

TABLE 1: 2000-2001 DEMOGRAPHICS WITHOUT RACIAL TIEBREAKER

SCHOOL	ASIAN	BLACK	LATINO	NATIVE AMERICAN	WHITE	NON-WHITE OVERALL
BALLARD	14.7%	8.9%	9.6%	4.3%	62.5%	37.5%
CHIEF SEALTH	27%	18%	21%	3%	32%	68%
CLEVELAND	43%	35%	10%	2%	10%	90%

SCHOOL	ASIAN	BLACK	LATINO	NATIVE AMERICAN	WHITE	NON-WHITE OVERALL
FRANKLIN	39.3%	34.6%	5.5%	0.8%	19.8%	80.2%
GARFIELD	12.5%	34.7%	4.4%	1.1%	47.2%	52.8%
INGRAHAM	38%	19%	9%	4%	30%	70%
NATHAN HALE	17.4%	12.1%	6.4%	3.3%	60.8%	39.2%
RAINIER BEACH	30%	52%	8%	2%	8%	92%
ROOSEVELT	26.8%	6.7%	8.7%	3.0%	54.8%	45.2%
W. SEATTLE	26%	15%	10%	2%	46%	54%

[**88]

Far from revealing "racially concentrated" or "racially isolated" student bodies, these figures demonstrate that each of the District's schools would enroll a vibrant array of students *without considering race at all.* n46 (Only by indulging the fallacious proposition that inter-ethnic diversity is irrelevant to the District's putative democratic mission could one conclude otherwise.) n47 It is thus particularly hard to [*984] credit the dissent's assumption that the tiebreaker is necessary to the District's fulfillment of its diversity oriented goals. n48 & n49

n46 The same picture emerges from 2002-03 school year data contained in the School District's "Individual School Profiles" report, submitted as an appendix to the supplemental amicus brief of Pacific Legal Foundation et al.

n47 Indeed, as one dissenting Board member noted in deposition testimony, "What we've done is we've defined ourself [*sic*] a problem by lumping all minorities together . . . . [O]ne of the things that the District still hasn't come to grips with is that minorities are quite different among and between themselves and sometimes have vast differences." It is in part for this reason that the history of racial conflict in this country is not one limited to tensions among whites and non-whites. *See, e.g.*, Bill Ong Hing, *In the Interest of Racial Harmony, 47 Stan. L. Rev. 901 (1995)* (discussing tensions between the African-American and Asian communities). Inter-ethnic tensions persist even within diverse high schools. *See, e.g.*, Carl Campanile, *Now It's a Federal Case*, N.Y. Post, Aug. 23, 2001, at 2 (detailing a series of incidents at Brooklyn's Lafayette High School between African-American students and Asians); Elissa Gootman, *City to Help Curb Harassment Of Asian Students at High School*, N.Y. Times, June 2, 2004, at B9 (describing a recent consent decree designed to address these incidents, and noting the diversity of Lafayette's student population). Surely helping resolve these tensions is just as crucial to the District's mission as addressing tensions between whites and non-whites.

[**89]

n48 While we do not mean to suggest that better-calibrated pure racial balancing would be constitutionally permissible, it bears note that the tie-breaker does not even operate to correct "racial imbalance" at the two schools where the white/non-white student ratio is most out of line with the District demographics (Rainier Beach and Cleveland). *Supra* at 9994-95 n.6; *post* at 10065 n.13. Taking the dissent on its own terms, it is thus that much harder to credit its claim that the tiebreaker is adequately designed to address the "flip side" of the District's interest -- ensuring that "'no student . . . attend a racially concentrated school.'" *Post* at 10065 (alteration in original); *see also id.* at 10095.

n49 We further note that these numbers show the District's high schools would enroll a proportion of underrepresented minority students already recognized by the Court as adequate to spur the internal educational benefits of diversity. This fact further counsels against deferring to the District's decision to use a racial classification here. *Cf. Grutter, 539 U.S. at 320* ("[A] race-blind admissions system would have a very dramatic, negative effect on underrepresented minority admissions. . . . [U]nderrepresented minority students would have comprised 4 percent of the entering class in 2000 instead of the actual figure of 14.5 percent.") (quotation omitted).

[**90]

Such an assumption becomes even less tenable in light of the tiebreaker's limited effect where it does operate. Indeed, the data demonstrate that the tiebreaker pro-

duces only the most trivial annual changes in school demography.

TABLE 2: 2000-2001 DEMOGRAPHIC IMPACT OF THE RACIAL TIEBREAKER

SCHOOL	ASIAN	BLACK	LATINO	NATIVE AMERICAN	WHITE
BALLARD	+ 2.8%	+ 1.9%	+1.1%	+ 0.3%	-6.1%
FRANKLIN	- 2.5%	- 2.4%	- 0.3%	- 0.1%	+ 5.3%
NATHAN HALE	+ 0.5%	+ 1.2%	+ 0.6%	+ 0.1%	- 2.4%
ROOSEVELT	+ 2.3%	+ 1.0%	+ 0.2%	+ 0.1%	- 3.7%

Given enrollment totals at these schools, the tiebreaker's annual effect is thus merely to shuffle a few handfuls of different minority students between a few schools -- about a dozen additional Latinos into Ballard, a dozen black students into Nathan Hale, perhaps two dozen Asians into Roosevelt, and so on. The District has not met its burden of proving these marginal changes substantially further its interests, n50 much less that they outweigh the cost of subjecting hundreds of students to [*985] disparate treatment based solely upon the color of their skin. n51

n50 Asked whether she was aware of any studies suggesting that the District's goals were better achieved by shifting enrollment proportions by "three, four, or five percentage points," Board Member Schaad-Lamphere said she was not aware of any such evidence and that she "had not used research to base [her] decisions on." [**91]

n51 It is not even clear that the tiebreaker itself is fully responsible for this trivial shuffling of students. The dissent, *post* at 10096 n.40, observes that among students who were denied admission to *any* school of their choice by operation of the tiebreaker, some 35 percent were assigned to the same school they would have been assigned to had the tiebreaker not operated.

As a consequence, the numbers in Table 3 likely overestimate substantially the demographic impact of the tiebreaker -- and thus cast further doubt over its usefulness.

In turn, the fact that these changes are so marginal dovetails our holding that the District was obligated to seriously consider whether alternative arrangements could have met its goals. *See supra* at 10020-31. Race-neutral alternatives not only may have produced equivalent levels of diversity in the District's schools, but far greater diversity than the tiebreaker.

2

Beyond casting serious doubt on the School District's need to use its racial tiebreaker, the numbers undermine the dissent's assessment of its efficacy -- and yet again, on the [**92] dissent's own terms. For present purposes, we take at face value the dissent's identification of the District's primary interest as ensuring "that children learn to interact with peers of different races," *post* at 10077; *see also post* at 10063-64, and accept *arguendo* its claim that "when a racially integrated school system is the goal . . ., there is no more effective means than a consideration of race to achieve a solution." *Post* at 10078, 10093. We credit for the moment its assessment that it is appropriate to "link[] the integration tiebreaker to the racial demographic of the District's population [because] the District is trying to teach its students to be effective participants *in the racially diverse environment in which they exist*," *post* at 10094 (emphasis added), and we ignore both that the tie-breaker does not operate where it would be most needed to meet the dissent's articulation of the District's goals *and* that its demographic impact is trivial where it does operate. Yet even then, it is clear to us that the School District's racial tie-breaker falls well short.

Because the tiebreaker relies on a crude white/nonwhite metric of racial identity, [**93] representation of particular minorities varies widely within the schools where it operates (indeed, throughout the school system). Once again, consider data produced by the School District and contained in the record:

TABLE 3: 2000-2001 DEMOGRAPHICS WITH RACIAL TIEBREAKER

SCHOOL	ASIAN	BLACK	LATINO	NATIVE AMERICAN	WHITE	NON-WHITE OVERALL
BALLARD	17.5%	10.8%	10.7%	4.6%	56.4%	43.6%
FRANKLIN	36.8%	32.3%	5.2%	0.7%	25.1%	74.9%
NATHAN HALE	17.9%	13.3%	7%	3.4%	58.4%	41.6%
ROOSEVELT	29.1%	7.7%	8.9%	3.1%	51.1%	48.9%

Given that the demographic impact of the tiebreaker during the 2000-2001 school year was merely to shift overall white/ non-white student ratios by at most 6.1 percent at the schools where it operated, *supra* at 10047, Table 2, these are truly enormous variations. The range in representation of Asians at the tiebreaker schools (19.3 percent, as Asian representation ranged from just 17.5 percent of students [*986] at Ballard to a whopping 36.8 percent of students at Franklin) was more than 3 times the size of the tiebreaker's *maximum* annual impact on overall white/non-white ratios; and the [**94] range in black representation (24.6 percent, ranging from 32.3 percent of students at Franklin to just 7.7 percent of students at Roosevelt) was more than 4 times the *maximum* annual white/non-white impact. n52 & n53

n52 Likewise, while Latinos accounted for less than one-tenth of the students at these schools, and Native Americans less than one-twentieth of students, representational ranges for those student populations were, respectively, almost as large as the maximum effect and more than half the size of the maximum effect.

n53 The point holds even using the dissent's preferred metric (ninth grade -- rather than overall -- enrollment changes): Individual inter-ethnic disparities either trump or rival overall white/non-white enrollment variances attributable to the tiebreaker's operation, and the schools continue to enroll widely diverse ninth grade classes -- a point essentially conceded by the dissent. *Post* at 10087 & 10095

These representational variances cut to the core of the dissent's [**95] defense of the tiebreaker's design. For if the tie-breaker's goal is (as the dissent characterizes it) to assure every student the opportunity to interact with the right ratio of different-looking peers in order to prepare them for life in our diverse society, the program plainly fails huge numbers of students. Consider: Roughly 600 black students at Garfield during the 2000-2001 school year were deprived of the chance to interact with a sufficient number of Asian students (12.5 percent of Garfield students versus 27.5 percent of students in the school population at large); more than 100 Latino students at Roosevelt were denied a chance to interact with an adequate number of African-American peers (7.1 percent of Roosevelt students versus 22.8 percent of the student population at large); 600 Asian students at Franklin were unable adequately to interact with Native American students (0.8 percent of Franklin students versus 2.5 percent of the student population at large). And thousands of other students left their schools not having been *inadequately exposed* to interaction with certain racial minorities, but rather having been *overexposed* to them -- and thus likewise *not* [**96] having been readied "to be effective participants in the racially diverse environment in which they exist." *Cf. post* at 10094. Even taking at face value the dissent's embrace of racial balancing, these data indicate the tiebreaker does not even rationally further the impermissible ends the dissent trumpets.

C

The final major point of departure between our opinion and the dissent is perhaps the most significant: We believe the dissent errs in failing to recognize the injury rendered by the tie-breaker. We have already explained that the individual right to equal treatment is implicated any time government uses race to apportion benefits or burdens. Here, in determining where some 300 students will attend high school, the School District crudely approximates the shades of their skin and assigns them to schools accordingly. Nonetheless, the dissent surprisingly suggests that not one of those students suffers a legally cognizable injury (whether such an injury can be justified or not) because the constitutional prohibitions against determinative racial preferences and quotas do not apply to secondary education, and because each of those students will get a basic education anyway. [**97] We address these claims in turn.

1

The dissent suggests that the constitutional prohibitions against determinative [*987] racial preferences and quotas do not apply within the secondary educational context because secondary schools do not employ race as a proxy for merit, and thus pose little risk of stigmatizing or stereotyping those they putatively benefit. *Post* at 10074-78. Its analysis cannot be squared with precedent.

The Court has long prohibited the use of outright quotas in contexts where merit and qualification are -- as the dissent asserts them to be here -- completely irrelevant. Thus, *Croson* rejected Richmond's racial quota for construction contracts on grounds that the "quota cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing." *Croson, 488 U.S. at 507.* Of course, when dealing with contracting, the only "qualification" or indicum of "merit" is submission of a low bid. *Croson*'s constitutional objection to the City's use of a quota was thus not that it threatened to stigmatize minorities: It was that quota-driven racial balancing is flatly at odds with the *Fourteenth Amendment's* "'ultimate goal' of 'eliminat[ing] [**98] entirely from governmental decisionmaking such irrelevant factors as a human being's race." *Id. at 500* (quoting *Wygant, 476 U.S. at 320* (Stevens, J., dissenting)) (alteration in original).

Likewise, courts have rejected the use of race-based quotas in legislative redistricting. As the Fifth Circuit has put the point, "[D]istricters are not bound -- or allowed -- to sacrifice traditional districting concerns to meeting quotas of diversity, just as they are not allowed to do so in order to meet quotas of racial concentration." *Chen v. City of Houston, 206 F.3d 502, 511 (5th Cir. 2000)*; *see also Easley v. Cromartie, 532 U.S. 234, 241, 257, 149 L. Ed. 2d 430, 121 S. Ct. 1452 (2001)* (recognizing that race may not be the predominant factor in legislative districting, and noting that an email referencing "racial balance" constituted evidence of such an "improper[]" use of race). But surely redistricting involves no "competition" or "consideration of merit," and of course "no stigma results from any particular [districting] assignment." *Cf. post* at 10076. At bottom, the problem with the imposition of a racial quota and the use [**99] of inflexibly mechanical racial preferences is not simply that they impermissibly conflate skin color with merit or qualification; it is that, more than any euphemistic "thumb on the scale," they breed deep-seated cross-racial resentment and do violence to the constitutional principle that "we are just one race here. It is American." *Adarand, 515 U.S. at 239* (Scalia, J., concurring). n54

n54 The dissent's assertion that the constitutional requirement of holistic review does not apply in this context fails for the same reason. *Grutter* and its progenitors require that one's race be considered only as one among many factors not because "holistic review . . . provides a closer fit with a university's interest in viewpoint diversity," *post* at 10076-77, but because any interest in race alone is unconstitutional: "Outright racial balancing . . . is patently unconstitutional. . . . Racial balance is not to be achieved for its own sake." *Grutter, 539 U.S. at 330* (quoting *Freeman, 503 U.S. at 494*, and citing *Bakke, 438 U.S. at 307*). Given such a clear -- and oft-repeated -- condemnation of the practice by the Supreme Court, it is hard seriously to credit the dissent's peculiar assertion that we misread the case law's *per se* ban on racial balancing. *See post* at 10075 n.22.

[**100]

2

Even more baffling is the dissent's claim that because the District ultimately assigns each student to a "quality" high school offering a "baseline . . . education," no applicant rejected on the basis of his or her race "suffers a constitutionally significant [*988] burden" from the tiebreaker's operation. *Post* at 10076-77, 10098-99.

We certainly agree with the dissent's observation that no student has a right to attend the school of his or her choice or to attend a school offering anything more than the standard education mandated by state law. *Post* at 10098. What the dissent seems to overlook is that individuals likewise have no right to welfare benefits, *Shapiro v. Thompson, 394 U.S. 618, 627 n.6, 22 L. Ed. 2d 600, 89 S. Ct. 1322 (1969)*, unemployment compensation, *Sherbert v. Verner, 374 U.S. 398, 404, 10 L. Ed. 2d 965, 83 S. Ct. 1790 (1963)*, *overruled on other grounds by Employment Div. v. Smith, 494 U.S. 872, 108 L. Ed. 2d 876, 110 S. Ct. 1595 (1990)*, a tax exemption, *Sherbert, 374 U.S. at 406* (discussing *Speiser v. Randall, 357 U.S. 513, 2 L. Ed. 2d 1460, 78 S. Ct. 1332 (1958))*, or a public job, *Perry v. Sindermann, 408 US. 593, 597-98, 33 L. Ed. 2d 570, 92 S. Ct. 2694 (1972).* [**101] Yet no one would seriously maintain that, as a result, states or localities could condition the distribution and extent of such benefits on the basis of race. n55

n55 Recall the undisputed fact that the gap in average SAT scores between students at Garfield and Cleveland is nearly 400 points. *See supra* at 9991 n.1.

The dissent's appeal to the rights/privileges distinction in this context is particularly ironic because it read-

ily parallels arguments long ago repudiated in this context. Indeed, it quite unintentionally evokes the State of Missouri's argument that because it had no duty to supply legal education, and there was therefore no personal "right" to a legal education, no one could suffer a legally cognizable injury from the University of Missouri Law School's use of a racial classification in admissions. Yet as the Court explained in rejecting that claim, "The question here is not of a duty of the State to supply legal training, or of the quality of the training which it does supply, but of its duty [**102] when it provides such training to furnish it to the residents of the State upon the basis of an equality of right." *Missouri ex rel. Gaines v. Canada, 305 U.S. 337, 349-50, 83 L. Ed. 208, 59 S. Ct. 232 (1938).*

Likewise, we think the issue here is not whether students have a right to attend the school of their choice, or one of significantly above-average quality. It is whether having made available a choice-based system of public education the District may use race to circumscribe parental choices in the way it has. The dissent's suggestion that it may do so because all are "*equally* subject" to such discrimination, *post* at 10097 (emphasis in original), cannot be correct: Across-the-board wrongs do not, as the dissent reasons, make a right.

D

Unfortunately, the dissent's thin scrutiny of the District's racial tiebreaker strays far from constitutional norms -- and it inadvertently threatens to entrench a permanent regime of racial discrimination. For if public education's most compelling mission really is to prepare children to interact with those who look different by balancing each school's racial profile, then the Constitution's promise of equal justice will remain unfulfilled [**103] for the inestimable number of future generations during which race inevitably will be perceptible.

V

Because the School District's use of the racial tiebreaker violates the equal protection mandate of the *Fourteenth Amendment*, we REVERSE the decision of the District Court and REMAND with instructions [*989] to ENJOIN the School District from using the racial tiebreaker, as most recently constituted, in making future high school assignments.

DISSENTBY: Susan P. Graber

DISSENT: GRABER, Circuit Judge, dissenting:

Fifty years after *Brown v. Board of Education, 347 U.S. 483, 98 L. Ed. 873, 74 S. Ct. 686 (1954)*, required the integration of public schools "with all deliberate speed," *349 U.S. 294, 301, 99 L. Ed. 1083, 75 S. Ct. 753, 71 Ohio Law Abs. 584 (1955)*, segregated schools remain in many communities, often as a result of segregated housing patterns. n1 Seattle has been no exception to the struggle to achieve and maintain integrated schools. After decades of more coercive efforts to counteract the effects of segregated housing patterns, Seattle School District No. 1 ("the District") in 1998 adopted a high school assignment plan ("the Plan") to maximize school choices for students and their families while continuing to ensure that [**104] integrated public schools are available to all. I respectfully dissent from my colleagues' conclusion that the Plan is unconstitutional. n2When understood in context, the Plan is narrowly tailored to serve a compelling governmental interest in ensuring that all students in Seattle's public high schools receive the educational benefits of an integrated learning environment.

n1 *See* Erica Frankenberg et al., *A Multiracial Society with Segregated Schools: Are We Losing the Dream?* 4 (The Civil Rights Project, Harvard Univ. Jan. 2003), *at* http://www.civilrightsproject.harvard.edu/research/ reseg03/AreWeLosingtheDream.pdf., *cited in Gratz v. Bollinger, 539 U.S. 244, 299 n.4, 156 L. Ed. 2d 257, 123 S. Ct. 2411 (2003)* (Ginsburg, J., dissenting).

n2 I agree with the majority's conclusion that the case is not moot. Maj. op. at 9998-10001.

The Supreme Court of the United States has never decided a case involving the consideration of race in a voluntarily imposed school assignment program that is intended [**105] to promote integrated secondary schools. The Court's recent decisions regarding the consideration of race in selective admissions to institutions of higher learning do not control in the secondary-school context, but they provide several guiding principles. First, the Court in *Grutter v. Bollinger, 539 U.S. 306, 328, 156 L. Ed. 2d 304, 123 S. Ct. 2325 (2003)*, clarified that remediation of past official or de jure discrimination is not the only permissible reason for a government to use racial classifications; one permissible reason for considering race is to achieve the educational benefits of diversity. Second, as the Court reminded us in *Grutter*:

> Not every decision influenced by race is equally objectionable and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the

> governmental decisionmaker for the use of race in that particular context.

Id. at 327. n3 Finally, the Court emphasized that "narrow tailoring" is a fact-based analysis, noting that the inquiry in *Grutter* had to be "calibrated to fit the distinct issues raised by the use of race to achieve student [**106] body diversity in public higher education." *Id. at 334.*

> n3 In other words, strict scrutiny is a tool that we use to root out the improper prejudices and stereotypes that are the baseline concern of the *Equal Protection Clause. See City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493, 102 L. Ed. 2d 854, 109 S. Ct. 706 (1989)* (stating that the aim of strict scrutiny is to determine "what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics").

In order to calibrate *our* inquiry to fit the distinct issues raised by the use of race as a factor in a school assignment program in a public school district, I believe it is [*990] necessary, first, to understand the governmental interests that the District is trying to further and, second, to employ a narrow-tailoring analysis that is appropriate to the secondary-school setting and to the process of assigning every student to a high school. Doing so leads me to conclude that the Plan is narrowly [**107] tailored to serve compelling governmental interests. n4

> n4 I agree with the majority that the rights afforded by *Title VI* are coextensive with those guaranteed by the *Equal Protection Clause.* Maj. op. at 9996 n.10, 10001 n.14. I therefore conclude that the Plan does not violate Title VI. *See Grutter, 539 U.S. at 343* (concluding that the university's admissions policy did not violate Title VI).

I. *The District's interests in employing a race-conscious classification are compelling, but are not identical to those asserted in* Grutter *and Gratz v. Bollinger, 539 U.S. 244, 156 L. Ed. 2d 257, 123 S. Ct. 2411 (2003).*

As the majority rightly notes, "diversity" can be an amorphous concept. Maj. op. at 10006. Indeed, the compelling interest that the Court recognized in *Grutter* is not "diversity" per se but, rather, promotion of the specific educational and societal benefits that flow *from* diversity. *See Grutter, 539 U.S. at 329-30* (noting that the law school's concept [**108] of critical mass must be "defined by reference to the educational benefits that diversity is designed to produce"). In evaluating the relevance of diversity to higher education, the Court focused principally on two benefits that a diverse student body provides: (1) the learning advantage of having diverse viewpoints represented in the "robust exchange of ideas" that is critical to the mission of higher education, *id. at 329-30*; and (2) the greater societal legitimacy that institutions of higher learning enjoy by cultivating a cadre of national leaders who are representative of our country's diversity, *id. at 331-33.* The Court also mentioned the role of diversity in challenging stereotypes. *Id. at 330, 333*; *see also* Lani Guinier, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals, 117 Harv. L. Rev. 113, 175-76 (2003)* (observing that the diversity interest recognized in *Grutter* has "three important elements . . .: diversity is pedagogical and dialogic; it helps challenge stereotypes; and it helps legitimate the democratic mission of higher education" (footnotes omitted)). The [**109] Court explicitly deferred to the law school's "educational judgment that such diversity is essential to its educational mission." *Grutter, 539 U.S. at 328.*

Because strict scrutiny requires us to evaluate the "fit" between the government's means and its ends, *Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 280 n.6, 90 L. Ed. 2d 260, 106 S. Ct. 1842 (1986)*, it is critical to identify precisely the governmental interests -- the ends -- to which the government's use of race must be fitted. *See United States v. Paradise, 480 U.S. 149, 171, 94 L. Ed. 2d 203, 107 S. Ct. 1053 (1987)* (noting that, in order to determine whether an order was narrowly tailored, "we must examine the purposes the order was intended to serve"). In other words, before we assume that the District shares the interest identified in *Grutter*, we must consider carefully the interests the District asserts and then determine whether the District's interests are compelling.

The District's interests are connected. First, the District seeks the affirmative educational benefits that flow from racial diversity (which, as I will discuss below, are different in K-12 education than in higher education). Second, [**110] and related, is the District's interest in preventing its [*991] school assignment system from replicating Seattle's segregated housing pattern; n5 that is, the District has an interest in ensuring that each one of its students has access to the educational benefits of an integrated school environment.

> n5 A map created by the District's planners shows a striking pattern: Between 70 and 100 percent of the students who live in the various

elementary-school "reference areas" in the south and southeast areas of the city are nonwhite, compared with 20 to 50 percent in the northern half of the city.

A. *The District has a compelling interest in the educational benefits of racial diversity in secondary education.*

The District has established that racial diversity produces compelling educational benefits in secondary education. n6 Because the educational benefits that the District seeks are materially different from those sought by the university in *Grutter*, however, the type of diversity required to produce those [**111] benefits is also different.

n6 The Plan under consideration here involves only high school assignments. However, because the District adopted the high school assignment Plan as part of a process of redesigning its school assignment system for all grade levels, the District understood its interest in diversity to span the K-12 system. Accordingly, when I discuss the details of "the Plan," I refer only to high school assignments; my discussion of the District's compelling governmental interests, however, encompasses the K-12 context as a whole.

The university sought to further the academic and professional development of its students through the "livelier, more spirited, and simply more enlightening and interesting" classroom discussions that result when students have "the greatest possible variety of backgrounds." *Grutter, 539 U.S. at 330* (internal quotation marks omitted). Aggrieved applicants accused the university of using race as an impermissible proxy for particular viewpoints and perspectives, [**112] but the Court disagreed, holding that racial diversity added to the mix of diversity factors by representing the "unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters." *Id. at 333.*

Although secondary-school educators share the university's academic goals to some extent, n7 achieving diversity of viewpoint and background is not the sole -- or even the primary -- reason for promoting an integrated secondary-school environment. *Cf. Comfort ex rel. Neumyer v. Lynn Sch. Comm., 283 F. Supp. 2d 328, 381 n.90 (D. Mass. 2003)* ("The value of a diverse classroom setting at these ages does not inhere in the range of perspectives and experience that students can offer in discussions; rather, diversity is valuable because it enables students to learn racial tolerance by building cross-racial relationships."). n8

N7 The Board explained that "diversity brings different viewpoints and experiences to classroom discussions and thereby enhances the educational process." Maj. op. at 10004. The District's expert noted 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."
[**113]

n8 *Comfort* involved an elementary-school assignment plan, in which the school district allowed students to transfer from their assigned neighborhood schools only if the transfer would further the district's desegregation goals. *283 F. Supp. 2d at 347-48.* I agree with the court's statement in *Comfort* that, "while a high school's mission is surely more academic-oriented than that of the elementary schools, citizenship training is still part and parcel of the enterprise." *Id. at 375 n.84.*

[*992] The District begins its own explanation of its interest in classroom diversity by noting the socialization and citizenship advantages of racially diverse schools. *See* maj. op. at 10003-04 (quoting the School Board's "Statement Reaffirming [the] Diversity Rationale"). Indeed, courts have recognized that the fundamental goal of K-12 education is to prepare children to be good citizens -- to socialize children and to inculcate civic values. n9 *See Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683, 92 L. Ed. 2d 549, 106 S. Ct. 3159 (1986)* (stating that the inculcation [**114] of civic values is "truly the work of the schools" (internal quotation marks omitted)); *Plyler v. Doe, 457 U.S. 202, 221-23, 72 L. Ed. 2d 786, 102 S. Ct. 2382 (1982)* (noting that public education perpetuates the political system and the economic and social advancement of citizens); *Ambach v. Norwick, 441 U.S. 68, 76-77, 60 L. Ed. 2d 49, 99 S. Ct. 1589 (1979)* (observing 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"); *Brown, 347 U.S. at 493* ("[Education] is required in the performance of our most basic public responsibilities . . . . It is the very foundation of good citizenship."); *see also Comfort, 283 F. Supp. 2d at 381 n.90* ("[A]t the elementary, middle, and high school level, the goal of teaching socialization is at least

as important as the subject matter of instruction."). n10 In Washington, such civic training is mandated by the state constitution: "Our constitution is unique in placing paramount value on education for citizenship." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist., No. 1, 149 Wn.2d 660, 72 P.3d 151, 158 (Wash. 2003).* [**115]

n9 The District's expert explained the civic benefits of diverse schools this way:

> The 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 democratic and inclusive experience for all citizens. More specifically, these benefits include more cross-race friendliness, reduction in prejudicial attitudes and increases in cross-race understanding of cultural differences. Recent research has identified the *critical role of early school experiences* in breaking down racial and cultural stereo-types. 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.

(Emphasis added.)

n10 The Supreme Court in *Grutter* also recognized the importance of higher education in "preparing students for work and citizenship." *539 U.S. at 331.* For the Court in *Grutter*, this point related less to the academic benefits of diversity and more to the Court's second rationale: ensuring open access to selective institutions of higher education in order to maintain their democratic legitimacy. *See id. at 331-33.*

[**116]

In our society, in which "race unfortunately still matters," *Grutter, 539 U.S. at 333*, the "goals of teaching tolerance and cooperation among the races[] [and] of molding values free of racial prejudice . . . are integral to the mission of public schools," *Parents Involved, 72 P.3d at 162.* n11 Achieving those teaching goals requires the presence of a racially diverse student body. *See Comfort, 283 F. Supp. 2d at 376-77* ("If the compelling goal of the Plan is to train citizens to [*993] function in a multiracial world, actual intergroup racial contact is essential."). The District has emphasized the importance of interaction with peers of other races in educating students for citizenship; school officials, relying on their experience as teachers and administrators, and the District's expert all explained these benefits on the record. Even Plaintiff's expert admitted that students are widely perceived to benefit from the information that they gain from increased contact with children of other races. n12 *See also Boston's Children First v. City of Boston, 62 F. Supp. 2d 247, 259 (D. Mass. 1999)* ("Diversity may well be [**117] more important at this stage than at any other -- [because elementary school] is when first friendships are formed and important attitudes shaped . . . ."). As the United States Supreme Court has noted, this educational goal is relevant for the entire community:

> Attending an ethnically diverse school may help accomplish this goal by 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.

Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 473, 73 L. Ed. 2d 896, 102 S. Ct. 3187 (1982) (citations and internal quotation marks omitted).

n11 Although it has not decided whether the state constitution requires integrated schools, the Supreme Court of Washington has written:

> If it is determined that in a contemporary setting de facto segregated schools cannot provide children with the educational opportunities necessary to equip them for their role as citizens, then the state constitution would most certainly mandate integrated schools.

Parents Involved, 72 P.3d at 162-63.

[**118]

n12 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).

The majority misperceives the distinction between the interest recognized in *Grutter* and the one that I would recognize here. *See* maj. op. at 10043-44. The District's socialization and citizenship training is no more tangential or external to the educational experience of a secondary school than is academic training to the educational experience offered by a law school. The University of Michigan wanted to promote a stimulating academic environment so that its graduates would become accomplished and well-rounded members of the legal profession; the District [**119] wants to encourage integrated schools so that its graduates will become tolerant, productive, and well-adapted members of this racially diverse society. In both cases, although the benefits are external and long-term, the teaching occurs -- and can be observed and evaluated -- within the school environment.

In short, the District has a compelling interest in educating all students in a racially diverse learning environment, to educate them effectively to take their places in a racially diverse society.

B. *The District has a compelling interest in reducing racial isolation and ameliorating de facto segregation.*

The District's interest in achieving the affirmative benefits of a racially diverse educational environment has a flip side: avoiding racially concentrated, or racially isolated, schools. In particular, the District is concerned with making the educational benefits of an integrated school environment available to all its students. Thus, in addition to striving for better academic and social outcomes across the board, the District has been motivated by its belief that "[n]o student should be required to attend a racially concentrated school." n13 In other words, the Plan [**120] [*994] strives to ensure that patterns of residential segregation are not repeated as patterns of educational segregation that would be "determinative of a child's opportunity." *Comfort, 283 F. Supp. 2d at 384.*

N13 Seattle's Cleveland and Rainier Beach High Schools, located in the minority-dominated southeast area of the city, enrolled 90 and 92 percent nonwhite students, respectively, in the 2000-2001 school year. The District's view that these schools are racially concentrated is, at the very least, reasonable, if not compelled by the evidence. *See 34 C.F.R. § 280.4(b)* (defining "minority group isolation, in reference to a school, [as] a condition in which minority group children constitute more than 50 percent of the enrollment of the school"); *see also infra* pp. 10085 (discussing the majority's assertion that "inter-ethnic diversity" obviates the District's need for pro-diversity and pro-integration policies, maj. op. at 10045-46).

This "flip side" makes the [**121] District's interest different from any that could have been posited in *Grutter*. Universities (like most other entities that select a few from among a pool of competitive applicants) are not, in any direct sense, responsible for the welfare of the entire universe of their applicants. That is, so long as all applicants are treated fairly in the competition for access to the limited government benefit, a university may design a class of students that satisfies its academic objectives without worrying about the effect that its admissions decisions have on rejected applicants. n14 Public school districts, on the other hand, must consider not only the affirmative effect that a student's assignment to a particular school will have on the level of diversity in that school, but also the concomitant effect of that assignment on the entire school system.

n14 There are at least two exceptions to this general proposition. First, public university systems can be ordered to desegregate to remedy the effects of past intentional or de jure segregation, as in *United States v. Fordice, 505 U.S. 717, 120 L. Ed. 2d 575, 112 S. Ct. 2727 (1992)*. Second, the Court in *Grutter* recognized that universities do exist in, and affect, the society as a whole and that they have a compelling interest in taking into account the effects of their admissions policies on that society. *539 U.S. at 332-33.*

[**122]

As the district court did in this case, n15 several courts have conceived of a school district's voluntary reduction or prevention of de facto segregation as a compelling interest. *See 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 1163, 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." (citing *Parent Ass'n of Andrew Jackson High Sch. v. Ambach, 598 F.2d 705, 717-20 (2d Cir. 1979)*); *Comfort, 283 F. Supp. 2d at 384-86* (holding that a school district had a compelling interest in ameliorating the effects of de facto [**123] residential segregation); *Hampton v. Jefferson County Bd. of Educ., 102 F. Supp. 2d 358, 379 (W.D. Ky. 2000)* (noting that "voluntary maintenance of the desegregated school system should be considered a compelling state interest," such that a district may consider race in assigning students to comparable schools).

n15 The district court held that "preventing the re-segregation of Seattle's schools is . . . a compelling interest." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 137 F. Supp. 2d 1224, 1237 (W.D. Wash. 2001)*; *see also id. at 1233-35.*

None of the school districts in the above-cited cases was subject to a court-ordered [*995] desegregation decree nor, with one exception, did the schools face an imminent threat of litigation to compel desegregation. n16 Like the Seattle School District, they may have been vulnerable to litigation in decades past, n17 but the districts' voluntary desegregation measures today would make it difficult to make the [**124] required showing that the districts *intended* to create segregated schools. *See,* e.g., *Comfort, 283 F. Supp. 2d at 390* (explaining that the district's vulnerability to litigation had been "headed off by the very Plan in contention here"). It is well established that school districts have no *obligation* to remedy de facto (as distinct from de jure) segregation. *Freeman v. Pitts, 503 U.S. 467, 495, 118 L. Ed. 2d 108, 112 S. Ct. 1430 (1992)*. Nevertheless, several courts have pointed out the irony of a conclusion that a measure that could be required to remedy segregation could not be adopted voluntarily to prevent segregation. *See, e.g., Comfort, 283 F. Supp. 2d at 384-85* ("It would make no sense if [school] officials were obliged to take responsibility for addressing these adverse consequences [of segregated schools] but at the same time were constitutionally barred from taking voluntary action aimed at nipping some of these effects in the bud."); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 137 F. Supp. 2d 1224, 1235 (W.D. Wash. 2001)* ("[I]t would defy logic for this court to find that the less intrusive [**125] programs of today violate the *Equal Protection Clause* while the more coercive programs of the 1970's did not."); *Hampton, 102 F. Supp. 2d at 379* ("It is incongruous that a federal court could at one moment require a school board to use race to prevent resegregation of the system, and at the very next moment prohibit that same policy.").

n16 The *Andrew Jackson* cases arose out of an action by minority students seeking compulsory desegregation, but the school district was held not to have engaged in intentional or de jure segregation and therefore could not be ordered to remedy the de facto racial imbalance that existed. *598 F.2d at 715*. The court then addressed the question whether the district's voluntary plan itself violated equal protection, *id. at 717*, holding that it did not, *id. at 718-19*.

n17 As I will discuss below, the District voluntarily adopted its first mandatory desegregation plan in 1977, in order to forestall legal action by the NAACP and the ACLU, who alleged that the District had acted to further de facto segregation.

[**126]

In essence, what these courts have recognized is that school districts have a prospective, even if not a remedial, interest in avoiding and ameliorating real, identifiable de facto racial segregation. Support for this conclusion comes from statements in the Supreme Court's school desegregation cases, which repeatedly refer to the voluntary integration of schools as sound educational policy within the discretion of local school officials. *See Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16, 28 L. Ed. 2d 554, 91 S. Ct. 1267 (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, 28 L. Ed. 2d 586, 91 S. Ct. 1284 (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."); *Bustop, Inc. v. Bd. of Educ. of L.A., 439 U.S. 1380, 1383, 58 L. Ed. 2d 88, 99 S. Ct. 40* [**127] (Rehnquist, Circuit Justice 1978) (denying a request to stay implementation of a desegregation [*996] 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, 37 L. Ed. 2d 548, 93 S. Ct. 2686 (1973)* (Pow-

ell, 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."); *Washington v. Seattle Sch. Dist., 458 U.S. 457, 480, 487, 73 L. Ed. 2d 896, 102 S. Ct. 3187* (reinstating the Seattle School District's authority to use mandatory busing to correct de facto segregation).

Of course, these statements must be considered in the light of the Court's later decisions in *City of Richmond v. J.A. Croson Co., 488 U.S. 469, 507, 102 L. Ed. 2d 854, 109 S. Ct. 706 (1989)* (holding that "outright racial balancing" did not constitute a permissible reason to establish a quota for awarding construction contracts); *Freeman, 503 U.S. at 494* (holding [**128] that, in the absence of a constitutional violation, the district *court* had no power to *order* "[r]acial balance . . . for its own sake"); and *Grutter, 539 U.S. at 329-30* (stating that the law school's concept of "critical mass" was permissible only because it was not "outright racial balancing," but rather was "defined by reference to . . . educational benefits"). Those decisions establish that the government may not act in furtherance of racial balance without a compelling nonracial reason. Unless and until the Supreme Court says otherwise, however, I would heed its repeated statements that the voluntary integration of public schools, in response to specific conditions of de facto segregation and in furtherance of legitimate educational policies, can be a constitutionally permissible interest.

In sum, I would hold that the District has a compelling interest in structuring its assignment policies to prevent a return to the era in which Seattle's undisputedly segregated housing pattern was the exclusive determinant of school assignments to neighborhood schools.

C. *Deference to administrators' expertise in education policy is warranted.*

In addition to [**129] signaling specifically its approval of voluntary measures to promote integrated schools, the Supreme Court repeatedly has shown deference to school officials at the intersection between constitutional protections and educational policy. *See generally* Wendy Parker, *Connecting the Dots:* Grutter, *School Desegregation, and Federalism, 45 Wm. & Mary L. Rev. 1691 (2004).* Local control over public education has animated Supreme Court jurisprudence from the dawn to the apparent twilight of federal-court involvement in the desegregation of public schools. *See, e.g., Brown v. Board of Educ., 349 U.S. 294, 299, 99 L. Ed. 1083, 75 S. Ct. 753, 71 Ohio Law Abs. 584* (directing local school officials, with court oversight, to devise remedies for segregation in the light of "varied local school problems"); *Milliken v. Bradley, 418 U.S. 717, 741-42, 41 L. Ed. 2d 1069, 94 S. Ct. 3112 (1974)* ("No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process."); *Freeman, 503 U.S. at 490* ("As we have long [**130] observed, 'local autonomy of school districts is a vital national tradition.'" (quoting *Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 410, 53 L. Ed. 2d 851, 97 S. Ct. 2766 (1977)).* In the context of a challenge to a school-funding system, the Court was motivated, in part, by concerns about the judiciary's lack of [*997] competency in the area of educational policy. *See San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 42, 36 L. Ed. 2d 16, 93 S. Ct. 1278 (1973)* (stating, in its rational-basis review of a school-funding system, that "this case . . . involves the most persistent and difficult questions of educational policy, another 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"). n18 Thus, although I agree that public secondary schools do not have "a constitutional right to select their student body," maj. op. at 10042, n19 they have been given considerable discretion to devise school assignment policies, even in the face of adjudicated constitutional violations

> n18 The logical corollary to this concern about the judiciary's lack of competency is a recognition that public school educators are, in fact, trained in and qualified to assess educational policies and their outcomes.

[**131]

> n19 Indeed, as I will argue below, a fundamental difference between the university and the public school settings is that public schools generally do not "select" their students at all. Rather, they are obliged to educate *all* students in the relevant district.

The Supreme Court also has shown solicitude toward the educational objectives of public school administrators in balancing those educational objectives with students' *First Amendment* rights. *See, e.g., Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273, 98 L. Ed. 2d 592, 108 S. Ct. 562 (1988)* (holding that educators may censor student speech in school-sponsored forums for valid educational reasons and noting that "[t]his standard is consistent with our oft-expressed view that the educa-

tion of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges"); *see also Comfort, 283 F. Supp. 2d at 374* & n.83 (citing Supreme Court cases involving the balancing of schools' curricular needs against students' rights under the First, Fourth, and [**132] *Eighth Amendments*, as well as the *Due Process Clause of the Fourteenth Amendment*). This deference recognizes not merely a school's need to preserve order so as to promote pure "academic" learning, as the majority suggests, maj. op. at 10043, but also to teach students that certain kinds of discourse are "wholly inconsistent with the 'fundamental values' of public school education," *Bethel Sch. Dist., 478 U.S. at 685-86.*

These Supreme Court decisions suggest that secondary schools, like universities, occupy a "special niche" in our constitutional tradition, albeit one that owes more to the values of federalism and to the public schools' broad educational mission than to a desire to safeguard academic freedom. For this reason, I would afford some deference to the District's judgment that integrated schools are essential to its educational mission and would extend to the District's identification of its core values a deference similar to that which the *Grutter* Court afforded the university. *See Grutter, 539 U.S. at 328*; *cf. Petit v. City of Chicago, 352 F.3d 1111, 1114 (7th Cir. 2003)* (extending deference, pursuant to *Grutter* [**133] , to the "views of experts and Chicago police executives that affirmative action was warranted to enhance the operations" of the Chicago Police Department), *cert. denied, 158 L. Ed. 2d 984, 124 S. Ct. 2426 (2004).*

In sum, I am convinced by the record, as well as by deference to the District's expertise in educational policy, that the District's interests in obtaining the educational benefits of diversity in secondary education and in ameliorating the de facto [*998] segregation caused by Seattle's segregated housing pattern are compelling as a matter of law.

II. *The District's Plan is narrowly tailored to achieve its compelling governmental interests.*

The narrow-tailoring inquiry is intended to "'smoke out' illegitimate uses of race" by ensuring that the government's classification is closely fitted to the compelling goals that it seeks to achieve. *Croson, 488 U.S. at 493.* As discussed above, the analysis must fit the context of the challenged governmental action. *Grutter, 539 U.S. at 327, 333-34.* For example, the factors that the Court uses to assess narrow tailoring in the employment context, *Paradise, 480 U.S. at 171*, n20 [**134] must be modified for use in the context of higher education. *See Johnson v. Bd. of Regents of Univ. of Ga., 263 F.3d 1234, 1252 (11th Cir. 2001)* ("We do think, however, that the *Paradise* factors should be adjusted slightly to take better account of the unique issues raised by the use of race to achieve diversity in university admissions."). Likewise, some of the factors used to assess programs related to employment or higher education are of doubtful relevance in the context of K-12 school assignment plans. *See Hampton, 102 F. Supp. 2d at 380* ("The workplace, marketplace, and higher education cases are poor models for most elementary and secondary public school education . . . ."). We must consider which narrow-tailoring factors are appropriate to this context; our inquiry

> pivots not merely on the fact that race is used in a school plan, but how it is used, in what settings, for what purposes, whether it is race conscious or race preferential, whether it involves an examination school (or a college or law school) for which there are significant qualifications, or an elementary school, for which there are not, whether the use of race excludes [**135] or simply affects the distribution of a benefit . . . .

Boston's Children, 62 F. Supp. 2d at 259.

> n20 In an oft-quoted sentence, the Court described the analysis as follows:
>
> > In determining whether race-conscious remedies are appropriate, we look to several factors, including the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties.
>
> *Paradise, 480 U.S. at 171.*

Because of the differences in setting, several of the narrow-tailoring factors employed by the Supreme Court in *Grutter* and *Gratz* -- and by the majority in this case -- have no logical relevance to the evaluation of secondary-school assignment plans like the District's. After fashioning an appropriately contextualized narrow-tailoring analysis, I will consider [**136] the Plan in its broader

historical and factual context and conclude that the Plan satisfies strict scrutiny.

A. *Narrow-tailoring factors involving "holistic review" and "quotas" have no relevance in the context of assigning students to secondary schools.*

For two reasons, cases involving selective admissions to institutions of higher learning do not provide a proper "narrow tailoring" model for this case. n21 First, [*999] they involve situations in which a school grants or denies access to a limited government benefit based on the school's evaluation of a particular applicant's merit; using race as a proxy, or as a substitute, for merit in awarding this benefit raises problems of stereotyping and stigma that are absent from the District's Plan. Second, the institutions involved in those cases seek the "true diversity" befitting their advanced academic orientations; as I have discussed, the diversity interest in the K-12 context involves different educational benefits and, like the District's related interest in ameliorating de facto segregation, is more appropriately achieved through an explicit consideration of racial diversity.

n21 The same is true of selective admissions to special high school programs, as in *Wessmann v. Gittens, 160 F.3d 790, 799-800 (1st Cir. 1998)* (employing a "true diversity" analysis in the context of *competitive* admissions to a prestigious examination high school); and *Hampton, 102 F. Supp. 2d at 380-81* (noting that admissions to *magnet* schools, unlike basic school assignments, have "vertical effects"). *See Brewer, 212 F.3d at 752-53* (distinguishing *Wessmann* because it was a selective admissions case in which "true diversity" was the compelling interest). I disagree with the majority's reasoning that the District's plan is "necessarily selective" merely because some schools are oversubscribed or more popular. *See* maj. op. at 10038-39. Under this logic, assignment between two first-grade classrooms in a single school -- classrooms that are equivalent but for the popularity of the teacher -- could be considered "selective."

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1. *Where competition for a limited government resource is absent, rules about how competition may be conducted are irrelevant.*

In *Grutter*, the Supreme Court "define[d] the contours of the narrow-tailoring inquiry with respect to race-conscious university admissions programs." *See Grutter, 539 U.S. at 333.* In the context of university admissions, where applicants compete for a limited number of spaces in a class, the Court focused its inquiry on what role race may play in judging an applicant's qualifications. The Court's underlying concern is for fair competition -- to prevent race from being used as an outright substitute for merit in the competition for access to a limited government resource, in part because of the stigma that may attach. *See Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 298, 57 L. Ed. 2d 750, 98 S. Ct. 2733 (1978)* (Powell, J., concurring) (stating that "preferential programs may only reinforce common stereo-types holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth"); *Croson, 488 U.S. at 493* ("Classifications based on race [**138] 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 also Gratz, 539 U.S. at 272-73* (applying the narrow-tailoring inquiry to ensure that applicants of all races have the opportunity to prove their merit based on a broad range of criteria). In *Grutter*, the Court discussed two specific rules to ensure fair competition. *539 U.S. at 334.* The first prohibits "quotas," which insulate applicants from certain groups from competition with applicants from other groups for some portion of the available slots. n22 *Id.* [*1000] *at 335.* The second rule prevents race from being used as a mechanical proxy for merit by requiring individualized consideration of the merit of each applicant, across a broad range of factors (of which race may be but one). *Id. at 336-37.*

n22 I use the term "quota" here, as I believe the Court did in *Grutter, 539 U.S. at 335*, to mean "a fixed number or percentage of minority group members who may be admitted into some activity or institution" -- not to mean, more generally, "a proportional part." Webster's Third New Int'l Dictionary 1868 (unabridged ed. 1993). Quotas, as I understand them, are not at issue here because no student is preferentially admitted to, or turned away from, the Seattle public high schools. Thus, the District does not run afoul of this aspect of the Court's narrow-tailoring analysis.

The majority seizes upon the more general sense of the word "quota" -- as meaning "proportion" -- and argues that "racial balancing" is per se unconstitutional. *See* maj. op. at 10051-52. The cited cases do not support the majority's sweeping statements. First, the Court in *Croson* held that a minority set aside was prohibited because the government could not prove that past discrimination provided a compelling reason for the program, not because "racial balancing" as a mechanism for achieving a compelling state interest

would necessarily be inconsistent with the *Fourteenth Amendment*. Second, states are prohibited from making race the *predominant* factor in drawing legislative districts because of the impermissibility of racial stereotyping (that is, using race as a proxy for political characteristics), not because any consideration of a district's racial proportions is per se improper. *See Bush v. Vera, 517 U.S. 952, 968, 135 L. Ed. 2d 248, 116 S. Ct. 1941 (1996)* (plurality); *see also id. at 958* (noting that redistricting may be performed with "consciousness of race"). These cases do not establish that the District is per se prohibited from linking its assignment practices to the racial make-up of its student enrollment, especially where student choices, not fixed proportions, are the principal determinant of student assignments. I simply cannot agree that we have reached the majority's promised land: Our governments, schools, and courts may yet be forced, by compelling reasons, to acknowledge that race exists in America. *See Grutter, 539 U.S. at 333* (noting that, in our society, "race unfortunately still matters").

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Neither of those requirements, which concern how universities are permitted to evaluate merit, is relevant in a situation where there is absolutely no competition or consideration of merit at issue. *All* high school students must and will be placed in a Seattle public school. The students' relative merit is irrelevant. There are no special qualifications for assignment to any school, so no stigma results from any particular school assignment. n23 The dangers of substituting racial preference for fair, merit- or worth-based competition are absent here. Justice Powell recognized this very fact in his landmark opinion in *Bakke*, which reasoned that the use of racial classifications to desegregate schools was fundamentally different from the selective admissions context because, in the school assignment context, "white students [were not] deprived of an equal opportunity for education." *Bakke, 438 U.S. at 301 n.39.*

n23 Students are selected by merit into at least one District *program* (which carries a corresponding school assignment), but not into any District *school*. Those who test in the top 2 percent of their grade levels are offered admission to the Advanced Placement Program for academically talented students. Selection for that program is not at issue in this case.

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Justice Powell's comment suggests an even more fundamental reason why a careful, holistic, individualized consideration of an applicant's worth is not necessary here: No student is being excluded from the government resource at issue -- a free public education. n24 In the assignment process, all students are accommodated with the same baseline high school education. n25 As [*1001] I will discuss in more depth below, differences among the high schools may be relevant to our consideration of the "burdens" that the Plan imposes, but perceived or actual differences in academic quality do not transform the District's assignment process into a competition for access to a limited government resource. This is especially true where it is clear that every student can enroll in at least one of Seattle's oversubscribed, "quality" high schools.

n24 Of course, I agree with the majority that the government must offer its benefits on equal terms, regardless of race. *See* maj. op. at 10053-54. But the governmental benefit at issue here is *a high school education*, not free student choice about school assignments. Indeed, the District could devise a permissible assignment system that is devoid of student choice among high schools. Nonetheless, the District has opted to offer some choices to families -- not as an abstract benefit, but rather as an educational policy that interacts with and is necessarily constrained by other District policies, including the District's diversity and integration goals.

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n25 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 respondent 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.

Bakke, 438 U.S. at 301 n.39.

2. *Where "true diversity" is not the goal, consideration of a broad range of diversity factors is unnecessary.*

Another rationale for the Court's requirement of holistic review is that it provides a closer fit with a university's interest in viewpoint diversity. *Grutter, 539 U.S. at 337*. The Court held that it was impermissible to presume that race would correlate with viewpoint, perspective, or background; rather, the university must *evaluate* each applicant's viewpoint, perspective, and background. *Id. at 338-39*.

The danger that race would be used to "fill[] stereotyped [**142] 'viewpoint' niches," *Comfort, 283 F. Supp. 2d at 379*, is not present here. The diversity interest in K-12 education is much simpler: that children learn to interact with peers of different races. That interest requires that there *be* children of different races in the classroom. Rather than relying on stereotypes, intergroup contact has the opposite effect; it inhibits the formation of stereotypes by teaching children that "all people are different no matter what their color or ethnic background." *Id.* In other words, the District's focus on racial diversity is not a presumption that students of the same race will share common viewpoints; the presence of students of different races is meant to break down, rather than to further, racial stereotypes by giving students an opportunity to learn that race does not signal an individual's viewpoint, perspective, or background.

Moreover, the holistic review necessary to achieve "true diversity" is of even less relevance to the District's interest in preventing and ameliorating de facto racial segregation. As the Second Circuit has said:

> If reducing racial isolation is -- standing alone -- a constitutionally permissible [**143] goal, as we have held it is . . ., then there is no more effective means of achieving that goal than to base decisions on race. . . . [T]he cases cited by the District Court in support of its decision that the use of race alone in the Program was not narrowly tailored only address the efficacy of employing strictly racial classifications to achieve "true diversity." Those decisions are, therefore, inapplicable to the present situation where the Program's aim . . . is precisely to ameliorate *racial* isolation in the participating districts.

Brewer, 212 F.3d at 752-53 (citations omitted). In other words, when the District's compelling interest is in racial diversity, it makes little sense to ask it instead to evaluate a student's musical talent, athletic prowess, or eligibility for a free lunch. n26

> n26 The majority's view is that diversity is an all-or-nothing proposition and that it is improper to try to achieve racial diversity without simultaneously trying to achieve every other conceivable type of diversity (e.g., socioeconomic, religious, or linguistic). *See* maj. op. at 10021-25. I disagree. The District's interest is in the socialization benefits that come from racial diversity in particular. The narrow tailoring inquiry is not concerned with how a *different* compelling interest might lead to similar benefits, but rather asks whether race-neutral means are effective in achieving the race-related compelling interest at issue.

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[*1002] B. *Viewed in its historical and factual context, the District's Plan satisfies an appropriate narrow-tailoring test.*

Except for rejecting the narrow-tailoring factors peculiar to situations of competition and "true diversity," I have no disagreement with the majority's identification of the remaining narrow-tailoring factors. As I will discuss, I conclude that the Plan satisfies the narrow-tailoring test. But first, in order to facilitate an accurate narrow-tailoring inquiry, I believe it is necessary to supplement the majority's statement of facts by placing the District's adoption of the Plan in a broader factual context.

1. *The broader context of desegregation efforts and the Board's decision to adopt the Plan.*

The increase in Seattle's minority population after World War II was concentrated first in the central, then in the south-east, area of the city. n27 Because school assignments were made strictly on the basis of neighborhood, schools in the central and southeast areas reflected that population concentration. In 1962, the central area's Garfield High School reported 64 percent minority enrollment (it accommodated 75 percent of all black students), and six of the [**145] central area elementary schools had at least 75 percent minority enrollment. n28 Meanwhile, the eight high schools serving other major areas of the city remained more than 95 percent white.

> n27 The history that follows comes principally from two documents in the district court record. One is a paper entitled, "The History of Desegregation in Seattle Public Schools, 1954-

1981," which was prepared by the District's desegregation planners. The other is the "Findings and Conclusions" adopted by the Board in support of the current Plan.

n28 South and southeast area high schools Franklin and Cleveland would experience similar enrollment changes in the 1960's and the 1970's, with minority enrollment at Franklin reaching 78 percent in 1977.

In the 1960's, the District responded to this imbalance in various ways. It granted the central area principals' request for special financial assistance. It responded to racial tensions by experimenting with exchange programs, in which a handful of students switched high [**146] schools for several weeks. And in 1963, the District implemented a voluntary racial transfer program, through which a student could transfer to any school with available space, if the transfer would improve the racial balance at the receiving school. Although this program had some positive results, it did not reduce the racial imbalance significantly.

In the 1970's, the District stepped up its efforts. It adopted a plan to desegregate central-area middle schools by requesting volunteers to transfer between minority- and majority-dominated neighborhood schools and ordering mandatory transfers when the numbers of volunteers were insufficient. The District also took steps to desegregate Garfield High School by changing its educational program, improving its facilities, and eliminating the "special transfers" that had allowed white students to leave the Garfield area. In addition, for the 1977-78 school year, the District instituted a magnet-school program to promote desegregation. According to the District's history:

> [*1003] While it appeared evident that the addition of magnet programs would not in itself desegregate the Seattle schools, there was supportive evidence that voluntary [**147] strategies, magnet and non-magnet, could be significant components of a more comprehensive desegregation plan.

By the 1977-78 school year, Franklin was 78 percent minority, Rainier Beach 58 percent, Cleveland 75 percent, and Garfield 64 percent. Other high schools ranged from 9 percent to 23 percent minority enrollment, with one school (Lincoln) at 37 percent. *See Seattle Sch. Dist., 458 U.S. at 461* (noting that the racial imbalance in Seattle's schools had increased between the 1970-71 and 1977-78 school years).

In the spring of 1977, the NAACP filed a complaint with the Office of Civil Rights, alleging that Seattle's School Board had acted to further racial segregation in the city's schools. Several other organizations, principally the ACLU, threatened to file an action in court if the District failed to adopt a mandatory desegregation plan. When the District agreed to develop a desegregation plan, the Office of Civil Rights concomitantly agreed to delay its investigation, and the ACLU agreed to delay filing a lawsuit. *See Seattle Sch. Dist., 458 U.S. at 460 n.2* (describing this threat of litigation).

During the summer of 1977, the District [**148] and community representatives reviewed five model plans. Ultimately, the District incorporated elements of each model into its final desegregation plan, adopted in December 1977 and known as the "Seattle Plan." The Seattle Plan divided the district into zones, within which majority-dominated elementary schools were paired with minority-dominated elementary schools to achieve racial balance. Mandatory high school assignments were linked to elementary-school assignments, although various voluntary transfer options were available. With the Seattle Plan,

> Seattle became the first major city to adopt a comprehensive desegregation program voluntarily without a court order. By doing so the District maintained local control over its desegregation plan and was able to adopt and implement a plan which in the eyes of the District best met the needs of Seattle students and the Seattle School District.

"History of Desegregation" at 36-37. An initiative was passed immediately to block implementation of the Seattle Plan, but the initiative ultimately was declared unconstitutional by the United States Supreme Court. *Seattle Sch. Dist., 458 U.S. at 470* (holding that [**149] the initiative violated equal protection).

The Seattle Plan apparently furthered the District's school desegregation goals, but its operation was unsatisfactory in other ways. n29 In 1988, the District abandoned the Seattle Plan and adopted a new plan that it referred to as "Controlled Choice." Under the Controlled Choice plan, schools were grouped into clusters that met state and district desegregation guidelines, and families were permitted to rank schools within the relevant cluster, increasing the predictability of assignments. Because of Seattle's housing patterns, the District's planners ex-

plained that "it was impossible to fashion clusters in a geographically contiguous manner"; some cluster schools were near the student's home, but others were in "racially and culturally different neighborhoods." Although roughly 70 percent [*1004] of students received their first choices, the Controlled Choice plan still resulted in mandatory busing for 16 percent of the District's students.

n29 For example, the District's History of Desegregation reports that the Seattle Plan was extremely confusing, required mandatory busing of non-white students in disproportionate numbers, made facilities and enrollment planning difficult, and contributed to "white flight" from the city schools.

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In the mid-1990's, District staff were directed to devise a new plan for *all* grade levels to simplify assignments, reduce costs, and increase community satisfaction, among other things; the guiding factors were to be choice, diversity, and predictability. Staff developed four basic options, including the then-existing Controlled Choice plan, a regional choice plan, a neighborhood assignment plan with provision for voluntary, integration-positive transfers, and an open choice plan.

Board members testified that they considered all the options, as they related to the District's educational goals -- with special emphasis, at the secondary-school level, on the goals of choice and diversity. Neighborhood and regional plans were viewed as unduly limiting student choice, on which the District placed high value because it was seen to increase parental involvement in the schools and promote improvements in quality through a marketplace model. The District sought to maintain its commitment to integrated education by establishing diversity goals, but moving away from the rigid desegregation guidelines and mandatory assignments prevalent in the 1970's and 1980's. The Board adopted the current, [**151] open choice Plan for the 1998-99 school year.

The Plan now under review permits students to rank their choices among the District's 10 high schools. The District has sought to make each of the 10 schools unique, with programs that attempt to respond to the continually changing needs of students and their parents. n30 Only when oversubscription results from families' choices -- as, of course, it has -- does the District become involved in the assignment process. Assignments to oversubscribed schools proceed by way of a series of tiebreakers: first, students with a sibling attending the selected school are assigned; second, *if* but only if the school deviates from the District's proportion of white and minority students by more than a specified percentage, n31 students who bring that school closer to the ratio are assigned; third, students are assigned in order of the distance from their homes to the school. n32 The first and third tiebreakers seek to further the District's goal of parental involvement, and the second is directed toward the District's diversity goal. Students not assigned to one of their chosen schools are assigned to the closest school with space available; naturally, [**152] students who list more choices are less likely to receive one of these "mandatory" assignments.

n30 Indeed, the District implemented the school assignment Plan as part of a comprehensive plan to improve and equalize the attractiveness of all the high schools, which included a weighted funding formula, a facilities plan, and a new teacher contract that would make teacher transfers easier.

n31 Originally, schools that deviated by more than 10 percent were considered "imbalanced." For the 2000-2001 school year, the trigger was increased to 15 percent, softening the effect of the tiebreaker.

n32 A fourth tiebreaker, a random lottery, is seldom used because distance is calculated to 1/100th of a mile.

Having examined the District's interests and the specifics of the Plan in its historical context, I will turn next to a consideration of whether the Plan is narrowly tailored to serve the compelling governmental interests that I have identified.

2. *The District's Plan is narrowly tailored.*

A narrow-tailoring [**153] analysis requires consideration of three traditional groups of [*1005] factors: (1) the necessity for the action and the efficacy of alternative, race-neutral remedies; (2) the extent to which the action is proportional to the District's interests (particularly, whether it is of limited duration and is flexible, in relation to its objective); and (3) the relative weight of any burden on third parties. *See Paradise, 480 U.S. at 171*; *see also Comfort, 283 F. Supp. 2d at 371-73.* As I stated above, the purpose of this inquiry is to "'smoke out' illegitimate uses of race" by ensuring that the government's means are closely fitted to its ends. *Croson, 488 U.S. at 493.*

(a) *The Plan achieves the District's diversity goals more effectively than any workable race-neutral alternative.*

(i) *Need for the integration tiebreaker*

The integration tiebreaker allows the District to make students' and parents' choices among high schools the primary feature of its educational plan, n33 while discouraging a return to enrollment patterns based on Seattle's racially segregated housing pattern. When the District moved from its Controlled Choice plan to the [**154] current, open choice Plan, it predicted that families would tend to choose schools close to their homes. Indeed, this feature was seen as a positive way to increase parental involvement. However, unfettered choice -- especially with tiebreakers based on neighborhood or distance from a school -- raised the risk that Seattle's high school enrollment would begin to reflect its segregated housing patterns. The District's 2000-01 enrollment data showed that, of the students living in the southern half of Seattle, only 23 percent are white (6,247 out of 27,377 students), as compared with 64 percent of the students living in the northern half of the city (12,571 out of 19,555 students).

n33 "Today choice is a popular way to reform American education . . . ." Wendy Parker, *The Color of Choice: Race and Charter Schools, 75 Tul. L. Rev. 563, 564 (2001).*

It is de facto residential segregation across this white/ nonwhite axis that the District has battled historically and that it sought to prevent by [**155] making the integration tiebreaker a part of its open choice Plan. Although I have no doubt that other forms of race-based tension exist, *see* maj. op. at 10046 n.47, the District reasonably placed its focus here. The District has consistently faced a pattern in which its white students live predominately in the northern half of the city (in 2000-2001, 66.8 percent of the District's white students lived in the northern half of the city) and its students of color -- in *each* of the three largest categories that the District tracks n34 -- live predominately in the southern half of the city. In 2000-2001, 74.2 percent of the District's Asian students, 83.6 percent of its Black students, and 65 percent of its Hispanic students lived in the southern half of the city:

2000-01 ENROLLMENT BY GEOGRAPHIC AREA

GEOGRAPHIC AREA	ASIAN	BLACK	HISPANIC	WHITE
NORTH	2,879	1,778	1,693	12,571
SOUTH	8,269	9,054	3,145	6,247
TOTAL	11,148	10,832	4,838	18,818
PERCENTAGE OF STUDENTS SOUTH	74.2%	83.6%	65.0%	33.2%

$ [*1006] Moreover, Seattle's peculiar geography makes its northern neighborhoods and schools distant from its southern neighborhoods [**156] and schools. In these circumstances, the District permissibly could prioritize white/nonwhite, primarily north/ south, movement. This white/nonwhite focus also is consistent with the history of public school integration measures in this country, as reflected in a current federal regulation defining " m inority group isolation" as "a condition in which minority group children constitute more than 50 percent of the enrollment of the school," without distinguishing among the various categories included within the definition of " m inority group." *34 C.F.R. 280.4(b).*

n34 Native American students are by far the smallest group and are the only group spread evenly between the two halves of the city.

To discourage choices that would perpetuate this north-south division between the district's white and nonwhite populations, the District gave priority to choices that would counter it and create north-south movement within the District. In the 2000-01 school year, the integration tiebreaker operated in four high [**157] schools (that is, four high schools were oversubscribed and deviated by more than 15 percent from the ratio of white to nonwhite students District-wide). Although the integration tiebreaker was a limited measure, in contrast to the District's previous efforts, it did serve to alter the imbalance in the schools in which it operated.

The majority's contrary view is based on a skewed presentation of the enrollment statistics. Figures reflecting the tie-breaker's total effect on a school's enrollment, such as those cited in the majority opinion, *see* maj. op. at 10047 ("Table 2"), 10049 ("Table 3"), 10049 (citing a maximum shift of 6.1 percent in the white/nonwhite ratio), artificially minimize the tiebreaker's effect by failing

to recognize that students enter the ninth grade in much greater numbers than they transfer to other schools after the ninth grade. The following statistics submitted by the District, which portray directly the effect of the tie-breaker on the make-up of the ninth grade classes at the four affected schools, illustrate the function of the tie-breaker far more accurately:

2000-01 CHANGE IN PERCENTAGES OF STUDENTS OF COLOR IN

NINTH GRADE CLASSES

SCHOOL	WITHOUT INTEGRATION TIEBREAKER	WITH INTEGRATION TIEBREAKER	PERCENT CHANGE
FRANKLIN	79.2	59.5	- 19.7
NATHAN HALE	30.5	40.6	+ 10.1
BALLARD	33.0	54.2	+ 21.2
ROOSEVELT	41.1	55.3	+ 14.2

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In other words, the majority's references to a 6.1 percent maximum shift do not tell the whole story.

Still, without the integration tiebreaker, the freshman classes at some of the affected north-end schools may well have been sufficiently diverse to promote interaction across the white/nonwhite axis and to prevent the tokenization of nonwhite students. *See* maj. op. at 10046 n.49. However, without the integration tiebreaker, the Plan would have operated to prevent students of color who lived in the south end of Seattle from attending those schools because of the schools' distance from south-end neighborhoods. The tie-breaker furthered the District's goal of giving south-end students of color the opportunity to [*1007] opt out of attending the more racially concentrated schools in their neighborhoods, if they so desired.

Certainly, the integration tiebreaker does not attempt to achieve perfect adherence to the District-wide ratios in each of the District's high schools. Except by encouraging an opt-out, the tiebreaker does not directly alter the racial make-up of schools that are not oversubscribed, even that of the south-end schools that diverge widely from District-wide [**159] proportions. *See supra* note 13. I do not, however, view the Plan's underinclusiveness as a fatal flaw.

Indeed, I find it peculiar that the majority's rebuttal makes so much of the failure of the District's Plan to achieve perfect racial balance. To be sure, in strict scrutiny review, especially in the *First Amendment* context, a law's underinclusiveness can be a sign that the enacting authority was not in fact motivated by its stated objectives. *See Republican Party of Minn. v. White, 536 U.S. 765, 780, 153 L. Ed. 2d 694, 122 S. Ct. 2528 (2002)* (noting that underinclusiveness impairs the credibility of the government's rationale for restricting speech) (citing *City of Ladue v. Gilleo, 512 U.S. 43, 52-53, 129 L. Ed. 2d 36, 114 S. Ct. 2038 (1994)).* Apparently, in order for the majority to find that a race-conscious means is necessary to achieve the District's stated goals, the means would have to produce perfect adherence to the District's racial make-up -- which, in Seattle's circumstances, only aggressive districting, forced busing, and more intrusive racial classifications could do. However, requiring that the chosen means achieve perfect balance would make strict scrutiny [**160] impossible to satisfy, because the burden caused by the Plan -- the third element of the narrow-tailoring inquiry -- would be enormous. That is why, in contexts more relevant to this case, such as employment, courts have found that the modesty -- *i.e.*, the underinclusiveness -- of government action is a point *in favor* of a conclusion that the action was narrowly tailored. *See, e.g., Cotter v. City of Boston, 323 F.3d 160, 171 (1st Cir.)* ("The necessity for relief was great, but the means chosen by the Department were modest -- only three African-American officers were promoted out of rank -- indicating narrow tailoring."), *cert. denied, 540 U.S. 825, 157 L. Ed. 2d 47, 124 S. Ct. 179 (2003).*

Because strict scrutiny is not meant to be "fatal in fact," *Grutter, 539 U.S. at 326*, I would hold that the District's modest measures, which were enacted to decrease the intrusiveness and burden of its assignment policy, do not cause its Plan to become unnecessary or the District's motivations to become suspect. And, the Plan furthers the District's goals better than any workable race-neutral alternative.

(ii) *Race-neutral alternatives*

In *Grutter* [**161] , the Court explained that narrow tailoring "re-quire[s] serious, good faith consideration of

workable race-neutral alternatives *that will achieve the diversity the university seeks*." *539 U.S. at 339* (emphasis added). On the other hand, "[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative." n35 *Id.* Furthermore, [*1008] the Court made clear that the university was not required to adopt race-neutral measures that would have forced it to sacrifice other educational values central to its mission. *Id. at 340*. Implicit in the Court's analysis was a measure of deference toward the university's identification of those values. *See id. at 328, 340* (affording deference to the university's judgment that diversity and "academic selectivity" were important to its educational mission). By affording deference to the university's identification of its core educational values in this context, the Court simply recognized that whether a race-neutral measure is truly an alternative in the first place depends on whether that measure is consistent with an institution's core values.

n35 Indeed, later in the opinion, the Court noted that universities in states with laws against "racial preferences" were experimenting with "a wide variety of alternative approaches." *Grutter, 539 U.S. at 342*. Yet the Court did not require the university to have analyzed fully and rejected each of these alternatives; instead, it noted that universities in states without such laws should monitor and "draw on *the most promising aspects* of these race-neutral alternatives as they develop." *Id.* (emphasis added).

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The majority faults the District for failing to consider seriously three specific race-neutral measures. Maj. op. at 10020-31. One of the majority's suggestions -- that the District measure and assign students according to their "true diversity," maj. op. at 10021-25 -- cannot properly be considered an "alternative," because it is not directed toward achieving the District's interest in a racially integrated learning environment. *See supra* pp. 10077-78. Furthermore, it is clear from the record that the school board *has* discussed the use of other diversity measures, including poverty, as a tiebreaker. Although the majority correctly points out that there has been no formal study of that proposal by District staff, Board members' testimony reveals two legitimate reasons why the majority of the Board rejected the use of poverty measures to reach its goal of racial diversity: one, it is insulting to minorities and often inaccurate to assume that the two populations are coextensive; and, two, implementation would be thwarted by high school students' reluctance to reveal their socioeconomic status to their peers.

The majority also asserts that the District should have considered [**163] more formally a proposal developed by the Urban League (which, incidentally, did not eliminate the integration tiebreaker, but merely demoted it). Maj. op. at 10026-31. The majority quotes at length from the colorful and often emotional testimony of one Board member, who clearly was not impressed by the proposal. But there was other testimony from other Board members suggesting that the Board was aware of, and informally considered, the Urban League's proposal. Board member Schaad-Lamphere testified that she remembers reading the Urban League's plan and considered it to be similar to other regional assignment plans being proposed at the same time; she testified that she weighed it as she did other community input. Furthermore, the testimony of Board member Nielsen is consistent with Superintendent Olchefske's understanding that regional plans, including the Urban League's, had been disfavored by the Board because of the high value the District placed on choice among the different academic offerings at the various high schools. In other words, when all the testimony in the record is examined, it is clear that the Urban League's plan was in fact considered and that it was rejected for [**164] legitimate educational reasons. n36

n36 The majority also notes the Urban League's suggestion that the District improve and better market its specialty programs, especially at racially concentrated schools. In fact, the District demonstrated that it *is* striving to improve its programming in a manner intended to make all schools equally attractive, thereby reducing or eliminating its dependence on the integration tiebreaker; it has installed new principals, constructed new buildings, undertaken major renovations, introduced an International Baccalaureate program, and introduced an information technology program linked with community colleges, among other things. Similar steps taken at Ballard and Nathan Hale High Schools led to their recent turnarounds in popularity.

[*1009] The majority concludes that such informal consideration is inadequate and that we should evaluate the District's consideration of race-neutral alternatives using the same rigorous evidentiary standard that we use to evaluate whether a local [**165] government has proved that past discrimination justified its enactment of a remedial minority set-aside program. Maj. op. at 10025 (citing cases that elucidate the latter standard). To the contrary, our cases on set-aside programs plainly employ different standards to these different analyses -- with a more permissive view toward the analysis of race-neutral

alternatives. *Compare Coral Constr. Co. v. King County, 941 F.2d 910, 916-22 (9th Cir. 1991)* (discussing, within its "compelling government interest" analysis, the high burden of demonstrating actual discrimination by the county), *with id. at 923* (noting, under the race-neutral alternatives prong of the narrow-tailoring analysis, that "some degree of practicality is subsumed in the exhaustion requirement" and that exhaustion of every possible alternative is *not* required); *see also Associated Gen. Contractors of Cal., Inc. v. Coalition for Econ. Equity, 950 F.2d 1401, 1416-17 (9th Cir. 1991)* (citing *Coral*). Under the relevant standard, the District adequately considered the alternatives.

Finally, the majority would require the District to "earnestly appraise[]" a random, [**166] citywide lottery for high school assignments. Maj. op. at 10020 (emphasis omitted). In view of the District's clear commitment to educational choice among high schools, and in view of its desire to provide students with an opportunity to attend school closer to home, the majority's suggestion flatly contradicts the *Grutter* Court's approach to narrow tailoring:

> The District Court took the Law School to task for failing to consider race-neutral alternatives such as "using a lottery system" . . . . But [this] alternative[] would require a dramatic sacrifice of diversity, the academic quality of all admitted students, or both. . . .
>
> . . . We are satisfied that the Law School adequately considered race-neutral alternatives currently capable of producing a critical mass without forcing the Law School to abandon the academic selectivity that is the cornerstone of its educational mission.

539 U.S. at 340. The university, in other words, was not required to "earnestly appraise[]," maj. op. at 10020 (emphasis omitted), a lottery system. The majority is incorrect in its conclusion that the District must do so, despite the harm that a lottery would do [**167] to the goals of choice and parental involvement that lie at the heart of its educational mission. n37

> n37 The majority interprets *Grutter* to demand that every school consider a pure lottery unless, but *only* unless, such a lottery would sacrifice the academic quality or diversity of the student body. *See* maj. op. at 10021. This narrow reading does not fit a context, like this one, in which the school's mission is not to fashion an academically exceptional student body. Instead, the more appropriate principle to draw from *Grutter* is that schools need not consider alternatives that would do violence to the values central to their particular educational missions -- here, choice and parental involvement.

It is a closer question whether the District's goals could be met by using a pure lottery *tiebreaker* -- that is, a lottery to determine which of the students who had *chosen* a particular school would be enrolled there. This format would allow the District to retain its emphasis on choice and [**168] would cause unhappiness more randomly. [*1010] However, as Superintendent Olchefske explained, District patterns suggested that more people would choose schools close to home, thus raising the justifiable concern that the pool of students choosing a particular school would be skewed in favor of the demographic of the surrounding residential area. Indeed, when the District adopted the Plan, it could not predict exactly how much harm open choice would do to the racial diversity of its schools. A lottery, in the face of this uncertainty, would have left the District without a safety net for its diversity goals and, moreover, would have prevented the District from furthering the policy goals reflected in its sibling and proximity tiebreakers.

Over the long history of its efforts to achieve integrated schools, the District has experimented with many alternatives, including magnet and other special-interest programs, which it continues to employ, and race-conscious districting. n38 But when a racially integrated school system is the goal (or racial isolation is the problem), there is no more effective means than a consideration of race to achieve a solution. Even Plaintiff's expert conceded that, [**169] "if 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." 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." The logic of this point is sound: When race is a principal element of the government's compelling interest, then race-neutral alternatives seldom will be equally efficient. *Cf. Hunter v. Regents of Univ. of Cal., 190 F.3d 1061, 1066 (9th Cir. 1999)* (upholding, as narrowly tailored, a research elementary school's admissions policy that explicitly considered race in pursuit of a racially balanced research sample). Of course, race-conscious remedies still must be proportional to the government's interest.

n38 We have held that a local government's continuing efforts to combine race-neutral measures with a minority set-aside program are "one factor suggesting that [a set-aside] plan is narrowly tailored." *Coral, 941 F.2d at 923*; *Associated Gen. Contractors, 950 F.2d at 1417* (citing *Coral*). *See supra* pp. 10080, 10083 & n.30, 10090-91 n.36 (discussing the District's many race-neutral efforts to promote integrated schools).

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(b) *The Plan satisfies requirements of proportionality, flexibility, and limited duration.*

The District's plan is proportional to its interests and is sufficiently flexible and time-limited to meet the requirements of narrow tailoring.

(i) *Proportionality*

To determine whether the means adopted are proportional to the government's interest, courts have considered the "relationship between the numerical relief ordered and the percentage of nonwhites in the relevant [school population]." *Paradise, 480 U.S. at 179*; *see Tuttle v. Arlington County Sch. Bd., 195 F.3d 698, 706 (4th Cir. 1999)* (per curiam) (applying *Paradise*'s proportionality analysis to K-12 student assignment plans); *Comfort, 283 F. Supp. 2d at 372* (same); *see also Brewer, 212 F.3d at 756-57* (Miner, C.J., dissenting) (same).

The principal question here is whether linking the integration tiebreaker to the racial demographic of the District's population -- rather than, for instance, that of the city of Seattle -- overshoots the District's goals. Specifically, Plaintiff suggests that, even when they are considered [*1011] "out of balance" by the [**171] District (i.e., when they deviate from the 60/40 ratio by more than 15 percent and thus enroll less than 45 percent or more than 75 percent nonwhite students), Seattle's oversubscribed schools are sufficiently racially diverse to achieve the District's goals.

I disagree that the District's means significantly overshoot its goals. First, the District is trying to teach its students to be effective participants in the racially diverse environment in which they exist. Superintendent Olchefske noted that Seattle's school-age demographic is significantly more racially diverse than the demographic for its population as a whole. ("There [are] a lot of elderly white people in this town," he noted.) And he stated that the District has no regular access to data on the racial make-up of Seattle's private school students.

Second, even if the racial mix at *some* of the oversubscribed high schools would be sufficiently diverse for the District to achieve its goals n39 in those schools without the integration tiebreaker, this fact would not account for the effect of the integration tiebreaker on the overall school system. A clear objective of the School Board was that "no child should be required [**172] to attend a racially concentrated school." Removing the integration tiebreaker would mean that non-white students living in the southern area of the city, where neighborhoods and schools are more racially concentrated, would not have an opportunity for access to the more diverse schools in the northern part of the city, simply because of where they live. Giving them this access furthers the District's diversity goals.

n39 To reiterate, in this context the District's relevant goals are for regular intergroup contact to occur and for students not to feel isolated or tokenized.

Furthermore, the fact that a particular oversubscribed high school would draw a sufficiently diverse population in a given year without the integration tiebreaker does not guarantee that it would continue to do so. As I discussed above, open choice puts school assignment in the hands of the students; a tie-breaker tied to the District's racial demographic is a natural way for the District to retain a safety net.

(ii) *Flexibility* [**173]

The District also has shown that its Plan is flexible in the short term and that its approach has been flexible over the long term. The District no longer forces white students south, nor nonwhite students north. For this reason, racial concentration has increased in some schools. But the District's response has been measured. Responsive to community concerns and its own educational goals, the District has abandoned its complicated and mandatory systems for integrating its schools. Instead, it has developed a system that gives south-end non-white students an opportunity to leave racially concentrated schools (if they wish to) and promotes integrated schools across the district, while preserving the choice that it considers so critical to parental involvement. Mandatory assignments are kept to a minimum, n40 and waivers are permitted for various reasons. The District's consistent movement from coercive to voluntary integration measures lends [*1012] credence to its argument that it is working, through improvements to its programs, to reduce or eliminate oversubscription and therefore to reduce its reliance on the integration tiebreaker.

n40 For the 2000-01 school year, roughly 350 students received "mandatory" assignments, meaning that their assigned school was not one of

their choices. Roughly 100 of these students had listed only one choice and another hundred had listed only two choices. Of the roughly 300 students affected by the integration tiebreaker, only 84 were given "mandatory" assignments. Of these, 29 were ultimately assigned to the same school they would have been attending without the tiebreaker, and 55 received assignments affected by the tiebreaker.

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Furthermore, the Plan is not inflexible in the manner of a quota; the integration tiebreaker operates only when *patterns of individual choice* result in oversubscription, and only until the school approximates the characteristics of the district as a whole. Choice, not a prescribed ratio of white to nonwhite students, controls the overwhelming majority of assignments. And choice patterns have been shown to change over time, as new facilities and programs are offered at different schools.

The District has demonstrated its ability to be responsive to these choice patterns and to the concerns of its constituents. It revisits the plan annually. n41 In 2000, when a higher than normal number of students selected the same schools, the Board responded by increasing the integration trigger from a 10 percent to a 15 percent deviation from the school population and adopting a "thermostat" that turns off the integration tiebreaker as soon as the school has come into balance. The majority considers it constitutionally significant that the Board rejected a staff suggestion that the trigger instead be increased to 20 percent. Board members testified that they rejected a 20 percent trigger, [**175] in effect, because it would fail to assist students in moving from racially concentrated south-end schools. In other words, the proposed 20 percent trigger would no longer promote the Board's goals; it therefore could not be considered narrowly tailored to achieve the District's compelling interest because it would not achieve that interest at all. The Board's decision thus is not a sign that the Board has failed, as the majority suggests, to "minimize [the] adverse impact on third parties," maj. op. at 10031.

n41 Like the majority, maj. op. at 10032-33 n.32, I believe that this annual review, combined with the fact that the tiebreaker operates only until a school comes into balance, satisfies the durational requirement of narrow tailoring. *See Grutter, 539 U.S. at 342-43*; *Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 238, 132 L. Ed. 2d 158, 115 S. Ct. 2097 (1995)* (holding that narrow tailoring requires that a program be limited in scope and duration "such that it will not last longer than the discriminatory effects it is designed to eliminate" (internal quotation marks omitted)).

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(c) *Relative burden on third parties.*

The majority assumes that every student who is denied his or her choice of schools because of the integration tiebreaker suffers a constitutionally significant burden. As I foreshadowed above, however, I consider the District's Plan to impose a minimal burden that is shared equally by all of the District's students. *See Parents Involved, 72 P.3d at 159-60* (noting that the burden of not being allowed to attend one's preferred school is shared by all students equally).

When we view the Plan on the large scale, without attempting to anticipate students' subjective and shifting preferences for different schools, all the District's students are *equally* subject to the possible burden of being denied their first choices. Only when we conceive of the Plan narrowly, by imagining two students -- one white, one nonwhite -- who are next door neighbors and have identical preferences for Ballard or for Franklin high school, will one student bear a "burden" and the other gain a "benefit."

Yet it is well established that "there [is] no right under Washington law to attend a local school or the school of the student's [*1013] choice." [**177] *Id. at 159.* n42 Of course, students and their parents will nonetheless prefer some schools over others; their preferences may be based on their perceptions of a school's academic quality, on their subjective preference for a particular educational theme or program, or on the convenience of attending a particular school, among other things. These preferences result in changing choice patterns and the oversubscription of certain high schools. But oversubscribed schools do not become a limited government resource because of their popularity in a given year or their convenience for a given family. *See Hampton, 102 F. Supp. 2d at 380 n.43* ("The Court understands that students and their parents might prefer one school over another. The preference may even arise from a perception that one school is better than others due to its location, its teachers and principal, or its classroom environment. However, these matters of personal preference do not distinguish those schools in a constitutionally significant sense."); *see also supra* note 24. Despite any differences in academic quality (or perceptions thereof), all students who enroll in a Seattle high school will receive [**178] a high school education that meets state standards. And, as the District points out, even if Plaintiff's assertions of objectively unequal school quality were accepted, n43 it is undisputed that the integration tie-

breaker operates to give every student an opportunity to attend at least one of five oversubscribed "quality" high schools (because at least one is "integration positive" for both white and nonwhite students). I do not believe that students' subjective preferences for one school over another, where the existence and educational relevance of objective differences among them is disputed, make the inconvenience of a nonpreferred assignment weightier than the District's legitimate educational goals.

n42 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, 28 L. Ed. 923, 5 S. Ct. 357 (1884)* (describing the states' traditional police powers).

n43 The District has disputed Plaintiff's assertion of significant differences in objective quality among the 10 high schools. Before granting summary judgment to Plaintiff, the majority must accept the District's version of the facts. *See Simo v. Union of Needletrades, Indus. & Textile Employees, 322 F.3d 602, 609 (9th Cir. 2003)* (stating that, on summary judgment, facts are to be viewed in the light most favorable to the nonmoving party). If this factual issue were material, summary judgment would not be proper. *Id. at 610.*

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Finally, the District has minimized any burden by working to ameliorate the inconvenience and frustration for families who do not receive their preferred school assignments. When the popularity of the District's five oversubscribed schools spiked for 2000-01 assignments, the School Board met to consider ways to soften the adverse effects. The administration immediately began to "aggressively move the wait-lists" and to attempt to increase capacity at the oversubscribed schools. The Board and the administration discussed specific, long-range plans to increase the attractiveness of the undersubscribed schools. Finally, the District reached out to students receiving assignments to undersubscribed schools to share with them advantages of the schools of which they may not have been aware.

III. *Conclusion.*

For all these reasons, the Plan adopted by the Seattle School District for high school assignments is constitutional notwithstanding its inclusion of an integration tiebreaker. I would affirm the district [*1014] court's judgment, and I dissent from the majority's contrary holding.

No. 05-908

In the
Supreme Court of the United States

PARENTS INVOLVED IN COMMUNITY SCHOOLS,
Petitioner,

v.

SEATTLE SCHOOL DISTRICT NO. 1, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, AMERICAN CIVIL RIGHTS INSTITUTE, AMERICAN CIVIL RIGHTS UNION, AND CENTER FOR EQUAL OPPORTUNITY IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the rationale for promoting student body viewpoint diversity in institutions of higher education, as discussed in *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Gratz v. Bollinger*, 539 U.S. 244 (2003), should be limited and not extended into the context of elementary and secondary public schools.

2. Is racial diversity a compelling interest that can justify the use of race in selecting students for admission to public high schools?

3. May a school district that is not racially segregated and that normally permits a student to attend any high school of her choosing, deny a child admission to her chosen school solely because of her race in an effort to achieve a desired racial balance in particular schools, or does such racial balancing violate the Equal Protection Clause of the Fourteenth Amendment?

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IDENTITY AND INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37.2, Pacific Legal Foundation (PLF), the American Civil Rights Institute (ACRI), Center for Equal Opportunity (CEO), and the American Civil Rights Union (ACRU) submit this brief amicus curiae in support of Petitioner Parents Involved in Community Schools.[1] Letters of consent to file this brief were obtained from all parties and have been lodged with the clerk of this Court.

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purposes of engaging in litigation in matters affecting the public interest. PLF has extensive litigation experience in the area of group-based preferences and civil rights. PLF has participated as amicus curiae in numerous cases relevant to the analysis of this case, including *Gratz v. Bollinger*, 539 U.S. 244 (2003), *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Johnson v. California*, 543 U.S. 499 (2005); and *Comfort v. Lynn School Committee*, 418 F.3d 1 (1st Cir. 2005) (*cert. denied*, 126 S. Ct. 798 (2005)).

ACRI and CEO are nonprofit research, education, and public advocacy organizations. Amici devote significant time and resources to the study of the prevalence of racial, ethnic, and gender discrimination by the federal government, the several states, and private entities. They educate the American public about the prevalence of discrimination in American society. Amici publicly advocate the cessation of racial, ethnic, and gender discrimination by the federal government, the several states, and private entities. They have participated as

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[1] Pursuant to Rule 37.6, amici curiae affirm that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

amici curiae in numerous cases relevant to the analysis of this case. ACRU is a nonprofit organization that supports and defends all the rights guaranteed in the federal constitution, as written. ACRU maintains that both basic morality and the constitution require that all Americans be treated equally under the law regardless of race or national origin. Amici participated as amici curiae in this case at all court levels including the Ninth Circuit Court of Appeals.

This case raises important issues of constitutional law. Amici consider this case to be of special significance in that it concerns the fundamental issue of whether racial diversity in noncompetitive K-12 public schools is a compelling governmental interest sufficient to justify discriminating against children.[2] Specifically, Amici will show that the rationale for promoting student body viewpoint diversity in institutions of higher education, as discussed in *Gratz*, 539 U.S. 244, and *Grutter*, 539 U.S. 306, simply has no counterpart in the context of K-12 public schools. Additionally, Amici will show that the "educational benefits" identified in *Grutter* are being used by numerous federal courts to sanction race-based policies in government employment. An outrageous example of how *Grutter* is being misinterpreted is the American Bar Association's (ABA) proposed new race diversity standard for law schools accreditation. It requires public law schools to pursue race diversity in admissions and faculty hiring even if it requires them to break state law. Amici believe that their public policy perspectives and litigation experiences provide an additional viewpoint on the issues presented in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Striving for a predetermined racial balance in its high schools, the Seattle School District (District) uses a race-based

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[2] K-12 indicates kindergarten through 12th grade.

student admissions plan. The District operates ten regular high schools, which vary widely in the quality of the education they provide. *Parents Involved in Cmty. Schools v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162, 1169 (9th Cir. 2005) (*PICS*). Although entering ninth grade students can elect to attend any of them, five high schools are oversubscribed, i.e. they have more applicants than available space. *Id.* The District uses tiebreakers to determine who may attend the oversubscribed schools. The first tiebreaker is to admit siblings of enrolled students. The next tiebreaker is race. If an oversubscribed school's population deviates from the overall racial makeup of Seattle's students (40% white and 60% nonwhite) by more than a set percentage point, the District admits only those students whose race will meet the preferred racial balance. *Id.* at 1170. For the 2000-01 school year, the racial tiebreaker worked to exclude over 300 students, both white and nonwhite, solely because of their race. *Id.* at 1170. Parents filed a lawsuit claiming that the racial tiebreaker violates the students' equal protection rights.

In the decision below, the Ninth Circuit issued an *en banc* decision holding that noncompetitive elementary and secondary public schools may use race as the ultimate factor in assigning students to public schools without violating the Equal Protection Clause. *PICS*, 426 F. 3d at 1169-70. In issuing this far-reaching decision, the court below extended unjustifiably the principles established in *Grutter* for competitive law school admissions, into the context of K-12 public school assignments. By doing so, the Ninth Circuit has reopened the permissibility of allocating educational opportunities on the basis of race throughout this country's 94,000 K-12 public schools, which educate approximately 47.7 million students ranging from 5 to 18 years of age, at an annual cost to taxpayers of more than

$400 billion.[3] Discounting the core concept of equal protection, the Seattle School District (District) is sending the wrong message to our children—that racial identification is more important than respect for individual rights and liberties in today's society.

No decision from this Court sanctions discriminatory student assignments to achieve racial balancing in K-12 public schools. *See Grutter*, 539 U.S. at 330. After *Grutter*, however, the lower courts are in disarray on whether classifying and assigning public school students on the basis of their race satisfies strict scrutiny. The First, Sixth, and now the Ninth Circuits have misapplied *Grutter*'s recognition of the educational benefits of diversity in competitive university admissions to K-12 student assignment plans and ignores the well-established narrowly tailoring principles set out in *Gratz*. In contrast, prior to *Grutter*, the First and Fourth Circuits observed that whether racial diversity was a compelling governmental interest remained an open question, but found that such programs were not narrowly tailored.

Grutter's viewpoint diversity rationale cannot be extended to racial diversity in noncompetitive, compulsory K-12 public schools. Racial diversity in K-12 is based on the idea that a child's skin color determines how that child thinks and behaves, a practice denounced as racial stereotyping. *Grutter*, 539 U.S. at 328-29. This Court should grant the Petition for Writ of Certiorari to ensure that public schools provide educational opportunities to all their students without regard to irrelevant, immutable characteristics such as race. In so doing, the Court should clarify that *Grutter* does not sanction naked racial balancing as a compelling state interest.

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[3] Nat'l Ctr. for Educ. Statistics, *Information on Public Schools and School Districts in the United States*, CCD Quick Facts, *at* http://nces.ed.gov/ccd/quickfacts.asp (last visited Oct. 17, 2005).

Further, clarification is necessary because lower federal courts are extending *Grutter*'s analysis to sanction race-based policies in government employment. The misapplication of *Grutter* is highlighted in the ABA's new proposed Standard 211 for law school accreditation. Standard 211 requires race-based diversity in admissions and faculty hiring despite the fact that several states, including California and Florida, ban race as a factor in law schools admissions or hiring. The standard claims that this requirement is consistent with *Grutter*'s analysis, yet nothing in *Grutter* supports such ABA bullying of law schools.

REASONS FOR GRANTING REVIEW

I

THIS COURT MUST RESOLVE THE CONFLICT AMONG THE CIRCUITS ON WHETHER RACE-BASED ASSIGNMENTS TO ACHIEVE RACIAL DIVERSITY IN K-12 PUBLIC SCHOOLS CAN SURVIVE STRICT SCRUTINY

This case raises important, recurring questions relating to the scope of the Equal Protection Clause's prohibition of state-imposed racial discrimination in K-12 public schools. The goal of many of these plans is to achieve racial balancing so that each school's racial composition matches the district-wide racial composition for a given race. This is achieved by sorting, assigning, and busing students according to their racial grouping. Such plans are mere proportional representation by pigmentation to achieve the public school administrator's preferred racial mix of students. The question of whether such race discrimination is permissible under the Equal Protection Clause has hopelessly divided the Circuit Courts of Appeals, and urgently demands resolution by this Court. The Ninth Circuit's holding in the present case validating racial balancing is consistent with recent decisions of the First and Sixth Circuits, but conflicts with the pre-*Grutter* decisions of the First

and Fourth Circuits condemning such racial balancing as violating the Equal Protection Clause.

The need for review by this Court was clearly expressed by the Ninth Circuit, *en banc* panel, when it recognized that "the Supreme Court has never decided a case involving the consideration of race in a voluntary imposed school assignment plan intended to promote racial and ethnically diverse secondary schools." *PICS*, 426 F.3d at 1173. The majority opinion relied upon *Grutter* to provide the necessary constitutional analysis for allowing racial preferences for nonremedial purposes.

> [I]t would be a perverse reading of the Equal Protection Clause that would allow a university . . . to use race when choosing its student body but not allow a public school district . . . to consider a student's race in order to ensure that the high schools within the district attain and maintain diverse student bodies.

Id. at 1176. Picking and choosing from *Grutter*'s hallmarks of narrow tailoring analysis, the Ninth Circuit found the school district's racial tiebreaker program to be narrowly tailored. *Id.* at 1192. Yet, to do so required the majority to reject the *Grutter* and *Gratz* requirement that race was only one of many factors to be considered. "[I]f a noncompetitive, voluntary student assignment plan is otherwise narrowly tailored, a district need not consider each student in a[n] individualized, holistic manner." *Id.* at 1183. As the dissent pointed out: "The importance of this factor is self-evident: individualized consideration serves the primary purpose of the Equal Protection Clause, which protects the individual from group classifications, especially those by race." *Id.* at 1210 (Bea, J. dissenting).

In rejecting individualized consideration, the District does not consider test scores, grades, letters of recommendation, or

personal statements on how the individual student will contribute to student body diversity. The contrast with the law school admissions plan examined in *Grutter* could not be sharper. The District's plan provides for none of the individualized consideration of the plan approved in *Grutter*, and it is even less flexible and more mechanical than the plan struck down in *Gratz*.

The dissent found the racial tiebreaker to be inconsistent with strict scrutiny. It recognized that the only way the "majority can arrive at the opposite conclusion" is by "applying a watered-down standard of review—improperly labeled 'strict scrutiny'—which contains none of the attributes common to our most stringent standard of review .... the racial tiebreaker ... violates the Equal Protection Clause whenever it excludes a student from a school solely on the basis of race" *Id.* at 1197 (Bea, J. dissenting). The dissent concluded that when strict scrutiny is applied, the District's race tiebreaker is unconstitutional because it seeks to accomplish only a predetermined white/nonwhite racial balance, *id.* at 1203, the race tiebreaker operates as a quota system, *id.* at 1213; and it does not satisfy the other narrow tailoring requirements set out in *Grutter* and *Gratz*, *id.* at 1209. In short, the race tiebreaker is nothing more than "simple racial balancing." *Id.* at 1197 (Bea, C.J. dissenting).

Similarly, the First Circuit recognized the need for guidance from this Court in *Comfort*, 418 F. 3d 1. In *Comfort*, the concurring opinion noted that using race as the touchstone for transfers may send "the wrong lesson for school boards to teach and students to absorb." 418 F.3d at 28 (Boudin, C.J., concurring). Judge Boudin's hand wringing concurrence recognized:

> If we knew how the Supreme Court would decide the case before us, it would be right to adopt its answer in advance—whatever this court's members might

> prefer. But where the outcome in the Supreme Court is uncertain and past pronouncements were made in contexts different than the one now presented, the appellate court must exercise its own judgment on whether the local plan is constitutionally forbidden.

Id. at 28 (Boudin, C.J., concurring). The dissent noted:

> There is neither a Supreme Court decision squarely addressing whether racial diversity alone may constitute a compelling interest sufficient to justify the government's race-conscious preferences nor one addressing the narrow tailoring of racial classifications in voluntary, non-competitive school transfer plans.

Id. at 29 (Selya, J., dissenting).

Like the Ninth and First Circuits, the Sixth Circuit applied *Grutter*'s compelling interest of student body diversity to a K-12 voluntary race-based student assignment plan. *McFarland v. Jefferson County Pub. Schools*, 416 F.3d 513 (6th Cir. 2005) (petition for writ of certiorari pending, No. 05-915). The Sixth Circuit issued a *per curiam* opinion affirming the district court's judgment. *McFarland v. Jefferson County Pub. Schools*, 330 F. Supp. 2d 834 (D. Ky. 2004). Although the district court noted that the "context of an elementary and secondary school student assignment plan" was "slightly different" from the context of *Grutter*, *id.* at 837, it found that the assignments implicated benefits that "are precisely those articulated and approved of in *Grutter*," *id.* at 853. The *McFarland* court maintained that those benefits flowed specifically from the provision of "racially integrated public schools." *Id.*

In contrast, prior to *Grutter*, three federal appellate court cases have held that nonremedial use of racial preferences in public schools violated the Equal Protection Clause. Those

cases are *Wessmann v. Gittens*, 160 F.3d 790 (1st Cir. 1998); *Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698 (4th Cir. 1999), and *Eisenberg v. Montgomery County Pub. Schools*, 197 F.3d 123 (4th Cir. 1999). Each case observed that whether racial diversity was a compelling governmental interest remained an open question.

In *Wessmann*, the First Circuit examined a race-based admissions policy at three "examination schools," where race was made a determining factor. As the *Wessmann* court stated: "The question of precisely what interests government may legitimately invoke to justify race-based classifications is largely unsettled." *Wessmann*, 160 F.3d at 795. The First Circuit assumed, without deciding, that racial diversity may in some cases be a compelling interest sufficient to justify the use of racial preferences in making student assignments. *Id.* at 796. The First Circuit then rejected the school's claim:

> The Policy is, at bottom, a mechanism for racial balancing—and placing our imprimatur on racial balancing risks setting a precedent that is both dangerous to our democratic ideals and almost always constitutionally forbidden. Nor does the School Committee's reliance on alleviating underrepresentation advance its cause. Underrepresentation is merely racial balancing in disguise—another way of suggesting that there may be optimal proportions for the representation of races and ethnic groups in institutions.

Id. at 799 (citations omitted).

In *Tuttle*, 195 F.3d 698, the Fourth Circuit examined whether an oversubscribed public school may use a weighted lottery in admissions to promote racial and ethnic diversity in its student body. The court stated that "[u]ntil the Supreme Court provides decisive guidance, we will assume, without so holding, that diversity may be a compelling governmental

interest and proceed to examine whether the Policy is narrowly tailored to achieve diversity." *Id.* at 705.

In *Eisenberg*, 197 F.3d 123, the Fourth Circuit again addressed whether a school district may deny a student's request to transfer to a magnet school because of his race. The court stated: "*Tuttle* notes that whether diversity is a compelling governmental interest remains unresolved, and in this case, we also choose to leave it unresolved." *Id.* at 130.

Both the First and Fourth Circuits were careful to point out that the type of racial diversity that may be constitutional was different from racial balancing pursued for its own sake. As explained by the First Circuit:

> "The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." A single-minded focus on ethnic diversity "hinders rather than furthers attainment of genuine diversity."

Wessmann, 160 F.3d at 798 (quoting *Bakke*, 438 U.S. at 315 (Powell, J., opinion)).

Applying this analysis, *Wessmann*, *Eisenberg*, and *Tuttle* held that the racial preferences at issue were not narrowly tailored to serve the potentially compelling interest of student body diversity. The Fourth Circuit in *Eisenberg* found:

> In fact, we find that it is mere racial balancing in a pure form, even at its inception . . . . The transfer policy is administered with an end toward maintaining this percentage of racial balance in each school. This is, by definition, racial balancing. As we have only recently held in *Tuttle*, "such nonremedial racial balancing is unconstitutional." . . . Although the transfer policy

> does not necessarily apply "hard and fast quotas," its goal of keeping certain percentages of racial/ethnic groups within each school to ensure diversity is racial balancing.

197 F.3d at 131 (citation and footnotes omitted).

The conflict in the Circuits over the constitutionality of race-based public school assignments highlights an issue of pressing national importance that must be—and can only be—resolved by this court.

II

REVIEW IS NECESSARY TO CLARIFY THAT *GRUTTER* DOES NOT COUNTENANCE RACIAL DISCRIMINATION IN K-12 PUBLIC SCHOOL ASSIGNMENTS, GOVERNMENT EMPLOYMENT, OR THE ABA'S PROPOSED ACCREDITATION STANDARD FOR LAW SCHOOLS

The Ninth Circuit's opinion in this case, deferring to the judgment of public school administrators engaged in race-based classification and assignment of students, is fundamentally incompatible with this Court's Equal Protection doctrine. This Court has never held that noncompetitive, compulsory K-12 public schools may voluntarily discriminate against children on the basis of race to achieve racial diversity. Nonetheless, the Ninth Circuit extended the rationale in *Grutter* in an attempt to justify the use of racial discrimination against children. Other lower federal courts have extended *Grutter* to sanction race-based policies in government employment and the ABA has a proposed accreditation standard for law schools requiring race preferences in admissions and faculty hiring even if it requires them to break state laws.

As this Court emphasized in *Grutter*, context matters in strict scrutiny analysis. *Grutter*, 539 U.S. at 308. Within the

context of evaluating an inclusive admissions policy at an elite law school, this Court applied a more relaxed version of strict scrutiny. *Id.* at 327. Although the lower court here claimed that "context matters," it dismissed as inconsequential the contextual differences between competitive admissions to an institution of higher education and assignment of students in noncompetitive elementary and secondary schools. *PICS*, 426 F.3d at 1174-75.

Grutter's relaxed version of strict scrutiny was based on two factors. First, on its face, this Court granted certiorari in *Grutter* to resolve "[w]hether diversity is a compelling interest that can justify the narrowly tailored use of race in selecting applicants for admission to public universities." *Grutter*, 539 U.S. at 322; *see also id.* at 328 ("the law school asks us to recognize, *in the context of higher education*, a compelling state interest in student body diversity"); *id.* (*Grutter*, like *Bakke*, "addressed the use of race *in the context of public higher education*") (emphasis added). *See also*, Paul Horwitz, *Grutter's First Amendment*, 46 B.C. L. Rev. 461, 464 (2005) (*Grutter* "asked only whether there is a 'compelling state interest in student body diversity' in 'the context of higher education'"). Like the court below, the First and Sixth Circuits simply ignored this contextual qualification.[4]

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[4] Angelo N. Ancheta, *Contextual Strict Scrutiny and Race-Conscious Policy Making*, 36 Loy. U. Chi. L.J. 21, 36 (2004) (noting that one question left open by *Grutter* is, "[s]hould elementary and secondary school districts that employ race-conscious diversity plans be granted the same level of deference as institutions of higher education?"). *See also* Jay P. Lechner, *Learning from Experience: Why Racial Diversity Cannot Be a Legally Compelling Interest in Elementary and Secondary Education*, 32 Sw. U. L. Rev. 201, 209 (2003) ("The Supreme Court has never considered whether educational diversity could be a compelling goal of public elementary or secondary education.").

Second, *Grutter*'s First Amendment rationale cannot be extended beyond universities. *Grutter*'s compelling interest analysis was expressly limited to the use of race in admissions in the context of "the expansive freedoms of speech and thought associated with the university environment . . . a special niche in our constitutional tradition." *Grutter*, 503 U.S. at 329; *accord Bakke*, 438 U.S. at 312 (Powell, J., opinion) (A university's First Amendment right to "[a]cademic freedom" includes "[t]he freedom of the university to make its own judgments as to education" and "the selection of its student body.").

Grutter's compelling state interest analysis simply has no counterpart in K-12 public schools.[5] Students in elementary and secondary schools have a right to admission. *Goss v. Lopez*, 419 U.S. 565, 574 (1975). Unlike universities, the education mission of American public schools is to *teach* fundamental values necessary to maintain a democratic system. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986). *See, e.g.*, Kevin G. Welner, *Locking up the Marketplace of Ideas and Locking Out School Reform: Courts' Imprudent Treatment of Controversial Teaching in America's Public Schools*, 50 UCLA L. Rev. 959, 965 (2003) (Public school "[e]ducation is inculcation, not exposure."). Such instruction necessarily includes less emphasis on the "robust exchange of ideas" in elementary and secondary school education. Joint

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[5] Professor Ancheta notes that *Grutter*'s rationale "may be difficult to extend beyond academic decision making and outside of the higher education context because of the key element of academic freedom under the First Amendment." Angelo N. Ancheta, *supra*, at 47. Although courts have sometimes deferred to public school administrators, this deference, unlike that of *Grutter*, "has not been rooted in academic freedoms typically ascribed to higher education, where the free exchange of ideas and viewpoints is highly valued; indeed, K-12 education is often highly standardized and regimented, particularly in the lower grade levels." *Id.* at 47.

Statement of Constitutional Law Scholars, The Civil Rights Project at Harvard University, *Reaffirming Diversity: A Legal Analysis of the University of Michigan Affirmative Action Cases* 23 (2003), *available at* http://www.civilrightsproject.harvard.edu/policy/legal_docs/Diversity_%20Reaffirmed.pdf (last visited Feb. 7, 2006).

Likewise, *Grutter's* compelling state interest principles cannot be transferred to government employment. Nonetheless, in *Petit v. City of Chicago*, 352 F.3d 1111 (7th Cir. 2003), the Seventh Circuit relied on *Grutter* to allow race-based decisionmaking in Chicago's Police Department. The court held that "[u]nder the *Grutter* standards," *id.* at 1114, the department had demonstrated a compelling interest "in a diverse population at the rank of sergeant in order to set the proper tone in the department and to earn the trust of the community, which in turn increases police effectiveness in protecting the city." *Id.* at 1115.[6]

An outrageous example of how *Grutter* is being misinterpreted is found in the ABA's proposed diversity standard for law school accreditation. Standard 211 requires law schools to pursue racial and ethnic diversity in admissions and faculty hiring policies. A law school must "demonstrate by concrete action" its commitment to racial diversity. "Interpretations" of Standard 211 states that "the requirements of a constitutional provision or statute that purports to prohibit consideration of gender, race, ethnicity or national origin in admissions or employment decisions is not a justification for a

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[6] *Grutter* has been used to racially balance fire departments. In the unreported decision of *Lomack v. City of New Newark*, No. Civ.A.04-6085(JWB), 2005 WL 2077479 (D.N.J. Aug. 25, 2005), the court relied on *Grutter's* language that education" benefits" derived from a diverse student body to find a similar compelling state interest in achieving the "benefits" of racial diversity in each firehouse of the department.

school's non-compliance with Standard 211." In other words, it is necessary for a law school to comply with Standard 211 despite the fact that several states, including California and Florida, ban race as a factor in admissions or hiring.[7] Equally disturbing is Interpretation 211-2, which states that, "consistent with the Supreme Court's decision in *Grutter v. Bollinger*, a law school may use race and ethnicity in its admissions process to promote equal opportunity and diversity." Nowhere does *Grutter* support such an expansive interpretation. First, *Grutter* held only that racial preferences in higher education are legal when used to promote diversity, not racial balancing. Second, *Grutter* did not hold that any law school may use race in its admission process, but was deferring to the school's "educational judgment that such diversity is essential to its educational mission." *Grutter*, 539 U.S. at 328. Nothing in *Grutter* permits the ABA to bully law schools into discriminating against individuals in admissions and hiring. Proposed Standard 211 is available at http://www.abanet.org/legaled/standards/standards.html (last visited Mar. 9, 2006). A copy of proposed Standard 211 is attached hereto as Exhibit A.

Clearly, this Court's analysis in *Grutter* has resulted in confusion as to the permissible boundaries for race-conscious policies. Some of the questions that are left unresolved are identified by Professor Ancheta:

> If, as the *Grutter* analysis implies, courts may on occasion employ more deferential versions of strict scrutiny, what contexts determine such occasions? Was the Court's contextual scrutiny in *Grutter* specific to higher education when the Court deferred to policy making that was associated with academic

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[7] *See Grutter*, 539 U.S. at 342 ("Universities in California, Florida, and Washington State, where racial preferences in admissions are prohibited by state law, are currently engaged in experimenting with a wide variety of alternative approaches.").

> freedoms rooted in the First Amendment? Or, was context grounded in a distinction between exclusionary and subordinative legislation on the one hand and inclusionary and interactive policies on the other—a distinction that the Court ostensibly rejected in *Croson* and *Adarand* when it ruled that both "invidious" and "benign" racial classifications are subject to strict scrutiny? Or is context to be addressed on an ad hoc, case-by-case basis? Moreover, assuming that context properly determines the rigor of strict scrutiny, how should courts customize their analyses to fit a given context?

Ancheta, *supra*, at 23. Yet bureaucrats now assume that because of *Grutter*, the use of race-conscious policies are permissible in a variety of contexts. J. Kevin Jenkins, Ed.D., *Grutter, Diversity, and Public K-12 Schools*, 182 Ed. Law. Rep. 353, 354 (2004) (*Grutter* provides "clear guidance from the Court: Diversity can be a compelling state interest. That's the green flag."); Joint Statement of Constitutional Law Scholars, *supra*, at 22 ("the *Grutter* Court's strong and expansive language addressing the value of diversity in education and other sectors of American life provides at least partial support for arguing that diversity can be a constitutionally compelling interest in other areas, such as K-12 public education and employment.").

This Court should grant the petition for certiorari in this case to the narrow reach of *Grutter* in determining the special circumstances in which racial diversity qualifies as a compelling state interest.

III

REVIEW IS NECESSARY TO CLARIFY THAT RACIAL BALANCING TO PROMOTE RACIAL DIVERSITY IN K-12 PUBLIC SCHOOLS OFFENDS THE EQUAL PROTECTION CLAUSE

The lower court held that the use of race to promote racial diversity does not violate the Equal Protection Clause. Although the Equal Protection Clause permits some racial classifications under the most limited circumstances, it does not allow racial balancing for the sole purpose of achieving a specified "racial mix" of students that a school district believes is desirable. *Grutter* reaffirmed:

> Because the Fourteenth Amendment protects *persons*, not *groups*, all governmental action based on race—a *group* classification long recognized as in most circumstances irrelevant and therefore prohibited—should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed.

Grutter, 539 U.S. at 326 (quoting *Adarand*, 515 U.S. at 227) (internal quotation marks and citations omitted; emphasis in original). *See also Loving v. Virginia*, 388 U.S. 1, 10 (1967) ("The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States.").

In *Adarand*, this Court reiterated that "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Adarand*, 515 U.S. at 214 (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). This Court stated that free people "should tolerate no retreat from the principle that government may treat people

differently because of their race only for the most compelling reasons." *Adarand*, 515 U.S. at 227. This intolerance is necessary because government racial discrimination of any sort is inherently suspect, since racial characteristics are almost never an appropriate consideration for the government. *Id.* at 216.

> [T]he central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States. This strong policy renders racial classifications "constitutionally suspect," and subject to the "most rigid scrutiny," and "in most circumstances irrelevant" to any constitutionally acceptable legislative purpose.

Id. (citations omitted). This includes "so-called" neutral policies that "burden or benefit the races equally." *Shaw v. Reno*, 509 U.S. 630, 651 (1993); *see also, Loving*, 388 U.S. at 8 (rejecting that a miscegenation statute did not discriminate because it "punish[ed] equally both the white and the negro participants in an interracial marriage."). Indeed, this Court rejected the notion that separate can ever be equal—or "neutral"—in *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954), and refused to resurrect it in *Johnson*, 543 U.S. at 499.

The Ninth Circuit misses this point. The District's racial tiebreaker is a mechanism to achieve a preferred racial mix of students. As the dissent points out, the racial "tiebreaker aims for a rigid, predetermined ratio of white and nonwhite students, and thus operates to reach 'a fixed number or percentage." *PICS*, 426 F.3d at 1213 (Bea, J. dissenting). In *Gratz*, this Court specifically rejected such a plan as not narrowly tailored. "[T]he University's policy, which automatically distributes [20%] . . . of the points needed to guarantee admission, to every single 'underrepresented minority applicant solely because of race, is not narrowly tailored." *Gratz*, 539 U.S. at 271-72. As this Court said in *Grutter*, this is nothing more than "racial

balancing, which is patently unconstitutional." *Grutter*, 539 U.S. at 330.

Put simply, the District's racial tiebreaker is an unconstitutional quota because it establishes a predetermined, preferred ratio of white and nonwhite students. The District's goal of racial diversity is based on the stereotype that all white students think and act alike and that all nonwhite children think and act alike. It inflicts undue harm on both white and nonwhite students alike. This Court should address the important national issue of whether the use of race to promote racial diversity in K-12 public schools violates the Equal Protection Clause.

CONCLUSION

For the foregoing reasons, amici respectfully request that this Court grant the writ of certiorari.

DATED: March, 2006.

Respectfully submitted,

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EXHIBIT

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Exhibit A–1

February 16, 2006

MEMORANDUM

TO: **Deans of ABA-Approved Law Schools**

FROM: **John Sebert, Consultant on Legal Education**

SUBJECT: **Revisions of Standards 210-212 and Associated Interpretations Approved by the Council at its Meeting of February 11, 2006**

As part of a comprehensive review of the Standards, the Standards Review Committee examined Standards 210-212 and the Interpretations of those Standards. Preliminary discussion of proposed changes was begun at the November 2004 meeting of the Committee. The Committee devoted its March 19, 2005, meeting to developing recommendations for presentation to the Council in August. The Committee was greatly assisted in its work by a set of recommendations for revisions prepared by the Section's Diversity Committee. The Standards Review Committee also had before it and considered (as did the Diversity Committee) recommendations for revisions of these Standards sent to the Committee by Gary Palm ("the Palm proposals") on behalf of himself and other members of the Clinical Legal Education Association (CLEA) and the Society of American Law Teachers (SALT).

In August 2005, the Council considered the Committee's recommendations and the Palm proposals, and the Council approved distributing for comment proposed revisions to Standards 210 - 212 and Interpretations of those Standards. The proposed revisions were widely distributed for comment and also were posted on the Section's website. A hearing to elicit comment was held during the AALS Annual Meeting on January 5, 2006, and many individuals appeared to speak to

these proposals at that hearing. Also, a large number of written and e-mail comments were received during the formal comment period. This set of Standards and Interpretations has not been altered for a number of years. The Committee and Council agreed that it was time to re-examine these provisions, especially in light of changes in the law and institutional practices since the existing Standards were adopted. They also concluded that a need existed for greater clarity regarding both what is permitted and what is required by the Standards to provide adequate guidance both to law schools and to the Accreditation Committee.

The Committee established several overarching goals for the proposed revisions:

1. To distinguish the obligations of non-discrimination and equality of opportunity (Standard 210) and the obligations of equal opportunity and diversity (Standard 211).
2. To determine which groups and individuals should be covered by these Standards and Interpretations.
3. To determine what law school activities and actions should be covered by these standards.

At its meeting on January 5, 2006, the Standards Review Committee carefully considered all of the comments that had been received, including the many thoughtful remarks that were made during the January 4 hearing. The Committee also granted Vernellia Randall privileges of the floor so that she could address the Committee during its January 5 meeting.

The Committee presented to the Council its final recommendations for revision of Standards 210 - 212 for review and action at it meeting on February 11, 2006. The Council approved the recommended changes with some modification. The changes approved by the Council will be presented to the American Bar Association House of Delegates

for concurrence at its August meeting. The changes will become effective upon the concurrence by the House of Delegates.

This memorandum discusses the changes. Marked-up and restated versions of the approved revisions to Standards 210 - 212 are attached.

. . .

Standard 211. Equal Opportunity and Diversity

Standard 211 had been primarily directed to the admission of students, although actions by the Accreditation Committee have extended its reach to faculty. The revisions make explicit that the Standard also applies to faculty and staff. While equal opportunity and diversity may have different foundations (equal opportunity in social justice and diversity in educational policy), the two have become connected in practice and the revisions to the Standard recognize that connection.

The requirement of the Standard is stated in terms of a commitment that is demonstrated by concrete action. There was extended discussion on this issue, both when the Committee and Council were developing the proposed revisions in 2005 and in the comments on those proposals. Some urged that the Standard be stated in terms of results and also suggested that the Standard should build on the language of the *Grutter* case and require that law schools have a "critical mass" of students from traditionally underrepresented groups. Evidence was provided to show continuing underrepresentation in law school and in the legal profession of individuals from groups that have been historically discriminated against, and the argument was made that only a "results test" could ensure that there would be substantial progress toward increasing access to legal education and the profession.

The Council was persuaded that it would be infeasible to develop and enforce a Standard that is based on requiring

schools to attain a "critical mass" of persons from underrepresented groups, both because of the difficulty of defining "critical mass" and because of the widely varying demographics of the markets in which different law schools recruit their student bodies. The Council believes that the Standard should require a commitment demonstrable by concrete action. Because the core of the requirement extends beyond mere effort, the term "effort" was deleted from the title of the Section.

The Council also recognized that the results achieved are very relevant, though not necessarily dispositive, in evaluating effort and commitment. Thus the second sentence of proposed Interpretation 211-3 was revised to provide: "The determination of a law school's satisfaction of such obligations is based on the totality of the law school's actions and the results achieved." The Council understands that this sentence is consistent with the current practice of the Accreditation Committee, which does consider the diversity results that a school has achieved as a factor in evaluating the school's compliance with current Standard 211.

In section (a) "qualified" has been deleted as unnecessary given other Standards regarding student selection and retention. "Underrepresented" was added to qualify "groups" covered to be consistent with the equal opportunity element. Specific language was added to make it clear that a law school must demonstrate a commitment to having a student body that is diverse with respect to gender, race and ethnicity.

A new section (b) makes clear that a law school must demonstrate a commitment to having a faculty and staff that are diverse with respect to gender, race and ethnicity.

New Interpretation 211-1

The Council approved this new Interpretation, which was added to the Committee's recommended changes at its January

2006 meeting. The purpose is to make it clear that a constitutional or statutory provision prohibiting a school from considering race in making admissions or other decisions does not insulate the school from the obligation of the Standard to demonstrate a commitment to have a diverse student body, faculty and staff. The Council understands that this Interpretation is consistent with the current practice of the Accreditation Committee under the current Standards.

New Interpretation 211-2

The Committee proposed, and the Council approved, some revisions of the proposed Interpretation that was distributed for comment. The revised first sentence relies more clearly on *Grutter* for the proposition that a school may use race and ethnicity in its admissions standards and deletes as unnecessary the initially proposed language "so long as it does so in a lawful manner." The Interpretation also indicates that, as part of school's effort to satisfy the basic requirements of Standard 211, schools "shall take concrete actions to enroll a diverse student body" that promotes cross-cultural understanding, helps break down racial and ethnic stereotypes, and enables students better to understand persons of different races, ethnic groups and backgrounds. In the version that was distributed for comment, the verb was "should". The Council approved the use of "shall" in order to be consistent with the black-letter, which establishes an obligation ("shall") to have a commitment to having a diverse faculty, staff and student body.

New Interpretation 211-3

The interpretation revises former Interpretation 211-1. It retains the language that meeting the requirements of the Standard will be determined by the totality of the law school's action, but replaces with a more general statement the prior list of actions that might demonstrate commitment to diversity. This change recognizes and encourages flexibility and innovation on the part of law schools in meeting the

requirement. The only change in this Interpretation from that distributed for comment is the addition of the phrase "and the results achieved" at the end of the second sentence. As explained above, the purpose of this addition is to make it clear that the results achieved are relevant, although not dispositive, in determining a school's compliance with the Standard.

Current Interpretation 211-2

As initially recommended, this Interpretation has been deleted. The Council agreed with the recommendation of the Committee that requiring a law school to prepare a written diversity plan imposed an unnecessary burden on law schools. In addition, conscientious application of the existing diversity plan requirement by the Accreditation Committee has on occasion led to the anomalous result of citing a school for non-compliance with the diversity plan requirement when the school has nonetheless been successful in achieving significant diversity in its faculty and student body. The proposed revised Standard requires that a school demonstrate by concrete action a commitment to diversity, so if a school has not succeeded in attaining a diverse faculty or student body the absence of a written plan still could be a factor in a determination by the Accreditation Committee that the school had not satisfied the requirements of the Standard. In the written comments and the hearing, there was no criticism of the Committee's proposal to delete Interpretation 211-2.

. . .

[MARKED-UP]

. . .

Standard 211. EQUAL OPPORTUNITY AND DIVERSITY ~~EFFORT~~.

(a) Consistent with sound legal education policy and the Standards, a law school shall demonstrate~~, or have~~

~~carried out and maintained;~~ by concrete action; a commitment to providing full opportunities for the study of law and entry into the profession by qualified members of underrepresented groups, ~~notably~~ particularly racial and ethnic minorities, and a commitment to having a student body that is diverse with respect to gender, race, and ethnicity. ~~which have been victims of discrimination in various forms. This commitment typically includes a special concern for determining the potential of these applicants through the admission process, special recruitment efforts, and a program that assists in meeting the unusual financial needs of many of these students, but a law school is not obligated to apply standards for the award of financial assistance different from those applied to other students.~~

(b) Consistent with sound educational policy and the Standards, a law school shall demonstrate by concrete action a commitment to having a faculty and staff that are diverse with respect to gender, race and ethnicity.

Interpretation 211-1:

The requirement of a constitutional provision or statute that purports to prohibit consideration of gender, race, ethnicity or national origin in admissions or employment decisions is not a justification for a school's non-compliance with Standard 211.

Interpretation 211-2:

Consistent with the U.S. Supreme Court's decision in Grutter v. Bollinger, 529 U.S. 306 (2003), a law school may use race and ethnicity in its admissions process to promote equal opportunity and diversity. Through its admissions policies and practices, a law school shall take concrete actions to enroll a diverse student body that promotes cross-cultural understanding, helps break down racial and ethnic stereotypes,

and enables students to better understand persons of different races, ethnic groups and backgrounds.

Interpretation 211-3:

This Standard does not specify the forms of concrete actions a law school must take to satisfy its equal opportunity and diversity obligations. The determination of a law school's satisfaction of such obligations is based on the totality of the law school's actions and the results achieved. The commitment to providing full educational opportunities for members of underrepresented groups typically includes a special concern for determining the potential of these applicants through the admission process, special recruitment efforts, programs that assist in meeting the academic and financial needs of many of these students and that create a more favorable environment for students from underrepresented groups.

~~***Interpretation 211-1:***~~

~~*This standard does not specify the forms of concrete actions a school must take in order to satisfy its equal employment obligation. The satisfaction of such obligations is based on the totality of its actions. Among the kinds of actions that can demonstrate a school's commitment to providing equal opportunities for the study of law and entry into the profession by qualified members of groups that have been the victims of discrimination are the following:*~~

~~*a. Participating in job fairs and other programs designed to bring minority students to the attention of employers.*~~

~~*b. Establishing procedures to review the experiences of minority graduates to determine whether their employers are affording equal opportunities to members of minority groups for advancement and promotion.*~~

~~*c. Intensifying law school recruitment of minority applicants, particularly at colleges with substantial numbers of minority students.*~~

~~*d. Promoting programs to identify outstanding minority high school students and college undergraduates, and encouraging them to study law.*~~

~~*e. Supporting the activities of the Council on Legal Education Opportunity (CLEO) and other programs that enable more disadvantaged students to attend law school.*~~

~~*f. Creating a more favorable law school environment for minority students by providing academic support services, supporting minority student organizations, promoting contacts with minority lawyers, and hiring minority administrators.*~~

~~*g. Encouraging and participating in the development and expansion of programs to assist minority law graduates to pass the bar.*~~

~~*h. Developing and implementing specific plans designed to increase the number of minority faculty in tenure and tenure track positions by applying a broader range of criteria than may customarily be applied in the employment and tenure of law teachers, consistent with maintaining standards of quality.*~~

~~*i. Developing programs that assist in meeting the unusual financial needs of many minority students, as provided in Standard 211.*~~

~~***Interpretation 211-2.***~~

~~*Each ABA approved law school (1) shall prepare a written plan describing its current program and the efforts it intends to undertake relating to compliance with Standard 211, and (2) maintain a current file which will include the specific actions*~~

~~*which have been taken by the school to comply with its stated plan.*~~

. . .

[RESTATED]

. . .

Standard 211. EQUAL OPPORTUNITY AND DIVERSITY.

(a) Consistent with sound legal education policy and the Standards, a law school shall demonstrate by concrete action a commitment to providing full opportunities for the study of law and entry into the profession by members of underrepresented groups, particularly racial and ethnic minorities, and a commitment to having a student body that is diverse with respect to gender, race, and ethnicity.

(b) Consistent with sound educational policy and the Standards, a law school shall demonstrate by concrete action a commitment to having a faculty and staff that are diverse with respect to gender, race and ethnicity.

Interpretation 211-1:

The requirement of a constitutional provision or statute that purports to prohibit consideration of gender, race, ethnicity or national origin in admissions or employment decisions is not a justification for a school's non-compliance with Standard 211.

Interpretation 211-2:

Consistent with the U.S. Supreme Court's decision in Grutter v. Bollinger, 529 U.S. 306 (2003), a law school may use race and ethnicity in its admissions process to promote equal opportunity and diversity. Through its admissions policies and practices, a law school shall take concrete actions to enroll a diverse student body that promotes cross-cultural

understanding, helps break down racial and ethnic stereotypes, and enables students to better understand persons of different races, ethnic groups and backgrounds.

Interpretation 211-3:

This Standard does not specify the forms of concrete actions a law school must take to satisfy its equal opportunity and diversity obligations. The determination of a law school's satisfaction of such obligations is based on the totality of the law school's actions and the results achieved. The commitment to providing full educational opportunities for members of underrepresented groups typically includes a special concern for determining the potential of these applicants through the admission process, special recruitment efforts, programs that assist in meeting the academic and financial needs of many of these students and that create a more favorable environment for students from underrepresented groups.

. . .

Appeal No. 01-35450
District Court No. C00-1205R

In the UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PARENTS INVOLVED IN COMMUNITY SCHOOLS,

PLAINTIFF-APPELLANT

v.

SEATTLE SCHOOL DISTRICT NO. 1, *et al.*

DEFENDANTS-APPELLEES.

On Appeal from the United States District Court
for the Western District of Washington

BRIEF of the NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. as *AMICUS CURIAE* IN SUPPORT OF REHEARING *EN BANC*

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STATEMENT OF CORPORATE DISCLOSURE

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae*, NAACP Legal Defense & Educational Fund, Inc., states that it is a non-profit 501(c)(3) organization, and therefore it is not a publicly held company that issues stock.

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STATEMENT OF INTEREST

The NAACP Legal Defense & Educational Fund, Inc. ("LDF") is a nonprofit corporation that assists African Americans and other people of color secure their constitutional and civil rights. The nation's oldest civil rights law firm, LDF has been integral in the struggle to dismantle racial segregation and pursue equal educational opportunity. It represented African American plaintiffs in the cases leading up to and including *Brown v. Board of Education*, 347 U.S. 483 (1954), and has been involved in numerous subsequent landmark school desegregation cases.

LDF has also participated in litigation seeking to foster racial integration and diversity in the context of both affirmative action in higher education, *e.g.*, *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Johnson v. Bd. of Regents of Univ. System of Ga.*, 263 F.3d 1234 (11th Cir. 2001); *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996), and voluntary integration policies in public primary and secondary schools. *E.g.*, *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982); *Brewer v. West Irondequoit Cent. Sch. Dist.*, 212 F.3d 738 (2d Cir. 2000); *Wessmann v. Gittens*, 160 F.3d 790 (1st Cir. 1998); *McFarland v. Jefferson County Public Sch.*, No. 3:02CV-620-H (W.D. Ky. June

29, 2004); *Comfort v. Lynn School Comm.*, 263 F. Supp. 2d 209 (D. Mass. 2003); *Burris v. Rock Hill Sch. Dist. No. 1*, No. 0:02-1409-10 (D.S.C. filed April 30, 2002).

As its extensive involvement in prior related matters demonstrates, LDF has a strong interest in preserving the ability of school districts to shape educational policies that ensure equal opportunity and foster racially and ethnically integrated learning environments.

ARGUMENT

I. The Court Should Grant the Petition for Rehearing *En Banc* Because this Case Presents a Novel Constitutional Question With Important, Broad-Reaching Consequences for the Future of Public Primary and Secondary Education.

This case raises the exceptionally important question of whether and to what extent school districts, acting in good faith and exercising their sound discretion, may voluntarily employ race-conscious student assignment policies in their quest to fulfill the promise of equal, integrated public education that the United States Supreme Court envisioned fifty years ago in the landmark case of *Brown v. Board of Education*, 347 U.S. 483 (1954).

In *Brown*, the Supreme Court recognized the detrimental impact of racial segregation. 347 U.S. at 494-95. Although no longer legally enforced, pervasive

racial isolation in American schools--and the harms associated with it--continue to exist today. Indeed, in recent years, this nation has witnessed not just a grinding halt in the progress of school desegregation, but a steady *re*segregation of public schools to levels not seen in nearly three decades. Today, three out of four black and Latino children attend schools in which they constitute a majority, and a remarkable one-third attend intensely segregated schools, where students of color comprise between ninety and one hundred percent of the pupil population.[1]

For the vast majority of students in these segregated minority schools, the guarantee of equal educational opportunity remains illusory. *See, e.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 346 (2003) ("However strong the public's desire for improved education systems may be, . . . it remains the current reality that minority students encounter markedly inadequate and unequal educational opportunities.") (Ginsburg, J., concurring). Predominantly minority schools are significantly more likely than their white counterparts also to be centers of poverty concentration,

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[1] Erica Frankenberg, Chungmei Lee, & Gary Orfield, *A Multiracial Society with Segregated Schools: Are We Losing the Dream?* 30-34 (Jan. 2003); *see also* John R. Logan, *Choosing Segregation: Racial Imbalance in American Public Schools, 1990-2000* (revised Mar. 29, 2002).

plagued by inadequate educational resources, high teacher turnover, lower levels of parental participation, fewer course offerings, and low expectations.[2]

Integrated schools, meanwhile, offer the promise of unique educational benefits. Decades of rigorously tested social science research demonstrate that students, regardless of race, attending schools with diverse enrollments exhibit greater toleration of and appreciation for members of other racial backgrounds, have an increased sense of civic engagement, and manifest a greater desire to live and work in multiracial settings as adults.[3] In addition to improving cross-racial understanding and challenging racial stereotypes, integrated schools have also been found to have a positive impact on the educational achievement, educational and

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[2] *See, e.g.,* Gary Orfield & Chungmei Lee, Brown *at 50: King's Dream or* Plessy*'s Nightmare?* 21-22 (Jan. 2004).

[3] *See, e.g.*, Amy Stuart Wells, *et al.*, *How Desegregation Changed Us: The Effects of Racially Mixed Schools on Students and Society* (Apr. 2004); Elliot Aronson & Shelley Patnoe, The Jigsaw Classroom: Building Cooperation in the Classroom (2d ed. 1997); Christopher Ellison & Daniel A. Powers, *The Contact Hypothesis and Racial Attitudes Among Black Americans*, 75 Soc. Sci. Q. 385 (1994); Lee Sigelman & Susan Welch, *The Contact Hypothesis Revisited*, 71 Soc. Forces 781 (1993); Janet Schofield, Black and White in School: Trust, Tension, or Tolerance? (1982); Elliot Aronson & Diane Bridgeman, *Jigsaw Groups and the Desegregated Classrooms*, 5 Personality & Soc. Psychol. Bull. 438 (1979).

occupational aspirations, and social and post-educational experiences of minority students who attend them.[4]

Thus, it is no wonder that some school districts have sought to capture the benefits of racial diversity and stave off the harms of racial isolation through the voluntary adoption of integrative, race-conscious student assignment policies. Indeed, given the persistence and pervasiveness of residential segregation in this country,[5] and the release of more and more school systems from court-ordered desegregation obligations each year,[6] the ability of school systems to counteract the trend toward resegregation is perhaps more critical now than ever.

Although several recent rulings have sustained these voluntary policies in the face of constitutional attacks, *see, e.g.*, *Brewer v. West Irondequoit Cent. Sch. Dist.*, 212 F.3d 738 (2d Cir. 2000); *Hunter v. Bd. of Regents of Univ. of Cal.*, 190

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[4] Janet Ward Schofield, *Maximizing the Benefits of Student Diversity: Lessons from School Desegregation Research, in* Diversity Challenged: Evidence on the Impact of Affirmative Action 99 (Gary Orfield & Michal Kurlaender eds. 2001); Marvin P. Dawkins & Jomills H. Braddock, *The Continuing Significance of Desegregation: School Racial Composition and African American Inclusion in American Society*, 63 J. Negro Educ. (1994); Amy S. Wells & Robert L. Crain, *Perpetuation Theory and the Long-Term Effects of School Desegregation*, 64 Rev. Educ. Res. 531 (1994).

[5] *See, e.g.*, John R. Logan, *Separate and Unequal: The Neighborhood Gap for Blacks and Hispanics in Metropolitan America* (Oct. 13, 2002).

[6] *See, e.g.*, Wendy Parker, *The Decline of Judicial Decisionmaking: School Desegregation and District Court Judges*, 81 N.C. L. Rev. 1623 (2003).

F.3d 1061 (9th Cir. 1999); *McFarland v. Jefferson County Public Sch.*, No. 3:02CV-620-H (W.D. Ky. June 29, 2004); *Comfort v. Lynn School Comm.*, 263 F. Supp. 2d 209 (D. Mass. 2003), this area of law remains unsettled, and the instant case represents the first opportunity for a federal appellate court to discuss how the landmark Supreme Court decisions of *Gratz v. Bollinger*, 539 U.S. 244 (2003), and *Grutter v. Bollinger*, 539 U.S. 306 (2003), impact the analysis of K-12 voluntary integration policies. This ruling is one upon which hundreds of school districts within the jurisdiction of this Court will rely and to which numerous other courts, deciding similar issues in years to come, will undoubtedly turn.

Yet, the three-judge panel did not produce a definitive pronouncement. Rather, it was deeply divided, with only one judge from this Court in the majority joined by a visiting judge sitting by designation. The "spirited and thoughtful" dissent, representing a "fundamentally divergent perspective," Slip Op. at 10040, disagreed not only with the majority's result, but with its legal analysis as well. *See id.* at 10056-10100. On a question of constitutional law as vital to the future of our nation's public education system as the one presented here, greater clarity and guidance from an *en banc* panel of this Court is needed. *See* Fed. R. App. P. 35(a)(1)&(2); L.R. 35-1.

II. The Framework Established in *Grutter v. Bollinger*, 539 U.S. 306 (2003), Should Not Have Been Applied Mechanistically Without Recognition of the Unique Context of K-12 Student Assignment.

As the dissent keenly noted, one of the most important lessons to emerge out of *Grutter* is that courts applying strict scrutiny must calibrate their analyses to the context in which the race-conscious action takes place. Slip Op. at 10057-58 (citing *Grutter*, 537 U.S. at 327). The majority, however, failed to heed the Supreme Court's guidance and instead formulaically required the Seattle School District here to meet essentially the same expectations that the Supreme Court placed upon the Law School in *Grutter*, without pausing to recognize the considerable differences between admission to a selective institution of higher education and assignment to one of several nonselective public high schools within a single school system. *See, e.g.*, Slip Op. at 10018.

Perhaps the most striking distinction either overlooked or ignored by the majority is in the very interest at stake itself. In faulting the District for not "serious[ly] consider[ing] all the ways an applicant might contribute to a diverse educational environment," *Id.* at 10019 (quoting *Grutter*, 539 U.S. at 337), the majority inaccurately conflates the District's interest with the kind of "true" diversity sought in *Grutter*, where other factors apart from race were relevant in the analysis. The District's interest, however, is in avoiding the *racial* isolation that

would otherwise result from Seattle's *de facto* residential patterns and in fostering *racial* diversity. *Id.* at 10060-69.[7] As the dissent rightly points out, "when the District's compelling interest is in racial diversity, it makes little sense to ask it instead to evaluate a student's musical talent, athletic prowess, or eligibility for a free lunch." *Id.* at 10078 (citing *Brewer*, 212 F.3d at 752-53). Imposing such considerations upon the District would be to replace the sound educational judgment of school officials with the majority's view of what the District should do.

Similarly, the majority's insistence on analytically awkward comparisons between higher education admissions and K-12 schools prevents it from viewing the challenged plan in its proper context: that of American public education, which unlike colleges and universities, has a tradition of compulsory assignment. *See, e.g.*, *Bazemore v. Friday*, 478 U.S. 385, 408 (1986) (White, J., concurring). The relevant metric, therefore, is not unfettered choice or merit-driven, selective admission, but mandatory student assignment. Analyzed from this perspective, it becomes clear that the very decision to use an assignment policy that affords

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[7] Indeed, as the Washington Supreme Court observed, "the justifications for racial integration are strong and lie close to the central mission of public schools." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No.1*, 72 P.3d. 151, 162 (Wash. 2003).

limited student choice (as opposed to the use of mandatory assignments) is itself evidence of the District's efforts to foster racial integration in a narrowly tailored way that has a *de minimus* burden--if any--on individual students. *See Comfort*, 283 F. Supp. 2d at 377.

Lastly, the majority's failure to recognize important contextual differences leads it to downplay another fundamental principle of narrow tailoring analysis: that courts must determine whether the challenged race-conscious action imposes a harm on third parties and weigh the degree of that harm in assessing whether a constitutional violation has occurred. *See, e.g., United States v. Paradise*, 408 U.S. 149, 182 (1987) (finding significant that the challenged racial classification had a minimal impact on other applicants). The majority's contrary claim--that "the asserted degree of intrusion that a particular use of race might render" is irrelevant, Slip Op. at 10037--is plainly at odds with Supreme Court precedent.

This erroneous conclusion also conflicts with the decisions of other federal courts also grappling with "narrow tailoring" in the context of nonselective public schools within the same district.[8] Assessing the "impact on third parties" one such

[8] Notably, although the Supreme Court has not directly addressed this question, in the context of court-ordered desegregation, it never once mentioned a need to balance desegregation remedies with any supposed "harm" that students who wish to be free from integrated assignments might endure.

court aptly emphasized that the question in the K-12 setting is not "whether a given plaintiff will receive a limited benefit" but "whether any student is entitled to a particular school assignment at all." *Comfort*, 283 F. Supp. 2d at 328; *see also McFarland, supra.*

CONCLUSION

For the foregoing reasons, *amicus* respectfully urges this Court grant to grant the petition for rehearing *en banc.*

Respectfully submitted,

Theodore M. Shaw
DIRECTOR-COUNSEL

Dated: August 17, 2004

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Ninth Circuit Rule 40-1(a) because it contains 2100 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect 9.0 in 14 point, Times New Roman font.

Dated: August 17, 2004

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Chinh Quang Le
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief in Support of Rehearing *En Banc* of NAACP Legal Defense & Educational Fund, Inc. as *amici curiae* was filed with the Clerk of the Court this 17th day of August, 2004, via Express Mail. I further certify that two copies of the same brief were also served via first class U.S. mail on each of the parties in this case:

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LEXSEE

DAVID MCFARLAND, PARENT AND NEXT FRIEND OF STEPHEN AND DANIEL MCFARLAND, ET AL., Plaintiffs, CRYSTAL D. MEREDITH, CUSTODIAL PARENT AND NEXT FRIEND OF JOSHUA RYAN MCDONALD, Plaintiff-Appellant, v. JEFFERSON PUBLIC SCHOOLS, Defendant, JEFFERSON COUNTY BOARD OF EDUCATION, ET AL., Defendants-Appellees.

No. 04-5897

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

2005 U.S. App. LEXIS 22940

October 21, 2005, Filed

NOTICE: [*1] NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 28(g) LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 28(g) BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

PRIOR HISTORY: *McFarland v. Jefferson County Pub. Schs, 416 F.3d 513, 2005 U.S. App. LEXIS 14783 (6th Cir.) (6th Cir. Ky., 2005)*

JUDGES: BEFORE: NORRIS and DAUGHTREY, Circuit Judges; and JORDAN, * District Judge.

* Hon. R. Leon Jordan, Senior United States District Judge for the Eastern District of Tennessee, sitting by designation.

OPINION:

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission [*2] and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

416 F.3d 513, *; 2005 U.S. App. LEXIS 14783, **;
2005 FED App. 0309P (6th Cir.), ***

LEXSEE

DAVID MCFARLAND, Parent and Next Friend of Stephen and Daniel McFarland; RONALD JEFFREY PITTENGER, Parent and Next Friend of Brandon Pittenger; ANTHONY UNDERWOOD, Custodial Parent and Next Friend of Max Aubrey, Plaintiffs, CRYSTAL D. MEREDITH, Custodial Parent and Next Friend of Joshua Ryan McDonald, Plaintiff-Appellant, v. JEFFERSON COUNTY PUBLIC SCHOOLS, Defendant, JEFFERSON COUNTY BOARD OF EDUCATION; STEPHEN W. DAESCHNER, Superintendent, Defendants-Appellees.

No. 04-5897

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

05a0309p.06;

416 F.3d 513; 2005 U.S. App. LEXIS 14783; 2005 FED App. 0309P (6th Cir.)

June 9, 2005, Argued
July 21, 2005, Decided
July 21, 2005, Filed

SUBSEQUENT HISTORY: Rehearing denied by, Rehearing, en banc, denied by *McFarland v. Jefferson Pub. Schs, 2005 U.S. App. LEXIS 22940 (6th Cir., Oct. 21, 2005)*
US Supreme Court certiorari granted by *Meredith v. Jefferson County Bd. of Ed, 2006 U.S. LEXIS 4350 (U.S., June 5, 2006)*

PRIOR HISTORY: [**1] Appeal from the United States District Court for the Western District of Kentucky at Louisville. No. 02-00620--John G. Heyburn II, Chief District Judge. *McFarland v. Jefferson County Pub. Schs, 330 F. Supp. 2d 834, 2004 U.S. Dist. LEXIS 15977 (W.D. Ky., 2004)*

COUNSEL: ARGUED: Teddy B. Gordon, Louisville, Kentucky, for Appellant.

Francis J. Mellen, Jr., WYATT, TARRANT & COMBS, Louisville, Kentucky, for Appellees.

ON BRIEF: Teddy B. Gordon, Louisville, Kentucky, for Appellant.

Francis J. Mellen, Jr., Byron E. Leet, WYATT, TARRANT & COMBS, Louisville, Kentucky, for Appellees.

Amy D. Cubbage, Sheryl G. Snyder, Bridget H. Papalia, FROST, BROWN & TODD, Louisville, Kentucky, Morgan G. Ransdell, KENTUCKY COMMISSION ON HUMAN RIGHTS, Louisville, Kentucky, Chester Darling, CITIZENS FOR THE PRESERVATION OF CONSTITUTIONAL RIGHTS, Andover, Massachusetts, Michael Williams, Robert J. Roughsedge, CITIZENS FOR THE PRESERVATION OF CONSTITUTIONAL RIGHTS, Boston, Massachusetts, Maya R. Kobersy, John W. Borkowski, Maree Sneed, HOGAN & HARTSON, Washington, D.C., Albert H. Kauffman, THE CIVIL RIGHTS PROJECT AT HARVARD UNIVERSITY, Cambridge, Massachusetts, Chinh Quang Le, NAACP LEGAL DEFENSE & EDUCATIONAL FUND, New York, New York, for Amici Curiae.

JUDGES: Before: NORRIS and DAUGHTREY, Circuit Judges; [**2] JORDAN, District Judge.*

* The Honorable R. Leon Jordan, United States District Judge for the Eastern District of Tennessee, sitting by designation.

OPINION:

[***2] [*514] PER CURIAM. Plaintiff Crystal Meredith, on behalf of her son Joshua Ryan McDonald, appeals the decision of the district court to uphold the student assignment plan of the Jefferson County Public Schools, which includes racial guidelines. The district court concluded that the assignment plan met the constraints of the *Equal Protection Clause of the Fourteenth Amendment* because the school board had a compelling interest to use the racial guidelines and applied them in a manner that was narrowly tailored to realize its goals. *McFarland v. Jefferson County Public Schools, 330 F. Supp. 2d 834 (W.D. Ky. 2004).*

Because the reasoning which supports judgment for defendants has been articulated in the well-reasoned opinion of the district court, the issuance of a detailed written opinion by this court would serve no useful purpose.

The judgment of the district court is **affirmed.**

LEXSEE 330 F. SUPP. 2D 834

DAVID McFARLAND, Parent and Next Friend of Stephen and Daniel McFarland, et al., PLAINTIFFS v. JEFFERSON COUNTY PUBLIC SCHOOLS, et al., DEFENDANTS

CIVIL ACTION NO. 3:02CV-620-H

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY

330 F. Supp. 2d 834; 2004 U.S. Dist. LEXIS 15977

June 29, 2004, Decided

SUBSEQUENT HISTORY: Affirmed by *McFarland v. Jefferson County Pub. Schs, 2005 U.S. App. LEXIS 14783 (6th Cir.) (6th Cir. Ky., 2005)*

DISPOSITION: Plaintiffs' request for relief granted in part and denied in part.

COUNSEL: [**1] For Plaintiff: Teddy B. Gordon, Louisville, KY.

For Defendant: Byron E. Leet, Francis J. Mellen, Jr., Pamela J. Ledford, Wyatt, Tarrant & Combs, Louisville, KY.

JUDGES: JOHN G. HEYBURN II, CHIEF JUDGE.

OPINIONBY: JOHN G. HEYBURN II

OPINION:

[*836] **MEMORANDUM OPINION**

For twenty-five years, the Jefferson County Public Schools ("JCPS" or "the Board") maintained an integrated school system under a 1975 federal court decree. After release from that decree four years ago, the JCPS elected to continue its integrated schools through a managed choice plan that includes broad racial guidelines ("the 2001 Plan"). This case arises because some students and their parents say that the Board's student assignment plan violates their rights under the *Equal Protection Clause of the United States Constitution.* n1

n1 Plaintiffs offer a litany of federal laws under which federal jurisdiction is appropriate and under which they request that the Court find their civil rights have been violated: *Titles VI* and *VII of the Civil Rights Act of 1964, 42 U.S.C. § 703(a)(1),the Civil Rights Act of 1991*, Title IX of the Educational Amendments of 1972, *20 U.S.C. § 1681*, KRS ch. 344, the *First* and *Fourteenth Amendments to the U.S. Constitution*, and "appropriate paragraphs" of the Kentucky State Constitution. The arguments presented by both sides have addressed only the constitutionality of the racial guidelines under the *Equal Protection Clause.*

[**2]

The occasion of the fiftieth anniversary of *Brown v. Board of Education* n2 has generated much discussion regarding whether that ruling has fulfilled its original promise. To give all students the benefits of an education in a racially integrated school and to maintain community commitment to the entire school system precisely express the Board's own vision of *Brown's* promise. The benefits the JCPS hopes to achieve go to the heart of its educational mission: (1) a better academic education for all students; (2) better appreciation of our political and cultural heritage for all students; (3) more competitive and attractive public schools; and (4) broader community support for all JCPS schools.

n2 *347 U.S. 483, 98 L. Ed. 873, 74 S. Ct. 686 (1954).*

One half a century of social change after *Brown,* the constitutional questions the [*837] federal courts confront are derivative of but dramatically different from those addressed in *Brown.* This case raises one of those questions: to what extent does the *Equal Protection Clause* [**3] limit JCPS's discretion to use race-conscious policies to maintain an integrated public school system. The Supreme Court has yet to consider this question directly.

I. SUMMARY

This case has required the Court to weigh individual rights under the *Equal Protection Clause* against the responsibility and right of an elected public school board to determine its own educational policies. For guidance, the Court has focused on the divided opinions of the Supreme Court in two recent cases: *Grutter v. Bollinger, 539 U.S. 306, 156 L. Ed. 2d 304, 123 S. Ct. 2325 (2003)*, and *Gratz v. Bollinger, 539 U.S. 244, 156 L. Ed. 2d 257, 123 S. Ct. 2411 (2003)*. The first of these opinions upheld race-conscious admissions policies at the University of Michigan Law School; the latter struck down different policies at the University of Michigan's College of Literature, Science and the Arts. These two cases set out the requirement that any use of race in a higher education admissions plan must further a compelling governmental interest and must be narrowly tailored to meet that interest. The Court considered these principles in the slightly different context of an elementary and secondary school student [**4] assignment plan.

JCPS meets the compelling interest requirement because it has articulated some of the same reasons for integrated public schools that the Supreme Court upheld in *Grutter*. Moreover, the Board has described other compelling interests and benefits of integrated schools, such as improved student education and community support for public schools, that were not relevant in the law school context but are relevant to public elementary and secondary schools.

In most respects, the JCPS student assignment plan also meets the narrow tailoring requirement. Its broad racial guidelines do not constitute a quota. The Board avoids the use of race in predominant and unnecessary ways that unduly harm members of a particular racial group. The Board also uses other race-neutral means, such as geographic boundaries, special programs and student choice, to achieve racial integration.

The student assignment process for the traditional schools is distinct from that employed at all other programs and schools. In that process, JCPS separates students into racial categories in a manner that appears completely unnecessary to accomplish its objectives. To the extent the 2001 Plan incorporates [**5] these procedures, the Court concludes that it violates the *Equal Protection Clause*. The Board may continue to administer the 2001 Plan in every respect in all of its schools, with the exception of its use of racial categories in the traditional school assignment process.

II. FACTUAL BACKGROUND

Plaintiffs all have children who attend or have attended Jefferson County public schools and have participated in the student assignment process. Each, in different ways, is dissatisfied with the procedure or result of his or her child's assignment to a Jefferson County public school. n3 Plaintiffs [*838] seek to enjoin the use of racial guidelines under the 2001 Plan, including the use of racial categories in the traditional school assignment process. This Court has stated that, because the student assignment plan applies at all grade levels in all school settings in the Jefferson County schools, any ruling would necessarily apply to the entire school system.

n3 Plaintiff David McFarland has two boys, Stephen and Daniel. In 2002-2003, Stephen applied to Jefferson County Traditional Middle School ("JCTMS") as a rising sixth grader without indicating a second choice option for a magnet or optional program. He was rejected by JCTMS and assigned to Newburg, his resides middle school. He then applied for a transfer to Myers Middle School, where he was accepted and enrolled. In 2003-2004, Stephen reapplied to JCTMS and was accepted. He attended JCTMS for the seventh grade.

Daniel McFarland lives in the Price Cluster. His resides elementary school is Bates. In 2002-2003, Daniel applied to two cluster schools, Fern Creek and Luhr, as well as to Schaffner Traditional Elementary without indicating a second choice option for a different magnet or optional program. He was rejected by Schaffner and chose not to accept an offer to go to the traditional program at Maupin; enrollment in the Maupin program would have put Daniel in the traditional school "pipeline." Daniel was then assigned to Fern Creek. He did not apply for a transfer from Fern Creek after the cluster and magnet application process was complete. In 2003-2004, Daniel applied again to Schaffner Traditional without indicating a second choice magnet program and was accepted. He attended Schaffner for the second grade.

Plaintiff Ronald Pittenger's son, Brandon, attended Bates Elementary School for kindergarten through fifth grade. In 2002-2003, as a rising sixth grader, Brandon applied to JCTMS as his first choice and the Newburg Math, Science and Technology Magnet Program as his second choice. He was not accepted at JCTMS, and his application to the Newburg MST Program was not processed because a student can only enroll in the Newburg magnet program if it is listed as the student's first choice. Brandon chose not to attend his resides middle school at Newburg. Brandon later enrolled at Evangel Christian School for the sixth grade and chose to stay there. He did not re-

apply to JCTMS or any other public school option in 2003-2004.

Plaintiff Anthony Underwood's son, Kenneth Maxwell Aubrey, attended several different schools in Jefferson County and elsewhere from kindergarten through fifth grade. In 2002-2003, he applied as a rising sixth grader to JCTMS without offering a second choice magnet or optional program. His application was rejected by JCTMS, and he was assigned to Newburg. He applied for a transfer to Myers Middle School, which was accepted, and he enrolled in Myers for the sixth grade. In 2003-2004, he did not apply for magnet programs nor a transfer from Myers. He attended Myers in the seventh grade.

Plaintiff Crystal Meredith's son, Joshua McDonald, was unable to be enrolled in his resides school, Breckinridge-Franklin Elementary School, because it was filled to capacity. He was then assigned to Young Elementary School ("Young") for kindergarten in 2002-2003. He applied for a transfer to Bloom Elementary School ("Bloom"), which was not in his assigned cluster of schools, and was denied admittance because his transfer to Bloom would have had an adverse effect on Young's racial composition in violation of the racial guidelines under the student assignment plan. Joshua, however, did not apply for any further transfers after his request for Bloom was denied (students are unlimited in the number of transfer requests they can make), did not appeal the decision to deny the transfer, and did not apply in 2003-2004 for a different cluster school, a magnet program, or another transfer. Joshua attended Young in the first grade.

[**6]

The JCPS Board is composed of seven members elected by district for terms of four years. The Board manages and controls JCPS. The Board is a corporate body which is organized and exists pursuant to KRS § 160.160. It has the powers and duties stated in KRS § 160.290 and other applicable statutes. The Board selects a superintendent, who acts as the chief administrative officer of JCPS. Defendant Stephen Daeschner is the Superintendent of JCPS.

This Court conducted a five-day hearing in December 2003. Prior to this hearing, the parties entered into a 135-paragraph stipulation that included 75 exhibits. At the hearing, several Plaintiffs testified [*839] about their experiences with the JCPS student assignment plan. n4 Defendants called the superintendent, several board members, numerous administrative staff members, principals and educational experts, who provided testimony about all aspects of the JCPS student assignment plan, the traditional program, the student population and the importance of a racially integrated education. n5

n4 Plaintiffs called four witnesses. Plaintiffs David McFarland, Ronald Pittenger, and Crystal Meredith testified about their experiences with the traditional school admissions process and the student assignment plan in general. Plaintiffs also called an additional witness, Cherri Jackson, who testified about her failed attempt to enroll her children at the elementary school that she preferred in her cluster.

[**7]

n5 Defendants called thirteen witnesses (listed in order of appearance): Carol Ann Haddad, a school board member, testified about changes in 1991 and 1996 to the student assignment plan, the origins of the traditional program, and more generally about the importance and benefits of racial integration in education; Dr. Stephen Daeschner, JCPS Superintendent, testified about the student assignment plan and the traditional program, the variables involved in reducing the achievement gap between Blacks and Whites and low and high performing schools, and the benefits of racial integration; Patricia Todd, Executive Director for Student Assignment, testified about the different types of schools and academic programs and the assignment process for the traditional schools and JCPS as a whole; Carolyn Meredith, Director of Employee Relations for JCPS, testified about the hiring and placement of principals and teachers; Loudena Peabody, Director of Instructional Support for JCPS, testified about her previous experience as a teacher and principal in JCPS and methods for improving student performance; Sam Corbett, former school board member and local business owner, testified about the importance of racial integration in education as it prepares students for working in a diverse workplace and the lack of differences between traditional and non-traditional schools; Dr. Robert Rodosky, Executive Director of Accountability, Research, and Planning, testified about the demographic make-up of and racial segregation in housing in Jefferson County, data about the student assignment process, data about state testing scores, use of income data as a predictor of academic performance, and data about the traditional school admis-

sions process; Dr. Edward Kifer, Jr., Professor in the College of Education at the University of Kentucky, testified about research regarding socioeconomic status as a predictor of academic success, the achievement gap between Blacks and Whites, and the impact of diversity on a public school system; Janice Hardin, Chief Financial Officer and Treasurer for JCPS, testified about school funding, per pupil expenditures, and teacher salaries; Tito Castillo, Principal of Fern Creek Traditional High School, testified about the similarities of his traditional high school to the magnet traditional program; Mark Rose, Principal at Jefferson County Traditional Middle School ("JCTMS"), testified about the differences and similarities between traditional and non-traditional public schools and the admissions process at JCTMS; Rick Caple, Director of Transportation for JCPS, testified about the JCPS transportation system for students and the transportation budget; Joseph Burks, Assistant Superintendent for JCPS High Schools, testified about his previous experience as principal of Louisville Male and his knowledge of Male and Butler as compared with other traditional JCPS high schools; and Dr. Gary Orfield, Professor of Education and Social Policy at Harvard University and Co-Director of the Harvard Civil Rights Project, testified about his research on desegregation and the benefits of diversity in public schools.

[**8]

A.

JCPS is the 28th largest public school system in the United States. Its district boundaries mirror those of the new Metropolitan Louisville which is now the 16th largest city in the nation. In 2003-2004, about 97,000 students were enrolled in JCPS: approximately 5,000 in preschool programs; 42,500 in elementary schools; 21,650 in middle schools; 24,750 in high schools; 2,100 in alternative schools; and about 1,000 in special schools and special [*840] education centers. The racial profile of students subject to the 2001 Plan is about 34% Black and 66% White. n6

n6 The JCPS student assignment plan records the race of each student as Black or African-American and Other, which this Court will denote as "White." This particular practice of distinguishing only Black and non-Black students and referencing non-Black students as "Others" was discussed rather extensively during the hearing. As several witnesses testified, JCPS is a school district almost entirely populated by only Black and White students. Students of other races and backgrounds, such as Latino and Asian students, are represented only in very small numbers, e.g., less than five percent of the total student population is neither non-Hispanic Black nor White. The Court believes that it is more accurate to refer to the two groups as "Black" and "White."

[**9]

JCPS offers a full array of comprehensive, specialized and advanced programs throughout its schools. n7 It operates pre-school and grades Primary 1 ("kindergarten") through grade five in its 87 elementary schools, sixth grade through the eighth grade in its 23 middle schools, and ninth grade through twelfth grade in its 20 high schools. It also operates the Brown School, which contains all grade levels in one building, as well as several alternative schools and special education centers. Each school building has a program capacity, which is the number of students that the building can accommodate, consistent with the programs offered there. JCPS allocates operating funds to each school using the same formula that is uniformly applied to all JCPS schools.

n7 The Comprehensive Program is the main instructional program. The Advance Program offers a curriculum for gifted and talented students. The Honors Program provides intensive academic preparation for middle and high school students in the Comprehensive Program. The Exceptional Child Education Program offers services to students with identified disabilities.

[**10]

The Kentucky Education Reform Act of 1990 ("KERA") sets out many requirements for curriculum development, educational goals and assessment requirements for all Kentucky schools, including JCPS. KERA requires each school to form a School-Based Decision Making Council ("SBDM council" or "Council") composed of parents, teachers and the school's principal or administrator. Each Council determines which textbooks, instructional materials and student support services will be used at its school. It also adopts policies for various aspects of school life.

KERA requires a statewide assessment program known as the Commonwealth Accountability Testing System ("CATS"). This test measures core academic content, basic skills, and higher-order thinking skills and their application. KERA requires that JCPS and SBDM councils identify achievement gaps between various

groups of students, including between Black and White students, and between Free and Reduced Lunch ("FRL") students and non-FRL students. JCPS sets biennial targets for eliminating those achievement gaps.

B.

This case and its legal predecessors n8 are inseparable from JCPS's ongoing commitment to racial integration within its individual [**11] schools. One can find the complete [*841] legal and historical background of this case in *Hampton I, 72 F. Supp. 2d 753, 754-67 (W.D. Ky. 1999)*. A brief description follows.

n8 *See Newburg Area Council, Inc. v. Bd. of Educ. of Jefferson County, 489 F.2d 925 (6th Cir. 1973)*; *Newburg Area Council, Inc. v. Bd. of Educ. of Jefferson County, 510 F.2d 1358 (6th Cir. 1974)*; *Newburg Area Council, Inc. v. Gordon, 521 F.2d 578 (6th Cir. 1975)*; *Cunningham v. Grayson, 541 F.2d 538 (6th Cir. 1976)*; *Haycraft v. Bd. of Educ. of Jefferson County, 560 F.2d 755 (6th Cir. 1977)*; *Haycraft v. Bd. of Educ. of Jefferson County, 585 F.2d 803 (6th Cir. 1978)*; *Hampton v. Jefferson County Bd. of Educ., 72 F. Supp. 2d 753 (W.D. Ky. 1999)* ("*Hampton I*"); *Hampton v. Jefferson County Bd. of Educ., 102 F. Supp. 2d 358 (W.D. Ky. 2000)* ("*Hampton II*").

In 1973, parents and students [**12] filed two federal lawsuits against the Board and the former Louisville Board of Education, alleging that each maintained a segregated school system and demanding desegregation of those schools (collectively, the "*Haycraft*" case). In December 1973, on appeal from dismissal of both lawsuits, the Sixth Circuit directed Judge James Gordon to devise a student assignment plan that eliminated all vestiges of state-imposed segregation in the two school systems. *Newburg Area Council, Inc. v. Bd. of Educ. of Jefferson County, 489 F.2d 925, 932 (6th Cir. 1973)*. In July 1975, Judge Gordon approved such a plan, and the then-existing Board implemented it. By December 1981, Judge Gordon ended his direct monitoring of schools. In April 1984, the Board approved the first significant modification of its student assignment plan.

Over the next decade, the Board gradually increased specialized educational offerings and encouraged students to make voluntary school choices. In August 1996, after receiving advice from consultants, various committees and a public opinion survey, the Board again revised its student assignment plan. In April 1998, students and parents filed a lawsuit [**13] alleging that the students were denied admission to Central High School due to their race. In June 1999, this Court concluded that Judge Gordon's original *Haycraft* desegregation decree was still in effect. *Hampton I, 72 F. Supp. 2d at 774*. Plaintiffs then moved to dissolve that decree.

In June 2000, this Court dissolved the 1975 desegregation decree, ordered JCPS to cease using racial quotas at Central High School, and ordered JCPS to complete any reevaluation and redesign of the admissions procedures in other magnet schools before the beginning of the 2002-2003 school year. *Hampton II, 102 F. Supp. 2d 358, 377-81 (W.D. Ky. 2000)*. n9

n9 Some of the Court's findings in *Hampton II* are relevant to the current case: (1) the Board demonstrated extraordinary good faith through its dedication to quality education in an integrated setting, *102 F. Supp. 2d at 369-70*; and (2) the Board's student assignment plan was no longer bound by a federal court decree, *id. at 377*. The Court concluded the following: (1) that elected school boards had traditional authority to establish an educational policy, *id. at 379*; (2) that, as between equal schools, the assignment to one particular school did not create a burden or confer a benefit that was constitutionally protected, *id. at 380*; (3) that the Board could use race along with other factors to maintain an integrated school system, *id. at 379*; and (4) that the use of racial quotas to exclude students from magnet schools with special programs violated the *Equal Protection Clause*, *id. at 381*. The Court did not discuss the status of traditional schools or the assignment process for them.

[**14]

To comply with the Court's order, the Board ended its use of racial quotas at Central High School and at three other magnet schools, duPont Manual High School (including the Youth Performing Arts School ("YPAS")), the Brown School, and Brandeis Elementary. The Board determined that the Court's order did not address the use of race at magnet traditional schools. In April 2001, after considering public feedback from opinion surveys and community meetings, the Board adopted the 2001 Plan.

III. THE 2001 STUDENT ASSIGNMENT PLAN

Notwithstanding many changes and refinements to its assignment plans over the past twenty-five years, the Board's primary [*842] objective has remained constant: to maintain a fully integrated countywide system of schools. The 2001 Plan contains three basic organizing principles: (1) management of broad racial guidelines, (2) creation of school boundaries or "resides" areas

and elementary school clusters, and (3) maximization of student choice through magnet schools, magnet traditional schools, magnet and optional programs, open enrollment and transfers. Using these principles, JCPS provides a form of managed choice in student assignment for its students individually [**15] and for the system as a whole.

A.

The racial guidelines broadly influence the overall student assignment plan. This is not surprising since one of the Board's current stated goals under the 2001 Plan is to provide "substantially uniform educational resources to all students" and to teach basic skills and critical thinking skills "in a racially integrated environment." To accomplish these objectives, the 2001 Plan requires each school to seek a Black student enrollment of at least 15% and no more than 50%. This reflects a broad range equally above and below Black student enrollment systemwide.

Prior to any consideration of a student's race, a myriad of other factors, such as place of residence, school capacity, program popularity, random draw and the nature of the student's choices, will have a more significant effect on school assignment. The guidelines mostly influence student assignment in subtle and indirect ways. For instance, where the racial composition of an entire school lies near either end of the racial guidelines, the application of any student for open enrollment, transfer or even to a magnet program could be affected. In a specific case, a student's race, whether Black [**16] or White, could determine whether that student receives his or her first, second, third or fourth choice of school.

For the most part, the guidelines provide administrators with the authority to facilitate, negotiate and collaborate with principals and staff to maintain schools within the 15-50% range. The Court will discuss the actual assignment process in greater detail in Sections III.D and III.E of this Memorandum.

B.

Geographic boundaries greatly influence student assignments. Each JCPS school, except Central, duPont Manual and YPAS, Male and Butler high schools, the Brown School, Brandeis Elementary, and the traditional programs at Foster and Maupin, has a designated geographic attendance area, which is called its "resides area." Each student is assigned a "resides school" based upon the residence address of his or her parent(s) or guardian. In 2002-2003, 57.5% of all students attended their resides school. n10

n10 At the elementary school level, 57% of students attended their resides school. At the middle school level, 67.5% attended their resides school. At the high school level, 49.7% attended their resides school.

[**17]

At the elementary school level, all non-magnet elementary schools are grouped into twelve clusters. The elementary schools in a cluster, which includes a student's resides school, are designated as "cluster resides schools" for that student. Racial demographics have influenced the boundaries for contiguous and non-contiguous resides areas and the composition of some elementary school clusters. Elementary schools are clustered so that combined attendance zones, assuming normal voluntary choices, will produce at each school student populations somewhere within the racial guidelines.

[*843] Each non-magnet middle and high school has its own resides area. There are no clusters at those levels. Apart from age, graduation from previous grade and residence, no selection criteria govern admission of any student to his or her resides school or a school within his or her cluster. The geographic boundaries of resides areas and cluster schools determine most school assignments.

C.

Student choice may be the most significant element of the 2001 Plan. In addition to a choice of geographic location, JCPS offers students the choice of numerous and varied specialized schools and programs. The basic settings [**18] of specialized curriculum are: (1) magnet schools, (2) magnet and optional programs, and (3) magnet career academies. Differences abound, even within these broad groupings. Virtually all age appropriate students may apply for admission to any of these specialized programs.

JCPS has created thirteen magnet schools. Non-traditional magnet schools do not have a resides area. Any student, regardless of address, may apply to the four non-traditional magnet schools: Brandeis Elementary, duPont Manual (including YPAS), Central, and Brown. These schools offer specialized programs and curricula. The remaining nine magnets are traditional schools that offer regular curriculum in a particular school environment. Although students may only apply to a particular traditional school based on place of residence (except for Butler, Male, and the traditional programs at Foster and Maupin), traditional schools are not resides schools for any student because all students must apply for entry.

The Board has created eighteen magnet programs. n11 These are small, specialized programs within a regu-

lar school. The Board has also created optional programs in twenty-two schools. n12 These are small, specialized [**19] programs with unique characteristics. A student may apply for admission to any magnet or optional program regardless of his or her resides area. n13

n11 Magnet programs are located at the following schools: at the elementary school level, Byck, Coleridge-Taylor Montessori, Foster, Kennedy Montessori, King, Maupin, Wheatley, and Young; at the middle school level, Farnsley, Highland, Thomas Jefferson, Meyzeek, Newburg, and Noe; and at the high school level, Atherton, Doss, Seneca, and Western. Foster and Maupin elementary schools have traditional magnet programs.

n12 Optional programs are located at the following schools: at the elementary school level, Cane Run and Price; at the middle school level, Crosby, Highland, Lassiter, Moore, Southern Leadership Academy, Stuart, and Westport Traditional; and at the high school level, Doss, Eastern, Fern Creek, Iroquois, Jeffersontown, Moore, Pleasure Ridge Park, Seneca, Shawnee, Southern, Valley, Waggener, and Western.

n13 Students who apply to the Math, Science and Technology Program at Farnsley, Meyzeek, or Newburg middle schools and are accepted to the program are assigned to one of those schools based upon place of residence.

[**20]

Magnet career academies are high schools that offer programs focusing on a specific technical career. Students must apply to the magnet program at a magnet career academy. The Board has designated thirteen resides high schools, plus Central, as magnet career academies. n14 Except in the case of Central, which has a unique curriculum and is open to students countywide, the majority of students enrolled in a magnet career academy live in that school's resides area.

n14 Magnet career academies are located at Atherton, Central, Doss, Fairdale, Fern Creek, Iroquois, Jeffersontown, Moore, Pleasure Ridge Park, Seneca, Shawnee, Southern, Valley, and Waggener.

[*844] An important part of student choice is the ability of virtually any student to apply for open enrollment (high school freshmen only) or transfer to any non-magnet school. The process for each is similar. After the initial assignment process is complete, any student may apply for transfer to any non-magnet school. n15 Rising freshmen may apply for open enrollment [**21] to any non-magnet high school. If the student is accepted, the receiving school becomes the student's resides school. In each case, the receiving school makes the original decision to accept or reject the applicant. The number of students actually requesting transfer or open enrollment is quite small. n16

n15 A school may approve transfer applications for a variety of reasons, including day care arrangements, medical criteria, family hardship, student adjustment problems, and program offerings. In addition, school capacity, a student's attendance record, behavior, grades and the racial guidelines play a role. Three of Plaintiffs' children applied to transfer out of the schools to which they were assigned. Two were successful; one was not. After Stephen McFarland and Kenneth Aubrey were not accepted to Jefferson County Traditional, they both applied for a transfer to Myers Middle School from their resides school at Newburg, and both were accepted. Joshua McDonald also applied for a transfer to Bloom Elementary School when he could not enroll in his resides school at Breckinridge-Franklin and was assigned to Young. His transfer request was denied under the racial guidelines, but he did not apply for another transfer that year nor did he submit an application for his resides school, another cluster school, a magnet school or program, or a transfer to another school the following year.

[**22]

n16 Overall, over the past two years, transfer and open enrollment applications together have represented about 7.6% of JCPS students. However, many students apply for both. Therefore, the actual number of students seeking either is probably less than 5%. In 2003-2004, JCPS received 1,208 open enrollment applications and accepted 335, or 27.7%. In 2002-2003, JCPS received a total of 6,185 transfer applications and granted 4,061, or 65.7%.

D.

School geographic boundaries and student choice interact to create a huge array of choices and flexibility within the assignment process.

At the Primary 1 (or kindergarten) level, a student is assigned to his or her resides school unless that school lacks capacity or the student applies for another school. The racial guidelines do not apply to kindergarten.

An elementary school student has as many as five choices. Normally, that student is assigned to his or her resides school unless that school exceeds its capacity or hovers at the extreme ends of the racial guidelines (except for kindergarten), or the student has been accepted to another school or program [**23] in or out of the resides cluster. n17 All parents of incoming kindergarten students, first graders or new elementary school students may select a first and second choice school within their resides cluster and a first and second choice magnet or optional program, including a traditional school. Students may list a traditional school only as a first choice magnet program. A student may exercise his or her choices in each successive year.

n17 A student could apply for and receive acceptance to a magnet or traditional school, a magnet or optional program, or a cluster or other school by transfer.

The principals in each cluster and JCPS administrators jointly determine elementary school assignments based upon student choices, the available space and the racial guidelines. If the student is unhappy with the assignment, the student may request a transfer to another elementary school, in or out of the cluster. Acceptance by [*845] transfer depends upon the racial guidelines and program capacity. If a student submits no application, [**24] then the student is assigned to a school within his or her resides cluster depending upon capacity and the racial guidelines. Only a small number of elementary students receive an assignment that is not one of their choices. n18

n18 Generally, about 95-96% of all elementary students receive their first or second choice cluster school. In 2003-2004, about 30% of elementary school applicants to magnet or optional programs received their first or second choice.

At the middle school level, students have three choices. Most students choose to attend their resides school, for which the only selection criteria are graduation from an elementary school and place of residence. A student may also apply for a first and second choice magnet middle school or magnet or optional program. Regardless of acceptance to a magnet program, a student may choose to attend either his or her resides school or select a third option, which is to apply for a transfer to another middle school.

At the high school level, students have the same [**25] basic three choices. Most high school students choose to attend their resides school for which the only selection criteria are middle school graduation and place of residence. Students may also apply for a first and second choice magnet high school or optional or magnet program. Rising freshmen may also apply for open enrollment to any non-magnet high school of their choice. If a student is accepted to a high school through open enrollment, that high school becomes the student's resides school. Regardless of acceptance to a magnet program, a student may choose to attend either his or her resides school or select a third option, which is to apply for a transfer to another high school.

The admissions process for non-traditional magnet schools, magnet programs and optional programs at all grade levels is relatively straightforward. Admissions decisions for the four non-traditional magnet schools n19 are based upon: (1) objective criteria established by the school or program, such as a survey and/or essay, recommendations by adults, a work sample or audition, attendance data, course grades and CATS and/or standardized test scores; (2) available space in the school or program; and (3) [**26] for students applying to Brown, position on a computer-generated random draw list and residence within a zip code that will make the student body representative of the entire county. In addition to objective criteria and program capacity, the racial guidelines are a factor in admission to all the other magnet and optional programs. Admission to one of the middle school Math, Science and Technology Programs is also based upon position on a computer-generated random draw list.

n19 The admissions process for the traditional schools will be explained separately.

E.

Traditional schools have a more complex admissions process, which combines elements of student choice, program and school capacity, geographic boundaries, pure chance, broad racial guidelines and the use of racial categories to separate applicants. Some Plaintiffs initiated this litigation because they object to JCPS's use of the racial guidelines in general, and the use of racial categories in particular, in the traditional school admissions process. [**27]

JCPS first developed traditional programs for the 1976-1977 school year. Traditional schools offer the same comprehensive [*846] curriculum offered by

every other non-magnet school. These schools emphasize basic skills in a highly structured educational environment, discipline and dress codes, learning with daily follow-up assignments, and concepts of courtesy, patriotism, morality and respect for others. Parents are expected to monitor their children's school work, to support their children's academic and extracurricular activities, and to be involved in the school PTA.

The traditional program is offered as the sole structure at nine schools: four elementary, three middle and two high schools. n20 In addition, JCPS offers the traditional program at two resides elementary schools, Foster and Maupin. n21 In 2002-2003, about 9.3% of all JCPS students were enrolled in the traditional program. Application to the traditional program at Foster and Maupin is open to students districtwide. Students apply to the other traditional schools based on place of residence (except at Butler and Male). The traditional schools, including Foster and Maupin, admit students only by application. They do not accept [**28] students based on transfer or high school open enrollment applications. In response to the increasing popularity of the traditional school setting, eight other resides schools now offer this learning environment to their students. n22

n20 The traditional schools are as follows: at the elementary school level, Audubon, Carter, Greathouse/Shryock, and Schaffner; at the middle school level, Barret, Jefferson County Traditional, and Johnson; and at the high school level, Butler and Louisville Male.

n21 Foster is a traditional program within a resides school. In 2003-2004, about half of its students were in the traditional program. Maupin also has a separate traditional program within its resides school, but all students at Maupin receive traditional instruction. Most importantly, as described later, any student attending the traditional program at these schools is part of the traditional school "pipeline."

n22 These resides schools have elected to provide instruction to their students in a traditional or structured environment, with the same emphasis on traditional discipline and other instructional concepts as the traditional magnet schools. All eight schools have "turned" traditional in the past ten years: Smyrna and Wilkerson elementary schools, Moore and Westport middle schools, and Fern Creek, Moore, Valley, and Waggener high schools. Each school's SBDM council, with Board approval, made the decision and designed the instructional program and environment at these schools. Students attending these eight resides traditional schools do not become part of the traditional school "pipeline" discussed in Section III.E.1.

[**29]

1.

Place of residence and position on the random draw lists are the primary factors for entry into the traditional program. With the exception of the programs at Foster and Maupin, which are open to students districtwide, each traditional elementary and middle school has its own geographic zone. Students attend the traditional school in their geographic zone. After initial acceptance, the so-called "pipeline" becomes the dominant influence in traditional school assignment. The "pipeline" guarantees each current traditional school student a spot in the next grade level without submitting a new application. The "pipeline" enlarges in each grade, thus creating openings for new applicants to the traditional program.

The traditional program begins in kindergarten. At this grade level, the four traditional elementary schools have a total of 360 openings (96 at each school, except 72 at Schaffner). n23 These students form the first stage of the traditional program "pipeline." The "pipeline" increases by twenty-four students at the first grade level. [*847] The "pipeline" increases by sixty-four students at the fourth grade level and by sixteen students at the fifth grade level, due to increases [**30] in the pupil to teacher ratio. After the four traditional elementary schools have filled all their available spaces, Foster and Maupin send letters to the parents of student applicants who were not accepted, offering them the opportunity to apply to those traditional magnet programs. Foster and Maupin also accept additional students to their traditional program between the first and fifth grades. Students who attend Foster and Maupin become part of the traditional school "pipeline" and therefore gain the right to attend a traditional middle school.

n23 A small number of kindergarten students attend the traditional programs at Foster and Maupin.

Middle schools are larger than elementary schools. Consequently, the "pipeline" increases by about 450 students at the sixth grade level and by sixty students at the seventh grade level. About 800 students graduate from the three traditional middle schools. These students can state a preference to attend either Butler or Male. The two traditional high schools have available [**31] space for 946 ninth graders, 446 at Butler and 500 at Male. Currently, most middle school students choose Male, so

that school usually has no spots available for new applicants. On the other hand, Butler typically has about 200 openings for students outside the traditional school "pipeline." Consequently, students not in the "pipeline" may apply for Butler. Their applications are considered to the extent space is available.

Students who are not accepted to a traditional school have other opportunities to join the "pipeline." For instance, a student may elect to apply to the traditional programs at Foster or Maupin. Plaintiff David McFarland's son, Daniel McFarland, chose not to accept his offer to attend Maupin. Students may also reapply each year. Two students in this case, Stephen and Daniel McFarland, applied a second time, and each was accepted to a traditional school. Neither Brandon Pittenger nor Kenneth Aubrey, the other two children challenging the traditional school assignment plan, chose to reapply to a traditional school.

2.

The racial guidelines also apply to the traditional schools. The process for employing the guidelines, however, is significantly different from the [**32] process as it is applied to all other schools. Applicants are separated and randomly sorted into four lists at each grade level: Black Male, Black Female, White Male and White Female.

The principal has discretion to draw candidates from different lists in order to stay within the racial guidelines for the entire school student population. The racial guidelines apply to the entire school, not per grade. Generally speaking, depending on how many spaces are available for new applicants, n24 a principal will first take a certain number of applicants from each list--for instance, the first ten names on each list--and notify the parents. If the parent declines to enroll the child in that school, the principal can now move to the next name on one of the four lists, using his or her discretion as to which list to choose from. If all of the parents accept, depending upon space availability, the selection process may be complete or may require selection of a few more students. The Office of Demographics gives final approval on a principal's selections to ensure that the school is within the racial guidelines.

n24 For instance, Schaffner has 72 slots available at kindergarten, so a principal will be able to take more students at that time. But, as the grades progress, a principal will have fewer and fewer slots available for new applicants because spaces are filled by students already in the "pipeline."

[**33]

[*848] A principal may not deviate from the order in which the names appear on the lists. If a principal has chosen all the names on a given list, he or she is not permitted to recruit additional applicants for that race/gender category. Similarly, if few or no Black students apply to a traditional school, a principal would be limited to admitting only those Black students who apply at that time. JCPS, however, makes a concerted effort through the Parent Assistance Center and the Department of Student Assignment to ensure adequate Black student participation in the traditional program. n25

n25 In Jefferson County, fewer Black than White students tend to apply to traditional schools so that the lists of Black males and females will be shorter than the lists for White applicants. Black applicants, therefore, generally have a higher chance of acceptance to traditional schools than White applicants because their numbers are smaller.

IV. THE STANDARD OF REVIEW

The *Equal Protection Clause of the United States Constitution* [**34] provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." *U.S. Const. amend. XIV, § 1.* While everyone agrees that any government action based on race is subject to thorough judicial inquiry, some dispute the exact nature of that inquiry. This Court concludes that the Supreme Court has unequivocally established that "all racial classifications reviewable under the *Equal Protection Clause* must be strictly scrutinized." *Gratz v. Bollinger, 539 U.S. 244, 270, 156 L. Ed. 2d 257, 123 S. Ct. 2411 (2003)* (quoting *Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 224, 132 L. Ed. 2d 158, 115 S. Ct. 2097 (1995))* (internal quotation marks omitted); *see also Grutter v. Bollinger, 539 U.S. 306, 326, 156 L. Ed. 2d 304, 123 S. Ct. 2325 (2003).*

The Supreme Court first stated this view in *Korematsu v. United States,* where it found all racial classifications to be "immediately suspect" and subject to "the most rigid scrutiny." *323 U.S. 214, 216, 89 L. Ed. 194, 65 S. Ct. 193 (1944).* In virtually every case since then, in a broad variety of circumstances and despite repeated entreaties to reverse itself, the Supreme Court has applied the same standard. *See, e.g.* [**35] , *Grutter, 539 U.S. at 326*; *Gratz, 539 U.S. at 270*; *Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227, 132 L. Ed. 2d 158, 115 S. Ct. 2097 (1995)* (invalidating a federal government contract program giving preference to businesses owned by racial minorities); *City of Richmond v. J.A.*

Croson Co., 488 U.S. 469, 493, 102 L. Ed. 2d 854, 109 S. Ct. 706 (1989) (plurality opinion) (invalidating municipal program requiring all contractors to subcontract at least 30% of each contract to minority-owned businesses); *Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 273, 90 L. Ed. 2d 260, 106 S. Ct. 1842 (1986)* (invalidating teacher layoff policy that granted racial preferences in making layoff decisions); *Loving v. Virginia, 388 U.S. 1, 11, 18 L. Ed. 2d 1010, 87 S. Ct. 1817 (1967)* (outlawing state anti-miscegenation statute); *Bolling v. Sharpe, 347 U.S. 497, 499, 98 L. Ed. 884, 74 S. Ct. 693 (1954)* (outlawing *de jure* racial segregation in the District of Columbia public school system). Most recently, in *Grutter* and *Gratz*, the Supreme Court explicitly reaffirmed strict scrutiny for review of racial classifications in higher education admissions programs. [**36] n26

n26 No Justice appears to have suggested that a lesser degree of scrutiny was appropriate in either *Grutter* or *Gratz*.

Several lower courts have suggested that some form of intermediate scrutiny might be more appropriate when examining the constitutionality of certain affirmative [*849] action plans promoting racial integration in housing and among students and teachers in public schools. n27 While the present case is distinguishable in many respects from the Supreme Court's most recent decisions in *Grutter* and *Gratz*, the Supreme Court has always chosen strict scrutiny as the proper standard of review for racial classifications. n28 Given our inherent suspicion of racial categories, the utmost level of scrutiny is required.

n27 *See Raso v. Lago, 135 F.3d 11, 16-17 (1st Cir. 1998)*; *Jacobson v. Cincinnati Bd. of Educ., 961 F.2d 100, 102-03 (6th Cir. 1992)*; *Kromnick v. Sch. Dist. of Phila., 739 F.2d 894, 902-03 (3d Cir. 1984)*; *Comfort v. Lynn Sch. Comm., 283 F. Supp. 2d 328, 364-66 (D. Mass. 2003)*.

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n28 Even when the Supreme Court once approved intermediate scrutiny of "benign" racial classifications, it later overruled that decision, applying strict scrutiny to all racial classifications. *See Metro Broad., Inc. v. FCC, 497 U.S. 547, 564-65, 111 L. Ed. 2d 445, 110 S. Ct. 2997 (1990)* (applying intermediate scrutiny to "benign" race-based measures), *overruled by Adarand, 515 U.S. 200, 132 L. Ed. 2d 158, 115 S. Ct. 2097 (1995)*.

This Court will therefore apply strict scrutiny to the JCPS student assignment plan.

V. JCPS HAS ESTABLISHED A COMPELLING INTEREST IN MAINTAINING INTEGRATED SCHOOLS

Strict scrutiny means that racial classifications must further a compelling governmental interest and must be narrowly tailored to meet that interest. Absent searching judicial inquiry, one cannot determine "what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Grutter, 539 U.S. at 326* (quoting *J.A. Croson Co., 488 U.S. at 493*). Strict scrutiny of all [**38] racial classifications will "'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.*

The Supreme Court has said that universities and graduate schools may state a compelling interest in obtaining "the educational benefits of a diverse student body." *Id. at 328*. The Board's interests articulated here overlap with those of the Michigan Law School at the individual student level. In addition, in its statement of interests, the Board has articulated broader concerns in the different context of public elementary and secondary education. n29 The different context "matters" because, under the *Equal Protection Clause*, "not every decision influenced by race is equally objectionable and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker [*850] for the use of race in that particular context." *Id. at 327*. No particular interest, however, is categorically compelling. The interest asserted must be examined and approved in each case in light of the particular context in which it [**39] is asserted.

n29 Justice Thomas has stated that one proposing to use race must "define with precision the interest being asserted." *Grutter, 539 U.S. at 354* (Thomas, J., dissenting). No doubt, Justice Thomas articulates a virtually unanimous view of the Court on this point. In view of its importance, this Court has set out the Board's precise statement of its interests at the very beginning of this Memorandum Opinion and repeats it here:

> To give all students the benefits of an education in a racially integrated school and to maintain community commitment to the entire school system precisely express the Board's own vision of *Brown's* promise. The benefits the JCPS hopes to achieve go to the heart of its educational mission: (1) a better academic education for all students; (2) better appreciation of our political and cultural heritage for all students; (3) more competitive and attractive public schools; and (4) broader community support for all JCPS schools. Mem. Op., at 1-2.

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Whether an asserted interest is truly compelling is revealed only by assessing the objective validity of the goal, its importance to JCPS and the sincerity of JCPS's interest. For the reasons that follow, the Court has no doubt that Defendants have proven that their interest in having integrated schools is compelling by any definition.

A.

Traditionally, Americans consider the education of their children a matter of intense personal and local concern. Not surprisingly, over many years and in a variety of circumstances, the Supreme Court has strongly endorsed the role and importance of local elected school boards as they craft educational policies for their communities. *Freeman v. Pitts, 503 U.S. 467, 489-90, 118 L. Ed. 2d 108, 112 S. Ct. 1430 (1992)*; *Bd. of Educ. of Okla. City Pub. Schs. v. Dowell, 498 U.S. 237, 248, 112 L. Ed. 2d 715, 111 S. Ct. 630 (1991)*; *Wash. v. Seattle Sch. Dist. No. 1,458 U.S. 457, 481-82, 73 L. Ed. 2d 896, 102 S. Ct. 3187 (1982)*; *Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 410, 53 L. Ed. 2d 851, 97 S. Ct. 2766 (1977)*; *Milliken v. Bradley, 418 U.S. 717, 741-42, 41 L. Ed. 2d 1069, 94 S. Ct. 3112 (1974)*; *San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 49-51, 36 L. Ed. 2d 16, 93 S. Ct. 1278 (1973)*. [**41] n30 The historical importance of the deference accorded to local school boards goes to the very heart of our democratic form of government. It is conceptually different--though perhaps more accepted--than the deference discussed in *Grutter* and *Bakke*. n31

n30 The Supreme Court has broadly endorsed the importance of local control of public education. This Court agrees with that view. *See Freeman, 503 U.S. at 490* ("As we have long observed, 'local autonomy of school districts is a vital national tradition.' Returning schools to the control of local authorities at the earliest practicable date is essential to restore their true accountability in our governmental system. When the school district and all state entities participating with it in operating the schools make decisions in the absence of judicial supervision, they can be held accountable to the citizenry, to the political process, and to the courts in the ordinary course.") (citation omitted); *Dowell, 498 U.S. at 248* ("Local control over the education of children allows citizens to participate in decisionmaking, and allows innovation so that school programs can fit local needs."); *Seattle Sch. Dist. No. 1, 458 U.S. at 481* ("No single tradition in public education is more deeply rooted than local control over the operation of schools. . . .") (quoting *Milliken, 418 U.S. at 741*); *Brinkman, 433 U.S. at 410* ("Our cases have . . . firmly recognized that local autonomy of school districts is a vital national tradition."); *Milliken, 418 U.S. at 741-42* ("No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process."); *Rodriguez, 411 U.S. at 49-50* ("[Local control of schools offers] the opportunity . . . for participation in the decisionmaking process that determines how those local tax dollars will be spent. . . . Pluralism also affords some opportunity for experimentation, innovation, and a healthy competition for educational excellence.").

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n31 Justice Powell first expressed the idea that a university's right to determine its own student body was accorded some special consideration under the *First Amendment*. *Regents of the Univ. of Calif. v. Bakke, 438 U.S. 265, 312-14, 57 L. Ed. 2d 750, 98 S. Ct. 2733 (1978)*. In *Grutter*, the Supreme Court reaffirmed the idea that academic freedom grounded in the *First Amendment* supported some deference to the university. *Grutter, 539 U.S. at 329*. In the different context of public school education, that concept of deference is not relevant here.

[*851] Democratically elected school boards across the country are struggling to improve our schools and the education of children in them and to retain the public support of their communities. The Court's deference to JCPS's efforts here is neither absolute nor determinative. Rather, offering deference is consistent with the Board's acknowledged responsibilities and complements the basic concepts of democracy. In a different age and under quite different circumstances, the Sixth Circuit observed that

> it is the wiser course to allow for [**43] the flexibility, imagination and creativity of local school boards in providing for equal opportunity in education for all students. . . . There may be a variety of permissible means to the goal of equal opportunity, and that room for reasonable men of good will to solve these complex community problem[s] must be preserved.

Deal v. Cincinnati Bd. of Educ., 369 F.2d 55, 61 (6th Cir. 1966). The same advice makes sense today in the aftermath of JCPS's long period of court-ordered integration.

Indeed, the Board has earned at least a small measure of the Court's respect as it chooses the method of organizing the community's schools. This Court addressed this very theme in *Hampton II:*

> If JCPS voluntarily chooses to maintain desegregated schools, it acts with the traditional authority invested in a democratically elected school board:
> 'School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, 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 of the district [**44] as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities . . .'

102 F. Supp. 2d at 379 (quoting *Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16, 28 L. Ed. 2d 554, 91 S. Ct. 1267 (1971)).* Viewing voluntary school integration as an extension of the Supreme Court's school desegregation jurisprudence makes sense. In 1975, an integrated school system and all the benefits it promised were thought so essential that various federal courts required JCPS to create and maintain it. Over the years much has changed. As many school systems escape the mandate of desegregation decrees, they face for the first time a choice of direction. It would seem rather odd that the concepts of equal protection, local control and limited deference are now only one-way streets to a particular educational policy, virtually prohibiting the voluntary continuation of policies once required by law. n32

> N32 Justice Thomas has argued that deference is contradictory to the very idea of strict scrutiny. *Grutter, 539 U.S. at 362* (Thomas, J., dissenting). For instance, he said that while a state may opt to create an elite law school, it has no compelling interest to do so. *Id. at 357-58.* He said that "there is no pressing public necessity in maintaining a public law school at all." *Id. at 357.* Public elementary and secondary school education, however, is an entirely different matter. Educating the community's children is not optional. It is essential to all facets of this community's growth and future. JCPS's interests are precisely those which Justice Thomas found absent at the Michigan Law School--educating all students who live in the community. This Court therefore concludes that strict scrutiny and limited deference are compatible here.

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[*852] While some deference is due JCPS in the exercise of its policy choices, the arguments favoring the Board's compelling interest are so objectively overwhelming that deference is immaterial to the result here.

B.

Now removed from the mandate of a federal court decree, the Board has made its choice. This Court must consider the importance and validity of that choice.

Integrated schools, better academic performance, appreciation for our diverse heritage and stronger, more competitive public schools are consistent with central values and themes of American culture. Access to equal and integrated schools has been an important national ethic ever since *Brown v. Board of Education* established what Richard Kluger described as "nothing short of a reconsecration of American ideals." n33 What Kluger and others have articulated is that *Brown's* symbolic, moral and now historic significance may now far exceed its strictly legal importance. Alluding to that very point, this Court has said that "*Brown* and its progeny established a moral imperative to eradicate racial injustice in the public schools." *Hampton II, 102 F. Supp. 2d at 379.* Congress recently affirmed the [**46] value of racial integration and interaction by its enactment of the *No*

Child Left Behind Act and by the statements contained in that legislation. *See 20 U.S.C. § 6301 et seq.* n34 Likewise, the Supreme Court has reiterated that "education . . . is the very foundation of good citizenship." *Grutter, 539 U.S. at 331* (quoting *Brown, 347 U.S. at 493*).

n33 Richard Kluger, *Simple Justice: The History of* Brown v. Board of Education *and Black America's Struggle for Equality* 710 (1975).

n34 In offering assistance to local educational agencies in setting up magnet schools, Congress specifically noted that

> it is in the best interests of the United States . . . to continue the Federal Government's support of local educational agencies that are implementing court-ordered desegregation plans and local educational agencies that are voluntarily seeking to foster meaningful interaction among students of different racial and ethnic backgrounds . . . [;] to ensure that all students have equitable access to a high quality education that will prepare all students to function well in . . . a highly competitive economy comprised of people from many different racial and ethnic backgrounds; and . . . to continue to desegregate and diversify schools by supporting magnet schools . . . .

20 U.S.C. § 7231(a)(4). Congress further noted that the purpose of this particular section of the bill was "to assist in the desegregation of schools . . . by providing financial assistance to eligible local educational agencies for . . . the elimination, reduction, or prevention of minority group isolation in elementary schools and secondary schools with substantial proportions of minority students" and for "the development and design of innovative educational methods and practices that promote diversity." *Id. § 7231(b)(1), (3).*

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Neither Congress's statements nor Supreme Court references are proof that a policy of school integration is a compelling goal. They do reinforce, however, the notion that *Brown's* original moral and constitutional declaration has survived to become a mainstream value of American education and that the Board's interests are entirely consistent with these traditional American values. They reinforce our intuitive sense that education is about a lot more than just the "three-R's."

For the majority in *Grutter,* cross-racial understanding and racial tolerance, preparation for a diverse workplace and training of the nation's future leaders were "substantial" benefits of diversity in higher education. *Id. at 330-32.* Like institutions of higher education, elementary and secondary schools are "pivotal to 'sustaining our political and cultural [*853] heritage' with a fundamental role in maintaining the fabric of society." *Id. at 331* (quoting *Plyler v. Doe, 457 U.S. 202, 221, 72 L. Ed. 2d 786, 102 S. Ct. 2382 (1982))*. For that reason, these same benefits accrue to students in racially integrated public schools. n35 Several JCPS witnesses testified that, in a racially integrated learning [**48] environment, students learn tolerance towards others from different races, develop relationships across racial lines and relinquish racial stereotypes. These values transcend their experiences in public school and carry over to their relationships in college and in the workplace. As a result, these students are better prepared for jobs in a diverse workplace and exhibit greater social and intellectual maturity with their peers in the classroom and at their job. These benefits that the Board seeks from an integrated school system are precisely those articulated and approved of in *Grutter.* The Court finds that the benefits of racial tolerance and understanding are equally as "important and laudable" in public elementary and secondary education as in higher education. n36 *Id. at 330.*

n35 Justice Scalia calls these benefits merely "a lesson of life" as opposed to an "educational benefit." *Grutter, 539 U.S. at 347* (dissenting, Scalia, J.). Such lessons are pretty important for most people who are fortunate enough to learn them early in life. These are precisely the lessons that JCPS hopes its students will absorb. JCPS is not attempting to cure "general societal ills" but, rather, to prepare its students for dealing with them. *Id. at 371* (dissenting, Thomas, J.).

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n36 Purely as a matter of evidence, JCPS more than carried its burden on this issue. Numerous witnesses testified about the value of these benefits. Plaintiffs offered nothing to the contrary.

Other benefits the Board seeks are quite different from those articulated in *Grutter*. Nevertheless, they seem equally compelling. The Board believes that integration has produced educational benefits for students of all races. Over the past twenty-five years, White and Black students in JCPS have progressed by every measure. In *Hampton II*, this Court found that "the Board is convinced that integrated schools provide a better educational setting for all its students; [and] that concentrations of poverty which may arise in neighborhood schools are much more likely to adversely affect black students than whites." *102 F. Supp. 2d at 371 n.30*. The evidence presented in this and earlier cases "seems to suggest that African-American student achievement has improved substantially" during the past twenty-five years. *Id. at 365 n.12*. Indeed, one of Defendants' experts testified [**50] that racial integration benefits Black students substantially in terms of academic achievement. The Court cannot be certain to what extent the policy of an integrated school system has contributed to these successes. Opinions surely vary on this issue. n37 The Court certainly need not resolve this ongoing debate. But, [*854] the *Fourteenth Amendment* does not enact any particular preference of educational policy. n38 As a matter of evidence, however, this Court can find that the Board has valid reasons for believing that its student assignment policies may aid student performance. n39

n37 For instance, in *Grutter*, Justice Thomas strenuously objected to the idea that a diverse student body or integrated school system is necessary for Black students to achieve success. He asserted his own view that "blacks can achieve in every avenue of American life without the meddling of university administrators." *Grutter, 539 U.S. at 350* (Thomas, J., dissenting). In an earlier desegregation case, he said:

> Given that desegregation has not produced the predicted leaps forward in black educational achievement, there is no reason to think that black students cannot learn as well when surrounded by members of their own race as when they are in an integrated environment.

Missouri v. Jenkins, 515 U.S. 70, 121-22, 132 L. Ed. 2d 63, 115 S. Ct. 2038 (1995) (Thomas, J., concurring). Justice Thomas's views of educational policy fall among the huge body of conflicting opinions about the benefits of racial integration.

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n38 *See Lochner v. New York, 198 U.S. 45, 75, 49 L. Ed. 937, 25 S. Ct. 539 (1905)* (Holmes, J., dissenting).

n39 Once again, Plaintiffs completely failed to introduce evidence that integration is only a neutral factor. All of the testimony of school officials and experts suggested that the fully integrated school system has helped achieve system-wide gains. Plaintiffs introduced no contrary evidence. All that matters is that the Board has valid reasons for believing its policies have succeeded.

The Board also believes that school integration benefits the system as a whole by creating a system of roughly equal components, not one urban system and another suburban system, not one rich and another poor, not one Black and another White. It creates a perception, as well as the potential reality, of one community of roughly equal schools. Student choice and integrated schools, the Board believes, invest parents and students alike with a sense of participation and a positive stake in their schools and the school system as a whole. This is vital to JCPS because, in a very real sense, it competes [**52] for students with many types of private and parochial schools throughout Jefferson County. In recent years, it has competed very successfully. One of the ways JCPS meets the competition is by offering quality education in an integrated setting at every school. n40 Every measure of student and public attitudes on the value of integration completely supports the conclusion that an integrated school system is an advantage for many parents and students. n41

n40 Presumably, Plaintiffs could have challenged the argument that integrated schools are not valuable to the system as a whole. No one, however, made that argument, and not one witness came forward to offer such a view. By contrast, JCPS offered numerous of its own witnesses and two expert witnesses to testify that integrated schools strengthen and make the entire school system more attractive. To find otherwise would require the Court to ignore every bit of testimony on the subject. As a matter of evidence, the Court's finding is compelled.

n41 To be sure, the constitutionality of a policy is not determined by its popularity. These

numbers merely demonstrate that JCPS's reasons have some validity. In 2000, a confidential survey of high school juniors was conducted for JCPS to record the benefits of a racially integrated school system. Over 90% of the students who received the survey responded. Approximately 92% of White students and 96% of Black students reported that they were "very comfortable" or "comfortable" working with students from different racial and ethnic backgrounds. Over 80% of Black and White students who responded said their school experience helped them learn how to relate to students from other racial groups. And over 90% of respondents in each group reported that they would be comfortable working under a supervisor of a different race as an adult.

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The evidence on each of these points demonstrates that maintaining an integrated system may help the Board to achieve its goals for individual students and the system as a whole. The Court concludes, therefore, that the Board's policy of integrated schools is both important and valid.

C.

The final factor of the compelling interest analysis is whether the Board's motives are sincere and not aimed at some improper or illegitimate purpose, or are merely for the purpose of racial balancing.

In *Hampton II,* this Court considered this very question at some length because the Board's commitment to the ideal of an integrated system went to the very essence of whether dissolving the existing desegregation decree was proper. The [*855] Court found that the Board had been truly dedicated to quality education, racial equity and integration over the past twenty-five years. The Board's commitment to the idea of an integrated school system was so strong that it continued even after it was unclear whether Supreme Court precedent or the decree required it. The Board took affirmative steps to build strong public support for its policies of an integrated school system, even when it clashed with the changing [**54] educational, social, political and legal perspectives of the 80's and 90's. *Hampton II, 102 F. Supp. 2d at 369-70.*

Successive boards and administrations dedicated themselves to integration in a manner thought to be constitutionally acceptable. *Id. at 370.* In the process, the Board treated the idea of an integrated system as much more than a legal obligation. The Board considered it "a positive, desirable policy and an essential element of any well-rounded public school education." *Id.* No one says that the Board somehow intends to discriminate or marginalize either Black or White students. In fact, the Board needs the support of each group to maintain roughly equal schools and a community school system that is attractive to all.

These findings demonstrate conclusively that JCPS is not advancing an interest in racial balancing that the Supreme Court would label as "patently unconstitutional." *Grutter, 539 U.S. at 330.* "Racial balance is not to be achieved for its own sake." *Freeman, 503 U.S. at 494.* And, to use race for this purpose fails for want of a compelling reason. In his *Grutter* dissent, Chief Justice [**55] Rehnquist said that, absent an adequate explanation of the law school's interest, its attempts to reach a "critical mass" were nothing more than unconstitutional racial balancing. *Grutter, 539 U.S. at 378-87* (Rehnquist, J., dissenting). Justice O'Connor distinguished Michigan Law School's use of race as "defined by reference to the educational benefits that [its compelling reason] is designed to produce." *Id. at 330.* In our case, the same distinction applies, but with even greater force. The Board has precisely described the academic, social and institutional benefits it achieves from integrated schools. This is a compelling explanation and one that is supported by overwhelming evidence. Based on the evidence, no one can honestly say that JCPS is asserting an interest in racial balancing merely for its own sake.

Considering all the evidence presented in this and other cases, the Court is convinced that the Board's policy of maintaining an integrated school system is sincerely held and not intended to disadvantage any race. n42 Based on the strong evidence of the Board's sincerity and the importance and validity of its goals, the Court concludes [**56] that the Board has met its burden of establishing a compelling interest in maintaining racially integrated schools.

n42 Plaintiffs did not introduce evidence in either the *Hampton* case or this case that suggested the Board's motives were illegitimate, improper or insincere in any manner.

VI. THE 2001 PLAN IS NARROWLY TAILORED IN MOST RESPECTS

Even to achieve a compelling purpose, the Board may use race only by means that are "specifically and narrowly framed to accomplish that purpose." *Grutter, 539 U.S. at 333* (quoting *Shaw v. Hunt, 517 U.S. 899, 908, 135 L. Ed. 2d 207, 116 S. Ct. 1894 (1996))* (internal quotation marks omitted). To be narrowly tailored, the Board's use of race must "'fit' this compelling goal so closely [*856] that there is little or no possibility that the motive for the classification was illegitimate racial

prejudice or stereotype." *J.A. Croson Co., 488 U.S. at 493*. The Court's narrow tailoring inquiry must be carefully "calibrated to fit the distinct [**57] issues raised by the use of race" in this case. *Grutter, 539 U.S. at 334*. Consequently, the Court will evaluate whether the 2001 Plan is narrowly tailored, or is a proper "fit," in light of the factual and analytical differences between this case and the admissions programs reviewed in *Grutter* and *Gratz*.

The complexity of these legal issues and the absence of judicial unanimity mean that fundamental truths about narrow tailoring are difficult to discern. The *Grutter* and *Gratz* opinions reveal a starkly divided court that determines equal protection jurisprudence by a shifting coalition of views in a given context or case. The Court must proceed carefully. For that reason, the Court will not accord even limited deference to the Board's implementation of its goals. n43

n43 In his dissent in *Grutter*, Justice Kennedy made this point:

> The [majority] confuses deference to a university's definition of its educational objective with deference to the implementation of this goal. In the context of university admissions the objective of racial diversity can be accepted based on empirical data known to us, but deference is not to be given with respect to the methods by which it is pursued.

539 U.S. at 388 (Kennedy, J., dissenting). The Court agrees with Justice Kennedy's observation and will recognize that distinction in its narrow tailoring analysis.

[**58]

With these principles in mind, in order to determine whether the 2001 Plan is narrowly tailored, the Court will evaluate the four primary factors that the Supreme Court considered in *Grutter:* (1) whether the 2001 Plan amounts to a quota that seeks a fixed number of desirable minority students and insulates one group of applicants from another, *id. at 334-35*; (2) whether the applicant is afforded individualized review, *id. at 336*; (3) whether the 2001 Plan "unduly harm[s] members of any racial group," *id. at 341*; and (4) whether JCPS has given "serious, good faith consideration of workable race-neutral alternatives" to achieve its goals, *id. at 339*. n44 Together, these factors constitute the "fit" that is so important to the narrow tailoring analysis. *Id. at 333*. The Court's analysis will focus upon elements of the 2001 Plan that govern assignment to non-traditional schools. In a separate section, the Court will consider whether the student assignment process for traditional schools is narrowly tailored.

n44 While the Supreme Court often overlapped its discussion of the first and second factors, *see Grutter, 539 U.S. at 334-39*, for the sake of clarity, this Court separately discusses each of those factors.

[**59]

The Court now considers each of these factors in turn.

A.

The most important narrow tailoring issue, and Plaintiffs' primary argument, concerns whether the 2001 Plan operates as a racial quota. "Properly understood, a 'quota' is a program in which a certain fixed number or proportion of opportunities are 'reserved exclusively for certain minority groups.'" *Id. at 335* (quoting *J.A. Croson Co., 488 U.S. at 496*). The Supreme Court said that a race-conscious admissions program cannot use a quota system because it would almost always violate the narrow tailoring requirement. *Id. at 334-35*. As the Supreme Court also wisely noted, however, "'some attention to numbers,' without more, does not transform [*857] a flexible admissions system into a rigid quota." *Id. at 336* (quoting *Bakke, 438 U.S. at 323*). Common sense and the Supreme Court suggest that any strict or *de facto* racial quota has a couple of known characteristics: it has a precise target, and it insulates some applicants from competition with other applicants. The Court concludes that, for the most part, the 2001 Plan's use of the racial guidelines lacks these attributes. [**60]

1.

By definition, a quota must present a relatively precise target. n45 While this would appear clear enough, everyone appears to have different ways of applying this definition to a given set of facts.

n45 A quota is "the share or proportional part of a total that is required" or "the number or percentage of persons of a specified kind permitted to enroll in a college, join a club, immigrate to a country, etc." *Random House Unabridged Dictionary* 1588 (2d ed. 1993).

The 2001 Plan's racial guidelines for all schools present a quite flexible and broad target range. The Board's goal is to achieve a racial mix of between 15% and 50% Black students at each school. That the actual percentage of Black students at individual schools ranges between 20.1% and 50.4% demonstrates the extent of the Board's flexibility in achieving its goals. Even within this broad range, the Court finds a wide dispersal among the percentages of Black students in JCPS schools. For instance, 62 out of 87 elementary schools, 17 of 23 middle [**61] schools, and 15 of 20 high schools have a racial mix of over 40% or under 30% Black students. In other words, only about 30% of all schools show a racial mix within even five percent of either side of the systemwide average. This represents a widely dispersed range in Black students among JCPS schools rather than a precise target.

Everyone seems to have an opinion about the meaning of statistics. In *Grutter,* for instance, Justices O'Connor and Kennedy battled over statistics and what constituted a quota. Justice O'Connor called the Michigan Law School's percentages of minority students, which varied between 13.5% and 20.1%, "a range inconsistent with a quota." *Grutter, 539 U.S. at 336.* Justice Kennedy, however, concluded that the percentage of minority law students fell in a much tighter range that he called a quota. He viewed race as almost "an automatic factor" that made the law school's "numerical goals indistinguishable from quotas." *Id. at 389* (Kennedy, J., dissenting). He said that "the narrow fluctuation band [among rates of admission for Black applicants] raises an inference that the Law School subverted individual determination, and [**62] strict scrutiny requires the Law School to overcome the inference." *Id. at 390-91.* Justice Kennedy cited Amherst College, which admitted between about 8.5% (81 out of 950 offers) and 13.2% (125 out of 950 offers) minority applicants over a ten-year period, as an example of a range not suggestive of a quota. *Id.* In our case, one finds neither an automatic assignment nor a "narrow band" of percentages of Black students among JCPS schools. Indeed, the range in the percentage of Black students among all JCPS schools is much broader than the range in minority admissions at either Amherst College or Michigan Law School. n46 [*858] This wide fluctuation suggests a lesser use of race and the absence of a specific target. Finally, even a cursory review of assignment data reveals that neither Black students nor White students are guaranteed assignment to a particular school. Too many race-neutral factors affect assignment for that to be true.

n46 The range in the Black student population in JCPS is between 20.1% and 50.4%, which is much broader numerically than the range in minority admissions at Amherst College. However, that is not a fair comparison because the range in JCPS percentages is larger overall. The best comparison is to determine the percentage deviation of each range from its mean. At Amherst, the mean percentage between 13.1% and 8.5% is 10.8%. The range extends 2.3% on either side, or about 21.2% on either side of the mean. The JCPS mean between 50.4% and 20.1% is 35.2%. The range extends 15.1% either side, or about 43% of either side of the mean. Therefore, the Amherst College range in minority admissions that Justice Kennedy viewed as not constituting a quota is, by comparison, much narrower than the range in the Black student population in JCPS schools.

[**63]

2.

A quota also insulates "each category of applicants with certain desired qualifications from competition with all other applicants." *Id. at 334* (quoting *Bakke, 438 U.S. at 315 (Powell, J.)).* In other words, it "put[s] members of those groups on separate admissions tracks." *Id.* (citing *Bakke, 438 U.S. at 315-16 (Powell, J.)).* Except for traditional school assignment, all JCPS students are subject to the same criteria within the 2001 Plan. Criteria such as residence, student choice and random lottery are significant assignment factors for every student. No JCPS student is insulated from competition with all other students, and no student is placed on a separate admissions track.

It is constitutionally permissible to set racial goals to achieve truly compelling interests. It is impermissible, however, to seek that racial goal so assiduously and precisely that it amounts to a quota. JCPS's conduct resembles the former because it has set "a permissible goal . . . requir[ing] only a good-faith effort . . . to come within a range demarcated by the goal itself." *Id. at 335* (quoting *Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421, 495, 92 L. Ed. 2d 344, 106 S. Ct. 3019 (1986)).* [**64] The broad range in the guidelines shows that the Board does not operate a *de facto* quota that imposes or arrives at a "fixed number or percentage which must be attained." *Id.* (quoting *Sheet Metal Workers Int'l Ass'n, 478 U.S. at 495*). Thus, the evidence simply does not support the conclusion that the broad racial guidelines actually mask a tighter range, create a *de facto* quota or insulate one group of applicants from competition with another group.

B.

In *Grutter,* Justice O'Connor noted that the law school's "highly individualized" review of applications meant that the admissions process did not contain "mechanical" or "predetermined diversity bonuses." *Id. at 337.* For her, the law school's approach was more nuanced than that of the undergraduate admissions program because the law school conducted a meaningful review of the individual candidate's application. In fact, in her *Gratz* concurrence joined by Justice Breyer, she noted the absence of individualized attention when finding the undergraduate program's use of race in its admissions policy impermissible. *Gratz, 539 U.S. at 276-77* (O'Connor, J., concurring). The switch [**65] that Justices O'Connor and Breyer made between *Grutter* and *Gratz* reveals a potential fault line in the narrow tailoring analysis: the presence or absence of individualized review. Consequently, the Court must determine whether the 2001 Plan incorporates some sufficient form of individualized attention in the assignment process. The Court concludes that it does.

"Highly individualized, holistic review" of each applicant ensures that "each applicant is evaluated as an individual and not in a way that makes an applicant's race or [*859] ethnicity the defining feature of his or her application." *Grutter, 539 U.S. at 337.* All relevant factors for assignment must be placed "on the same footing for consideration" even though one factor may be accorded more weight in the end. *Id.* (quoting *Bakke, 438 U.S. at 317*) (internal quotation marks omitted). Likewise, the process must ensure that "all factors that may contribute to student body diversity are meaningfully considered alongside race in admissions decisions." *Id.* Under those circumstances, race is "one of many factors" to consider and may be used as a permissible "tipping" factor in deciding a [**66] particular student's placement. *Id. at 339* (citing *Bakke, 438 U.S. at 316*).

One must analyze the 2001 Plan in its totally different context. Unlike the law school, JCPS does not deny anyone the benefits of an education. Unlike the law school, JCPS does not have the goal of creating elite and highly selective school communities. Unlike the law school's admissions process, the JCPS assignment process does not involve weighing comparative criteria in a competitive manner. Rather than excluding applicants, the Board's goal is to create more equal school communities for educating all students. But, like the law school, the JCPS assignment process focuses a great deal of attention upon the individual characteristics of a student's application, such as place of residence and student choice of school or program. It is individualized attention of a different kind in a different context than the Supreme Court found in *Grutter.*

In significant ways, the 2001 Plan actually operates like the "plus" system of which the Supreme Court has spoken so approvingly. *Id. at 335* (citing *Johnson v. Transp. Agency, 480 U.S. 616, 638, 94 L. Ed. 2d 615, 107 S. Ct. 1442 (1987)).* [**67] Many factors determine student assignment, including address, student choice, lottery placement, and, at the margins, the racial guidelines. But, race is simply one possible factor among many, acting only occasionally as a permissible "tipping" factor in most of the JCPS assignment process. The Supreme Court has said this narrow use of race is permissible given a compelling reason. Specifically, Justice Powell stated in *Bakke* that "when the [Harvard] Committee on Admissions reviews the large middle group of applicants who are 'admissible' and deemed capable of doing good work in their courses, the race of an applicant may tip the balance in his favor. . . ." *438 U.S. 265, 316, 57 L. Ed. 2d 750, 98 S. Ct. 2733 (1978)* (quoting from amicus brief regarding aspects of Harvard admissions policy). In *Grutter,* the Supreme Court echoed these sentiments, stating that situations where race makes a difference in admissions could happen in "any plan that uses race as one of many factors," including the Michigan Law School plan. *539 U.S. at 339.*

In light of the foregoing analysis, the Court concludes that the 2001 Plan allows for the consideration of several factors, including race. Moreover, [**68] except as to traditional schools, the appropriate consideration of individual factors within the assignment context ensures that race does not become "the defining feature" of a student's application.

C.

Another factor in the narrow tailoring analysis is that the Board's use of race does not "unduly harm members of any racial group." *Grutter, 539 U.S. at 341.* This is neither a new nor surprising concept. Some twenty-six years ago, Justice Powell referenced the same distinction between denial of admission to a selective graduate school and the assignment of a student to an alternative [*860] but appropriate public school. *Bakke, 438 U.S. at 300 n.39.* n47 His observation seems applicable here.

> n47 Justice Powell contrasted the situation of the applicant in *Bakke* rejected by his preferred medical school against that of a public school student sent away from his neighborhood school: "[The applicant'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. [The medical school] did not arrange for [Allan Bakke] 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." *Bakke, 438 U.S. at 300 n.39.*

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Justice Powell's observation is consistent with the now well established concept that a student has no constitutional right to attend a particular school. *Johnson v. Bd. of Educ. of Chi., 604 F.2d 504, 515 (7th Cir. 1979)*; *Hall v. St. Helena Parish Sch. Bd., 417 F.2d 801, 810 n.15 (5th Cir. 1969)*; *see Milliken, 418 U.S. at 746-47*; *United States v. S. Bend Cmty. Sch. Corp., 692 F.2d 623, 627 (7th Cir. 1982)* (citing *United States v. Perry County Bd. of Educ., 567 F.2d 277, 279 (5th Cir. 1978)*). As this Court explained in *Hampton II,* the consequences of assigning students to various public schools are quite different from denying an applicant admission to a selective college or job placement:

> The workplace, marketplace, and higher education cases are poor models for most elementary and secondary public school education precisely because they always involve vertical choices--one person is hired, promoted, receives a valuable contract, or gains admission. Ordinarily, when JCPS assigns students to a particular elementary, middle, or high school, the assignment has no qualitative or 'vertical' [**70] effects. This is so because the Court concludes that as between two regular elementary schools, assignment to one or another imposes no burden and confers no benefit. The same education is offered at each school, so assignment to one or another is basically fungible. As a logical consequence, most courts have concluded that there is no individual right to attend a specific school in a district or to attend a neighborhood school. As among basically equal schools, the use of race would not be a 'preference.' As among basically equal schools, therefore, JCPS's policy is not one of 'affirmative action.'

102 F. Supp. 2d at 380 (citations and footnotes omitted). The difference between the use of race in graduate school admissions and the JCPS student assignment plan results from the vastly different concept of each system. The law school admissions program excludes many applicants because of its goal of creating an elite community. The JCPS policy of creating communities of equal and integrated schools for everyone excludes no one from those communities. Consequently, when the Board makes a student assignment among its equal and integrated schools, it neither denies anyone [**71] a benefit nor imposes a wrongful burden. n48

> n48 Likewise, Plaintiff Crystal Meredith's son, Joshua McDonald, was not unduly harmed when JCPS denied his transfer from Young to Bloom under the racial guidelines. He was not denied any benefit because he was denied a transfer between equal and integrated schools. Furthermore, race was only a "tipping" factor in denying Joshua's transfer request. JCPS took into account his address and school preference when he applied to attend his resides school at Breckinridge-Franklin, a request which was denied because the school was full. Next, Joshua had stated no additional preferences for other schools in his cluster, so he was then assigned to Young (he applied right before the school year began and had already missed the deadline for magnet and optional programs). Once he was assigned, he applied to transfer to Bloom, a school outside of his cluster. Here, the racial guidelines factored into his assignment. They did so, however, only with respect to his third choice and after JCPS had already considered other factors in denying his application to Breckinridge-Franklin. There was no evidence that Joshua's transfer request from Young would have been consistently denied under the racial guidelines had he applied for further transfers to different schools that same year. And, there was no evidence that Joshua's transfer request would have been denied had he applied the following year for his resides school at Breckinridge-Franklin, another cluster school, a magnet or optional program or a transfer.

[**72]

[*861] The Court concludes that the 2001 Plan uses race in a manner calculated not to harm any particular person because of his or her race. Certainly, no student is directly denied a benefit because of race so that another of a different race can receive that benefit. Rather, the Board uses race in a limited way to achieve benefits for all students through its integrated schools.

D.

Finally, narrow tailoring requires "serious, good faith consideration of workable race-neutral alternatives that will achieve" the Board's goals. *Grutter, 539 U.S. at 339.* It is apparent that, with the notable exception of the traditional schools, the Board not only considered, but actually implemented, a variety of race-neutral strategies to achieve its goals.

Many aspects of the 2001 Plan have avoided using race at all. About 18,000 students, almost 20% of the system, are not covered by the racial guidelines because they attend special schools, programs or kindergarten. Voluntary student choices for numerous academic concentrations and school settings create a certain degree of integration within different schools and the system as a whole. School geographic boundaries accomplish much the [**73] same. These two factors account for a vast proportion of all student assignments.

"Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative." *Id.* For instance, the Board could accomplish its objective through some form of an assignment lottery covering the entire school system. Such a system, however, would require a "dramatic sacrifice" in student choice, geographic convenience and program specialization. *Id. at 340.* Moreover, it could only be achieved at a huge financial cost. This is not required.

In every area of school assignment except the traditional schools, the Board has undertaken considerable effort to achieve its goals without the overt use of race in student assignments. It encourages students of all races to exercise choices. It recruits Black and White students for academic programs that promote educational improvement and enhance school integration. As a consequence, the Board's goal of an integrated school system is achieved primarily through alternative measures that are educationally laudable and restrained in the use of race. The Court concludes that, throughout most of the assignment process, the Board sufficiently [**74] considered and used alternatives, which either were race-neutral or made minimal use of race, to meet narrow tailoring requirements.

E.

In summary, except for the traditional school assignment process, which will be discussed separately, the 2001 Plan is a proper "fit" because it is sufficiently flexible to determine school assignments for all students by a host of factors, such as residence, student choice, capacity, school and program popularity, pure chance and race. *Id. at 337.* Data showing that the majority of students attend their resides schools and that only a [*862] very small percentage of students are not assigned to one of the schools they preferred suggest the minimal impact of race on this process. Even for those students assigned to a school they did not select, race is not necessarily "a defining feature" in those assignments. Students may also be enrolled in a particular school because, for instance, (a) they did not make any choices at all or stated only a preference for one particular magnet program that did not accept them, or (b) their preferred or resides school or program was already filled to capacity. Even where race does "tip" the balance in some [**75] cases, it does so only at the end of the process, *after* residence, choice and all the other factors have played their part.

The 2001 Plan also "fits" its intended objectives because it does not unduly harm other students. The Plan works so that most students attend a school of their choice. Because all schools have similar funding, offer similar academic programs and comprise more similar ranges of students than possible in neighborhood schools, an assignment to one school over another does not cause constitutional harm to any student.

Except as to traditional schools, the Court cannot see that JCPS has any other workable race-neutral alternatives for accomplishing its compelling objective.

VII. THE TRADITIONAL SCHOOL ASSIGNMENT PROCESS IS NOT NARROWLY TAILORED

The sole exception to the Court's narrow tailoring inquiry concerns the traditional school assignment process. Traditional school enrollment amounts to a small portion of the overall student census. n49 The assignment process for those schools has features that make it distinct from other aspects of the 2001 Plan and present particularly difficult constitutional questions. In the end, the Court finds that the use [**76] of race in the traditional school assignment process is not narrowly tailored.

n49 In 2002-2003, about 9.3% of all JCPS students were enrolled in the traditional program.

In some respects, the traditional schools are no different than others throughout JCPS. Traditional schools have the same curriculum, financial resources and student discipline regulations as nearly every other school. They offer a distinct atmosphere for the same educational curriculum available at most other schools. The broad racial guidelines cover traditional schools in the same manner as every other school. Were the traditional school assignment process to function under the same broad racial guidelines and operational principles as previously discussed, it would be entirely permissible.

The traditional school assignment process, however, differs in two respects that have constitutional significance: (1) the assignment process puts Black and White applicants on separate assignment tracks, and (2) its use of the separate lists appears [**77] to be completely unnecessary to accomplish the Board's goal.

The significance of separating traditional school applicants into explicit racial categories is that students are placed on separate assignment tracks where race becomes "the defining feature of his or her application."

Grutter, 539 U.S. at 334, 337. Elsewhere in the 2001 Plan, the racial guidelines play a muted role in the assignment process along with other factors, such as residence, program capacity and, sometimes, placement in a lottery. True, an individual student's selection to a [*863] traditional school depends in some measure upon the luck of the random draw. It is, however, a random draw within each separate racial category. The assignment process insulates one group of applicants from the randomness of choice and "competition" with other applicants. The use of categories, therefore, makes race the "defining feature" rather than merely the "tipping" factor. n50 In this Court's view, the Supreme Court would likely find these racial categories highly suspect.

n50 That race becomes more significant in the traditional school assignment process is, overall, borne out by admission statistics. Black applicants generally have a higher chance of acceptance to traditional schools than White applicants because they apply in smaller numbers.

[**78]

An even more troublesome aspect of these racial classifications is that they appear entirely unnecessary to achieve the Board's stated goal of racial integration. The Court has compared data regarding the racial make-up of the applicant pools in the last two academic years with the racial make-up of the student populations in individual traditional schools at the same time. Overall, the percentage of Black applicants each year to a particular traditional school rather closely approximated the percentage of Black students in that school's population. n51 Under the general law of probabilities, if applicants were selected off of one random draw list, the ratio of Black to White students in the applicant pool at a particular school would be reflected in the ratio of Black to White students in the pool of admitted students and, consequently, in the school's student population at large. More importantly, given the current numbers of Black students applying to traditional schools, the laws of probability predict that each school would fall within the racial guidelines. This is true even at [*864] Greathouse Elementary and Johnson Middle where numbers of Black applicants hover at either end of [**79] the guidelines. This evidence suggests that the use of racial categories is completely unnecessary.

n51 For instance, in 2002-2003, 34% of the applicants to Carter were Black, and Blacks made up 35.4% of the students there. At Schaffner, 28% of the applicants were Black, and Black students were 32.2% of the population. At Barret, 24% of the applicants were Black, and Black students were 27.9% of the population. At Jefferson County Traditional, 23% of the applicants were Black, and Blacks made up 26.4% of the student population. In 2003-2004, 33% of the applicants to Carter were Black, and Blacks made up 33.1% of the students. At Schaffner, 30% of the applicants were Black, and Black students were 32% of the population. At Barret, 30% of the applicants were Black, and Black students were 29.5% of the population. At Jefferson County Traditional, 32% of the applicants were Black, and Blacks made up 29.2% of the student population.

In both years, Johnson was the only school where the percentage of Black applicants was noticeably larger than the percentage of Black students at the school. In 2002-2003, 34% of the applicants were Black, and Blacks made up 28.6% of the students. In 2003-2004, 39% of the applicants were Black, and Blacks made up 28.5% of the students. By contrast, in both years, Audubon and Greathouse/Shryock were the only schools where the percentage of Black applicants was visibly lower. In 2002-2003, 23% of the applicants to Audubon were Black, and Black students were 33.2% of the population--a ten-point difference. At Greathouse, 17% of the applicants were Black, and 24.1% of the students were Black--a seven-point difference. In 2003-2004, 22% of the applicants to Audubon were Black, and 32.9% of the students were Black--nearly an eleven-point difference. At Greathouse, 17% of the applicants were Black, and 22.3% of the students were Black--a five-point difference. In 2002-2003, Blacks likewise applied to Butler in numbers (12%) noticeably lower than their representation in the school population (20.8%). But, Butler rebounded in 2003-2004 when 19% of the applicants were Black, and 20.1% of the students were Black.

In *all* cases, however, the percentage of Black applicants fell within the racial guidelines (with the one exception of Butler in 2002-2003). Louisville Male was excepted from these statistics because it typically only has enough space for those students already in the "pipeline" and thus rarely accepts new applicants.

[**80]

JCPS says that separate racial lists are necessary to maintain solid levels of Black student participation in traditional schools. JCPS fears that, without the lists, Black students would be admitted in fewer numbers, racial isolation would result, and Black students would

be discouraged from applying in the future. Even if this speculation should prove true, the Board has much less intrusive and more precisely targeted means at its disposal to maintain present levels of Black student participation in the traditional program or to rectify decreased future participation at certain schools. JCPS can enhance its recruitment efforts for White and Black students at various traditional schools. It can redraw traditional school boundaries (at least at the elementary and middle school levels) to increase the chances of attracting more Black students from neighborhoods in which Blacks reside and increase outreach to Black families. As the 2001 Plan provides, the Board could then use race as a "tipping" factor if necessary to achieve its compelling goals.

The Court must conclude that the initial separation of traditional school applicants into racial categories makes race a defining feature [**81] of the student's application and is entirely unnecessary to accomplish the Board's stated objective of racial integration. This use of race in the 2001 Plan therefore is not narrowly tailored. By revising the 2001 Plan in a manner consistent with this Memorandum Opinion, the Board may maintain its current assignment process. Although the Court has found that the use of racial categories under the 2001 Plan violates Plaintiffs' rights under the *Equal Protection Clause*, their children are not entitled to admission to the school of their choice. First, Plaintiff McFarland's children, Stephen and Daniel, are already enrolled in a traditional school, mooting their particular request for injunctive relief. Second, Plaintiffs Pittenger and Underwood have offered no proof that their children, Brandon Pittenger and Kenneth Aubrey, respectively, were denied entry into a traditional school solely because of their race. Finally, neither has reapplied for the traditional program in a subsequent year. While the Court will enjoin the use of the racial categories in the traditional school assignment process, equity does not require that Plaintiffs' children be admitted to the school of their choice [**82] in the upcoming school year. Like all JCPS students, Plaintiffs Pittenger and Underwood may reapply for admission to a traditional school for the 2005-2006 academic year.

The Court will enter an order consistent with this Memorandum Opinion.

ORDER

The Court has issued a Memorandum Opinion setting forth its views on the issues raised in this case. Being otherwise sufficiently advised,

IT IS HEREBY ORDERED that Plaintiffs' request for relief is granted only to the extent that JCPS shall revise the student assignment process for traditional magnet schools in a manner consistent with the accompanying Memorandum Opinion in time for its use in the 2005-2006 school year assignments.

IT IS FURTHER ORDERED that, as to all other aspects of the JCPS student assignment plan, Plaintiffs' requests for relief are DENIED.

This is a final and appealable order.

This 29th day of June, 2004.

No. 05-915

In the

Supreme Court of the United States

CRYSTAL D. MEREDITH, Custodial Parent
and Next Friend of Joshua Ryan McDonald,

Petitioner,

v.

JEFFERSON COUNTY BOARD OF EDUCATION, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, AMERICAN CIVIL RIGHTS INSTITUTE, AND CENTER FOR EQUAL OPPORTUNITY IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether achieving racial diversity is a compelling governmental interest sufficient to permit race-based restrictions on school assignments in public elementary and secondary schools.

2. Whether school districts' educational judgment is entitled to deference under strict scrutiny review when analyzing the use of a student's race in public elementary and secondary schools to achieve racial diversity or racial integration.

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IDENTITY AND INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37.2, Pacific Legal Foundation (PLF), the Center for Equal Opportunity (CEO), and the American Civil Rights Institute (ACRI) submit this brief amicus curiae in support of Petitioner Crystal D. Meredith.[1] Letters of consent to file this brief were obtained from all parties and have been lodged with the clerk of this Court.

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purposes of engaging in litigation in matters affecting the public interest. PLF participated as amicus curiae in numerous United States Supreme Court cases relevant to the analysis of this case, including *Gratz v. Bollinger*, 539 U.S. 244 (2003), *Grutter v. Bollinger*, 539 U.S. 306 (2003), *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), and *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978).

CEO and ACRI are nonprofit research, education, and public advocacy organizations. Amici devote significant time and resources to the study of the prevalence of racial, ethnic, and gender discrimination by the federal government, the several states, and private entities. They educate the American public about the prevalence of discrimination in American society. Amici publicly advocate the cessation of racial, ethnic, and gender discrimination by the federal government, the several states, and private entities. Amici have participated as amicus curiae in numerous United States Supreme Court cases relevant to the analysis of this case.

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[1] Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

This case raises important issues of constitutional law. Amici consider this case to be of special significance in that it concerns the fundamental issue of whether racial diversity in elementary and secondary (K-12) public schools may be deemed a compelling governmental interest sufficient to justify discriminatory school assignments based solely on the students' race. Specifically, Amici will show that the rationale for promoting student body viewpoint diversity in institutions of higher education, as discussed in *Gratz* and *Grutter*, simply has no counterpart in the context of elementary and secondary public schools. Amici believe that their public policy perspectives and litigation experience provide an additional viewpoint on the issues presented in this case, which will be of assistance to the Court in its deliberations.

INTRODUCTION AND SUMMARY OF ARGUMENT

In the decision below, the Sixth Circuit issued a *per curiam* decision adopting the reasoning of the district court, which held that the assignment of Jefferson County's students to elementary and secondary public schools on the basis of their race does not violate the Equal Protection Clause. *McFarland v. Jefferson County Pub. Schools*, 416 F.3d 513 (6th Cir. 2005). In issuing this far-reaching decision, the court below extended unjustifiably the principles established in *Grutter* for competitive law school admissions, into the context of K-12 public school assignments. By doing so, the Sixth Circuit has reopened the permissibility of allocating educational opportunities on the basis of race throughout this country's 94,000 K-12 public schools, which educate approximately 47.7 million students ranging from 5 to 18 years of age, at an annual cost to taxpayers of more than $400 billion.[2] Discounting the

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[2] Nat'l Ctr. for Educ. Statistics, *Information on Public Schools and School Districts in the United States*, CCD Quick Facts, *at* http:// (continued...)

core concept of equal protection, Jefferson County's public schools are sending the wrong message to our children—that racial identification is more important than respect for individual rights and liberties in today's society.

No decision from this Court sanctions discriminatory student assignments to achieve racial balancing in K-12 public schools. *See Grutter*, 539 U.S. at 330. After *Grutter*, however, the lower courts are in disarray on whether classifying and assigning public school students on the basis of their race satisfies strict scrutiny. The First, Ninth, and now the Sixth Circuits have misapplied *Grutter*'s recognition of the educational benefits of diversity in competitive university admissions to K-12 student assignment plans and ignore the well-established narrow tailoring principles set out in *Gratz*. In contrast, prior to *Grutter*, the First and Fourth Circuits observed that whether racial diversity was a compelling governmental interest remained an open question, but found that such programs were not narrowly tailored.

Grutter's viewpoint diversity rationale cannot be extended to racial diversity in noncompetitive, compulsory K-12 public schools. Racial diversity in K-12 is based on the idea that a child's skin color determines how that child thinks and behaves, a practice denounced as racial stereotyping. *Grutter*, 539 U.S. at 328-29. This Court should grant the Petition for Writ of Certiorari to ensure that public schools provide educational opportunities to all their students without regard to irrelevant, immutable characteristics such as race. In so doing, the Court should clarify that *Grutter* does not sanction naked racial balancing as a compelling state interest, and that public school administrators should be required to pursue the many innovative, *non-race-based* policies at their disposal to avoid de facto re-segregation of their schools.

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[2] (...continued)
nces.ed.gov/ccd/quickfacts.asp (last visited Oct. 17, 2005).

REASONS FOR GRANTING REVIEW

I

THIS COURT MUST RESOLVE THE CONFLICT AMONG THE CIRCUITS ON WHETHER RACE-BASED ASSIGNMENTS TO ACHIEVE RACIAL DIVERSITY IN K-12 PUBLIC SCHOOLS CAN SURVIVE STRICT SCRUTINY

This case raises important, recurring questions relating to the scope of the Equal Protection Clause's prohibition of state-imposed racial discrimination in K-12 public schools. According to David J. Armor and Christine H. Rossell, nearly 1,000 school districts have some type of race-based assignment plan.[3] The goal of these plans is to achieve racial balancing so that each school's racial composition matches the district wide racial composition for a given race. This is achieved by sorting, assigning, and busing students according to their racial grouping. Such plans are mere proportional representation by pigmentation to achieve the public school administrator's preferred racial mix of students. The question of whether such discrimination is permissible in the context of K-12 public school assignments has hopelessly divided the Federal Circuit Courts of Appeals, and urgently demands resolution by this Court.

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[3] David J. Armor & Christine H. Rossell, *Desegregation and Resegregation in the Public Schools*, in Beyond the Color Line: New Perspectives on Race and Ethnicity in America 219, 226 (Abigail Thernstrom & Stephen Thernstrom, eds. 2002) *available at* http://www.google.com/search?q=cache:CWbm4yL_ROYJ:www.hoover.org/publications/books/fulltext/colorline/219.pdf+David+Armor+and+Christine+Rossell+%22Desegregation+and+Resegregation&hl=en

The Sixth Circuit's holding in the present case validating racial balancing is consistent with recent decisions of the First and Ninth Circuits, but conflicts with the pre-*Grutter* decisions of the First and Fourth Circuits condemning such racial balancing as violating the Equal Protection Clause.

Last year in *Comfort v. Lynn Sch. Comm.*, 418 F.3d 1 (1st Cir. 2005), *cert. denied*, 126 S. Ct. 798 (2005), the First Circuit upheld a race-based public school transfer program which, on its face, provided for none of the individualized consideration of the plan approved in *Grutter*. As the appellate court noted, *Grutter* "focused on the advantages of viewpoint diversity in the classroom," *id.* at 16, whereas in the Lynn plan, "[t]he only relevant criterion . . . is a student's race." *Id.* at 18. Nevertheless, the court extended *Grutter*'s finding of a compelling governmental interest in racial diversity to cover the race-based classification and assignment of public school students. *Id.* at 16.

Similarly, in *Parents Involved in Cmty. Schools v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162 (9th Cir. 2005) (*en banc*) (petition for writ of certiorari pending, No. 05-908) (*PICS*), the Ninth Circuit examined a program that employed a series of tiebreakers to determine which students would be admitted to oversubscribed public high schools. The ultimate tiebreaker was race. Like the Sixth Circuit in the case at bar, the *PICS* court relied on *Grutter* as providing the necessary rationale for allowing K-12 public school administrators to employ racial preferences for nonremedial purposes:

> [I]t would be a perverse reading of the Equal Protection Clause that would allow a university . . . to use race when choosing its student body but not allow a public school district . . . to consider a student's race in order to ensure that the high schools within the district attain and maintain diverse student bodies.

Id. at 1176. Picking and choosing from *Grutter*'s hallmarks of narrow tailoring analysis, the Ninth Circuit found the school district's racial tiebreaker program to be narrowly tailored. *Id.* at 1179.

In contrast, prior to *Grutter*, three federal appellate court cases held that nonremedial use of racial preferences in public schools violated the Equal Protection Clause. Those cases are *Wessmann v. Gittens*, 160 F.3d 790 (lst Cir. 1998); *Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698 (4th Cir. 1999), and *Eisenberg v. Montgomery County Pub. Schools*, 197 F.3d 123 (4th Cir. 1999). Each case observed that whether racial diversity was a compelling governmental interest remained an open question.

In *Wessmann*, the First Circuit examined a race-based admissions policy at three "examination schools," where race was made a determining factor. As the *Wessmann* court stated: "The question of precisely what interests government may legitimately invoke to justify race-based classifications is largely unsettled." *Wessmann*, 160 F.3d at 795. The First Circuit assumed, without deciding, that racial diversity may in some cases be a compelling interest sufficient to justify the use of racial preferences in making student assignments. *Id.* at 796. The First Circuit then rejected the schools' claim:

> The Policy is, at bottom, a mechanism for racial balancing—and placing our imprimatur on racial balancing risks setting a precedent that is both dangerous to our democratic ideals and almost always constitutionally forbidden. Nor does the School Committee's reliance on alleviating underrepresentation advance its cause. Underrepresentation is merely racial balancing in disguise—another way of suggesting that there may be optimal proportions for the representation of races and ethnic groups in institutions.

Id. at 799 (citations omitted).

In *Tuttle*, 195 F.3d 698, the Fourth Circuit examined whether an oversubscribed public school may use a weighted lottery in admissions to promote racial and ethnic diversity in its student body. The court stated that "[u]ntil the Supreme Court provides decisive guidance, we will assume, without so holding, that diversity may be a compelling governmental interest and proceed to examine whether the Policy is narrowly tailored to achieve diversity." *Id.* at 705.

In *Eisenberg*, 197 F.3d 123, the court addressed whether a school district may deny a student's request to transfer to a magnet school because of his race. The court stated: "*Tuttle* notes that whether diversity is a compelling governmental interest remains unresolved, and in this case, we also choose to leave it unresolved." *Id.* at 130.

Both the First Circuit in *Wessmann* and the Fourth Circuit were careful to point out that the type of racial diversity that may be constitutional was different from racial balancing pursued for its own sake. As explained in *Wessmann*:

> "The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." A single-minded focus on ethnic diversity "hinders rather than furthers attainment of genuine diversity."

Wessmann, 160 F.3d at 798 (quoting *Bakke*, 438 U.S. at 315 (Powell, J., opinion)).

Applying this analysis, *Wessmann*, *Eisenberg*, and *Tuttle* held that the racial preferences at issue were not narrowly tailored to serve the potentially compelling interest of student body diversity. The Fourth Circuit in *Eisenberg* found:

> In fact, we find that it is mere racial balancing in a pure form, even at its inception . . . . The transfer policy is administered with an end toward maintaining this percentage of racial balance in each school. This is, by definition, racial balancing. As we have only recently held in *Tuttle*, "such nonremedial racial balancing is unconstitutional." . . . Although the transfer policy does not necessarily apply "hard and fast quotas," its goal of keeping certain percentages of racial/ethnic groups within each school to ensure diversity is racial balancing.

197 F.3d at 131 (citation and footnotes omitted).

The conflict in the Circuits over the constitutionality of race-based public school assignments highlights an issue of pressing national importance that must be—and can only be—resolved by this Court.

II

K-12 PUBLIC SCHOOLS CANNOT MEET THE NARROW TAILORING PRINCIPLES SET OUT IN *GRATZ* AND *GRUTTER*

Too many K-12 administrators in charge of assigning students to public schools assume that the use of race is permissible after *Grutter*. J. Kevin Jenkins, Ed.D., *Grutter, Diversity, and Public K-12 Schools*, 182 Ed. Law. Rep. 353, 354 (2004) (*Grutter* provides "clear guidance from the Court: Diversity can be a compelling state interest. That's the green flag."). Not only does this view reflect an unjustified extension of this Court's holding in *Grutter*, it completely ignores the well-established narrow tailoring principles set out in *Gratz*.

Gratz invalidated an undergraduate admissions program that automatically awarded 20 points of the 100 needed to guarantee admission to every applicant from an

underrepresented racial or ethnic minority group. This mechanical application of race violated the Equal Protection Clause because it did not consider each applicant as an individual. As this Court emphasized in *Grutter*, "[T]he hallmarks of a narrowly tailored plan [is that there be] truly individualized consideration [in which race is only] used in a flexible, nonmechanical way." *Grutter*, 539 U.S. at 334.

Public school administrators are not set up to give individual consideration to students in assigning them to public schools. It would be administratively impossible to give individualized consideration to the 97,000 students in Jefferson County when assigning them to a public school. Jefferson County does not consider test scores, grades, letters of recommendation, or personal statements on how the individual student will contribute to student body diversity. Instead, the assignment is based simply on the racial classification listed for the child. Like the undergraduate admissions program in *Gratz*, race completely overrides any other factor in K-12 public schools. A child who belongs to the "wrong" race cannot overcome his or her pedigree by receiving "points" for other characteristics. Racial diversity or racial integration as applied in K-12 education, is based on stereotypes that a child's skin color determines how that child thinks and behaves, a practice denounced as racial stereotyping. Such plans are mere proportional representation by pigmentation to achieve the public school administrator's preferred racial mix of students. This is nothing more than racial balancing, which is constitutionally forbidden. As mentioned in *Goss v. Lopez*, 419 U.S. 565 (1975),

> The Court has repeatedly condemned racial balancing [and] held that a State's creation of a system of compulsory public education endows *students* (not schools) with a constitutionally-protected interest, and has pointedly reminded school authorities that "[t]he Fourteenth Amendment . . .

> protects the citizen against the State itself and all of its creatures—Boards of Education not excepted."

Id. at 574.

As discussed above, *Wessmann*, *Eisenberg*, and *Tuttle*, together with *Gratz*, *Grutter*, and *Bakke*, lead to the conclusion that narrowly tailoring a racial preference program at the K-12 level is impossible.

> It is challenging enough to determine what elements of "diversity" a young adult, who has had time to gain some modicum of life experience, might bring to a law school class. It would be absurd to presume the ability to make such a determination for students in the public K-12 setting. Instead of conducting a thorough examination of relevant individual characteristics, schools would likely resort to race as a proxy for "the diversity that furthers a compelling state interest which encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element."

Jenkins, *supra*, at 368 (citation omitted). Certainly when racial balancing becomes a permissible government objective, few of the narrowly tailoring requirements of strict scrutiny apply in any meaningful way. If racial balance is a permissible goal, there is no need for individualized consideration of applicants or consideration of other ways in which a student could contribute to diversity—race becomes the sole factor.

To remove this uncertainty and confusion, this Court should clarify for the benefit of lower courts and the public schools how *Grutter* and *Gratz* affect the Equal Protection rights of students in K-12 public schools.

III

REVIEW IS NECESSARY TO CLARIFY THAT *GRUTTER* DOES NOT COUNTENANCE RACIAL DISCRIMINATION IN K-12 PUBLIC SCHOOL ASSIGNMENTS

The Sixth Circuit's opinion in this case, deferring to the judgment of public school administrators engaged in the race-based classification and assignment of students, is fundamentally incompatible with this Court's Equal Protection doctrine. This Court has repeatedly and definitively required the strictest judicial scrutiny of governmental policies that classify and subject Americans to differential treatment according to their race. This unwavering standard of scrutiny was reaffirmed in *Grutter*:

> [A]ll racial classifications imposed by government "must be analyzed by a reviewing court under strict scrutiny." This means that such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests.

Grutter, 539 U.S. at 326 (quoting *Adarand*, 515 U.S. at 227); *Gratz*, 539 U.S. at 270. This Court applies "strict scrutiny to ***all*** racial classifications to 'smoke out illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool.'" *Grutter*, 539 U.S. at 326 (quoting *City of Richmond v. Croson*, 488 U.S. 469, 493 (1989) (emphasis added). Strict scrutiny applies to ***any*** race-based classification, regardless of the race of those burdened or benefitted by a particular classification. *See Gratz*, 539 U.S. at 270. Thus any person, of whatever race, has the right to demand that any government actor subject to the Constitution justify, under the strictest of judicial scrutiny, any racial classification subjecting that person to unequal treatment. Under a consistent application of the Equal Protection Clause, strict judicial scrutiny is required when reviewing "even benign

racial classifications designed to benefit racial minorities." Angelo N. Ancheta, *Contextual Strict Scrutiny and Race-Conscious Policy Making*, 36 Loy. U. Chi. L.J. 21, 28 (2004).

As this Court has repeatedly recognized, the Equal Protection Clause prohibits the state from employing policies that look only at skin color and that fail to afford any individualized consideration to persons in recognition that they likely have relevant qualities other than skin color. *See Gratz*, 539 U.S. at 270-71. Racial balancing for its own sake has never been recognized as a compelling state interest sufficient to meet the requirements of strict scrutiny. *See Freeman v. Pitts*, 503 U.S. 467, 494 (1992). *Accord*, *Grutter*, 539 U.S. at 330. *Grutter* cannot be construed as abandoning the requirement of strict scrutiny, especially when the challenged decision involves racial policies in K-12 public schools, given this nation's history of racial stigmatization and discrimination in that context. Nothing in *Grutter* supports a more deferential posture toward school administrators under the Equal Protection Clause than that applied in *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), and its progeny.

In *Grutter*, this Court upheld the consideration of race among other factors in competitive admissions to an elite law school, as meeting the requirement of a compelling state interest under strict scrutiny. However, this exception to this Court's general equal protection jurisprudence was based on two factors present in the facts of *Grutter* that are never applicable in the context of K-12 public education. First was the Court's concern for the academic freedom of institutions of higher learning, grounded in the First Amendment. *Grutter*, 539 U.S. at 329. Second, the Court found that a racially diverse student body in the intellectually interactive setting of an elite law school would contribute to educational values by promoting a diversity of viewpoints. *Id.* at 329-30. Neither of these factors has any application in the context of K-12 public schooling.

On its face, of course, *Grutter* did not address whether the employment of race-driven admission policies in elementary and secondary schools similarly qualifies as a compelling state interest. *See* Ancheta, *supra*, at 36 (noting that one question left open by *Grutter* is, "[s]hould elementary and secondary school districts that employ race-conscious diversity plans be granted the same level of deference as institutions of higher education?"). *See also* Jay P. Lechner, *Learning from Experience: Why Racial Diversity Cannot Be a Legally Compelling Interest in Elementary and Secondary Education*, 32 Sw. U. L. Rev. 201, 209 (2003) ("The Supreme Court has never considered whether educational diversity could be a compelling goal of public elementary or secondary education."). To the contrary, the *Grutter* Court was careful to restrict its holding to the narrow context of higher education, a contextual qualification that the court below—like the courts of the First, Sixth, and Ninth Circuits—simply ignored. *See Grutter*, 539 U.S. at 328 ("[T]he law school asks us to recognize, *in the context of higher education*, a compelling state interest in student body diversity"); *id.* (*Grutter*, like *Bakke*, "addressed the use of race *in the context of public higher education*") (emphasis added). *See also* Paul Horwitz, *Grutter's First Amendment*, 46 B.C. L. Rev. 461, 464 (2005) (*Grutter* "asked only whether there is a 'compelling state interest in student body diversity' in 'the context of higher education' ").

Interpreting *Grutter* as authorizing widespread deference to public administrators engaged in the classification and disparate treatment of citizens on the basis of their race would constitute a sharp break with this Court's prior equal protection jurisprudence.

The inapplicability of *Grutter*'s First Amendment rationale to K-12 schools has been capably explained by Professor Ancheta, who notes that *Grutter*'s rationale "may be difficult to extend beyond academic decision making and outside of the higher education context because of the key

element of academic freedom under the First Amendment." Ancheta, *supra*, at 47. Although courts have sometimes deferred to public school administrators, this deference, unlike that of *Grutter*, "has not been rooted in academic freedoms typically ascribed to higher education, where the free exchange of ideas and viewpoints is highly valued; indeed, K-12 education is often highly standardized and regimented, particularly in the lower grade levels." *Id.* at 47.

As for viewpoint diversity, the transference of this value from the context of graduate legal studies to elementary and secondary schools borders on the nonsensical. The educational mission of K-12 public schools is different from that of universities. The purpose of American public schools is to *teach* fundamental values necessary to maintain a democratic system. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986). *See, e.g.*, Kevin G. Welner, *Locking up the Marketplace of Ideas and Locking Out School Reform: Courts' Imprudent Treatment of Controversial Teaching in America's Public Schools*, 50 UCLA L. Rev. 959, 965 (2003) (Public school "[e]ducation is inculcation, not exposure."). K-12 public schools prepare students for citizenship, which includes teaching the principles of our Constitution. *Bethel Sch. Dist.*, 478 U.S. at 681. Such instruction necessarily includes less emphasis on the "robust exchange of ideas" in elementary and secondary school education. Joint Statement of Constitutional Law Scholars, The Civil Rights Project at Harvard University, *Reaffirming Diversity: A Legal Analysis of the University of Michigan Affirmative Action Cases* 23 (2003), *available at* http://www.civilrightsproject.harvard.edu/policy/legal_docs/Diversity_%20Reaffirmed.pdf (last visited Jan. 23, 2006).

This Court's analysis in *Grutter* has resulted in confusion as to the permissible boundaries for race-conscious educational policies. Some of the questions that were left unresolved are identified by Professor Ancheta:

> If, as the *Grutter* analysis implies, courts may on occasion employ more deferential versions of strict scrutiny, what contexts determine such occasions? Was the Court's contextual scrutiny in *Grutter* specific to higher education when the Court deferred to policy making that was associated with academic freedoms rooted in the First Amendment? Or, was context grounded in a distinction between exclusionary and subordinative legislation on the one hand and inclusionary and interactive policies on the other—a distinction that the Court ostensibly rejected in *Croson* and *Adarand* when it ruled that both "invidious" and "benign" racial classifications are subject to strict scrutiny? Or is context to be addressed on an ad hoc, case-by-case basis? Moreover, assuming that context properly determines the rigor of strict scrutiny, how should courts customize their analyses to fit a given context?

Ancheta, *supra*, at 23. This Court should grant the petition for certiorari in this case to clarify the narrow reach of *Grutter* in determining the special circumstances in which racial diversity qualifies as a compelling state interest.

IV

THIS COURT SHOULD REQUIRE THE NATION'S PUBLIC SCHOOLS TO SHOW THE INFEASIBILITY OF ADDRESSING THE PROBLEMS ASSOCIATED WITH RACIALLY IMBALANCED SCHOOLS *THROUGH RACE-NEUTRAL MEANS* BEFORE TURNING TO A SYSTEM OF NAKED RACIAL PREFERENCES

Deferring to public school administrators engaged in the race-based classification and assignment of students not only subverts this Court's equal protection jurisprudence; it does so

prematurely and unnecessarily. The requirement of narrow tailoring "dictates that the government use race ***only when necessary*** to achieve a compelling interest," *Comfort*, 418 F.3d at 22 (emphasis added). Public school administrators should not be allowed to invoke *Grutter* as carte blanche to avoid the necessity of determining whether their goals can be achieved through race-neutral means.

> Perhaps in lieu of spending time and money on racial balancing schemes, public school officials could better use the resources trusted to their care by focusing on the problems that currently exist in many schools serving disadvantaged students. Addressing deficiencies in neighborhood schools would allow interested students the opportunity to prepare for higher education and to compete for admission on equal footing, without the accompanying stigma and resentment associated with racial preferences.

Jenkins, *supra*, at 369-70.

There was no showing in the record below that Jefferson County was unable (or even attempted) to address the issue of racially imbalanced student populations through race-neutral means. The United States Department of Education, Office for Civil Rights has identified numerous "innovative 'race-neutral' alternatives" to promote student body diversity while avoiding the sort of blatantly discriminatory policies adopted by Jefferson County's public schools. Office for Civil Rights, U.S. Dep't of Educ., *Achieving Diversity: Race-Neutral Alternatives in American Education* (2004), *available at* http://www.ed.gov/about/offices/list/ocr/raceneutral.html (overview) and http://www.ed.gov/about/offices/list/ocr/edlite-raceneutralreport2.html (report) (last visited Oct. 25, 2005). Perhaps the foremost example of such a race-neutral alternative would be providing preferential assignments on the basis of socioeconomic status.

Such plans seek to reduce concentrations of poverty by providing

> all students a chance to attend middle-class schools, in which a majority of students set the tone that academic achievement is to be valued and that aspirations should be set high, students learn from one another's differences, misbehavior is kept under control and does not become contagious, and teachers are not overwhelmed by large numbers of high-need students.

Id. at 34 (citation omitted).

To the extent racially imbalanced schools are merely a side effect of poor student achievement, other race-neutral strategies can be brought to bear on the problem. These might include:

- Creating new "skills development" programs—projects designed to improve educational achievement among students who attend traditionally low-performing schools.

- Low performing schools entering into partnership with universities to strengthen their students' ability to succeed in college.

The requirement of narrow tailoring should receive more than mere lip service when a government proposes the classification and differential treatment of children on the basis of their race. This Court should grant certiorari to remind the Nation's public school administrators that adopting a system of naked racial preferences should be the last, not the first, alternative when seeking to remedy problems associated with racial imbalances in K-12 public schools.

CONCLUSION

For the foregoing reasons, Amici respectfully request that this Court grant the writ of certiorari.

DATED: February, 2006.

Respectfully submitted,

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CASE NO. 04-5897

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DAVID McFARLAND, Parent and Next Friend of Stephen and Daniel McFarland; RONALD JEFFREY PITTENGER, Parent and Next Friend of Brandon Pittenger; ANTHONY UNDERWOOD, Custodial Parent and Next Friend of Max Aubrey; — Plaintiffs

CRYSTAL D. MEREDITH, Custodial Parent and Next Friend of Joshua Ryan McDonald — Plaintiff - Appellant

v.

JEFFERSON COUNTY PUBLIC SCHOOLS; — Defendant

JEFFERSON COUNTY BOARD OF EDUCATION; STEPHEN W. DAESCHNER, Superintendent — Defendants - Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION
Civil Action No. 3:02CV-620-H

BRIEF OF THE CIVIL RIGHTS PROJECT AT HARVARD UNIVERSITY AS AMICUS CURIAE IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE OF THE JUDGMENT OF THE DISTRICT COURT

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CASE NO. 04-5897

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DAVID McFARLAND, et al.;	Plaintiffs
CRYSTAL D. MEREDITH	Plaintiff - Appellant
v.	
JEFFERSON COUNTY PUBLIC SCHOOLS;	Defendant
JEFFERSON COUNTY BOARD OF EDUCATION, et al.	Defendant - Appellees

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 26.1, The Civil Rights Project at Harvard University makes the following disclosure:

1. Is said party a subsidiary or affiliate of a public-owned corporation? **YES**

   The Civil Rights Project at Harvard University is affiliated with Harvard University and the President and Fellows of Harvard College, which is organized as a nonprofit corporation.

2. Is there a publicly-owned corporation, not a party to the appeal, that has a financial interest in the outcome? **NO**

   Neither The Civil Rights Project at Harvard University nor the President and Fellows of Harvard College has a substantial financial interest in the outcome of this litigation.

_____ _____

(Signature of Counsel) (Date)

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SOURCE OF AUTHORITY FOR FILING, IDENTITY, AND INTEREST OF AMICUS CURIAE

Pursuant to Federal Rule of Appellate Procedure 29(a) and based upon motion for leave of court, The Civil Rights Project at Harvard University submits this amicus curiae brief in support of Defendants-Appellees and affirmance of the judgment of the District Court below.

Founded in 1996, The Civil Rights Project is a nonprofit organization based at Harvard University whose mission is to advance research and advocacy in pursuit of racial justice. The Civil Rights Project devotes significant attention to educational issues, including the consequences of racial and ethnic diversity in higher education, the problem of minority dropouts, the effects of high stakes testing on minority children, K-12 school reform proposals, racial disparities related to special education and school discipline, the rights of English language learners, and the problems of segregation and resegregation in the public schools.

A central focus of The Civil Rights Project's research has been the development of scholarship that provides insights into the impact of racial diversity in education. Since its founding, The Civil Rights Project has commissioned or produced dozens of studies on a range of topics, including the effects of diversity in education in both K-12 schools and higher education. As a result of these studies and numerous conferences and roundtables, several volumes focusing on legal and social science findings involving diversity and

education have been published, including *Diversity Challenged: Evidence on the Impact of Affirmative Action*, which was cited approvingly by the United States Supreme Court in its opinion in *Grutter v. Bollinger,* 123 S. Ct. 2325 (2003), affirming the legality of race-conscious admissions policies in higher education.

The federal courts have often employed relevant research studies in equal protection decisions involving race, and the Court's analysis in the instant case can and should be informed by credible and reliable research findings. The Civil Rights Project has a deep-seated interest in the accurate presentation of relevant research findings addressing the benefits of racial diversity and the harms of racial isolation. Although an extensive body of desegregation research has been developed during the past forty years, much of the research, particularly on the educational benefits of diversity for *all* students, has been generated only recently. Accordingly, this brief provides highlights and citations to relevant research findings to help clarify the Court's review of the literature.

Because of its core mission and its research and advocacy work in defense of civil rights, specifically in the area of racial diversity in education, The Civil Rights Project has a strong interest in the outcome of this case. However, The Civil Rights Project does not, in this brief or otherwise, represent the official views of Harvard University.

All parties have consented to the filing of this Amicus Curiae brief.

SUMMARY OF ARGUMENT

The District Court correctly upheld the constitutionality of the Jefferson County Board of Education's student assignment plan (the "2001 Plan"). The court's conclusion that promoting racial diversity and reducing racial isolation in the Jefferson County public schools are compelling governmental interests is well supported by both the expert testimony introduced at trial and numerous research studies documenting the benefits of racially integrated student bodies and the harms of racially segregated learning environments.

Among the many benefits that accrue from racial diversity in the student body are increased academic achievement, greater educational and occupational aspirations and success, improved cross-racial understanding, a stronger sense of civic engagement, and an increased desire and ability to live and work in settings with members of multiple racial groups. The school district and broader community also benefit from an increased ability to compete effectively with private schools, an improved racial climate, and greater community support and participation.

Among the harms associated with racial isolation and segregated learning environments are adverse effects on school attendance and performance, stereotyping and racial hostility, decreased opportunities to learn from members of other racial groups, and poorer preparation to address interracial contexts as adults.

The school district and community as a whole can suffer when schools are perceived as unrepresentative and racially segregated.

Research studies and evidence introduced in the court below also support the District Court's conclusion that the 2001 Plan is narrowly tailored because of the necessity of employing race-conscious policies in attaining student bodies that can promote the benefits of racial diversity and prevent the harms of racial isolation, and because there is no undue harm to students who do not receive their school of choice. The Jefferson Plan is flexible in its efforts to maintain a minority student presence at each school that is sufficient for successful integration, and differences in test scores between schools do not accurately reflect on the quality of education that a given student has received.

Differences in context also strongly suggest that the standards for narrow tailoring in higher education, especially the requirement for individualized review, should be reconsidered in the context of elementary and secondary education.

The judgment of the district court should be affirmed.

ARGUMENT

I. PROMOTING RACIAL DIVERSITY IN ELEMENTARY AND SECONDARY EDUCATION IS A COMPELLING GOVERNMENTAL INTEREST.

In recently upholding the University of Michigan's compelling interest in promoting student body diversity, the Supreme Court affirmed this Circuit's decision and recognized the substantial educational benefits that result from diverse student bodies in higher education. *Grutter v. Bollinger*, 539 U.S. 306, 328-33 (2003). The Court paid particular attention to the substantial body of social science research documenting such benefits: "[N]umerous studies show that student body diversity promotes learning outcomes, and 'better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.'" *Id.* at 330.

The benefits of student body diversity in elementary and secondary education are also well documented. First, the benefits identified in *Grutter* are compelling in the area of primary and secondary education as well. *McFarland v. Jefferson County Public Schools*, 330 F. Supp. 2d 834, 852-53 (W.D. Ky. 2004). These benefits include increased academic achievement for minority students, greater educational and job-related aspirations and accomplishments, improved cross-racial understanding and higher comfort levels with members of racial groups other than one's own, a stronger sense of civic engagement, and an

increased desire and ability to live and work in settings with members of multiple racial groups. Second, these and other "equally compelling" benefits are of unique or increased importance in the K-12 context. *See id.* at 853-54. It is especially important and appropriate to promote cross-racial understanding and to prepare students to work with members of other races and ethnic groups in *early* public education. The school district and broader community also benefit from integrated public schools, which can improve community participation and help the district to compete successfully with private schools.

"Like institutions of higher education, elementary and secondary schools are 'pivotal to "sustaining our political and cultural heritage" with a fundamental role in maintaining the fabric of society.'"[1] As the First and Ninth Circuits recently held in finding racial diversity a compelling interest in primary and secondary education: "At bottom, *Grutter* plainly accepts that constitutionally compelling internal educational and external societal benefits flow from the presence of racial and ethnic diversity in educational institutions."[2] Promoting racial diversity in K-12 education should thus be no less compelling than the interest in promoting educational diversity in higher education.

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[1] *McFarland*, 330 F. Supp. 2d at 852-53 (quoting *Grutter*, 539 U.S. at 331 (quoting *Plyler v. Doe*, 457 U.S. 202, 221 (1982))).

[2] *Parents Involved in Community Schools v. Seattle School District No. 1*, 377 F.3d 949, 964 (9th Cir. 2004); *Comfort v. Lynn School Committee*, ___ F.3d ___, 2004 WL 2348505 (1st Cir. (Mass.) Oct. 20, 2004) (No. 03-2415).

A. Expert Testimony and Evidence Introduced in the Court Below Demonstrate the Benefits of Racial Diversity.

In upholding the constitutionality of the 2001 Plan, the District Court correctly relied on expert testimony demonstrating the benefits of racial diversity in the Jefferson County public schools. *See McFarland*, 330 F. Supp. 2d at 839 n.5.

The District Court discussed the results of an extensive survey[3] of eleventh grade students from the Jefferson County high schools. *See id.* at 854 & n.41. As Dr. Gary Orfield[4] stated:

> [We found] stunningly strong and parallel views of black and white students about the benefits of their school system . . . . [T]hese students feel very comfortable living and working with students . . . and working under the supervision of people from other racial and ethnic groups . . . . We found that students, both black and white . . . had very [high and similar] educational aspirations . . . and they reported similar levels of encouragement from their teachers . . . . [M]ore than 80 percent of both groups said their school experience had helped them learn how to work and relate to students from other groups.

(Gary Orfield at TR 5-28 to 5-29, 5-48). Researchers have employed the same survey instrument (a detailed questionnaire, prepared with experts from around the

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[3] *See* Michal Kurlaender & John T. Yun, *Is Diversity a Compelling Educational Interest?: Evidence from Louisville*, in Diversity Challenged: Evidence on the Impact of Affirmative Action 111 (Gary Orfield with Michal Kurlaender eds. 2001) [hereinafter Kurlaender & Yun, *Louisville Survey*].

[4] Dr. Orfield has been involved with the Jefferson County School District since the original desegregation decree in 1975, and testified in the previous litigation. (Gary Orfield at TR 5-11 to 5-13).

country) in other major school districts, and have found similarly positive educational effects arising in racially diverse schools.[5]

Ninety-seven percent of graduates from the Jefferson County public schools agreed or strongly agreed that having students from different races and backgrounds at the same school was important for long-term success.[6] Furthermore, 89 percent of graduates that were in college, and 88 percent of students asked to comment about the workplace, reported that going to classes with people from different cultural backgrounds while at the Jefferson County public schools had prepared them or strongly prepared them for college and the workplace respectively. (Robert Rodosky at TR 3-123 to 3-125).

Dr. Orfield documented the enhanced academic achievements of minority students at desegregated schools, as measured by test scores and improvements in the achievement gap between black and white students. (Gary Orfield at TR 5-14, 5-46 to 5-47). *See McFarland*, 330 F. Supp. 2d at 853-54. He also described the

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[5] *See* Michal Kurlaender & John T. Yun, *The Impact of Racial and Ethnic Diversity on Educational Outcomes: Cambridge, MA School District*, available at http://www.civilrightsproject.harvard.edu/research/diversity/cambridge_diversity.php#fullreport [hereinafter Kurlaender & Yun, *Cambridge Survey*]; The Civil Rights Project at Harvard University, *The Impact Of Racial and Ethnic Diversity on Educational Outcomes: Lynn, MA School District* (2002), *available at* http://www.civilrightsproject.harvard.edu/research/diversity/LynnReport.pdf [hereinafter Civil Rights Project, *Lynn Survey*].

[6] The 2002 survey was conducted by Dr. Robert Rodosky and Dr. Edward Kifer in conjunction with the Survey Research Group at the University of Kentucky. It was administered to students who had graduated from the Jefferson County high schools in 1997. (Robert Rodosky at TR 3-123).

powerful effects of racially-integrated schools on improving minority student "life chances, on the chances of finishing high school, going to college, what you do as an adult, [and] what kind of employment you get." (Gary Orfield at TR 5-78).

Psychologists in similar cases have found that integration results in positive intergroup relations, the breaking down of racial stereotypes and tensions, and the promotion of racial harmony. "Intergroup contact theory" is a prominent and widely accepted psychological theory that posits that interaction between students of different races promotes empathy, understanding, positive racial attitudes, and the disarming of stereotypes.[7] The benefits from intergroup contact are especially compelling in the K-12 context. Public education is a "principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." *Plyler*, 457 U.S. at 223. Justice Scalia suggested that such lessons in life are more appropriate in early education. *See Grutter*, 539 U.S. at 347 (Scalia, J., dissenting).

Maintaining racially integrated schools also "benefits the system as a whole." *McFarland*, 330 F. Supp. 2d at 854. "One of the ways JCPS meets the competition is by offering quality education in *an integrated setting at every*

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[7] *Id.* at 356. *See generally* Gordon W. Allport, The Nature of Prejudice (1954); Christopher Ellison & Daniel A. Powers, *The Contact Hypothesis and Racial Attitudes Among Black Americans*, 75 Soc. Sci. Q. 385 (1994); Lee Sigelman & Susan Welch, *The Contact Hypothesis Revisited: Black-White Interaction and Positive Racial Attitudes*, 71 Soc. Forces 781 (1993).

school." *Id.* (emphasis added). Integrated schools can improve the racial climate of the entire community. (Gary Orfield at TR 5-73 to 5-74). The district and community benefit when "the citizens of the community see[] all the schools as worthwhile" and not separated across racial lines: "invest[ing] parents and students alike with a sense of participation and a positive stake in their schools and the school system as a whole." (Gary Orfield at TR 5-73). *Id.*

B. Research Studies Show that Racial Diversity in K-12 Education Produces Educational and Social Benefits for Minority Students

An extensive body of research addressing the educational and social benefits of desegregation and racially integrated schools supports the District Court's conclusion that promoting racial diversity in elementary and secondary education is a compelling governmental interest.

1. Racial Diversity Can Increase the Academic Achievement of Minority Students.

Minority students who attend more racially integrated schools show increased academic achievement and progress.[8] In a 1983 review of over ninety

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[8] *See, e.g.*, Janet Ward Schofield, *Maximizing the Benefits of Student Diversity: Lessons from School Desegregation Research, in* Diversity Challenged: Evidence on the Impact of Affirmative Action 99 (Gary Orfield with Michal Kurlaender eds. 2001) [hereinafter Schofield, *Maximizing the Benefits of Student Diversity*]; 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 & Cherry A. McGee Banks eds. 1995) [hereinafter Schofield, *Review of Research*]; Robert L. Crain & Rita E. Mahard, *The Effect of Research Methodology on Desegregation Achievement*

research studies – including over 300 samples – examining the effects of school desegregation on black student achievement, Crain and Mahard found consistent results involving enhanced black achievement (even controlling for ability and socioeconomic status). Crain & Mahard, *supra*. The greatest academic gains occurred when desegregation plans encompassed both cities and suburbs, as in the case at hand. Crain and Mahard found agreement in the literature on achievement benefits at the lower grade levels, suggesting that age at which black students enter desegregated schools is critically important; studies that have included students in desegregated schools from the primary grades have provided consistent findings of achievement gains for black students. More recent economic analyses of black students' test score data have confirmed positive effects of student achievement arising from a school's more diverse racial composition.[9]

2. Racial Diversity Can Have Positive Effects on the Educational and Occupational Attainment of Minority Students.

Studies: A Meta-Analysis, 88 Am. J. Soc. 839 (1983); Robert L. Crain, *School Integration and the Academic Achievement of Negroes*, 44 Soc. Educ. 1 (1971).

[9] Eric A. Hanushek, John F. Kain & Steven G. Rivkin, *New Evidence about Brown v. Board of Education: The Complex Effects of School Racial Composition on Achievement* (2002), *available at* http://www.nber.org/papers/w8741, http://edpro.stanford.edu/eah/papers/jpe.resubmission.feb04.PDF (analyzing test score data and finding that "[t]he uneven distribution of blacks across school districts can explain a significant portion of the black-white achievement gap in Texas."); Eric A. Hanushek, *Black-White Achievement Differences and Governmental Interventions*, 91 Am. Econ. Rev 24, 24-28 (2001) (concluding that national data suggests that integration has had a strong impact on narrowing the black-white achievement gap).

Racially diverse learning environments have positive effects on minority students' educational attainment and their occupational aspirations and careers. Segregated schools that are predominantly non-white often transmit lower expectations to minority students and offer a narrower range of educational and job-related options.[10]

Studies on the educational attainment of black students have found that blacks who attend desegregated schools have a higher college attendance rate than black students who attended segregated schools.[11] Desegregated schooling has a positive effect on the number of years of school completed and on the probability of attending college.[12] A study on the influence of school peers through a nationally representative sample found that both black and white students who had cross-racial friendships had higher educational aspirations than students with only same-race friendships.[13]

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[10] *See* Marvin P. Dawkins & Jomills H. Braddock, *The Continuing Significance of Desegregation: School Racial Composition and African American Inclusion in American Society*, 63 J. Negro Educ. 394 (1994); Schofield, *Review of Research, supra.*

[11] *See* Robert L. Crain & Rita E. Mahard, *School Racial Composition and Black College Attendance and Achievement Test Performance*, 51 Soc. Educ. 81 (1978).

[12] *See* Michael A. Boozer, et al., *Race and School Quality Since Brown v. Board of Education*, 1992 Brooking Papers Econ. Activity (Microeconomics) 269.

[13] Maureen T. Hallinan & Richard A. Williams, *Students' Characteristics and the Peer Influence Process*, 63 Soc. Educ. 122 (1990).

The literature examining the relationship between racially diverse schools and *occupational* attainment also reveals a number of positive effects of integration. Among the positive consequences for black students are: "(a) fostering higher occupational aspirations and more consistent career planning linked to these aspirations, (b) increasing earnings modestly, and (c) increasing the likelihood that they will work in professions in which blacks have traditionally been underrepresented."[14] A 1970 study of black males found that graduates of desegregated high schools held higher status jobs and earned higher incomes than their counterparts from segregated schools.[15] A 1983 study focusing on 1972 high school graduates similarly revealed that school desegregation positively influenced black males' occupational aspirations.[16] A 1992 study found that black students who attended racially isolated schools obtained jobs that were both lower paying and more racially isolated than the jobs obtained by whites. Boozer, et al., *supra.*

3. Racial Diversity Can Have Positive Effects on Minority Students' Social Interaction and Post-Educational Experiences.

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[14] Schofield, *Maximizing the Benefits of Student Diversity*, *supra*, at 100; *see also* Dawkins & Braddock, *supra* (reviewing studies on the relationship between desegregation and occupational attainment, including several studies relying on longitudinal data sets measuring high school, family, individual, and workplace characteristics).

[15] Robert Crain, *School Integration and Occupational Achievement of Negroes*, 75 Am. J. Soc. 593 (1970).

[16] Marvin P. Dawkins, *Black Student's Occupational Expectations: A National Study of the Impact of School Desegregation*, 18 Urb. Educ. 98 (1983).

A related body of literature indicates that exposure to desegregation and racial diversity in elementary and secondary education can lead to more racially integrated experiences as adults.[17] A recent review of twenty-one studies examining "perpetuation theory" – a theory proposing that racial segregation tends to repeat itself across an individual's life experiences and across institutions – found that desegregated experiences for black students typically lead to increased interaction with members of other racial groups in subsequent years.[18] The studies suggested that school desegregation had positive effects on both black and white students: students who attended desegregated schools were more likely to function in desegregated settings, such as colleges and universities, workplaces, and neighborhoods later in life. Desegregation has the effect of "break[ing] the cycle of segregation and allow[ing] nonwhite students access to high-status institutions and the powerful social networks within them." *Id.* at 531. Therefore, "interracial contact in elementary or secondary school can help blacks overcome perpetual segregation." *Id.* at 552.

C. Research Studies Show that Racial Diversity in K-12 Education Leads to Intergroup Contacts which Promote Cross-Racial

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[17] *See, e.g.,* Jomills H. Braddock, *The Perpetuation of Segregation Across Levels of Education: A Behavioral Assessment of the Contact-Hypothesis*, 53 Soc. Educ. 178 (1980); James M. McPartland & Jomills H. Braddock, *Going to College and Getting a Good Job: The Impact of Desegregation, in* Effective School Desegregation (William D. Hawley ed. 1981).

[18] Amy Stuart Wells & Robert L. Crain, *Perpetuation Theory and the Long-Term Effects of School Desegregation*, 64 Rev. Ed. Res. 531 (1994).

Understanding and which Challenge Stereotypes Among All Students.

Research studies addressing the benefits of racial diversity for *all* students have shown that increased intergroup contacts can promote greater cross-racial understanding and friendships and can undermine racial stereotypes. "[D]esegregation made the vast majority of the students who attended these schools less racially prejudiced and more comfortable around people of different backgrounds."[19] The same study, which based its conclusions on data drawn from over 500 interviews of 1980 high school graduates, educators, advocates, and policy makers who were involved in racially diverse public high schools nearly twenty-five years ago, found that "the vast majority of graduates across racial and ethnic lines greatly valued the daily cross-racial interaction in their high schools. They found it to be one of the most meaningful experiences of their lives, the best – and sometimes the only – opportunity to meet and interact regularly with people of different backgrounds." *Id.* at 6.

Recent surveys on the attitudes of current high school students toward their peers indicate that students of all racial and ethnic groups who attend more diverse schools have higher comfort levels with members of racial groups other than their own, have an increased sense of civic engagement, and have a greater desire and

[19] Amy Stuart Wells, et al., *How Desegregation Changed Us: The Effects of Racially Mixed Schools on Students and Society* (Apr. 2004), *available at* http://www.tc.columbia.edu/newsbureau/features/ASWells032904.pdf.

perceived ability to live and work in multiracial settings. Kurlaender & Yun, *Cambridge Survey*, *supra*; The Civil Rights Project, *Lynn Survey*, *supra.*

The specific survey of the Jefferson County high schools used the same instrument and yielded similar findings.[20] Kurlaender & Yun, *Louisville Survey*, *supra*, at 118, 130. In Jefferson County, both black and white students reported great educational benefits from the diversity in their schools, and the strong uniformity in responses provided evidence of a successful integration plan. *Id.* at 137. More than 90 percent of both black and white students reported being comfortable working and interacting with members of racial and ethnic groups different than their own. *Id.* at 124. Similarly, 85 percent of all students felt that they were prepared to work in a job setting where people are of a different racial or ethnic background and that they were likely to do so in the future, and more than 90 percent reported that they would be comfortable working under a supervisor of a different racial or ethnic background. *Id* at 124, 130. Students across the board reported high levels of educational aspirations. A "remarkable" 80 to 85 percent of both black and white students reported an interest in attending a four-year college. *Id.* at 125-27. There was strong evidence that perceived opportunities to meet these aspirations cut across racial and ethnic lines. *Id.* at 136-37. More than 80 percent of both black and white students believed that *their school experiences*

[20] The survey was administered in 2000 to a representative sample of juniors (with an excellent response rate of over 90 percent).

have helped them to work more effectively and to get along better with members of other races and ethnic groups. *Id.* at 130.

Studies of intergroup contact and interracial friendships at the earlier grade levels confirm the importance of interracial contact in increasing racial tolerance and increasing interactions with members of other racial groups over the course of an individual's lifetime.[21] In addition, a classroom with a positive racial climate particularly influences the stability of interracial friendships of black students. *Id.* Such friendships have important implications beyond a student's educational years, for, as one study on interracial friendships states, "[t]he tendency [among whites] to prefer whites over blacks in basic feelings of warmth and closeness and in personal social predispositions in the workplace and neighborhood does decline quite markedly . . . among whites who have both friends and acquaintances who are black."[22]

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[21] *See, e.g.*, Ellison & Powers, *supra*, at 392; Richard R. Scott & James M. McPartland, *Desegregation as National Policy: Correlates of Racial Attitudes*, 19 Am. Educ. Res. J. 397 (1982). For instance, the racial composition of classes has been found to have an impact on the stability of interracial friendships between white students and black students, with even stronger effects for white students. Maureen T. Hallinan, & Richard A. Williams, *The Stability of Students' Interracial Friendships*, 52 Am. Soc. Rev. 653 (1987) (longitudinal study of 375 students in the fourth to seventh grades in sixteen desegregated classrooms).

[22] Mary R. Jackman & Marie Crane, *"Some of my best friends are black . . . .": Interracial Friendship and Whites' Racial Attitudes*, 50 Pub. Opin. Q. 459, 470 (1986).

Elementary and secondary school settings are particularly well suited to promoting these types of positive interracial contact because of the equal status of racial groups in the schools, the support of authority figures such as teachers and staff, the existence of common goals and cooperative activities, and extensive opportunities for personalized contact to disrupt stereotypes – all of which are fully supported in the research literature on the effectiveness of contact theory. *See id.*

II. REDUCING RACIAL ISOLATION IN ELEMENTARY AND SECONDARY EDUCATION IS A COMPELLING GOVERNMENTAL INTEREST.

Reducing racial isolation is a compelling governmental interest in the K-12 context. Since *Brown v. Board of Education*, 347 U.S. 483 (1954), the courts have recognized the harms associated with racially segregated schools, and the strong constitutional interest in eliminating school segregation "root and branch." In *Brewer v. West Irondequoit Central School District*, 212 F.3d 738 (2d Cir. 2000), the court held that reducing racial isolation and combating de facto desegregation constitutes a compelling governmental interest, and "indeed, such integration serves important societal functions." *Id.* at 751. Recent legislation passed by Congress has affirmed the importance of eliminating minority group isolation in the public schools. *See McFarland*, 330 F. Supp. 2d at 852 & n.34.

A. Expert Testimony and Evidence Introduced in the Court Below Demonstrate the Harms of Racial Isolation.

Racial isolation under either de jure or de facto resegregation causes significant harm to students. (Gary Orfield at TR 5-16). The compelling interest in avoiding segregation is "rooted in practicality and logic. It is incongruous that a federal court could at one moment require a school board to use race to prevent resegregation of the system, and at the very next moment prohibit that same policy." *Hampton v. Jefferson County Board of Education*, 102 F. Supp. 2d 358, 379 (W.D. Ky. 2000) ("*Hampton II*").

There are significant negative consequences from the interaction between poverty and racial segregation: Almost all minority children, and very few white children, end up in concentrated poverty schools. (Gary Orfield at TR 5-18). In fact, 76 percent of black students in the Jefferson County school district are from low-income families, more than double the 35 percent of all other students. (Stipulation par. 37). In the district-encompassed City of Louisville, 67 percent of black households are poor, as opposed to 44 percent of white households; and 23 percent of white households are affluent, as opposed to only 9 percent of black households. (Robert Rodosky at TR 3-89). Concentrated poverty in schools will thus disproportionately and adversely affect the black students in Jefferson County. *See McFarland*, 330 F. Supp. 2d at 853 (citing *Hampton II*).

All students in racially isolated schools, and white students in particular, suffer from the "tremendously negative" consequences of "not being able to

understand and operate in a multiracial setting." (Gary Orfield at TR 5-15). "[A]s a result of racial isolation and segregation, these students forfeit the opportunity to learn from other groups and are less prepared to handle interracial settings as [adults]." *Comfort*, 283 F. Supp. 2d at 355-56.

Stereotyping is an especially problematic outcome of racial isolation. *All* students may be harmed by racial stereotyping, not simply those who are the objects of stereotypes. *Id.* at 356. Dr. Orfield emphasized the need to provide interracial contact in the *early* school years in order to defeat stereotyping:

> [S]tudents come to school initially . . . without really well-developed racial stereotypes, and they develop somewhere after the 3rd or 4th grade in a fairly serious way . . . . [I]t's much better in terms of the development of those stereotypes and ideals about race that children are together from [as] early as possible . . . . [T]hey learn from their peer groups, and what their peer groups are matters a lot.

(Gary Orfield at TR 5-62). If a school has an insubstantial number of minority students, these students are likely to feel isolated: "[I]f you have a class where you have one or two black students, for example, they are considered the official voice of the black community. They are expected to speak for the entire community, and they are always on the spot . . . they are [] treated as an afterthought in the discussion . . . ." (Gary Orfield at TR 5-80, 5-31).

Resegregation will also have a negative impact on the school district and broader community. *See McFarland,* F. Supp. 2d at 854 n.40 Racially-identifiable schools – and the perception that a school is "becoming black" – affect the

decisions of middle class minorities and whites, who tend to leave or stop moving into these, generally urban, neighborhoods. (Gary Orfield at TR 5-37, 5-84). It becomes difficult for segregated districts to equalize the ability of its schools to attract and hold experienced and talented teachers: "[W]hite teachers, who are the great bulk of the teaching force" will "systematically leave resegregated schools." (Gary Orfield at TR 5-20) (citing recent studies in Texas and North Carolina).

B. Research Studies Have Demonstrated the Harms of Racial Isolation.

Segregated schools can transmit significant harms in the form of lower expectations, resources, and opportunities. *See supra* Part I.B. Racial isolation can be especially harmful because it is closely linked to concentrated poverty: "88 percent of the intensely segregated minority schools (or schools with less than ten percent white [students]) had concentrated poverty, with more than half of all students getting free lunches. That means that students in highly segregated neighborhood schools are many times more likely to be in schools of concentrated poverty."[23] Concentrated poverty often leads to a myriad of detrimental effects on students:

> Concentrated poverty turns out to be powerfully related to both school opportunities and achievement levels. Children in these schools tend to be less healthy, to have weaker preschool experiences, to have only one parent,

[23] Gary Orfield & Chungmei Lee, *Brown at 50: King's Dream or Plessy's Nightmare* 21 (Jan. 2004), *available at* http://www.civilrightsproject.harvard.edu/research/reseg04/resegregation04.php.

> to move frequently and have unstable educational experiences, to attend classes taught by less experienced or unqualified teachers, to have friends and classmates with lower levels of achievement, to be in schools with fewer demanding pre-collegiate courses and more remedial courses, and to have higher teacher turnover. Many of these schools are also deteriorated and lack key resources. The strong correlation between race and poverty show that a great many black and Latino students attend these schools of concentrated poverty.

Id. at 21-22.

Recent studies of cities and school districts that have been experiencing resegregation offer specific instances of the harms of racial isolation. A 2003 study of the Charlotte-Mecklenburg school district, which until 2002 had been subject to court-ordered desegregation, found that the district has been experiencing resegregation and that increasing racial isolation is leading to harmful educational effects on students.[24] Racially identifiable black schools had deficiencies in teacher resources and material resources (up-to-date media centers, ample access to current technology, and newer, safer buildings), fewer Advanced Placement courses, and fewer services for gifted and talented students. *Id.* at 1547-48. Minority students were disproportionately tracked into lower level placements and special education classes. Student achievement scores in many racially identifiable schools were thus markedly lower than in the more racially integrated

[24] Roslyn Arlin Mickelson, *The Academic Consequences of Desegregation and Segregation: Evidence from the Charlotte-Mecklenburg Schools*, 81 N.C. L. Rev. 1513 (2003).

schools. *Id.* at 1558-59. A 2004 study of the metropolitan Boston area also found significant detrimental effects on students in racially identifiable schools.[25] Educational outcomes for students in minority-identified schools in metropolitan Boston were predictably lower than in white-identified schools. Ninety-six percent of the students attending low-minority/low-poverty schools passed the English portion of the standardized achievement test for the state, compared to only 61 percent of students in high-minority/high-poverty schools. *Id.* at ii. Only 45 percent of the students in high-minority/high-poverty schools were estimated to graduate from high school on time, compared to 79 percent of students in low-minority/low-poverty schools. *Id.*

III. THE JEFFERSON COUNTY SCHOOL BOARD PLAN IS NARROWLY TAILORED TO THE COMPELLING INTERESTS IN PROMOTING RACIAL DIVERSITY AND REDUCING RACIAL ISOLATION.

Expert testimony and research literature also support the District Court's conclusion that the 2001 Plan is narrowly tailored to the compelling interests in promoting racial diversity and reducing racial isolation. On the one hand, there is extensive evidence that the 2001 Plan meets the standards for narrow tailoring as set forth in *Grutter* and applied by the court below. On the other hand, significant differences between K-12 public schools and schools of higher education suggest

[25] Chungmei Lee, *Racial Segregation and Educational Outcomes in Metropolitan Boston* (Apr. 2004), *available at* http://www.civilrightsproject.harvard.edu/research/metro/Segregation_Educational_Outcomes.pdf.

that a different standard should be applied to the determination of narrow tailoring in the context of elementary and secondary education.

A. Research Studies and Evidence Introduced in the Court Below Show that the Jefferson County School Board Plan is Narrowly Tailored under *Grutter*.

Sociological and historical conditions particular to Louisville and the Jefferson County public schools, and widely accepted research regarding social capital and the achievement gap, strongly support the District Court's conclusions that the Jefferson Plan is necessary and does not cause undue harm to the appellants. Research studies provide further support for the necessity of achieving more than token integration, and demonstrate the flexibility of the 2001 Plan.

In terms of undue harm, the First Circuit correctly recognized that the problems of minority-student stigma and majority-group stereotyping discussed in *Bakke* and *Grutter*, resulting from the belief that students from the "preferred" racial group lack merit, are "far less ominous, if not altogether absent, in the K-12 setting." *Comfort*, 2004 WL 2348505 (1st Cir. 2004) at *15.

> [T]he transfer provisions of the [Assigment] Plan do not operate competitively: "X" is granted or denied a transfer on the basis of a set . . . standard, not on the basis of how he stacks up when compared to "Y." Thus, the provisions neither skew a competitive process nor substitute race as a proxy for an applicant's merit.

Id.

Expert testimony and social science research weigh strongly against appellants' claim that students denied their school of choice are deprived of the difference between average test scores at the school of choice and the school to which they are assigned. (Brief of Appellant, 22-23). As the court found in *Hampton II*: "It seems likely that numerous external factors – including high poverty incidence, lower levels of parental education, [and] higher incidence of families without two active parents . . . produce the disparity [in test scores]."[26] A large body of research establishes the relationship between such "social capital"[27] and test scores. (Edward Kifer at TR 3-175, 3-201). Test score comparisons are of marginal assistance in determining whether schools are equal, because they do not control for social capital.[28] (Gary Orfield at TR 5-14, 5-46).

Dr. Kifer and Dr. Rodosky compared the level of social capital that students were bringing to each of the Jefferson County schools to the test score data for that

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[26] 102 F. Supp. 2d at 366; *see also United States v. City of Yonkers*, 197 F.3d 41, 54 (2d Cir. 1999) (noting the possible effects of a broad array of socioeconomic factors on such an achievement gap); *People Who Care v. Rockford Bd. of Educ.*, 111 F.3d 528, 537-38 (7th Cir. 1997) (finding that many causes of such an achievement gap are beyond the school system's control).

[27] Social capital is defined broadly as those external factors that a child *brings* to the school and is generally operationalized to include such variables as family income and whether the student is from a single or two-parent household.

[28] Researchers agree that studies should instead measure how individual students change over time. (Edward Kifer at TR 3-209).

school,[29] and found that social capital dramatically influenced test scores. Differences in social capital predicted differences in test scores: schools with higher social capital had higher test scores, and vice versa. (Robert Rodosky at TR 3-150). Because of pre-existing student differences, higher test scores at school A than school B, do not mean that A is a better school. (Edward Kifer at TR 3-176 to 3-177). A statewide regression analysis confirmed these findings. Adjusting for free-or-reduced lunch status as a rough estimate of social capital, schools with little or no racial diversity (20 or 30 percent of the schools in the state) moved from the top of the list of highest performers on test scores down to the middle or bottom of the list, and schools with greater diversity moved up significantly. (Edward Kifer at TR 3-203).

A minimal number of students from a different race is needed in order to achieve the benefits of an integrated education and to prevent stereotyping and other adverse effects of racial isolation. Without a substantial number of black and white students in a given school, the efforts to promote cross-racial understanding lose much of their force. There is a well-established desegregation literature focusing on benchmarks, such as the twenty percent figure, that have become

[29] More specifically, the results were compared to the school's accountability index, which is 85 percent test scores and 15 percent nonacademic educational factors such as dropout and suspension rates. (Robert Rodosky at TR 3-153).

widely accepted among social scientists, educators, and policy makers for the effective integration of their schools.[30]

The 2001 Plan employs a "quite flexible and broad target" (from 15 to 50 percent of the students) to determine whether its schools are avoiding racial isolation and promoting racial diversity. *McFarland*, 330 F. Supp. 2d at 857. This range is fully consistent with the research literature and provides the Jefferson County public schools with a highly flexible policy under which race can be factored into school assignment decisions. Actual percentages of black students attending each school range from 20 to 50 percent. *Id.* In *Grutter*, Justice Rehnquist expressed concern that the percentages of minorities enrolled at the law school fluctuated little, yet were proportional, year-to-year, with the number of minority applicants. *See Grutter*, 539 U.S. at 383-86 (Rehnquist, J., dissenting). Similarly, the First Circuit held that the plan in *Comfort* was problematically "calibrated toward proportional representation . . . it seeks to maintain within each school a racial mix within 10%-15% of the racial mix of the aggregate student population . . . ." 2004 WL 2348505 at *17. By having a broad and flexible goal that is independent of percentages in the general student population, and by

[30] *See, e.g.*, Willis D. Hawley, et al., *Strategies for Effective Desegregation: Lessons from Research* (1983); Schofield, *Review of Research, supra.* Dr. Orfield cited a comprehensive study describing a 20 percent figure below which members of a racial minority are marginalized. (Gary Orfield at TR 5-79 to 5-80).

limiting its focus to achieving substantial student representation, the 2001 Plan avoids such problems.

The school district had no other race-neutral way to achieve its compelling interest in promoting racial diversity and avoiding racial isolation. *See McFarland*, 330 F. Supp. 2d at 857. Removing the race factor from the 2001 Plan would result in resegregated schools. (Gary Orfield at TR 5-32 to 5-33; Robert Rodosky at TR 3-128, 4-45). Avoiding the resegregation that alternative plans would allow is especially important given the history of desegregation in the school district. "Jefferson County is nationally acknowledged as one of the most thorough and successful desegregation plans in the nation . . . JCPS has consistently met the many and varied challenges presented to it." *Hampton II*, 102 F. Supp. 2d at 369-70.

B. The Jefferson County School Board Plan is Narrowly Tailored under Standards that Consider the Context of K-12 Education.

The nature of strict scrutiny and the narrow tailoring inquiry depend on the particular context in which race is being considered. *Grutter*, 539 U.S. at 327. The narrow tailoring inquiry "must be calibrated to fit the distinct issues raised by the use of race to achieve student body diversity in public higher education" and "the very purpose of strict scrutiny is to take such 'relevant differences into account.'" *Id.* at 334 (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200,

228). The narrow tailoring inquiry in this case must therefore be calibrated to take account of the significantly different context of K-12 education.

In particular, the requirement of individualized consideration in *Grutter* is not as appropriate in the K-12 context. It is not necessary for the Jefferson County Public Schools to give comprehensive, individualized review to each student in this context. Unlike higher education acceptance decisions, most K-12 public school assignment decisions are noncompetitive, and are not based on differences in achievement, ability, or experiences. In addition, the managed choice plans that have been effective in maintaining integrated schools, improving student achievement, and garnering widespread support from the greater school community, involve the difficult task of coordinating the assignment of a huge student body- in this case almost 100,000 students. In this sense, public school systems with comparatively limited budgets and staff are unlikely to have sufficient time or funding to conduct individualized holistic review. Except in the comparatively rare cases of very small, highly competitive schools or programs, school districts would similarly be limited in their capacity to review the more complex array of individual characteristics appropriate for consideration in the context of higher education.

Conclusion

For all of the foregoing reasons, the 2001 Plan should be upheld as constitutional and the District Court's judgment should be affirmed.

Respectfully submitted,

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The Civil Rights Project at Harvard University

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7), the undersigned certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 29(d) and Fed. R. App. P. 32(a)(7)(C).

1. Exclusive of the portions of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), the brief contains 6,544 words.

2. The brief has been prepared in proportionately spaced typeface using Microsoft Word 2003 in Times New Roman 14 point type.

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Dated: November 10, 2004

CERTIFICATE OF SERVICE

I hereby certify that, on this 10th day of November 2004, pursuant to Fed. R. App. P. 25, I have caused a copy of the foregoing brief of amicus curiae The Civil Rights Project at Harvard University to be served by United States first-class mail, postage prepaid, on the following:

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Expertise

Desegregation; Economics of education; Education Policy and Governance; Educational equity; Educational Program evaluation; Minority/Underrepresented Students; Quantitative methods; Sociology of education; Urban education

Program Affiliations

- School Organization and Educational Policy

Education

- Ed.D. (2005) Harvard University Graduate School of Education
- Ed.M. (1997) Harvard University Graduate School of Education
- B.A. (1995) University of California, Santa Cruz

Highlighted Publications

- Reardon, S., Yun, J. and Kurlaender, M. (2006). The Limits of Income Desegregation Policies for Achieving Racial Desegregation. Educational Evaluation and Policy Analysis, 28 (1): 49-75.
- Kurlaender, M. (2006). Choosing Community College: Factors Affecting Latino College Choice. New Directions for Community Colleges, 133: 7-19.
- Kurlaender, M. and J. T. Yun. (2005). Fifty Years after Brown: New Evidence of the Impact of School Racial Composition on Student Outcomes. International Journal of Educational Policy, Research and Practice, 6(1): 51-78.

- Yun, J. and Kurlaender, M. (2004). School Racial Composition and Student Educational Aspirations: A Question of Equity in a Multiracial Society. Journal of Education for Students Placed at Risk 9(2):143-168.
- Shavit,Y., Ayalon, H. and Kurlaender, M. (2002). Schooling Alternatives, Inequality, and Mobility in Israel. Schooling and Social Capital in Diverse Cultures, Research in Sociology of Education, 13:105-124.

View full publication list

Awards and Honors

- Faculty Research Development Grant, University of California-Davis, 2005
- Dissertation Fellowship, Spencer Foundation, 2003-2004
- Dissertation Grant, American Educational Research Association, 2003-2004
- Roy Larsen Research Fellowship. Harvard University Graduate School of Education, 1999-2001.

Associations, Boards & Committees

- Reviewer: *Annual Review of Sociology of Education*, *Review of Educational Research*, *Sociology of Education*, *Journal of Comparative Policy Analysis*, *Educational Researcher*.
- Member, American Educational Research Association, American Sociological Association.
- Program Committee, Economy, Justice & Society, Institute for Governmental Affairs, University of California-Davis.
- Faculty Policy Research Panel, Policy Analysis for California Education-PACE.
- Advisory Board, Chief Justice Warren Institute on Race, Ethnicity and Diversity, UC Berkeley School of Law.
- Faculty Affiliate, New Vision-Higher Education Working Group.
- Faculty Affiliate, The Civil Rights Project, Harvard University.

Courses Taught at UC Davis

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Education

Ph.D. Harvard University
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Biography

Professor David Armor has conducted research and written widely in the fields of education and education reform, school desegregation and related civil rights issues, and military manpower. He has consulted on and testified as an expert witness in more than 40 school desegregation and educational adequacy cases. In 1999 he was appointed to the National Academy of Science Committee on Military Recruiting. He is currently studying the effects of family vs. schools on academic achievement, supported by grants from various organizations.

Areas of Expertise

- Social Statistics
- Social Policies in Education, Family, Civil Rights
- Military Manpower
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Curriculum Vita

1966-72 Asst/Assoc Professor of Sociology, Department of Social Relations, Harvard

1972-73 Visiting Professor, Department of Sociology, UCLA

1973-82 Senior Social Scientist, The Rand Corporation, Santa Monica

1982-85 President, National Policy Analysts

1985-86 Elected member, Los Angeles Board of Education

1986-89 Principle Deputy Assistant Secretary of Defense and Acting Assistant Secretary of Defense, Force Management and Personnel

1992- Joined the Institute of Public Policy, GMU

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Publications & Research

Maximizing Intelligence (Transaction Publishers, 2003)

Attitudes, Aptitudes, and Aspirations of American Youth (contributor; National Academy Press, 2003)

School Desegregation in the 21st Century (Co-editor; Praeger, 2002)

Competition in Education (Pioneer Institute, 1997)

Forced Justice: School Desegregation and the Law (Oxford, 1995)

Current Research: (1) How to reduce the achievement gap; (2) how to improve military recruiting; (3) school vs. family influence on academic achievement

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Arthur L. Coleman is a partner and co-leader of Holland & Knight's education policy team. He provides legal, policy, strategic planning and advocacy services to educators throughout the country. Mr. Coleman's focus is on preventive law. He works to help states, school districts, higher education institutions, private education providers, and associations understand how to structure programs in ways that best serve their educational goals and meet federal and state legal requirements thereby improving education while reducing the risk of litigation or enforcement. He also focuses on federal advocacy before the United States Department of Education and Congress on key education issues. Mr. Coleman deals extensively with issues related to the implementation of the No Child Left Behind Act and federal non-discrimination laws. In particular, he addresses issues such as the development of accountability and assessment systems, the use of high-stakes tests, services for students with disabilities and English language learners and efforts to promote diversity.

Mr. Coleman served as Deputy Assistant Secretary of the U.S. Department of Education's Office for Civil Rights (OCR) from June of 1997 until January of 2000 following his service as Senior Policy Advisor to the Assistant Secretary for Civil Rights from November of 1993 until 1997. Throughout his Department of Education tenure, Mr.Coleman was responsible for the development of federal civil rights legal policy in education. His focus included issues relating to standards reform, test use, students with disabilities, English language learners, affirmative action, sexual and racial harassment, and gender equity in athletics. Mr.Coleman was a partner in the firm of Nelson Mullins Riley and Scarborough in Columbia, South Carolina, where he practiced law from 1984 until 1993. He was also Counsel at Nixon Peabody LLP in Washington, D.C. from 2000 until 2004.

Mr.Coleman received his J.D. from Duke University School of Law (with honors) in 1984 and his B.A. with High Distinction from the University of Virginia in 1981, where he was a Phi Beta Kappa graduate. Mr.Coleman has served as an adjunct professor at two law schools and at one graduate school of education.

Mr.Coleman is a member of the Advisory Board of the Alliance for Excellent Education, the National Association of College and University Attorneys, and the National School Boards Association's Council of School Attorneys. He has spoken widely and published extensively regarding legal and policy issues in education.His most recent publications include:

Co-author, "Diversity in Higher Education: A Strategic Planning and Policy Manual Regarding Federal Law in Admissions, Financial Aid and Outreach," (The College Board, 2004)

Co-author, "Legal Lessons," Bi-monthly column in *Education Assessment Insider* (Aspen Publishers, Inc., 2002-2003)

Testimony, United States Senate Committee on Health, Education, Labor and Pensions, "Title IX of the Education Amendments of 1972: Three Decades of Policy and Enforcement," (June 27, 2002)

Author, "How Accommodating? High-Stakes Testing and Federal Laws that Apply to Students with Disabilities," (National School Boards Association Council of School Attorneys, 2002)

Author, "Diversity in Higher Education: A Continuing Agenda," Chapter in *Rights at Risk: Equality in the Age of Terrorism* (Citizen's Commission on Civil Rights, 2002).

Co-author, "From Desegregation to Diversity: A School District's Self-Assessment Guide on Race, Student Assignment, and the Law," (National School Boards Association Council of Urban Boards of Education, 2002)

Author, "A Framework for Addressing Test Use Issues," in Student Testing and Assessment: Answering the Legal Questions, (National School Boards Association, 2000)

Author, "Education Excellence for All: How Federal Nondiscrimination Laws Promote High Standards Learning and Good Test-Use Practices," The College Board Review (January 2000).

ractice Areas:

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University of Virginia

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Publications and Press Releases:

New Manual Gives Practical and Useful Guidance on Diversity Issues to Higher Education Officials
Tuesday, June 07, 2005

From Admissions to Financial Aid: Federal Principles to Guide the Development of Effective Diversity-Related Policies
Tuesday, May 31, 2005

New Guidebook Will Help Race-Based Student-Aid Programs Avoid Straying From Supreme Court Rulings
Thursday, March 31, 2005

U.S. Department of Education Title IX Athletics Clarification
Wednesday, March 23, 2005

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Stephan Thernstrom is the Winthrop Professor of History at Harvard University where he teaches American social history. He was born in Port Huron, Michigan and educated in the public schools of Port Huron and Battle Creek. He graduated with highest honors from Northwestern University in 1956, and was awarded the Ph.D. by Harvard in 1962. He held appointments as assistant professor at Harvard, associate professor at Brandeis University, and professor at UCLA before returning to Harvard as a professor in 1973. In 1978-1979 he was the Pitt Professor of American History and Institutions at Cambridge University and Professorial Fellow at Trinity College.

He has been awarded fellowships from the John S. Guggenheim Foundation, the American Council of Learned Societies, the Social Science Research Council, and the John M. Olin Foundation, and research grants from the National Endowment for the Humanities, the Mathematical Social Science Board, the American Philosophical Society, the Rockefeller Foundation, and the Smith Richardson Foundation.

[redacted] most recent book, co-authored with Abigail Thernstrom, is *America in Black and White: One Nation. Indivisible*. He is also the editor of the *Harvard Encyclopedia of American Ethnic Groups*, and the author of *Poverty and Progress: Social Mobility in a Nineteenth-Century City; Poverty, Politics, and Planning in the New Boston*; *The Origins of ABCD; The Other Bostonians; Poverty and Progress in the American Metropolis, 1880-1970*; and a two-volume survey, *A History of the American People*.

His books have been awarded the Bancroft Prize in American History, the Harvard University Press Faculty Prize, the Waldo G. Leland Prize of the American Historical Association, and the R. R. Hawkins Award of the Association of American Publishers. He also has written widely in periodicals for general audiences, including *The New Republic*, the *Times Literary Supplement*, *The Public Interest, Commentary, Dissent*, *Partisan Review*, *The Wall Street Journal*, and *The Washington Post*.

Media:

- Mind the Gap, Uncommon Knowledge, Filmed on May 3, 2004.
  Guests: Bernard Gifford, Abigail Thernstrom, and Stephen Thernstrom

Articles:

- Harvard's Crucible *National Review*, April 11, 2005
- 'At Stake Is Academic Freedom' *The New York Sun*, March 17, 2005
- One Drop-Still: A racialist's Census *National Review*, April 17, 2000
- [redacted] Another Bend In 'The Shape Of The River' *The Washington Post*, December 14, 1998

Articles by Abigail & Stephan Thernstrom

- Q and A with Abigail and Stephan Thernstrom Editorial, *The San Diego Union-Tribune*, 11-13-05
- Busting Busing Myths *New York Sun*, 11-1-05
- Have We Overcome? *Commentary,* November 2004
- Deconstructing the urban NAEP results *The Education Gadfly* 1-22-04 (Vol. 4, # 3)
- Left behind *Boston Globe*, 10-26-03
- Admissions Impossible: California without the SAT *National Review*, March 19, 2001
- Even in This Election, It Is Not Class Warfare *Los Angeles Times*, November 27, 2000
- Answer the Census. The Alternative Is Worse. *The Wall Street Journal*, April 6, 2000
- Reflections on *The Shape of the River* UCLA Law Review, June 1999
- Racial Preferences *Commentary*, February 1999
- The Consequences of Colorblindness *The Wall Street Journal*
- Affirmative Action's Unlikely Foes By Steven A. Holmes, *The New York Times*
- In Black and White The NewsHour with Jim Lehrer, Transcript, November 11, 1997

Books

- *No Excuses: Closing the Racial Gap in Learning* (Simon & Schuster, 2003)
- *Beyond the Color Line: New Perspectives on Race and Ethnicity* (Hoover Institution Press, January 2002)
- *America in Black and White: One Nation, Indivisible* (Simon & Schuster, September 1997)
- *History of the American People* (Thomas Learning, March 1989)
- *Poverty and Progress: Social Mobility in a Nineteenth Century City* (Harvard University Press, June 1981)
- *Harvard Encyclopedia of American Ethnic Groups* (Belknap Press, October 1980)

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