## ABSTRACT

This Article argues that racial literacy may be used as a lawful strategy to produce both racially-diverse secondary schools and racially-diverse institutions of higher learning.

First, because meaningful numbers of racially-diverse students in an educational environment have proven to produce strong racial literacy acquisition, public school officials may lawfully maintain those numbers as a narrowly-tailored means of achieving their compelling interest in teaching racial literacy.

Second, institutions of higher learning may lawfully preference admissions applicants who have developed a strong record of racial literacy acquisition because those applicants have experienced racially-diverse educational environments.

Third, students who desire admissions preferences may be incentivized to attend pre-collegiate educational institutions, which by virtue of their racial diversity, are capable of producing high literacy acquisition scores.

# DRAFT

## Satisfying the Constitution and Proposition 209: Lawful Educational Strategies Designed to Teach Racial Literacy to Secondary School Students and to Preference Racially-literate Applicants to Higher Education

**by Michael J. Kaufman***

### I. INTRODUCTION

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

In her *Grutter* Opinion, however, Justice O'Connor rejected the constitutionality of the use of race-conscious admissions to higher education solely as a method of compensating for inequitable educational preparation. According to the Supreme Court, race-conscious admissions policies violate the equal protection clause unless they are part of an individualized consideration of each applicant to determine whether the admission of that applicant might produce the educational benefits of a diverse learning environment.[4] The Court presumes that

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

[2] *See* Holmes and Winter, Fixing the Racial Gap in 25 Years or Less, N.Y. Times, June 29, 2003, at 4:1.

[3] *Id*.

[4] *Compare Grutter* v. *Bollinger*, 539 U.S. 306 (2003) *with Gratz* v. *Bollinger*, 539 U.S. 268 (2003).

race-conscious educational strategies are unconstitutional. The presumption can be rebutted only if the differential treatment of students based on their race is narrowly tailored to achieve a compelling interest.

The Supreme Court also has indicated its interest in scrutinizing voluntary, race-conscious student assignment strategies by public secondary school officials under this framework.[5] The issue presented by these strategies is whether a public school district's consideration of a student's race in deciding to assign that student to a particular educational environment within the district violates the equal protection clause. To the extent that such educational strategies can be characterized as "preferential treatment" based on race in the "operation of public education," they could be scrutinized under Proposition 209 as well.[6]

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[5] *See McFarland* v. *Jefferson County*, 330 F.Supp. 2d 834 (W.D.Ky. 2004) *aff'd, McFarland* v. *Jefferson County Pub. Sch.*, 415 F.3d 513 (6th Cir. 2005); *Parents Involved in Community Schools* v. *Seattle School Dist. No. 1*, 426 F.3d 1162 (9th Cir. 2006), *cert granted, Meredith* v. *Jefferson County Bd. of Educ.*, 05-915 (Sup. Ct. June 5, 2006). After a history of racial segregation, the Jefferson County Public Schools in Kentucky were ordered to maintain an integrated school system. The schools did so for 25 years. After they were released from the federal court decree, the schools chose to attempt to maintain their integrated status through a student assignment plan that considers a student's race together with a "myriad of other factors," including residence, school capacity, program popularity, student choice, and random draw. *See McFarland*, 330 F.Supp. at 841-45.

The Seattle School District No. 1 was never the subject of a judicial decree requiring remedial action to dismantle racially segregated schools. Rather, the District voluntarily sought to avoid the racial segregation in its schools that resulted from school assignment based on proximity from home to school. The District adopted an open choice plan whereby students may apply to any one of the District's ten schools. Each student is asked to rank each of the District's high schools in the order of the student's preference. If there is capacity in the student's preferred school, the District assigns the student to that school. When a school becomes oversubscribed, however, the District gives preferential treatment to students who have siblings already attending the requested school. If the school is still oversubscribed, the District then considers the race of the student together with the racial composition of the school in making its school assignment. If the racial composition of a particular high school significantly (initially by 10 percent or more, and eventually by 15 percent or more) deviates from the demography of the Seattle District's overall student population (which is about 40 percent white and 60 percent nonwhite), and if the assignment of the student would bring the school's demography closer to the Seattle District's overall student demography, then the student would be assigned to that school. After all of the students whose admission to a particular school would bring that school's racial demography closer to the Seattle District's racial demography have been admitted to an oversubscribed school, the District then assigns students to that school based on the distance between their residence and the school. A student who resides as little as one hundredth of a mile closer to the school than another student will be given priority. Finally, if after considering student's choice, facilities capacity, racial demography and proximity, the District still has space for students in an oversubscribed school, assignment to that school is based on lottery. *See Seattle*, 426 F.3d at 1169-70.

[6] Proposition 209 prohibits in pertinent part "preferential treatment" of any individual based on race in the "operation of public education."

This Article suggests an effective and lawful strategy for enhancing racial diversity in both public school districts and in institutions of higher learning. The suggested strategy is built upon Justice O'Connor's recognition that racial diversity in higher education is inextricably tied to the quality and diversity of pre-collegiate educational institutions. The linchpin of this strategy is a learning outcome which can be characterized as "racial literacy." The concept of racial literacy includes: an understanding of the biological and social components of race itself; an understanding of the history of race throughout the world and in America; an understanding of the current and projected racial composition of the world, the country, the state, the county, the school district and the school; an understanding of the relationship *vel non* between race and politics, law, society, geography, language, culture, religion, family and education; an understanding of the connection *vel non* between race and perceptions of the world and one's self, an understanding of the racial prejudices and biases that may exist in each student; an understanding of the strategies that may be used to overcome such prejudices and biases; and an understanding of the value of racial differences and racial tolerance.[7]

Racial literacy is hardly a novel educational objective. John Dewey concluded that encouraging students to understand and confront racial differences is a particularly critical function to be performed by education in the American Democracy.[8] Educational philosophers and practitioners have long recognized that because of the pervasiveness of racial issues throughout the curriculum, students must receive an educational foundation in racial literacy.[9] Moreover, local public school districts, under direction from their states, commonly include

[7] In From Racial Liberalism to Racial Literacy, 91 J. Am. His. (June 2004), Lani Guinier has defined "racial literacy" in the different context of developing a sophisticated understanding and reaction to race in America. She writes that "racial literacy is epiphenomenal . . . is contextual rather than universal . . .depends on the engagement between action and thought . . . is about learning rather than knowing . . . is an interactive process in which race functions as a tool of diagnosis, feedback and assessment."

[8] Dewey, Education in Democracy, reprinted in Cahn, Classic and Contemporary Readings in the Philosophy of Education (1997) ("Cahn"), at 288-93.

[9] Postman, The End of Education: Redefining the Value of School (1995).

instruction in race as a required component of their curriculum and instructional practices.[10] The Jefferson County and Seattle School Districts, for example, have reached the educational judgment that racial literacy is a particularly important objective for a secondary school in a democratic community.[11]

In Section II, this Article shows that public school districts can engage in race-conscious school assignment even under the Supreme Court's current strict equal protection scrutiny. A district may assign a meaningful number of racially diverse students to its schools in order to achieve the compelling interest in producing the educational benefits of racial literacy. The Supreme Court has recognized that states have a compelling interest in encouraging their educational institutions to provide "educational benefits" to their citizens.[12] The Court also has recognized that a school's use of student enrollment to produce a meaningful number of diverse students within an educational institution can be narrowly tailored to achieve the compelling governmental interest in producing these educational benefits. Many public school districts, including Seattle and Jefferson County, have determined that their students are benefited by educational strategies designed to teach about race.[13] They have reached the educational judgment that their district's curriculum and instructional practices should be designed to help their students learn "racial literacy."

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[10] *See* Bruce M. Mitchell & Robert E. Salsbury, Multicultural Education in the U.S.: A Guide to Policies and Programs in the 50 States *passim* (2000) (Citing states that have racial literacy programs, persons overseeing such programs, funding for programs, or other similar equity programs: Connecticut, Delaware, Florida, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, New Jersey, New Mexico, New York, North Carolina, Washington, Wisconsin, and Wyoming). Numerous other states, although lacking a specific program, stress multi-racial learning within the classrooms through efforts such as teacher education and local decision making. *Id.*

[11] *See Parents Involved in Community Schools* v. *Seattle School Dist. No. 1*, 426 F.3d 1162 (9th Cir. 2006); *McFarland* v. *Jefferson County Public Schools*, 330 F. Supp. 2d 834 (W.D. Ky. 2004), aff'd, 416 F.3d 513 (6th Cir. 2005).

[12] *See Grutter* v. *Bollinger* 539 U.S. 306 (2003); *Gratz* v. *Bollinger*, 539 U.S. 268 (2003).

[13] See note 10, supra.

Once it is conceded that teaching racial literacy is a compelling interest, the only remaining question for equal protection analysis is whether a district's educational strategies and instructional practices sufficiently serve that interest. Where race is at issue, those strategies and practices must be narrowly tailored to achieve the compelling interest in teaching racial literacy. There are many approaches to teaching generally, and to teaching racial literacy in particular. Many educational professionals, however, have determined that an effective method of teaching racial literacy requires students to interact with peers from a different racial background.[14] Secondary school educational professionals understand that racial literacy cannot be taught through the monolithic delivery of information to passive students.[15] Rather, teaching racial literacy requires prompting students to confront the personal and political nature of race and racism in their educational environment.[16] From an educational perspective, the use of student assignment to maintain meaningful numbers of racially diverse students in a secondary school is precisely tailored to achieve the compelling interest in teaching racial literacy.[17] This Article

[14] *See, e.g.* The Impact of Racial and Ethnic Diversity of Educational Outcomes, Orfield, Diversity Challenged, The Civil Rights Project, Harvard Un. (Jan. 2002); Kohn, What to Look for in a Classroom, (2002) (concluding that genuine character or moral education would require students to practice perspective taking with diverse students in their class).

[15] *See*, e.g. Jane Bolgatz, Developing Racial Literacy: What Happens When Students and Teachers Talk About Race, 2004. diversity-conference.com/ProposalSystem/Presentations/P000465.

[16] Id. *See also* Kohn, What to Look for in a Classroom (2002).

[17] A vast amount of social science research has been generated indicating the educational benefits of a racially diverse educational environment generally, and the benefits of such an environment to the production of racial literacy. *See, e.g.*, Robert E. Slavin & Eileen Oickle, *Effects of Cooperative Learning Teams on Student Achievement and Race Relations: Treatment by Race Interactions*, 54 Sociology of Education 178 (1981) (finding that both white and African American students gained academically from cooperative diverse learning environments); Robert Slavin, *Cooperative Learning and Intergroup Relations, in* Handbook of Research on Multicultural Education 633 (James A. Banks ed. 2001) (Offering an overview of intergroup research studies and concluding that students in ethnically diverse education settings receive long-lasting social, cross-ethnic friendships and improved student achievement); Amy Stuart Wells, et al., How Desegregation Changed Us: The Effects of Racially Mixed Schools on Students and Society, (forthcoming 2005) (Reporting positive overall societal results from integration of schools by studying a particular class from 1980, including students who are less racially prejudiced and more open to people of different backgrounds); Thomas F. Pettigrew, *Intergroup Contact: Theory, Research, and New Perspectives*, *in* Handbook of Research on Multicultural Education 770 (2nd ed. 2004) (arguing that proper education prepares students better for democratic citizenship); Patricia Gurin, et al, *The Benefits of Diversity in Education for Democratic Citizenship*, 60 Journal of Social Issues, 32 (2004) (presenting studies that examine and conclude that diversity in student bodies, although altered by personal experiences with the diverse

groups, generally create students that are better suited for "democratic citizenship"); Amy Guttman, *Unity and Diversity in Democratic Multicultural Education, in* Diversity and Citizenship Education 71 (2004) (presenting that multicultural education furthers democratic ideals through teaching tolerance and role that cultural differences have had in the shaping of society); Walter G. Stephan & Cooke White Stephan, *Intergroup Relations in Multicultural Education Programs, in* Handbook of Research on Multicultural Education 782 (2nd ed. 2004) ( affirming that one goal of multicultural education is to improve relations among ethnic groups and reviewing the processes that lead to such change); Janet Ward Schofield, *Fostering Positive Intergroup Relations in Schools, in* Handbook of Research on Multicultural Education 799 (2nd ed. 2004) (agreeing that multicultural education can improve ethnic relations among students, primarily because young students have their first experiences with others from different ethnic backgrounds in schools, and outlining policies to effectively foster those relationships); James A Banks, Democratic Citizenship Education in Multicultural Societies, *in* Diversity and Citizenship Education 10 (James A. Banks, ed. 2004) (arguing that proper education can prepare students better for democratic citizenship); Derek Black, Comment, *The Case for the New Compelling Government Interest: Improving Educational Outcomes*, 80 N.C. L.Rev. 923, 944-47 (2002) (noting the vast amount of research affirming the positive effects of diverse educational environments); Genva Gay, *curriculum Theory and Multicultural Education, in* Handbook of Research on Multicultural Education 32-33 (2nd ed. 2004) ( reviewing scholarship on the value of multicultural education and defining multicultural education as an idea that recognizes the importance of ethnic and cultural diversity in educational settings); Gloria Ladson-Billings, *Culture Versus Citizenship, in* Diversity and Citizenship Education 122 (James A. Banks, ed. 2004) (finding that part of the educator's responsibility is to teach civic and democratic ideals).

A host of literature has begun to emerge on the value of multicultural education in the international forum as well. *See, e.g.*, Stephen Castles, *Migration, Citizenship, and Education, in* Diversity and Citizenship Education 32-42 (James A. Banks, ed. 2004) (reviewing different strategies immigrant countries have implemented to further multicultural ideals in education); Peter Figueroa, *Diversity and Citizenship Education in England, in* Diversity and Citizenship Education 236 (James A. Banks, ed. 2004) (noting the new curriculum in England to further citizenship education through a multicultural approach.) Several social science studies have generally studied the educational benefits of racially-diverse schools. *See, e.g.*, Janet Wart Schofield, *Review of Research on School Desegregation's Impact on Elementary and Secondary School Students, in* Handbook of Research on Multicultural Education 597 (James A. Banks, ed. 2004) (providing a comprehensive survey of the major social and statistical studies on desegregation and the impact on African American students, Hispanic students, and white students from 1975 through 1991 and concluding that the positive effects of desegregation include, *inter alia*, improved reading skills for African American young and higher college graduation rates leading to higher employment income); Amy Stuart Wells & Robert L. Crain, *Perpetuation Theory and the Long-term Effects of School Desegregation*, 64 Review of Educational Research, 531, 532, 540, 546, 552 (1994) (Reviewing twenty-one studies of the impacts of desegregation and integrated learning environments, concluding that African American students attending desegregated schools set future employment goals higher than in segregated school, a higher ratio of African American students from desegregated schools attain higher education, African American students from desegregated schools are more likely to be employed in white-collar/professional careers); Eric A. Hanushek, et al., *New Evidence About* Brown v. Board of Education: *The Complex Effects of School Racial Composition on Achievement* 23-24 (Nat'l Bureau of Econ. Research, Working Paper No. W8741, 2004) (studying academic achievement and concluding that African American achievement, particularly in mathematics, is improved through diverse learning); Roslyn Arlin Mickelson, *The Academic Consequences of Desegregation and Segregation: Evidence from the Charlotte-Mecklenburg Schools*, 81 N.C. L.Rev. 1513, 1560 (2003) (concluding that all students benefit from diverse schools, African American identified schools have negative effects on all students, and even desegregated schools may have disproportionate education based on race due to other social and academic factors); Maureen Hallinan, Diversity Effects on Student Outcomes: Social Science Evidence, 59 Ohio St. L.J. 733, 753 (1998) (providing an overview of the social science literature regarding diversity and desegregation, the resulting impact on students, and finding that the reliable findings are typically positive); Jomills Henry Braddock II & Tamela McMulty Eitle, *The Effects of School Desegregation, in* Handbook of Research on Multicultural Education 828 (2nd ed. 2004) (providing an overview of the social science research regarding the effects of desegregation and concluding that modest, but significant, improvements exist for African American students); The Civil Rights Project, The Impact of Racial and Ethnic Diversity on Educational Outcomes; Cambridge, MA School District 12, http://www.civilrightsproject.harvard.edu/research/diversity/cambridve_diversity.pdf (last visited Oct. 10, 2006); The Civil Rights Project, The Impact of Racial and Ethnic Diversity on Educational Outcomes: Lynn, MA School

shows, therefore, that a school district's use of student assignment to create a meaningful number of diverse students in a school in order to serve its compelling interest in teaching racial literacy should survive any credible constitutional challenge.

In Section III, this Article then demonstrates that race-neutral strategies designed to achieve racially-diverse educational environments are not necessarily tailored to produce the precise educational benefit of racial literacy. Accordingly, these strategies need not be pursued by a school district as an alternative to using race-conscious decisions which in fact are narrowly tailored to achieve this particular, compelling educational objective. At the same time, this Article suggests that it is illogical to suppose that these race-neutral strategies will be as effective as decisions designed to produce the educational benefit of racial literacy through the mechanism of maintaining a racially-diverse school environment.

Finally, in Section IV, this Article shows that an institution of higher learning that values racial literacy in its enrolled students may, and should, preference applicants who have acquired a strong foundation in such literacy by virtue of having attended a racially diverse secondary school. These students would receive preferential treatment not because of their race, but because of their high Racial Literacy Acquisition ("RLA") score. A college or university's preferential treatment of applicants who have a relatively high RLA would be an effective strategy for increasing racial diversity in that institution. That strategy would be compatible with both the Constitution and Proposition 209.

## II. THE CONSTITUTIONALITY AND EFFECTIVENESS OF RACE-CONSCIOUS EDUCATIONAL STRATEGIES BY PUBLIC SCHOOL DISTRICTS DESIGNED TO TEACH RACIAL LITERACY

### A. The State Has a Compelling Interest in Teaching Racial Literacy in its Secondary Schools

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District 11, http://www.civilrightsproject.harvard.edu/research/diversity/LynnReport.pdf (last visited Oct. 10, 2006).

Under the equal protection clause, race-conscious decisions are permissible only where the government carries the burden of proving that these decisions are "narrowly tailored to further compelling governmental interests."[18] A government action will not survive strict scrutiny unless it is animated by a "compelling state interest."[19] Because strict scrutiny requires the Court to evaluate the "fit" between the government's means and its ends,[20] it is critical to identify precisely the governmental interests to which the government's use of race must fit.[21]

The Supreme Court thus far has recognized two compelling governmental interests that have justified race-conscious decision-making in the public education context. First, the Court has allowed racial classifications to remedy past racial imbalances in schools resulting from past *de jure* segregation, or proven acts of *de facto* segregation.[22] This interest, however, cannot by

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[18] *See Johnson v. California*, 125 S. Ct. 1141, 1146 (2005); *Grutter*,539 U.S. at 326; *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 226-27 (1995). The Supreme Court in *Johnson v. California*, 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 "[a]bsent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining . . . what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics" (internal quotation marks and citation omitted)). *Johnson* is not entirely analogous to the voluntary integration strategies because the CDC segregated inmates on the basis of race, whereas the District's use of race is aimed at achieving the opposite result — attaining and maintaining integrated schools. Nevertheless, the First, Sixth and Ninth Circuits — the only circuits to rule, post-*Grutter* and *Gratz*, on the constitutionality of a voluntary plan designed to achieve the benefits of racial diversity in the public secondary school setting — all have concluded that the Plan must be reviewed under strict scrutiny. *See Comfort v. Lynn School Committee*, 418 F.3d 1, 6 (1st Cir. 2005) (en banc); *McFarland v. Jefferson County Public Schools*, 330 F. Supp 2d 834 (W.D.Ky. 2004), aff'd, *McFarland v. Jefferson County Public Schools*, 416 F.3d 513, 514 (6th Cir. 2005) (per curiam).

The Fourteenth Amendment provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." The Amendment's prohibition extends to "any person" within the state. Where federal or state governments classify a person according to race, the Supreme Court reviews such governmental action under the most "detailed judicial inquiry." The Court recently has made clear that: "*[A]ll* racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized." Johnson, 125 S.Ct. at 1146. 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." Id. The Court requires such a demanding inquiry "to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool." Accordingly, all racial classifications by the government, regardless of purported motivation, are "inherently suspect," and "presumptively invalid." Id.

[19] *See id*. at 325, 327.

[20] *Wygantv. Jackson Bd. of Educ.*, 476 U.S. 267, 280 n.6 (1986).

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

[22] *Freeman* v. *Pitts*, 503 U.S. 467, 494 (1992).

itself justify racial classifications where a public school district engages in voluntary race-conscious decision-making.[23] Second, the Court has allowed undergraduate and graduate universities to consider race in deciding whether to admit a student in order to achieve the compelling governmental interest in producing the educational benefits of student body diversity.[24] The Court has struck down every other interest claimed to be compelling enough to justify race-based decision-making.[25] Moreover, the Court has declared that racial balance is not by itself a compelling interest to be achieved "for its own sake," and that "outright racial balancing . . . is patently unconstitutional."[26]

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

In *Grutter*, the Supreme Court recognized that although the creation of a racially diverse student population may not by itself be a compelling governmental interest, the promotion of specific educational benefits that flow from such a diverse student population is a compelling interest.[27] The Court identified no less than thirteen "substantial" governmental benefits that flow from a diverse student population: (1) overarching educational benefits; (2) an increase in the "robust" exchange of ideas; (3) cross-racial understanding; (4) breaking down racial stereotypes; (5) livelier, more spirited, enlightening and interesting classroom discussions; (6) the promotion of learning "outcomes"; (7) better preparation of students to work and interact in

[23] *See Freeman*, 503 U.S. at 494.
[24] *Grutter*, 539 U.S. at 328; *Gratz*, 539 U.S. at 268-69.
[25] *See Shaw v. Hunt*, 517 U.S. 899, 909-12 (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 (1989) (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 (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").
[26] *See, e.g.*, *Grutter*, 539 U.S. at 330. The U.S. Supreme Court frequently has declared that "racial balancing" violates the Equal Protection Clause. *See Freeman*, 503 U.S. at 494.
[27] *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").

an "increasingly diverse" society and workforce; (8) better preparation as professionals in an "increasingly global marketplace"; (9) helping the military to fulfill its very mission of "national security"; (10) facilitating the "diffusion of knowledge and opportunity through public institutions of higher education" to be accessible to all individuals and thereby sustaining our "political and cultural heritage"; (11) fostering the effective participation by members of all racial and ethnic groups which is vital to becoming one nation; (12) supporting the training in law school for diverse national leaders and thereby cultivating leaders with legitimacy; and (13) developing attorneys of diverse races and ethnicities who will be able, in turn, to help all members of a "heterogeneous society" succeed.[28]

These substantial benefits include racial literacy in the form of cross-racial understanding, breaking down racial stereotypes, learning outcomes regarding race, preparation to operate in a "diverse" society, and the "diffusion of knowledge" about racial diversity.[29] In evaluating the relevance of diversity to educational objectives, the Court focused principally on the "learning outcomes" that a diverse student body provides.[30] Those learning outcomes are derived not only from having diverse viewpoints represented in the "robust exchange of ideas," [31] but also from the presence of racially diverse students in the classroom as a method of challenging racial stereotypes.[32] The Court deferred to the law school's educational judgment not only in determining that diversity would produce these educational benefits.[33]

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[28] *Id. See also* Kaufman, Education Law, Policy and Practice: Cases and Materials, 527 (2005).
[29] *Id.*
[30] For an outstanding empirical analysis of the achievement gains produced by a racially-diverse educational environment, *see* R. Mickelson, The Academic Consequences of Desegregation and Segregation: Evidence from the Charlotte-Mecklenburg Schools, 81 N.Car. L. Rev., 1513, 1517, 1546 (2003) ("desegregated education leads to higher achievement"). See also note 17, supra.
[31] *Id*. at 329-30.
[32] *Id*. at 330, 333.
[33] *Id*. at 328-33.
The Court also heeded the judgment of amici curiae — including educators, business leaders and the military — that the educational benefits that flow from diversity constitute a compelling interest. *Grutter*, 539 U.S.

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

In attempting to fit within the compelling interest identified in *Grutter* and *Gratz*, public school districts have identified specific educational benefits produced by a diverse secondary school population. These benefits include the acquisition of racial literacy. For example, in Seattle District, 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 . . . believes that providing a diverse learning environment is educationally beneficial for all students.

Similarly, the Jefferson County School's objective is to give to "all students the benefits of an education in a racially integrated school," including: (1) a better academic education for all students; and (2) better appreciation of our political and cultural heritage for all students.

As the Supreme Court's strong line of public school decisions recognizes, these interests in the educational benefits of a diverse secondary school student population are as compelling as those identified in *Grutter*. The Supreme Court in *Grutter* noted the importance of higher

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at 330 ("The Law School's claim of a compelling interest is further bolstered by its *amici*, who point to the educational benefits that flow from student body diversity."); *see also id*. ("These benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints."); *id*. at 331 ("[H]igh-ranking retired officers and civilian leaders of the United States military assert that, '[b]ased on [their] decades of experience,' a 'highly qualified, racially diverse officer corps . . . is essential to the military's ability to fulfill its principle mission to provide national security.' "). See also note 17, supra.

education in "preparing students for work and citizenship."[34] Public secondary schools have an even more significant role in this preparation. As the Supreme Court explained in *Plyler v. Doe*, "[w]e have recognized the public schools as a most vital civic institution for the preservation of a democratic system of government, and as the primary vehicle for transmitting the values on which our society rests."[35] The Court further recognized that public education perpetuates the political system and the economic and social advancement of citizens and that "education has a fundamental role in maintaining the fabric of our society".[36] In *Bethel Sch. Dist. No. 403 v. Fraser*,[37] as well, the Court declared that the inculcation of civic values is "truly the work of the schools." In *Ambach v. Norwick*,[38] the Court likewise observed that public schools transmit to children "the values on which our society rests," including "fundamental values necessary to the maintenance of a democratic political system." In *Brown v. Bd. of Educ.*,[39] of course, the Court declared: "[Education] is required in the performance of our most basic public responsibilities . . . . It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." [40]

Moreover, for the significant number of public high school graduates who do not attend college,[41] the public elementary and secondary school experience will be their only opportunity to obtain the educational benefits of a diverse learning environment. As the district court found

[34] 539 U.S. at 331.
[35] 457 U.S. 202, 221 (1982) (internal quotation marks and citations omitted).
[36] *Id.*
[37] 478 U.S. 675, 683 (1986).
[38] 441 U.S. 68, 76-77 (1979).
[39] 347 U.S. 483, 493 (1954).
[40] 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).
[41] For instance, 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. *Seattle*, 426 F.3d at 1162.

in *McFarland*, these "benefits of racial tolerance and understanding are equally as important and laudable in public elementary and secondary education as in higher education."[42]

Not surprisingly, the Supreme Court itself has relied upon elementary and secondary school cases to reach its judgment that the benefits of racial diversity in an educational institution are compelling. In these cases, the Supreme Court specifically proclaimed "the public schools . . . a most vital civic institution for the preservation of a democratic system of government and . . . the primary vehicle for transmitting the values on which our society rests."[43] It was in the context of public secondary schools that the Court concluded that the "process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order."[44] The Court also has recognized that the educational benefits of a racially diverse school extend to all students in that school: "[a]ttending an ethnically diverse school may help [in] preparing

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[42] *McFarland*, 330 F. Supp. 2d at 853. The First Circuit, for example, concluded that "there [is] significant . . . evidence supporting the view that the benefits to be derived from a racially diverse educational milieu are *more compelling* at younger ages."

[43] *Plyler v. Doe*, 457 U.S. 202, 221 (1982).

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

> It is difficult to deny the importance of teaching children, during their formative years, how to deal respectfully and collegially with peers of different races. Whether one would call this a compelling interest or merely a highly rational one strikes me as little more than semantics. The reality is that attitudes and patterns of interaction are developed early in life and, in a multicultural and diverse society such as ours, there is great value in developing the ability to interact successfully with individuals who are very different from oneself. It is important for the individual student, to be sure, but it is also vitally important for us as a society.
>
> It may be true, as the dissent suggests, that students are influenced far more by their experiences in the home, church and social clubs they attend outside of school. But this does not negate the fact that time spent in school and on school-related activities, which may take up as much as half of a student's waking hours, nevertheless has a significant impact on that student's development. The school environment forces students both to compete and cooperate in the classroom, as well as during extracurricular activities ranging from football to forensics. Schoolmates often become friends, rivals and romantic partners; learning to deal with individuals of different races in these various capacities cannot help but foster the live-and-let-live spirit that is the essence of the American experience. I believe this is a rational objective for an educational system—every bit as rational as teaching the three Rs, advanced chemistry or driver's education. Schools, after all, don't simply prepare students for further education, though they certainly can and should do that; good schools prepare students for life, by instilling skills and attitudes that will serve them long after their first year of college. *Seattle*, 426 F.3d at 1171.

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."[45]

### (3). The Professional Educational Judgment that Producing Racial Literacy is a Compelling Educational Objective Should Survive Judicial Scrutiny

The Supreme Court also has recognized that the federal courts are ill-equipped to second-guess the educational judgment of local school officials. The Supreme Court has repeatedly recognized that "[n]o single tradition in public education is more deeply rooted than local control over the operation of schools."[46] Because "the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges,"[47] courts have deferred to the professional judgment of local school districts regarding matters of educational policy. The Supreme Court, for example, has concluded:

> [E]ducational policy . . . is [an] area in which this Court's lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels. . . . [T]he judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions.[48]

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[45] *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 473-73 (1982). Because racially diverse schools, as the Supreme Court recognized in *Grutter*, promote these "learning outcomes," racially diverse student enrollments also serve the vital local governmental interest of promoting community support for and involvement in local public schools:

> *The general quality of the schools . . . tends to decline when substantial elements of the community abandon them.* The effects of resegregation can be even broader, reaching beyond the quality of education in the inner city to the life of the entire community. When the more economically advantaged citizens leave the city, the tax base shrinks and all city services suffer. And students whose parents elect to live beyond the reach of the [local school district] lose the benefits of attending ethnically diverse schools, an experience that prepares a child for citizenship in our pluralistic society.

[46] *Milliken v. Bradley*, 428 U.S. 717, 741 (1974); *see, e.g.*, *Dayton v. Brinkman*, 433 U.S. 406, 410 (1977) ("[O]ur cases have . . . firmly recognized that local autonomy of school districts is a vital national tradition.").

[47] *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 283 (1988).

[48] *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42-43 (1973).

According to the Supreme Court, "local control over the educational process affords citizens an opportunity to participate in decision-making, permits the structuring of school programs to fit local needs, and encourages 'experimentation, innovation, and a healthy competition for educational excellence.'"[49] The educational judgment of local school professionals is uniquely entitled to judicial deference. These judgments are: (1) the product of "specialized knowledge" which the judiciary lacks; (2) the product of local governmental agencies accountable to their own local constituencies; (3) the product of a process that benefits from local input and that tailors educational strategies to local circumstances; and (4) the product of data derived from strategies employed by other local educational agencies also allowed to experiment.

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

A public school districts' use of race-conscious decision-making must be narrowly tailored to achieve its compelling interests in the educational benefits of a diverse student population.[50] The attempt by public school districts to demonstrate that their use of race in student assignment is narrowly tailored to achieve their compelling interests is typically framed by the Court's narrow tailoring analysis in *Grutter* and *Gratz*.[51]

In its analysis, the Supreme Court identified hallmarks of a narrowly tailored race-conscious admissions plan, including: (1) individualized consideration of applicants; (2) the absence of quotas; (3) that no member of any racial group was unduly harmed; and (4) that the

[49] *Milliken*, 418 U.S. at 742 (quoting *Rodriguez*, 411 U.S. at 50).
[50] *See Grutter*, 539 U.S. at 333.
[51] *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 into account") (internal quotation marks omitted).

program had a sunset provision or some other end point.[52] As shown in this Section, none of these considerations undermines the constitutionality of a school district's decision to assign a meaningful number of diverse students to a particular educational environment in order to achieve the precise compelling interest of producing racial literacy. The final hallmark of individualized consideration is the educational institution's inability to accomplish its compelling educational interests by race-neutral alternatives. As shown in Section IV, however, the constitutionality of a school district's strategies cannot be undermined by its failure to pursue such alternative race-neutral strategies where they are not tailored to achieve the district's compelling interest.

1. *Individualized Consideration*

*Grutter* emphasized the importance of the individualized consideration of each applicant, declaring that in the context of a race-conscious university admissions program, such consideration

> must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application. T*he importance of this individualized consideration in the context of a race-conscious admissions program is paramount*.[53]

Public school districts, however, generally do not engage in an individualized consideration of each applicant's characteristics and qualifications.[54] Indeed, the Seattle District conceded its lack of individual assessment by claiming that its interest in encouraging racially diverse schools required that its school assignment plan ultimately must "focus on the race of its

[52] *Smith v. Univ. of Washington*, 392 F.3d 367, 373 (9th Cir. 2004); C*omfort*, 418 F.3d at 17 (characterizing *Grutter* as outlining a "four-part narrow tailoring inquiry").
[53] *Id.* at 337 (emphasis added).
[54] *See Grutter*, 539 U.S. at 337.

students."[55] Rather than address the school districts' lack of individualized assessment, proponents of race-conscious student assignment plans, and the courts that have accepted them, therefore, have simply concluded that "if a noncompetitive, voluntary student assignment plan is otherwise narrowly tailored, a district need not consider each student in a individualized, holistic manner."[56]

A public school district's lack of individualized assessment cannot render its plan unconstitutional where its precise compelling interests are not served by any such individualized assessment of inapposite characteristics. The Supreme Court's requirement of individualized, holistic review in *Grutter* may be relevant to the compelling interest advanced by a law school in

[55] *Parents*, 426 F.3d at 1166.

[56] *See e.g.*, *Seattle*, 426 F.3d at 1173.

A school district need not consider each student in a holistic matter, they argue, because students do not compete for admission to seats in a school district. In the context of university admissions, where applicants compete for a limited number of spaces in a class, the Court in *Grutter* and *Gratz* focused its inquiry on the role race may play in judging an applicant's qualifications. The Court's underlying concern was that the "admissions policy is flexible enough to consider all pertinent elements of diversity in light of the particular *qualifications* of each applicant, and to place them on the *same footing* for consideration . . . ." The focus on fair competition was driven by the desire to avoid the stigma that may attach if some individuals are viewed as unable to achieve success without special protection.

This focus on an applicant's qualifications, including an applicant's test scores, grades, artistic or athletic ability, musical talent or life experience, however, is arguably not applicable where there is no competition or consideration of qualifications at issue. All high school students must and will be placed in a public school. 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 public high schools in a state is entitled to an assignment to one of the state's public schools. In Seattle or Louisville, for instance, no assignment to any of the District's high schools is linked to a student's "qualifications." Thus, no stigma results from any particular school assignment. Accordingly, the danger that may be present in the university context of substituting racial preference for qualification-based competition is absent when a public school district assigns students to one of its many schools.

Parents objecting in litigation to this program, however, argue that it seems to be precisely what *Grutter* warned against, and what *Gratz* held unconstitutional: a mechanical, predetermined policy "of automatic acceptance or rejection based on a[ ] single 'soft' variable," that being the student's skin color. First, objectors argue that the racial tiebreaker's overbroad classification of students as "white" or "nonwhite" runs counter to the required individualized consideration of each applicant. Second, opponents argue that, although public school districts do not exclude any student from a public education by operation of the racial tiebreaker, and there is no competition for admission to any of the district's schools, there is a competitive market for school attendance zones. Third, opponents argue that individualized assessment by public school districts would not be impractical.

fostering viewpoint diversity, but it is not relevant to a public secondary school's compelling interest in producing the educational benefits of racial literacy.[57]

A public secondary school district may well conclude that bringing "different viewpoints and experiences to classroom discussions" will produce educational benefits.[58] In the law school setting, viewpoint diversity fosters the "robust exchange of ideas."[59] In the high school context, as well, the educational benefits of class interactions are enhanced by viewpoint diversity. As the Supreme Court recognized in *Tinker*, "The [high school] classroom is peculiarly the marketplace of ideas. The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues."[60]

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

[57] *See Grutter*, 539 U.S. at 337. The Supreme Court noted that the law school did not "limit in any way . . . the broad range of qualities and experiences that may be considered valuable contributions to student body diversity." To this end, the law school's policy made clear that "[t]here are many possible bases for diversity admissions, and provide[d] examples of admittees who have lived or traveled widely abroad, are fluent in several languages, have overcome personal adversity and family hardship, have exceptional records of extensive community service, and had successful careers in other fields." 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."

[58] *See* note 10, supra.

[59] *Grutter*, 539 U.S. at 324; *see Comfort*, 418 F.3d at 16 ("[L]ively classroom discussion is a more central form of learning in law schools (which prefer the Socratic method) than in a K-12 setting.").

[60] *Tinker v. Des Moines Independent Community Sch. Dist.*, 393 U.S. 503, 512 (1969) (internal quotation marks omitted).

of teaching racial literacy.[61] For example, Eric Benson, the principal of Nathan Hale High School, one of the Seattle 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."

The educational judgment that racial literacy is best taught in a racially diverse school environment is not only reasonable; it is virtually undisputed. According to the Supreme Court, school districts, given their "broad power to formulate and implement educational policy," could "well conclude . . . that in order to prepare students to live in a pluralistic society[,] each school should have a prescribed ration of [African-American] to white students reflecting the proportion for the district as a whole."[62] If a school district has a compelling interest in fostering the educational benefits of a racially diverse educational environment, then a plan precisely designed to achieve that environment certainly meets any credible standard of narrowly tailored.[63]

*2. Absence of Quotas*

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[61] *See Comfort*, 418 F.3d at 18 (holding that when racial diversity is the compelling interest — "[t]he only relevant criterion, then, is a student's race; individualized consideration beyond that is irrelevant to the compelling interest"); *Brewer v. W. Irondequoit Cent. Sch. Dist.*, 212 F.3d 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."). *See also* Sapp, Cooperative Learning: A Foundation for Race Dialogue, 30 Teaching Tolerance (Fall 2006), www.tolerance.org.teach/.magazine/features; Kagan, The Power to Transform Race Relations, 30 Teaching Tolerance (Fall 2006); Grant, Teaching and Learning About Racial Issues in the Modern Classroom (2003). See also notes 10 and 17, supra.

[62] *Swann v. Charlotte-Mecklenburg Bd. Of Educ.*, 402 U.S. 1, 16 (1971). *See also Deal v. Cincinnati Bd. of Educ.*, 369 F.2d 55, 61 (6th Cir. 1996). ("[I]t is not unconstitutional for [boards of education] to consider racial factors and take steps to relieve racial imbalance if in their sound judgment such action is the best method of avoiding educational harm.") Rather, "[a]n integrated school experience is too important to the nation's children for this Court to jeopardize the opportunity for such an experience by constructing obstacles that would discourage school officials from voluntarily undertaking creative programs." *Higgins v. Bd. of Educ. Of City of Grand Rapids,508 F.2d 779, 795 (6th Cit. 1974).*

[63] 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 (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.")

The second narrow-tailoring factor addresses the use of quotas based upon race. [64]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."[65] School districts, including the Seattle District and Jefferson County, commonly attempt to achieve a racially diverse school environment by approximating the racial diversity that exists in the district as a whole.[66]

The districts typically argue that no quota exists because the racial tiebreaker "does not set aside a fixed number of slots for nonwhite or white students," nor is their goal always satisfied.[67] Yet, school districts arguably create a quota whenever they establish a predetermined, preferred ratio of white and nonwhite students. In *Bakke*, the medical school argued that it did not operate a quota in its admissions system because it did not always fill the preselected seats; thus, its admissions system only had a "goal." Justice Powell rejected that argument, stating that regardless of whether the preselected seats were a "quota" or a "goal," 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.[68]

*Grutter* recognized, however, that in order to achieve its compelling interest in obtaining the educational benefits from a diverse post-secondary school environment, a university could strive to enroll a "critical mass" of nonwhite students. The Court stressed that the University

[64] *Grutter*, 539 U.S. at 334.
[65] *Id.* at 335 (internal quotation marks and citations omitted).
[66] For example, a particular Seattle District school is oversubscribed and "integration positive"—*i.e.*, the white or nonwhite student body of the school deviates by plus or minus 10% or 15% (depending on the school year)[66] of the preferred 40% white/60% nonwhite ratio—the District assigns students to a particular school whose presence will move the racial composition of that school closer to the racial composition of the entire district.
[67] *See, e.g.*, *Parents*, 426 F.3d at 1170.
[68] *Bakke*, 438 U.S. at 289 (Powell, J.).

could determine what number of nonwhite admittees would be "meaningful" enough to achieve its desired educational benefit. The Court defined a critical mass as "meaningful numbers" and "meaningful representation" precisely because it recognized that the University could properly determine that some degree of racial balance would be necessary to achieve the benefits of a diverse educational environment.[69] Hence, although the law school's plan did not seek to admit a set number or percentage of minority students, the law school would consult "daily reports" that kept track of the racial composition of the incoming class.[70] The Supreme Court held that this attention to numbers did not transform the law school plan into a quota, but instead demonstrated that the law school sought to enroll a critical mass of minority students in order "to realize the educational benefits of a diverse student body."[71]

A public school district's decision to assign a student to a particular school or classroom in order to realize these benefits is neither driven by a racial quota nor the effort to achieve racial balance for its own sake. To the contrary, the school seeks to assign meaningful numbers of diverse students in its educational institution in order to realize its compelling educational interests.[72] A school district that seeks to maintain a relatively stable critical mass of white and

[69] 539 U.S. at 318.
[70] *Id*. at 318.
[71] *Id*.
[72] Thus, the Court in *Seattle* concluded: "Although the dissent contends that the "tiebreaker aims for a rigid, predetermined ratio of white and nonwhite students," we believe it is more appropriately viewed as a "permissible goal." Such a goal "requires only a good faith effort . . . to come within a range demarcated by the goal itself." *Seattle*, 426 F.3d at 1180, Citing *Grutter*, 539 U.S at 334 (internal quotation marks and citation omitted).

In fact, the Seattle District's race-based tiebreaker does not set aside a fixed number of slots for nonwhite or white students in any of the District's schools. The tiebreaker is used only so long as there are members of the underrepresented race in the applicant pool for a particular oversubscribed school. If the number of students of that race who have applied to that school is exhausted, no further action is taken, even if the 15 percent variance has not been satisfied. That is, if the applicant pool has been exhausted, no students are required or recruited to attend a particular high school in order to bring it within the 15 percent plus or minus range for that year.

Moreover, the number of white and nonwhite students in the high schools is flexible and varies from school to school and from year to year. This variance in the number of nonwhite and white students throughout the District's high schools is because, under the Plan, assignments are based on students' and parents' preferences. The tiebreakers come into play in the assignment process only when a school is oversubscribed. 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

nonwhite students in each of its high schools does so in order to produce the educational benefits derived from an educational environment with a "meaningful" number of students from different racial groups. The Seattle District, for instance, determined meaningfulness 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 15 percent below the overall 60 percent nonwhite student population) and more than 55 percent white students, the school is considered racially concentrated or isolated, meaning that it lacks a meaningful number of students needed to realize the educational benefits of a diverse student body.[73]

In its use of a 15 percent plus or minus variance tied to the District's school population demographics, the District unquestionably uses race in its assignment process. According to *Grutter* and *Gratz*, however, the use of race in governmental decisions is not itself a constitutional violation. 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.[74] Moreover, the use of a school district's overall demographics as a guide to what constitutes a "meaningful" number of white and nonwhite students is not only reasonable, it is consistent with traditional standards employed in both voluntary and court-ordered school desegregation plans. As the Seattle District's expert testified,

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oversubscription . . . [is] the reason the [tiebreaker] kicks in . . . . Everything happens when more people want the seats. And why they want the seats sometimes we don't know." *Seattle*, 426 F.3d at 1179.

[73] *Seattle*, 426 F.3d at 1169-70.

[74] 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).

> Most of the cases I've participated in . . . generally worked with numbers that reflect the *racial composition of the school district* but, at the same time, tr[ied] to allow the district sufficient flexibility so that it would not have to regularly and repeatedly move students on a short-term basis simply to maintain some specific number. That's why *we see ranges of plus or minus 15 percent* in most cases of school desegregation.[75]

Even the expert called by opponents of the District's assignment plan testified that school districts throughout the country determine whether a district is sufficiently desegregated by looking to the "population of the district" in question.[76] Given this established conception of "meaningful" numbers of diverse students in the public high school desegregation context, a school district's belief that it can achieve its compelling interest in the educational benefits of racial diversity by striving for those numbers is not unreasonable. A student assignment plan designed to foster the educational benefits recognized to flow from meaningful numbers of white and nonwhite students in a particular school must necessarily attempt to achieve those meaningful numbers.[77]

3. *Undue Harm*

The next narrow-tailoring factor determines whether an institution's District's use of the racial tiebreaker "unduly burden[s] individuals who are not members of the favored racial and ethnic groups."[78] Opponents of race-conscious school assignment plans by school districts argue that every student who is denied his or her choice of schools because of the district's educational

[75] *Seattle*, 426 F.3d at 1177.
[76] *See also Comfort*, 418 F.3d at 21 (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").
[77] *See Grutter*, 539 U.S. at 336 ("[S]ome attention to numbers, without more, does not transform a flexible admissions system into a rigid quota.") (internal quotation marks and citations omitted).
[78] *See Grutter*, 539 U.S. at 341.

goals suffers a constitutionally significant burden. As the Supreme Court of Washington concluded, however, race-conscious student assignment plans typically impose a minimal burden that is shared equally by all of the district's students.[79] 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."[80] Indeed, public schools, unlike universities, have a tradition of compulsory assignment.[81] When an applicant's qualifications are not under consideration at all, no single student has a right or an entitlement to be assigned to any particular school.[82]

Moreover, the use of race in student assignment 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 Seattle 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.[83] Accordingly, school districts are entitled to assign all students to any of its schools,

[79] *Parents IV*, 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).
[80] *Id.* at 159.
Subject to federal statutory and constitutional requirements, structuring public education has long been within the control of the states as part of their traditional police powers. *See Barbier v. Connolly*, 113 U.S. 27, 31-32 (1884) (describing the states' traditional police powers).
[81] *See Bazemore v. Friday*, 478 U.S. 385, 408 (1986) (White, J., concurring) (noting that "school boards customarily have the power to create school attendance areas and otherwise designate the school that particular students may attend").
[82] *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.").
[83] *Seattle* 426 F.3d at 1169-70.

no student is entitled to attend any specific school and use of race in student assignment cannot uniformly benefit any race or group of individuals to the detriment of another.

4. *Sunset Provision*

The Supreme Court also considered whether an educational institution's race-conscious decisions are "limited in time," and "have a logical end point."[84] 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.[85]

Under *Grutter*, however, "this durational requirement can be met by periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity."[86] School districts constantly monitor and review their student assignment plans and enrollment figures. They also employ numerous forms of standardized tests and authentic assessments to determine whether their instructional practices are producing the desired learning outcomes. If racial literacy acquisition scores are not improved in a racially-diverse educational environment, the school may certainly attempt alternative educational methods. If racial literacy acquisition scores are improved in a racially-diverse environment and if those higher scores are preferenced in the college admissions process, the enhanced incentive given to students of all races to attend a racially-diverse secondary school that produces high RLA scores may render Justice O'Connor's notion of "artificial" preferences unnecessary.

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[84] *See Grutter*, 539 U.S. at 342.
[85] *Id.* at 341-42 (internal quotation marks and alterations omitted).
[86] *Parents*, 426 F.3d at 1170.

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

In *Grutter*, the Supreme Court explained that narrow tailoring also "require[s] serious, good faith consideration of *workable* race-neutral alternatives *that will achieve the diversity the university seeks*."[87]

The following "race-neutral" alternatives have been suggested as methods to achieve racial diversity in an educational environment: (1) student assignment based on socio-economic status; (2) student assignment based on interest in magnet schools; (3) student assignment by lottery; and (4) student assignment based on a multi-factoral index. Each of these alternatives is a strategy designed to achieve racial integration in an educational environment in the absence of race-conscious student admissions or assignment. Although these strategies may produce some racial integration in some situations, none of them is as effective as race-conscious school assignment.

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

#### 1. Socio-economic Integration Strategies

There is great debate about whether student assignment or admission based on socio-economic status is an effective race-neutral method of achieving a racially diverse educational environment.[88] Because there are instances in which student admission based on socio-economic status can have the collateral benefit of enhancing racial diversity, objectors to a

[87] 539 U.S. at 339 (emphasis added).

[88] *See, e.g.*, Catherine L. Horn and Stella M. Flores, Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences, The Civil Rights Project at Harvard University 92003); William G. Bowen et. al., Equity and Excellence in American Higher Education, 177 (2005); Richard Sander, Experimenting with Class-Based Affirmative Action, 47 J.LEGAL EDUC. 471, 474 (1997); Mark Satin, Economic-Class-Based Affirmative Action: The Elites Loathe It, the People Want It (July/August 2003); available at www.radicalmiddle.com/x_affirmative_action; Sun Staff, Basing Affirmative Action on Income Changes Payoff, Balt. Sun. May 23, 2003, at 1C; Richard Kahlenberg, The Remedy: Class, Race, and Affirmative Action (1996).

school district's voluntary integration program argue that the district must adopt such a race-neutral strategy. In the Seattle District, for instance, the northern Seattle area contains a majority of "white" students and is "historically more affluent."[89] The southern Seattle area is necessarily less affluent. Thus, moving more affluent students south, and less affluent students north, could possibly provide a more diverse student body. Nonetheless, the Seattle District rejected this alternative for two reasons: (1) "it is insulting to minorities and often inaccurate to assume that poverty correlates with minority status;" and (2) students would be reluctant to reveal their socioeconomic status to their peers.[90] The District effectively argued that it considered the strategy to be unworkable in its situation.

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

2. Magnet Programs Such As Dual Language Immersion

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

[89] Majority op. at 14660.
[90] Majority op. at 14699-700.

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 can help each school address racial diversity issues by encouraging students to travel outside of their geographic attendance zone to participate in a specific magnet program.

Dual language Spanish magnet schools can be a particularly effective way of achieving racial diversity where the program attracts an equal number of English speaking students and students for whom Spanish is their first language. The magnet may pull white students away from their geographic attendance zones and into a school with a significant number of Hispanic or Latino students for whom English may not be their first language. The program's goal is foreign-language acquisition, but its methods may have the collateral benefit of achieving a racially diverse classroom.

In Illinois School District 112, for example, the district operates a dual-language immersion program which has produced both foreign language acquisition learning outcomes and racial diversity. The district educates approximately 4000 students in eight elementary schools and three middle schools. The district as a whole is predominately white,[91] but more than 62% of the students who reside in the northern section of the district are hispanic.[92] In 1996, the district began a dual language (Spanish-English) immersion program. The program was housed in one school building in the predominately Hispanic northern attendance zone, and in two school buildings in the predominately white southern attendance zone. The program

[91] More than 80% of the district's students are white. *See* Ill. Sch. Dist. 112 State Report Card, www.nssd112.org/reportcards/schoolrprtcrd05/ot05src.pdf [hereafter, "Report Card."]
[92] *Id.*

requires school administrators to assign an equal number of students who are Spanish dominant and English dominant to the same classroom. The program's goals include high academic achievement in Spanish and English, and "cross-cultural awareness."[93] In 2006-2007, 570 of the district's students participated in the program, which enticed English-dominant students to choose to attend school in the predominantly Spanish-dominant attendance zone, and enticed Spanish-dominant students to choose to attend schools in the predominately English-dominant attendance zone. The result of the program was that the dual language classrooms throughout the district had equal numbers of English and Spanish dominant children. As a collateral benefit, these classrooms were racially diverse as well.

The program assesses its students to determine whether its educational objectives have been met. Students from both language backgrounds have enjoyed tremendous academic success.[94] Spanish dominant children in grades Kindergarten through eight acquire English language skills at a more rapid rate than their Spanish dominant peers in traditional bilingual programs.[95] English dominant students acquire Spanish language skills at a highly accelerated rate relative to their peers. Moreover, both Spanish dominant and English dominant students show great academic success in cognitive areas other than language.[96] In fact, the evidence indicates that English dominant students in the dual language program perform better on state standardized tests in Math and English than their English dominant peers in the same district.[97] Accordingly, this type of magnet program is a race-neutral strategy for producing dual language acquisition which can in some districts also produce the benefits of racial integration.

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[93] *See* www.nssd112.org/curriculum/dlgeneral.html.
[94] *Id.*
[95] See note 92 supra.
[96] Id.
[97] www.nssd112.org/curriculum/framework.

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

3. Lottery

Public school districts may always choose to use a lottery to determine which students should be assigned to its oversubscribed high schools. The lottery alternative assumes that drawing from this pool would produce a student body in each of the oversubscribed schools that approaches the district's overall racial composition. These assumptions, however, are not logical. As the Seattle experience suggests, the pool of applicants to any oversubscribed school will necessarily be skewed toward less than meaningful numbers of diverse students. In the Seattle litigation, Superintendent Olchefske testified that District patterns indicate that more people choose schools close to home. The pool of applicants inevitably would be skewed in favor of the demographic of the surrounding residential area. Where there is meaningful residential segregation, in a district where non-geographic student assignment is necessary to achieve meaningful diversity in a particular school, random sampling from such a racially skewed pool would produce a racially skewed student body. As one Seattle District Board member testified, a lottery was not a viable alternative because "[i]f applicants are overwhelmingly majority and you have a lottery, then your lottery — the pool of your lottery kids are going to be overwhelmingly majority. We have a diversity goal."[98]

4. Diversity Index

In San Francisco, the California public school district employs a program focused on enhancing diversity in the classrooms. The program allows students to choose any school within the district. When a school is oversubscribed, the program first assigns students with siblings to

[98] *Parents*, 426 F.3d at 1121.

the same school, and then accommodates students with specialized learning needs. After that, the so-called "Diversity Index" is employed. "Under the Diversity Index process, the school district calculates a numerical profile of all student applicants. The current Diversity Index is composed of six factors: socioeconomic status, academic achievement status, mother's educational background, language status, academic performance index, and home language."[99] Even if the program may result in enhanced diversity, the Supreme Court has made clear that "[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative."[100] Furthermore, the school district cannot be required to adopt race-neutral measures that would have forced it to sacrifice other educational values central to its mission.[101] Not surprisingly, if the compelling interest to be achieved is meaningful racial diversity within schools in a segregated school district, efforts to achieve that diversity by ignoring the race of students cannot be as precisely tailored as considering the race of students in that process.[102]

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

There may be school districts in which student assignment plans based on socio-economic status, magnet schools, lottery or index happen to result in a meaningful number of racially diverse students in a particular school. Yet, while race-neutrality as an abstract matter may be preferable to race-conscious decisions, race-neutrality cannot be required where it is not at all tailored to the interest deemed compelling. Because producing the educational benefits of racial literacy is a compelling interest, a school district may permissibly seek that interest if its

[99] 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).
[100] *Id.*
[101] *Id*. at 340.
[102] *See id*. at 340 (dismissing the race-neutral alternative of "percentage plans," advocated by the United States in an amicus brief, because the "United States [did] not . . . explain how such plans could work for graduate and professional schools"); *Comfort*, 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).

means are narrowly tailored to achieve that precise interest. A school district should not be encouraged to conceal its compelling interest of achieving racial literacy through the use of "some clumsier proxy device" such as poverty, lottery, magnet schools, or indexes.[103]

Professional educators recognize without refutation that student assignment to create meaningful numbers of racially diverse students in a school or classroom is precisely tailored to the compelling interest in teaching racial literacy. According to the Ninth Circuit, the Seattle District established that racial diversity in secondary education produces a number of compelling educational benefits. The District presented expert testimony 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." School officials, relying on their experience as teachers and administrators, and the District's expert all offered testimony regarding these benefits. 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 . . . 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." The District's expert also noted that "research shows that a[ ] desegregated educational experience opens opportunity networks in areas of higher education and employment . . .[and] strongly shows that graduates of desegregated high schools are more likely to live in integrated

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

communities than those who do not, and are more likely to have cross-race friendships later in life."[104]

In the Seattle litigation, the fact that a diverse secondary school environment produces educational benefits was not disputed. Even Parents' expert conceded that "[t]here is general agreement by both experts and the general public that integration is a desirable policy goal mainly for the social benefit of increased information and understanding about the cultural and social differences among various racial and ethnic groups."[105] In fact, the dissent in the *Seattle* litigation acknowledged "the idea that children will gain social, civic, and perhaps educational skills by attending schools with a proportion of students of other 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." [106] The Supreme Court as well has recognized the educational benefits of a racially diverse student population.[107]

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[104] The 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).

[105] 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).

[106] *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 "[i]t is more difficult to teach racial tolerance to college-age students; the time to do it is when the students are still young, before they are locked into racialized thinking"); *see also* Goodwin Liu, *Brown, Bollinger, and Beyond*, 47 How. L.J. 705, 755 (2004) ("[I]f 'diminishing the force of [racial] stereotypes' is a compelling pedagogical interest in elite higher education, it can only be *more so* in elementary and secondary schools — for the very premise of *Grutter*'s diversity rationale is that students enter higher education having had too few opportunities in early grades to study and learn alongside peers from other racial groups.") (citing *Grutter*, 539 U.S. at 333) (emphasis added)). 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 resegregation. The desegregation of black students, which increased

When producing the educational advantages of a racially diverse school is the compelling interest, there is no more effective means than a consideration of race to achieve that interest. Even the expert called by parents opposed to the district's plan was forced to concede the logic of that plan: "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." As the Ninth Circuit concluded: "The

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continuously from the 1950s to the late 1980s, has now receded to levels not seen in three decades."). *See also Parents I*, 137 F. Supp. 2d at 1235. *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). *See Parents I*, 137 F. Supp. 2d at 1237; *Parents II*, 285 F.3d at 1239-40; *Parents* III, 294 F.3d at 1088; *Parents IV*, 72 P.3d at 153. *Parents I*, 137 F. Supp. 2d at 1235. *Id.* at 1237; *see id.* at 1233-35. *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 reduction of racial isolation and what appears to be de facto segregation"), *superseded on other grounds as stated in Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163, 171 n.7 (2d Cir. 2001); *Parent Ass'n of Andrew Jackson High Sch. v. Ambach*, 738 F.2d 574, 579 (2d Cir. 1984) ("[W]e held that the Board's goal of ensuring the continuation of relatively integrated schools for the maximum number of students, even at the cost of limiting freedom of choice for some minority students, survived strict scrutiny as a matter of law.") (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).

[107] *See Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971) (stating that school authorities "are traditionally charged with broad power to formulate and implement educational policy and might well conclude . . . that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole"); *N.C. State Bd. of Educ. v. Swann*, 402 U.S. 43, 45 (1971) ("[A]s a matter of educational policy school authorities may well conclude that some kind of racial balance in the schools is desirable quite apart from any constitutional requirements."); *Bustop, Inc. v. Bd. of Educ. of Los Angeles*, 439 U.S. 1380, 1383 (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 (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).

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."[108]

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

The use of race-conscious student enrollment is narrowly-tailored to the recognized compelling interests in achieving the educational benefits of student body diversity, including the production of racial literacy. The suggested race-neutral alternatives are not narrowly tailored to achieve these compelling interests. Race-neutral student enrollment strategies, however, are constitutional, even if they are driven by the desire to achieve racial integration. They are also compatible with Proposition 209. They do not treat students differently *because of* their race. Nor do they preference any student in the operation of a public school. As such, they readily survive minimal judicial scrutiny because they are rationally related to the legitimate governmental interest of school assignment. Put another way, the use of the race-conscious student assignment to achieve the race-neutral end of "educational benefit" is constitutional, and the use of the race-neutral means of student assignment to achieve the race-conscious end of racial integration is both Constitutional and lawful under Proposition 209.

The nucleus of any educational strategy that is both lawful and effective is the compelling interest in producing the educational benefit of racial literacy. The interest has been recognized as compelling by educational professionals and the Supreme Court. The goal of creating racial literacy is best achieved in an educational environment where there are meaningful numbers of racially-diverse students. Students who are taught racial literacy in a racially-diverse educational

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

environment can be expected to achieve extremely high levels of Racial Literacy Acquisition. An institution of higher learning could well conclude that its educational mission would be served by enrolling students who have a record indicating Racial Literacy Acquisition. An institution that offered preferential treatment in admissions to students who score well in the area of Racial Literacy Acquisition would not run afoul of either the equal protection clause or Proposition 209. As suggested in this section, if institutions of higher education begin to preference students with high RLA scores, families may well be drawn to elementary and secondary schools with the kind of racial diversity that can generate these scores.

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

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

racial literacy. The showing could not be made unless the applicant in fact attended a pre-collegiate educational institution with a meaningful number of students of diverse races.

The admissions standards would be race-neutral. The race of the applicant would be irrelevant. Preferential treatment would be given to applicants not based on their race, but instead based on their level of exposure to a racially diverse educational environment in which racial literacy is best produced. The strategy thus would survive constitutional and Proposition 209 challenge.

Moreover, the objective of the strategy would be race-neutral as well. The interest served by this selection method would be to enroll a racially literate class, not a racially-diverse class. Yet, the path to the acquisition of racial literacy would be exposure to meaningful numbers of racially diverse students in educational institutions.

### B. Racial Literacy Acquisition Preferencing Would Foster Racial Diversity at Both Post-Secondary and Secondary Institutions

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

the students are assigned by geographic proximity. In the absence of any racial integration strategy, therefore, white students from Seattle would be significantly behind African-American students in their racial literacy scores. If the University weighed those scores heavily in the admissions process, the effect would be enhanced racial integration.

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

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

secondary schools if students were motivated by the goal of increasing their college credentials by attending a school with a strong racial literacy acquisition program and reputation.

## V. CONCLUSION

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