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SEATTLE AND *LOUISVILLE*

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INTRODUCTION

Two cases before the Supreme Court this Term present the following question: To what extent, if any, may local school boards voluntarily consider race in student assignment in order to achieve or maintain racially integrated schools?[1] In answering this question, the Court will write perhaps the final chapter of the constitutional and cultural legacy of *Brown* in public education.[2]

The cases arise in the context of demographic trends that portend an increasingly diverse but segregated society. Whereas whites comprised 80% of public

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1 *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 426 F.3d 1162 (9th Cir. 2005) (en banc), *cert. granted*, 126 S. Ct. 2351 (2006); McFarland v. Jefferson County Pub. Schs., 330 F. Supp. 2d 834 (W.D. Ky. 2004), *aff'd per curiam*, 416 F.3d 513 (6th Cir. 2005), *cert. granted sub nom.* Meredith v. Jefferson County Bd. of Educ., 126 S. Ct. 2351 (2006). I occasionally refer to these cases as *Seattle* and *Louisville*. A third recent case presented similar issues, but the Court declined review. *See* Comfort v. Lynn Sch. Comm., 418 F.3d 1 (1st Cir.) (en banc), *cert. denied*, 126 S. Ct. 798 (2005). In all three cases, the district courts and courts of appeals upheld the race-conscious school assignment plans.

2 Brown v. Bd. of Educ., 347 U.S. 483 (1954).

school enrollment in 1968, the nation's student body had become 58% white, 17% black, 19% Latino, and 4% Asian by 2003.[3] Yet despite this growing diversity, and despite efforts to dismantle *de jure* segregation and its vestiges, many public schools remain highly segregated by race. The average white student attends a school that is nearly 80% white, making whites "the most isolated group" in our public schools.[4] The average black student attends a school that is 53% black, even though blacks comprise only one in six pupils nationwide.[5] In the entirety of our history, never has a majority of the nation's black schoolchildren attended majority-white schools.[6] The average Latino student likewise attends a majority (55%) Latino school,[7] as "Latino segregation continues to increase in every region" of the country.[8] Thirty-eight percent of blacks and 39% of Latinos attend schools with 90% to 100% minority enrollment.[9] Although there is some segregation of minority groups from each other, the lion's share of segregation in public schools occurs between whites and non-white groups.[10]

Against this backdrop and the pervasive reality of residential segregation in their communities, the Seattle and Louisville school districts voluntarily adopted race-conscious school assignment plans to promote integration. The details of the plans are numerous, and I will describe them more fully later in this Essay.[11]

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3 *See* GARY ORFIELD & CHUNGMEI LEE, RACIAL TRANSFORMATION AND THE CHANGING NATURE OF SEGREGATION 8 tbl.1, 13 fig.1 (2006).

4 *See id.* at 8 (2003-04 data).

5 *See id.* at 9 tbl.2 (2003-04 data).

6 The high point of black-white integration occurred in 1988, when 44% of blacks in the South attended majority-white schools. *See* ERICA FRANKENBERG ET AL., A MULTIRACIAL SOCIETY WITH SEGREGATED SCHOOLS: ARE WE LOSING THE DREAM? 38 fig.10 (2003) (South); *id.* at 39 fig.11 (all regions).

7 *See* ORFIELD & LEE, *supra* note 3, at 9 tbl.2 (2003-04 data).

8 FRANKENBERG ET AL., *supra* note 6, at 42.

9 *See* ORFIELD & LEE, *supra* note 3, at 10 tbl.3, 11 tbl.4 (2003-04 data). Asians appear to be the least segregated group in public schools. The average Asian student attends a school that is 45% white, 12% black, 20% Latino, and 22% Asian. *See id.* at 9 tbl.2. Moreover, Asians are the group most likely to attend multiracial schools where each of at least three racial groups has 10% enrollment. *See id.* at 15-16.

10 *See* Sean F. Reardon et al., *The Changing Structure of School Segregation: Measurement and Evidence of Multiracial Metropolitan-Area School Segregation, 1989-1995*, 37 DEMOGRAPHY 351, 358 & tbl.3 (2000) (finding that 80% of racial segregation measured in 217 metropolitan areas "was due to segregation between whites and members of other groups" while segregation among black, Hispanic, and Asian students accounted for 20% of total segregation). Although a significant amount of racial segregation occurs across district lines, still one-third of total school segregation is attributable to within-district segregation, the biggest component of which is white/non-white segregation in central-city school districts such as Louisville and Seattle. *See id.* at 358.

11 *See infra* Part II.D. The short summaries of the plans in this paragraph and the next are based on descriptions by the lower courts and by the school districts. *See Seattle*, 426 F.3d at 1169-71;

In a nutshell, Seattle is a multiracial community whose public school enrollment is roughly 40% white with substantial numbers of Asians, blacks, Latinos, and Native Americans. The school assignment plan gives incoming ninth-graders the opportunity to choose any of the ten high schools in the district. Where a school is oversubscribed, the district allocates seats through a series of tiebreakers, the first of which favors students with a sibling attending the school and the third favoring students who live closer to the school. The second tiebreaker is used to enroll students who will bring the school racial composition within a range of 25% to 55% white.

Louisville is largely a black-white community; two-thirds of students in public schools are white, one-third of students are black. The school assignment plan grows out of a long history of court-ordered desegregation. When the court order was dissolved in 2000, the school board voluntarily sought to maintain racially integrated schools. The current plan groups students into attendance zones and makes initial school assignments based on the zones. It then allows various forms of choice among schools and programs within the zones. If a student is not satisfied with her initial assignment or choice-based placement, then the student may request a transfer to another school inside or outside her attendance zone. The attendance zones and the opportunities for choice and transfers are structured to produce schools with 15% to 50% black enrollment.

The constitutionality of such policies "is fundamentally different from almost anything that the Supreme Court has previously addressed."[12] But in the area of race and equal protection, the current Court seems unlikely to break significantly new legal ground. Thus, rather than propose a wholly novel approach to race-conscious school assignment, this Essay examines how the Court should adapt the principles from its contemporary race cases to the issues posed by the Seattle and Louisville plans. The task is made interesting and difficult by the possibility that the Court, as it did in the context of university admissions, will avoid a categorical rule prohibiting or permitting the use of race and will opt instead for a legal framework that balances competing values and provides workable guidance to school officials.[13]

McFarland, 330 F. Supp. 2d at 841-45; Br. for Respondents at 1-11, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, No. 05-908 (U.S. Oct. 10, 2006) [hereinafter *Seattle* Brief for Respondents]; Br. for Respondents at 1-9, Meredith v. Jefferson County Bd. of Educ., No. 05-915 (U.S. Oct. 10, 2006) [hereinafter *Meredith* Brief for Respondents].

12 *Lynn*, 418 F.3d at 27 (Boudin, C.J., concurring); *see Seattle*, 426 F.3d at 1195 (Kozinski, J., concurring in the judgment) ("the case at hand differs in material respects from those the Supreme Court has previously decided").

13 *See* Grutter v. Bollinger, 539 U.S. 306 (2003) (upholding use of race as one of many factors to achieve educational diversity in an admissions policy affording holistic, individualized consideration to each applicant); Gratz v. Bollinger, 539 U.S. 244 (2003) (invalidating point system that effectively assured the admission of every qualified minority applicant). In addition to Justice O'Connor, Justice Breyer cast swing votes in *Grutter* and *Gratz*, joining the majority in both. Al-

In this Essay, I take as a starting point the near inevitability that the Court will apply strict scrutiny to the Seattle and Louisville plans because they involve express racial classifications.[14] A more relaxed standard of review has been urged on two main grounds. The first is the deference owed to local school boards on matters of educational policy, which the Court has often acknowledged.[15] As an argument against strict scrutiny, however, "local control" has an unsettling ring given its historic association with arguments made to preserve *de jure* segregation.[16] Deference to local control creates unnecessary difficulties for judicial review where education policymakers assert that *segregation* not integration yields important benefits, a scenario far from hypothetical even today.[17]

Second, as Judge Kozinski argued in *Seattle*, an integrative school assignment plan does not oppress minorities, does not segregate races, and does not

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though Justice Kennedy dissented in *Grutter*, he made clear his "approval of giving appropriate consideration to race in this one context" according to the framework established by Justice Powell in *Bakke*. *Grutter*, 539 U.S. at 395 (Kennedy, J., dissenting); *see id.* at 387 ("The opinion by Justice Powell, in my view, states the correct rule for resolving this case." (citing Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 289-91, 315-18 (1978) (opinion of Powell, J.))); *id.* at 392-93 ("There is no constitutional objection to the goal of considering race as one modest factor among many others to achieve diversity, but an educational institution must ensure, through sufficient procedures, that each applicant receives individual consideration and that race does not become a predominant factor in the admissions decisionmaking."). In *Seattle* and *Louisville*, one could easily imagine Justice Kennedy or Justice Breyer proposing a careful framework to guide race-conscious school assignment, much as Justice Powell did for affirmative action in university admissions.

[14] *See* Shaw v. Reno, 509 U.S. 630, 642 (1993) ("No inquiry into legislative purpose is necessary when the racial classification appears on the face of the statute. Express racial classifications are immediately suspect . . . ." (citations omitted)); *accord* Miller v. Johnson, 515 U.S. 900, 913 (1995); Adarand Constructors v. Peña, 515 U.S. 200, 227 (1995).

[15] *See* Missouri v. Jenkins, 515 U.S. 70, 102 (1995); Freeman v. Pitts, 503 U.S. 467, 490 (1992); Milliken v. Bradley, 418 U.S. 717, 741-42 (1974); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 49-50, 58-59 (1973). Elsewhere I have argued that the Court's deference to local control in these cases undermined constitutional rights. *See* Goodwin Liu, Brown*,* Bollinger*, and Beyond*, 47 HOW. L.J. 705, 721-31 (2004).

[16] *See* Transcript of Oral Argument of John W. Davis on behalf of Appellees, Brown v. Bd. of Educ., 347 U.S. 483 (1954) (No. 101), *in* 49 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 329, 339 (Philip B. Kurland & Gerhard Casper eds., 1997) ("What underlies this whole question? What is the great national and federal policy on this matter? Is it not a fact that the very strength and fiber of our federal system is local self-government in those matters for which local action is competent? Is it not, of all the activities of government, the one which most nearly approaches the hearts and minds of people, the question of the education of their young? Is it not the height of wisdom that the manner in which that shall be conducted should be left to those most immediately affected by it . . . ?").

[17] *See* Sam Dillon, *Law to Segregate Omaha Schools Divides Nebraska*, N.Y. TIMES, Apr. 15, 2006, at A9 (reporting on newly enacted Nebraska statute "dividing the Omaha public schools into three racially identifiable districts, one largely black, one white and one mostly Hispanic," based on a state legislator's claim of "a desire by blacks to control a school district in which their children are a majority").

stigmatize, deny a government service, or grant political power based on race.[18] But this argument against strict scrutiny boils down to a claim that the use of race in school assignment is benign. The Court has foreclosed this reasoning on the ground that the very function of strict scrutiny is to distinguish between benign and invidious uses of race.[19] Moreover, as I discuss below, race-conscious school assignment is not immune to the risk of racial stereotyping and other harms associated with government decision-making based on race. Strict scrutiny ensures that those harms are minimized or avoided.

The format of this Essay is straightforward. Part I discusses the compelling interest prong of strict scrutiny. I examine the two main goals that typically support racially integrative school assignment: interracial socialization and educational equity. Mindful of racial stereotyping concerns, I analyze how these goals are conceptualized, what empirical basis they have, and how they are instantiated by the Seattle and Louisville plans. The goal of interracial socialization, I argue, presents few difficulties as a compelling interest justifying race-conscious school assignment. The goal of educational equity presents a closer question because of the risk of negatively stereotyping predominantly minority schools. But the risk can be avoided through a careful, evidence-based articulation of how racially identifiable schools undermine the equitable distribution of high-quality teachers.

Part II addresses narrow tailoring. Here is where the cases seriously test the notion that the "fundamental purpose" of strict scrutiny is to "take 'relevant differences' into account."[20] Because school assignment is a *sorting* not a *selection* process, I argue that the Court should look to its doctrine on race-conscious electoral redistricting, not affirmative action, in crafting the appropriate narrow tailoring framework. Under the framework I propose, local school boards may consider race as a non-predominant factor in school assignment to attain racially integrated schools. But using race as the predominant factor is presumptively unconstitutional. Predominance should be determined based on how race affects school assignments in the district as a whole, not on how it affects the placement of a single student. Where race is the predominant factor, the presumption of unconstitutionality may be overcome where desegregation is court-ordered or

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[18] *See Seattle*, 426 F.3d at 1194 (Kozinski, J., concurring in the result); *cf.* Bush v. Vera, 517 U.S. 952, 1010 (1996) (Stevens, J., dissenting, joined by Ginsburg & Breyer, JJ.) ("[W]hen the state action (i) has neither the intent nor effect of harming any particular group, (ii) is not designed to give effect to irrational prejudices held by its citizens but to break them down, and (iii) uses race as a classification because race is 'relevant' to the benign goal of the classification, we need not view the action with the typically fatal skepticism that we have used to strike down the most pernicious forms of state behavior." (citation omitted)).

[19] *See Adarand*, 515 U.S. at 226-29; *see also* Metro Broad., Inc. v. FCC, 497 U.S. 547, 634-35 (1990) (Kennedy, J., dissenting); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion).

[20] *Adarand*, 515 U.S. at 228; *see* Johnson v. California, 542 U.S. 499, 515 (2005).

where a previously *de jure* segregated district can show that the non-predominant use of race would result in substantial resegregation. This proposal achieves a practical balance that allows school districts to use race enough to promote meaningful integration in public schools, but not so much as to exacerbate the perception or reality of racial difference in our society.

The official use of race to integrate public schools presents a genuine dilemma for those who are committed to fostering "the harmony and mutual respect among all citizens that our constitutional tradition has always sought"[21] while also determined to "encourage the transition to a society where race no longer matters."[22] If there is truth in the maxim that problems can be solved but dilemmas only managed,[23] then managing the dilemma of race will require an accommodation of competing concerns. Between the fallacy of strict colorblindness and the inherent dangers of racial sorting lies a tenable middle course.

I. COMPELLING INTEREST

Broadly speaking, there are two goals that potentially support voluntary policies to integrate public schools. The first goal, interracial socialization, focuses on reducing racial prejudice and stereotypes, fostering cooperation and mutual respect, and strengthening the social fabric of our diverse nation. The second goal, educational equity, focuses on enhancing opportunities afforded to minority children too long relegated to racially isolated and inferior schools. There are various sub-goals that could be put under one heading or the other. But it seems clear there are two general goals that can be distinguished. In this Part, I examine the validity of these goals in their general formulation and in the specific ways they are instantiated by the Seattle and Louisville plans.[24]

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[21] Grutter v. Bollinger, 539 U.S. 306, 395 (2003) (Kennedy, J., dissenting).

[22] Georgia v. Ashcroft, 539 U.S. 461, 490 (2003) (citing Shaw v. Reno, 509 U.S. 630, 657 (1993)).

[23] *See* LARRY CUBAN, HOW CAN I FIX IT? FINDING SOLUTIONS AND MANAGING DILEMMAS 12, 16 (2001).

[24] I treat the question whether the local policies actually further the goals of interracial socialization and educational equity as part of the compelling interest inquiry, although I realize this question may also be treated as part of the narrow tailoring inquiry into "fit" between means and ends. My approach follows *Croson*, where the Court held, in its compelling interest analysis, that while remedying identified discrimination in Richmond's construction industry could support race-conscious affirmative action, the 30% minority set-aside in the local policy did not further that remedial goal. *See* 488 U.S. at 498-505. As other examples show, the Court has not been particularly rigid in distinguishing the substantive inquiries under the two prongs of strict scrutiny. *Compare* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274-76 (1986) (plurality opinion) (rejecting role model theory and remedying societal discrimination as compelling interests for affirmative

A. *Interracial Socialization*

The importance of racially integrated public schools to promoting tolerance and mutual respect in our multiracial society requires little elaboration given the Court's own pronouncements in this area. Across many contexts, the Court has made clear that irrational prejudice, animus, and stereotypes distort the proper functioning of our democracy.[25] "If our society is to continue to progress as a multiracial democracy," the Court has said, "it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury."[26] This concern underscores the unique importance of public schools, for they are "the most powerful agency for promoting cohesion among a heterogeneous democratic people."[27] Education is, in *Brown*'s familiar words, "the very foundation of good citizenship" and "a principal instrument in awakening the child to cultural values."[28] Public schools "inculcat[e] fundamental values necessary to the maintenance of a democratic political system"[29] and play "a fundamental role in maintaining the fabric of our society."[30] By preparing children of all races to live and work together in our pluralistic society,[31] integrated schools help to reduce the significant social costs of prejudice and intolerance.[32]

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action because they lack a "logical stopping point") *with Grutter*, 536 U.S. at 342 (requiring all racial classifications to have "a logical end point" as part of narrow tailoring).

[25] *See, e.g.*, Romer v. Evans, 517 U.S. 620, 634-35 (1996); Miller v. Johnson, 515 U.S. 900, 911-12 (1995); Palmore v. Sidoti, 466 U.S. 429, 433 (1984). Ensuring fair political participation by minority groups has long attracted constitutional concern not simply because a minority group by definition lacks majority power, but because "*prejudice* . . . tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities." United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (emphasis added). Moreover, mutual respect across racial lines is important not only to how whites relate to minority groups, but also to how minority groups relate to whites and to one another. In the voting rights context, for example, the Court has emphasized that " 'minority voters are not immune from the obligation to pull, haul, and trade to find common political ground.' " Georgia v. Ashcroft, 539 U.S. 461, 481 (2003) (quoting Johnson v. DeGrandy, 512 U.S. 997, 1020 (1994)). *Ashcroft* held that § 5 of the Voting Rights Act is not violated when states, instead of concentrating minority voters into "safe" districts where they are likely to elect the candidate of their choice, spread minority voters over a greater number of districts on the theory that " 'minority citizens are able to form coalitions with voters from other racial and ethnic groups.' " *Id.* (quoting *DeGrandy*, 512 U.S. at 1020).

[26] Edmonson v. Leesville Concrete Co., 500 U.S. 614, 630-31 (1991).

[27] McCollum v. Bd. of Educ., 333 U.S. 203, 216 (1948).

[28] Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

[29] Ambach v. Norwick, 441 U.S. 68, 77 (1979).

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

[31] *See* Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 473 (1982) ("Attending an ethnically diverse school . . . prepar[es] minority children for citizenship in our pluralistic society, while,

These common-sense propositions have a "strong basis in evidence"[33] comprised of empirical studies on the relationship between integrated schooling and interracial attitudes, friendships, and cooperation.[34] Perhaps the most robust finding of this research is that students who attend racially integrated schools tend to live racially integrated lives as adults. Black students who attend schools with higher white enrollments are more likely to enroll in majority-white colleges, to work in mixed-race settings, to live in integrated neighborhoods, and to have white friends.[35] Similarly, white and Latino students who attend more integrated schools are more likely to work in mixed-race environments,[36] and they are more inclined to live in diverse neighborhoods, to have friends of other races, and to

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we may hope, teaching members of the racial majority to live in harmony and mutual respect with children of minority heritage.") (internal quotation marks and citations omitted); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971) (racially integrated schools "prepare students to live in a pluralistic society").

32 These costs are all too familiar to the federal and state courts. *See, e.g.*, Johnson v. California, 543 U.S. 499, 502-03 (2005) (racial conflict in prisons); McGinest v. GTE Serv. Corp., 360 F.3d 1103, 1107-11 (9th Cir. 2004) (racially hostile workplace for blacks); Kang v. U. Lim Am., Inc., 296 F.3d 810, 817 (9th Cir. 2002) (racially hostile workplace for Koreans); Choi v. Gaston, 220 F.3d 1010, 1012 (9th Cir. 2000) (racial profiling of Asians by law enforcement); Aguilar v. Avis Rent A Car Sys., 980 P.2d 846, 849-50 (1999) (racially hostile workplace for Latinos); People v. Durazo, 124 Cal. App. 4th 728, 735-38 (2004) (racial profiling of Latinos by law enforcement); *see also* K.A. DIXON ET AL., JOHN J. HELDRICH CTR. FOR WORKFORCE DEV., A WORKPLACE DIVIDED: HOW AMERICANS VIEW DISCRIMINATION AND RACE ON THE JOB 11, 29 (2002) (finding in national survey that 28% of blacks and 22% of Hispanics have experienced racial discrimination on the job); Laura Beth Nielsen & Robert L. Nelson, *Rights Realized? An Empirical Analysis of Employment Litigation as a Claiming System*, 2005 WIS. L. REV. 663, 682-85 (collecting survey data on employment discrimination); Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 429 (2004) ("Employment discrimination cases constitute an increasing fraction of the federal civil docket, now reigning as the largest single category of cases at nearly 10 percent.").

33 Miller v. Johnson, 515 U.S. 900, 922 (1995); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 500 (1989).

34 For an overview, see Statement of American Social Scientists of Research on School Desegregation, Appendix to Brief of 553 Social Scientists as *Amici Curiae* in Support of Respondents at App. 3-11, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, No. 05-908, and Meredith v. Jefferson County Bd. of Educ., No. 05-915 (U.S. Oct. 10, 2006) [hereinafter Social Science Statement].

35 *See* Marvin P. Dawkins & Jomills Henry Braddock II, *The Continuing Significance of Desegregation: School Racial Composition and African American Inclusion in American Society*, 63 J. NEGRO EDUC. 394 (1994); Amy Stuart Wells & Robert L. Crain, *Perpetuation Theory and the Long-Term Effects of School Desegregation*, 64 REV. EDUC. RES. 531 (1994).

36 *See* William T. Trent, *Outcomes of School Desegregation: Findings from Longitudinal Research*, 66 J. NEGRO EDUC. 255, 256-57 (1997); Marvin P. Dawkins et al., *Why Desegregate? The Effect of School Desegregation on Adult Occupational Desegregation of African Americans, Whites, and Hispanics*, 31 INT'L J. CONTEMP. SOC. 273, 279-80 (1994).

work to improve race relations.[37] Among college freshmen of all races, the most significant determinant of perceived social distance from other groups is the degree of racial segregation in the schools they attended while growing up.[38] These patterns of interaction in neighborhoods, college campuses, and workplaces diminish the role of race as a barrier to cooperation and mutuality, and enhance the social capital that is essential to a diverse democracy.[39]

This set of outcomes is especially important given the continuing prevalence of residential segregation by race. Although black-white residential segregation has declined in recent decades, the pace of change has been slow, and blacks remain "hypersegregated" in many U.S. cities despite improvements in the socioeconomic condition of black families.[40] Meanwhile, the segregation of Latinos

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[37] *See* 1 U.S. COMM'N ON CIVIL RIGHTS, RACIAL ISOLATION IN THE PUBLIC SCHOOLS 110-13 (1967); 2 *id.* at 211-41; Michal Kurlaender & John T. Yun, *Fifty Years After* Brown*: New Evidence of the Impact of School Racial Composition on Student Outcomes*, 6 INT'L J. EDUC. POL'Y, RES. & PRACTICE 51, 58, 62-63 (2005); *cf.* Patricia Gurin et al., *Diversity and Higher Education: Theory and Impact on Educational Outcomes*, 72 HARV. EDUC. REV. 330, 353 (2002) (interracial contact in college is positively associated with citizenship engagement and racial/cultural engagement for Asian, black, Latino, and white students).

[38] *See* DOUGLAS S. MASSEY ET AL., THE SOURCE OF THE RIVER: THE SOCIAL ORIGINS OF FRESHMEN AT AMERICA'S SELECTIVE COLLEGES AND UNIVERSITIES 171-74 (2003). Even prominent critics of school desegregation acknowledge that there is a significant relationship between attending a racially integrated school and living racially integrated lives as adults. *See* Br. of David Armor et al. as *Amici Curiae* in Support of Petitioners at 21-22, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, No. 05-908, and Meredith v. Jefferson County Bd. of Educ., No. 05-915 (U.S. Aug. 21, 2006). Yet they contend that the relationship is plagued by self-selection. *See id.* at 22. To be sure, selection bias is a possible explanation for the observed relationships. But the *possibility* of selection bias does not mean that it *actually* explains the observed relationship. Without specific evidence that selection bias is at work (the Armor brief cites none), there is no reason why the consistent findings of long-term studies using multiple methodologies should be attributed to "family preference for integrated environments," *see id.*, rather than to the impact of racially integrated schools on the habits and values that children carry into adulthood.

[39] *See* CYNTHIA ESTLUND, WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY 69-76, 105-24 (2003) (explaining that racially integrated workplaces are important sites of cooperation that promote trust, reciprocity, and communication across racial boundaries); ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 22, 363 (2000) (observing that networks "encompass[ing] people across diverse social cleavages" build the social capital necessary "[to solve] our biggest collective problems"); 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 117 (Phillips Bradley ed., Knopf 1954) (1835) (highlighting the importance of voluntary associations as sites where "[f]eelings and opinions are recruited, the heart is enlarged, and the human mind is developed [through] the reciprocal influence of men upon one another").

[40] *See* DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 60-82 (1993) (finding persistently high residential segregation among blacks despite improvements in black income from 1970 to 1980); John R. Logan et al., *Segregation of Minorities in the Metropolis: Two Decades of Change*, 41 DEMOGRAPHY 1, 3, 6-11 (2004) (finding slow decline of black-white segregation from 1980 to 2000 despite improvement in black income during the 1990s); Rima Wilkes & John Iceland, *Hypersegregation in the Twenty-*

and Asians from whites, though not as severe as black-white segregation, has remained stable or increased since 1980.[41] Whites remain the most racially isolated group: the typical neighborhood of a white metropolitan resident was 80% white in 2000, down only slightly from 89% white in 1980.[42] Without deliberate steps to foster integration, our public schools, like our neighborhoods, "may balkanize us into competing racial factions."[43]

Before we can conclude that promoting interracial socialization is a compelling interest, however, we must ask whether using race-conscious school assignment to achieve this goal implicates illegitimate racial stereotypes. In his *Seattle* dissent, Judge Bea argued that the use of race to foster "cross-racial socialization" is premised on a theory of racial essentialism—"that all white children express traditional white viewpoints and exhibit traditional white mannerisms; all nonwhite children express opposite nonwhite viewpoints and exhibit nonwhite mannerisms, and thereby white and nonwhite children will better understand each other."[44] Yet this critique misapprehends the purpose of school integration policies. Unlike selective institutions of higher education, K-12 public schools do not pursue racial integration as part of a broader goal of fostering viewpoint diversity. Instead, school integration policies reflect the common-sense belief that children inherit a society where race remains a salient social boundary *independent of* an individual's viewpoints or behavior.[45] By enabling children of different races to learn and work together, racially integrated education aims to dispel stereotypes that individual behavior and perspectives are intrinsically racial.

Yet this articulation of the goal of race-conscious school assignment raises a different concern. When government acts on the premise that racial difference and division permeate our society, it runs the risk of magnifying the perception or reality of those differences. School districts thus face a delicate balance between using race enough to achieve meaningful integration and not using race so much

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First Century, 41 DEMOGRAPHY 23, 29 (2004) (listing 29 metropolitan areas with black-white hypersegregation in 2000 and observing that "[m]ost of the metropolitan areas that were hypersegregated in 2000 were also hypersegregated in 1990").

[41] *See* Logan et al., *supra* note 40, at 7, 9, 11.

[42] *See id.* at 8.

[43] Shaw v. Reno, 509 U.S. 630, 657 (1993).

[44] *Seattle*, 426 F.3d at 1203 (Bea, J., dissenting).

[45] The continuing salience of race as a social boundary has been demonstrated by psychological research on implicit bias and by powerful experimental evidence. *See, e.g.*, Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945 (2006); Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991 (2004); Ian Ayers & Peter Siegelman, *Race and Gender Discrimination in Negotiation for the Purchase of a New Car*, 84 AM. ECON. REV. 304 (1995).

that it undermines "the transition to a society where race no longer matters."[46] This balance is critically important, and I will say much more about it later in the context of narrow tailoring.[47]

The more serious stereotyping concern in *Seattle* and *Louisville* does not have to do with the general goal of promoting interracial understanding, but with the specific way the school assignment plans pursue that goal. In particular, the Louisville plan seeks integration between "blacks" and "others,"[48] and the Seattle plan focuses on "whites" and "non-whites."[49] While this racial dichotomy may be sensible in Jefferson County, "a school district almost entirely populated by only Black and White students,"[50] the white/non-white dichotomy in Seattle does not map easily onto a goal of interracial socialization in a school district that was 24% Asian, 24% black, 11% Latino, and 41% white in 2000-01.[51] The concern is that the Seattle plan "conceives of racial diversity in simplistic terms as a dichotomy between white and nonwhite, as if to say all nonwhites are interchangeable."[52] As one critic has argued, the plan

> effectively enacts as government policy the condescending notion that any minority group will benefit simply from exposure to White students and viewpoints, and that exposure to any single minority group is sufficient for the White students. That approach systematically undervalues the differences within the overall non-White population in the service of aggrandizing the difference between Whites and "others."[53]

This is a non-trivial concern. But the force of the argument seems to depend on abstracting the plan from its social context. The largest component of racial

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[46] Georgia v. Ashcroft, 539 U.S. 461, 490 (2003) (citing *Shaw v. Reno*, 509 U.S. at 657).

[47] *See infra* Part II.B.

[48] *McFarland*, 330 F. Supp. 2d at 840 n.6.

[49] *Seattle*, 426 F.3d at 1170.

[50] *McFarland*, 330 F. Supp. 2d at 840 n.6.

[51] *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 377 F.3d 949, 1005 (9th Cir. 2004) (Graber, J., dissenting) (showing 2000-01 district enrollment by race), *vacated*, 426 F.3d 1162 (9th Cir. 2005) (en banc).

[52] *Seattle*, 426 F.3d at 1204 (Bea, J., dissenting) (quoting Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 72 P.3d 151, 169 n.5 (2003) (Sanders, J., dissenting)) (internal quotation marks omitted).

[53] Br. of *Amicus Curiae* Center for Individual Rights in Support of Petitioner at 8, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, No. 05-908 (U.S. Aug. 21, 2006); *see id.* at 10 ("Indeed, the very notion of diversity—touted by the school district—suggests that discrete cultural and racial identities are more meaningful than the bare commonality of not being White.").

segregation in large central-city school districts is white/non-white segregation,[54] and Seattle is no exception. Historically, the most pronounced dimension of racial segregation in Seattle has been between whites in the northern half of the city and non-whites in the southern half.[55] In a school district that is roughly 40% white and 60% non-white, two-thirds of the district's white students lived in the north in 2000-01, while 84% of its black students, 74% of its Asian students, and 65% of its Latino students lived in the south.[56] The disparate racial contexts produced by this residential pattern can be seen by comparing student population ratios among Seattle's four major racial groups in the north and south.[57]

STUDENT POPULATION RATIOS, 2000-01

	Districtwide	North	South
Asian/Black	1.03	1.62	0.91
Black/Latino	2.24	1.05	2.89
Asian/Latino	2.30	1.70	2.63
White/Asian	1.69	4.37	0.76
White/Black	1.74	7.07	0.69
White/Latino	3.89	7.43	1.99

As the table shows, the white-black ratio is ten times greater in the north (7.1) than in the south (0.69), the white-Asian ratio is nearly six times greater in the north (4.4) than in the south (0.76), and the white-Latino ratio is almost four

54 *See supra* note 10 and accompanying text.

55 *See* KATE DAVIS, HOUSING SEGREGATION IN SEATTLE 8-12, 19-32 (2005), *available at* http://www.seattle.gov/civilrights/documents/housing_seg_in_seattle-2005.pdf (last visited Oct. 3, 2006); SEATTLE HUMAN RIGHTS DEP'T, A STUDY AND DATA ON SEGREGATED HOUSING IN SEATTLE, WASHINGTON 4-10 (1976).

56 *See Seattle*, 377 F.3d at 1005 (Graber, J., dissenting).

57 I calculated these ratios using district enrollment data by race and region in Joint Appendix at 175a, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, No. 05-908 (U.S. *cert. granted* June 5, 2006). The data show that in 2000-01 the northern half of the district had 2,879 Asian students, 1,778 blacks, 1,693 Latinos, and 12,571 whites, while the south had 8,269 Asians, 9,054 blacks, 3,145 Latinos, and 6,247 whites. Districtwide, there were 11,148 Asians, 10,832 blacks, 4,838 Latinos, and 18,818 whites. Thus, the Asian/black ratio districtwide is equal to 11,148 divided by 10,832, or 1.03; in the north, it is 2,879 divided by 1,778, or 1.62; and in the south, it is 8,269 divided by 9,054, or 0.91.

times greater in the north (7.4) than in the south (2.0). None of these extremes resembles the overall community of children in the district. By contrast, the ratios of Asians to blacks, of blacks to Latinos, and of Asians to Latinos differ much less between north and south, and they deviate far less from districtwide norms than the white/non-white ratios. Residential segregation among non-white groups does not exist to the same extent as white/non-white segregation. "On average, minority residents in Seattle live in diverse neighborhoods that are not dominated by a single racial or ethnic group," while "[t]he only group that is truly isolated is the white population."[58] Thus, instead of stereotyping non-white groups as interchangeable, the white/non-white dichotomy in the Seattle plan simply responds to the reality of the city's stark racial geography. The plan illustrates that the expressive value of a racial classification can be quite different when examined in local context than when considered in the abstract.

Apart from stereotyping concerns, however, it may be objected that the broad goal of promoting racial tolerance and understanding does not entail school enrollments that approximate districtwide racial demographics. For example, children in Louisville may learn important lessons in interracial understanding in schools that are more than 50% black, and the same may be true in Seattle for children in schools that are more than 55% white. An insistence on rough congruence between school and district demographics, the argument goes, serves no compelling educational interest, only an unlawful interest in "outright racial balancing."[59] The socialization objectives of school integration support a policy of enrolling a "critical mass" of students of each race, enabling contact among racial groups and ensuring diversity within each group.[60] But the critical mass requirement leaves substantial room for demographic variation and does not imply any need for congruence between school and district racial composition.

At the core of this critique, however, is an incomplete account of the interracial socialization that public schools seek to achieve. A school in Louisville that is two-thirds black and one-third white (assuming one-third equals or exceeds a critical mass) may offer a suitable environment for interracial contact that dispels stereotypes and teaches children of different races to treat each other with respect. But the socialization goals of school integration go beyond cultivating harmony in interpersonal relations. A critical part of what it means to be educated for citizenship in a multiracial society is to understand racial dynamics as a

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[58] DAVIS, *supra* note 55, at 25, 32.

[59] City of Richmond v. J.A. Croson Co., 488 U.S. 469, 507 (1989); *see* Brief of *Amicus Curiae* Center for Individual Rights, *supra* note 53, at 12-15 (making this argument).

[60] *See Grutter*, 536 U.S. at 319 ("critical mass means numbers such that underrepresented minority students do not feel isolated or like spokespersons for their race"); *id.* at 319-20 ("when a critical mass of underrepresented minority students is present, racial stereotypes lose their force because nonminority students learn there is no ' "minority viewpoint" ' but rather a variety of viewpoints among minority students" (quoting law school dean)).

social not merely interpersonal phenomenon, shaped not only by individual attitudes and prejudices but also by the demographic structure of the surrounding community. In Louisville, a black-white community with a legacy of *de jure* segregation, there is good reason for public schools to be sites where a white majority and black minority together learn how to transcend race as the defining feature of historic power imbalance and how to adapt majority rule for the protection of a long subordinated group. In Seattle, a community with no racial majority among its public schoolchildren, "majority minority" schools highlight the practical importance of interracial cooperation for all groups in a multiracial democracy and challenge students to understand racial identity and race relations without a solid white majority as the central frame of reference.

Education occurs in social context, and social context adds complexity to the goal of interracial socialization beyond the generic aim of promoting individual tolerance and mutual respect. While the traditional black-white paradigm captures the racial context of Louisville, the multiraciality of Seattle presents different dynamics. The qualitative demands of interracial understanding are different in each circumstance, and they are not served merely by ensuring a critical mass of each racial group in every school. The point is not that every school must be an exact racial microcosm of the surrounding community; indeed, the Seattle and Louisville plans allow for a wide range of racial permutations. The point is simply that rough congruence between school and district demographics is readily understood not as pure racial balancing, but as a way to foster specific aspects of interracial understanding whose salience arises from local context.

In sum, the Court should have little difficulty concluding that interracial socialization is a compelling interest justifying the limited use of race in school assignment. Both the conceptual aim and its specific formulations in the Seattle and Louisville plans steer clear of improper racial stereotypes and naked racial balancing.

B. *Educational Equity*

A second broad goal of voluntary school integration policies is to enhance educational opportunity for minority students. Racially segregated schools, while denying important socialization opportunities to all children, have historically worked to the disadvantage of minority children in particular. Despite the end of *de jure* segregation, minority students in racially isolated schools still typically have inferior learning opportunities and poor educational outcomes.[61]

[61] The empirical literature on this point is immense. For a summary, see Social Science Statement, *supra* note 34, at App. 28-40. For compelling narrative accounts of the continuing relationship between racial segregation and educational inequality, see JONATHAN KOZOL, THE SHAME OF THE NATION: THE RESTORATION OF APARTHEID SCHOOLING IN AMERICA (2005).

In California, for example, public schools with 90% to 100% minority enrollment are six times as likely as majority-white schools to have a combination of high teacher turnover, high rates of uncredentialed teachers, poor instructional materials, and inadequate or unsafe facilities.[62] In 2004-05, 24% of California public high schools with 90% to 100% minority enrollment, compared to just 1% of majority-white high schools, had a combination of more students per counselor and more students per teacher than the national average, inadequate training of teachers in college prep courses, and a shortage of college preparatory courses in the curriculum.[63] Black and Latino students who attend majority-white or majority-Asian public high schools have significantly higher rates of eligibility for the University of California than their counterparts in majority-black or majority-Latino high schools.[64] While only 22% of Latinos and 34% of blacks attended majority-white high schools in California in 2000, 53% of black and Latino freshmen at UC San Diego, 49% at UC Berkeley, and over 40% throughout the UC system came from majority-white high schools.[65] Among the twenty-five

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[62] *See* JEANNIE OAKES ET AL., UCLA INST. FOR DEMOCRACY, EDUC., & ACCESS, SEPARATE AND UNEQUAL 50 YEARS AFTER *BROWN*: CALIFORNIA'S RACIAL "OPPORTUNITY GAP" 5-6 (2004). Racially isolated schools are less likely to have physical and social environments conducive to learning. In 2004-05, 27% of California high schools with over 90% minority enrollment were "critically overcrowded" (*i.e.*, they had twice as many students per acre as the state recommends) compared to just 1% of majority-white high schools. *See* JOHN ROGERS ET AL., CALIFORNIA EDUCATIONAL OPPORTUNITY REPORT 2006: ROADBLOCKS TO COLLEGE 9, 17 (2006). California "schools with more Black or Latino students have more facilities-related problems such as uncomfortable classroom temperatures; unclean bathrooms; and evidence of cockroaches, rats, or mice." Susanna Loeb et al., *How Teaching Conditions Predict Teacher Turnover in California Schools*, 80(3) PEABODY J. EDUC. 44, 58 (2005). In addition, black and Latino students in more racially diverse California middle schools report less peer victimization and greater safety. *See* Jaana Juvonen et al., *Ethnic Diversity and Perceptions of Safety in Urban Middle Schools*, 17 PSYCHOL. SCI. 393 (2006). Similarly, black and Latino college freshmen from racially integrated high schools report much less violence, drug use, and disorder in their high schools than their peers who attended segregated schools. *See* MASSEY ET AL., *supra* note 38, at 95 tbl.5.5.

[63] *See* ROGERS ET AL., *supra* note 62, at 9.

[64] *See* Robert Teranishi et al., *Opportunity at the Crossroads: Racial Inequality, School Segregation, and Higher Education in California*, 106 TEACHERS C. REC. 2224, 2234 tbl.3 (2004). Among Latino high school graduates in 2000, only 0.5% who attended majority-Latino schools and 1.2% in majority-black schools had completed UC-required coursework and taken the SAT, compared to 4.5% of Latino graduates in majority-white schools and 13.4% of Latinos in majority-Asian schools. *See id.* Among black high school graduates, 0.6% in majority-black schools and 1.5% in majority-Latino schools had completed UC-required coursework and taken the SAT, compared to 3.7% in majority-white schools and 17.8% in majority-Asian schools. *See id.*; *see also* Isaac Martin et al., *High School Segregation and Access to the University of California*, 19 EDUC. POL'Y 308, 318, 319 tbl.3 (2005) (finding negative association between black and especially Latino high school enrollment and percentage of high school graduates admitted to UC).

[65] *See* Robert Teranishi & Tara Parker, Social Reproduction of Inequality: The Composition of Feeder Schools to the University of California 12-13 (Aug. 2006), *available at* http://www.law.berkeley.edu/centers/ewi/research/TeranishiParker2006_AERJ_v2.pdf.

public high schools with the highest rates of UC admission in 1999, fourteen were majority-white and seven were majority-Asian; only one had majority black and Latino enrollment.[66]

These facts speak clearly to the persistence of racial disparities in public education. However, an inference to the educational importance of racial integration is not straightforward, for it cannot be assumed that differences between racially segregated and integrated schools are distinctly a function of school *racial* composition. Many high-minority schools are also high-poverty schools, where low parental education and limited English proficiency are more concentrated than in middle-class, predominantly white schools.[67] The case for *racial* integration depends on disentangling the effect of racial isolation from other aspects of educational disadvantage. Further, even if a distinctly racial effect can be isolated, it is important to know the mechanism underlying the effect. How exactly does school *racial* composition shape educational opportunities and outcomes?

Lurking beneath the surface of these questions is the risk of racial stereotyping vigorously articulated by Justice Thomas in *Missouri v. Jenkins*.[68] In condemning the district court's effort to convert the majority-black Kansas City schools into a "magnet district" to attract white students from surrounding suburbs, Justice Thomas said: "It never ceases to amaze me that the courts are so willing to assume that anything that is predominantly black must be inferior."[69] The notion that racial imbalances, regardless of cause, "inflict harm on black students . . . appears to rest upon the idea that any school that is black is inferior, and that blacks cannot succeed without the benefit of the company of whites."[70]

> [I]f separation itself is a harm, and if integration therefore is the only way that blacks can receive a proper education, then there must be something inferior about blacks. Under this theory, segregation injures blacks because blacks, when left on their own,

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66 *See* Isaac Martin et al., *Unequal Opportunity: Student Access to the University of California*, *in* UNIV. OF CAL. INST. FOR LABOR AND EMPLOYMENT, THE STATE OF CALIFORNIA LABOR, 2003, at 119, 145 (2003). The racial compositions of these top 25 schools are available from the California Department of Education's DataQuest website, http://data1.cde.ca.gov/dataquest/. Racially integrated high schools also supply a substantial share of the black and Latino students who attend elite colleges nationally. A study of fall 1999 freshmen in 28 of the nation's most selective colleges, including Yale, Stanford, Columbia, Princeton, and UC Berkeley, found that 78% of Latino freshmen and 64% of black freshmen came from high schools with less than 50% black or Latino enrollment. *See* MASSEY ET AL., *supra* note 38, at 94 tbl.5.4.

67 *See* ORFIELD & LEE, *supra* note 3, at 30, 31 tbl.14; Social Science Statement, *supra* note 34, at App. 28-29, 35-36.

68 515 U.S. 70, 114 (1995) (Thomas, J., concurring).

69 *Id.*

70 *Id.* at 119.

> cannot achieve. To my way of thinking, that conclusion is the result of a jurisprudence based upon a theory of black inferiority.[71]

Justice Thomas's concern, though controversial, calls for careful examination of the relationship between racial segregation and educational inequality.

In research on educational outcomes, there are difficult methodological challenges involved in separating the effect of school racial composition from the influence of students' social background and other school and non-school determinants of learning.[72] One of the most rigorous efforts in this vein is a recent study of three cohorts of more than 200,000 students attending over 3,000 Texas public elementary schools during the 1990s.[73] Applying stringent controls for student, peer, teacher, and school characteristics, the study sought to isolate the effect of school racial composition on student achievement as measured by standardized math tests.[74] The results show a strong negative relationship between math achievement among black students and the percentage black enrollment in a school.[75] This negative relationship holds across the spectrum of black enrollment from low to high.[76] The magnitude of the effect is "significant": equalizing the distribution of black students throughout the state from fifth to seventh grade "would be consistent with an increase in black seventh grade achievement of 0.19 standard deviations," which "amounts to over one-quarter of the seventh grade achievement gap between blacks and whites."[77]

But what bearing do such findings have on the racial stereotyping concern? While demonstrating a relationship between school racial composition and student achievement, the "data do not enable the identification of causal mechanisms underlying the racial composition effects."[78] As possible explanations, the

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71 *Id.* at 122.

72 Some recent efforts include Kathryn M. Borman et al., *Accountability in a Postdesegregation Era: The Continuing Significance of Racial Segregation in Florida's Schools*, 41 AM. EDUC. RES. J. 605 (2004); Jonathan Guryan, *Desegregation and Black Dropout Rates*, 94 AM. ECON. REV. 919 (2004); and Roslyn Arlin Mickelson, *The Academic Consequences of Desegregation and Segregation: Evidence from the Charlotte-Mecklenburg Schools*, 81 N.C. L. REV. 1513 (2003).

73 *See* Eric A. Hanushek et al., New Evidence About *Brown v. Board of Education*: The Complex Effects of School Racial Composition on Achievement 12 (Oct. 2004), *available at* http://edpro.stanford.edu/hanushek/admin/pages/files/uploads/race.pdf.

74 *See id.* at 12-14, 22-23 (discussing controls).

75 *See id.* at 13-18.

76 *See id.* at 22. In other words, the study found little or no evidence of non-linearity; an increase in black enrollment in a school with low black enrollment had a similar effect on achievement as the same increase in a school with high black enrollment.

77 *Id.* at 23-24.

78 *Id.* at 21.

study mentioned (without endorsing) theories of negative black peer pressure or cultural behavior that produce a "direct social interaction effect."[79] From a legal perspective, there is understandable concern that the use of such theories as a predicate for race-conscious government conduct may tend to reify observed behavior among black students or their families as intrinsically *racial*, raising the specter of improper racial stereotyping.[80] Thus, although evidence of a direct link between school racial composition and student achievement may suggest that integration has instrumental benefits, a policy premised on that link may carry a risk of expressive harm, especially when the underlying nature of the link remains unclear.

However, the racial equity case for school integration need not rest on a direct relationship between school racial composition and student achievement. The Texas study held constant an array of in-school factors that affect student learning, including curriculum, school leadership, teacher experience, and class size.[81] But, as noted earlier, these factors are not equally distributed across schools of differing racial composition. This is especially true of teacher quality, "the most important school-related factor influencing student achievement."[82]

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[79] *Id.* at 20-21. In particular, the study noted the "controversial" hypothesis that "some blacks discourage others from excelling academically." *Id.* (citing *inter alia* John Ogbu & Signithia Fordham, *Black Students' School Success: Coping with the Burden of "Acting White*,*"* 18 URB. REV. 176 (1986) (describing oppositional culture among black students that associates academic achievement with "acting white" and thus hinders black school performance), and JOHN MCWHORTER, LOSING THE RACE: SELF-SABOTAGE IN BLACK AMERICA (2000) (arguing that underperformance of black students is rooted in cultural attitudes of separateness, victimhood, and anti-intellectualism)). *But cf.* Philip J. Cook & Jens Ludwig, *The Burden of "Acting White": Do Black Adolescents Disparage Academic Achievement?*, *in* THE BLACK-WHITE TEST SCORE GAP 375, 392 (Christopher Jencks & Meredith Phillips eds., 1998) ("[O]ur results do not support the belief that group differences in peer attitudes account for the black-white gap in educational achievement."); Roland G. Fryer, *"Acting White": The Social Price Paid by the Best and Brightest Minority Students*, EDUC. NEXT, Winter 2006, at 52 (finding evidence that "acting white" is a problem in racially integrated public schools but not in public schools with 80% or higher black enrollment). Alternatively, stereotype threat—a form of test performance anxiety arising from fear of confirming negative stereotypes about academic ability, *see* Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Test Performance of Academically Successful African Americans*, *in* THE BLACK-WHITE TEST SCORE GAP, *supra*, at 401—may help explain the findings of the Hanushek study if it could be shown that stereotype threat increases as black school enrollment increases.

[80] *Cf.* Ronald F. Ferguson, *A Diagnostic Analysis of Black-White GPA Disparities in Shaker Heights, Ohio*, *in* BROOKINGS PAPERS ON EDUCATION POLICY 347, 377 (2001) ("Explanations for [the black-white achievement gap] are along a continuum from an emphasis on genetics and heredity at one end, to environmental factors at the other, with many blends in the middle. Few, if any, of the explanations are flattering to black people.").

[81] *See* Hanushek et al., *supra* note 73, at 22-23.

[82] JENNIFER KING RICE, ECON. POL'Y INST., TEACHER QUALITY: UNDERSTANDING THE EFFECTIVENESS OF TEACHER ATTRIBUTES v (2003); *see* Steven G. Rivkin et al., *Teachers, Schools, and Academic Achievement*, 73 ECONOMETRICA 417 (2005); William L. Sanders & Sandra P. Horn,

Public schools with high black or Latino concentration have serious difficulty attracting and retaining high-quality teachers. Importantly, as I explain below, this problem is directly related to the *racial* make-up of schools independent of other factors such as teacher salaries, school poverty, or student achievement. Thus, besides affecting student achievement when all else is equal from school to school, school racial composition explains why all else is *not* equal from school to school.

Abundant evidence shows that the least qualified teachers are disproportionately found in schools with the highest minority enrollment.[83] Although comparisons between high- and low-poverty schools and between high- and low-achieving schools reveal a similarly inequitable pattern,[84] school *racial* composition is a robust determinant of teacher mobility and turnover independent of non-racial school characteristics. In a study of all Texas public school teachers from 1993 to 1996, researchers found that higher teacher mobility (*i.e.*, switching schools, switching districts, or exiting Texas public schools) is significantly correlated with higher black or Latino school enrollment after controlling for salaries, student test scores, class size, school poverty, and other school and district characteristics.[85] A study of 11,070 Georgia public elementary school teachers from 1994 to 2001 likewise found that black enrollment has a strong and large

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Research Findings from the Tennessee Value-Added Assessment System (TVAAS) Database: Implications for Educational Evaluation and Research, 12 J. PERSONNEL EVAL. EDUC. 247, 255 (1998) ("teacher effectiveness is the major factor influencing student academic gain").

[83] In 2004-05, for example, 20% of teachers in California schools with over 90% minority enrollment were underprepared (lacked a full credential for their teaching assignment) or were novice teachers (in their first or second year of teaching) compared to only 11% of teachers in schools with 30% or lower minority enrollment. *See* CAMILLE E. ESCH ET AL., TEACHING AND CALIFORNIA'S FUTURE: THE STATUS OF THE TEACHING PROFESSION 2005, at 70-71 (2005). The percentage of underprepared math and science teachers was four times greater in schools with over 90% minority enrollment (16%) than in schools with 30% or lower minority enrollment (4%). *See id.* at 74-76; *see also* Charles T. Clotfelter et al., *Who Teaches Whom? Race and the Distribution of Novice Teachers*, 24 ECON. EDUC. REV. 377, 391 (2005) ("Within districts [in North Carolina], novice teachers are disproportionately assigned to the schools and to the classrooms within schools that disproportionately serve black students.").

[84] *See* Donald Boyd et al., *Explaining the Short Careers of High-Achieving Teachers in Schools with Low-Performing Students*, 95 AM. ECON. REV. 166 (2005) (examining teacher turnover in low-achieving New York City schools); Hamilton Lankford et al., *Teacher Sorting and the Plight of Urban Schools: A Descriptive Analysis*, 24 EDUC. EVAL. & POL'Y ANALYSIS 37, 54 (2002) ("Non-white, poor, and low performing students, particularly those in urban areas, attend schools with less qualified teachers.").

[85] *See* Eric A. Hanushek et al., *Why Public Schools Lose Teachers*, 39 J. HUM. RESOURCES 326, 343-50 (2004). For a non-technical presentation of this study, see Eric A. Hanushek et al., *The Revolving Door*, EDUC. NEXT, Winter 2004, at 77.

positive association with the likelihood that a teacher will exit a school.[86] Further, the study reported that teacher pay has little influence on rates of teacher exit and that high poverty and low test scores do not predict higher teacher turnover once black enrollment is taken into account.[87] Consistent with the Texas teacher study, which found "little evidence of an independent effect" of school poverty on teacher mobility,[88] the Georgia study concluded that, while "teachers are much more likely to leave high poverty schools," this "occurs because teachers are more likely to leave a particular type of poor school—one that has a large proportion of minority students."[89]

An earlier study examined teacher transfers during the mid-1990s in 70% of California school districts.[90] Controlling for school poverty, teacher salaries, and other school and district characteristics, the study found "a consistent pattern" of teacher transfers out of schools with high black or Latino enrollment as well as a negative relationship between black or Latino enrollment and the odds that a newly hired teacher will be fully credentialed.[91] A separate California study showed that, while minority enrollment predicts the proportion of first-year teachers in a school and the extent to which teachers report that their schools have difficulty filling vacancies, the influence of student demographics is muted once teacher salaries and perceptions of working conditions are taken into account.[92] But even so, the study found that majority black enrollment and majority black or Latino enrollment—net of school poverty, salaries, and working conditions—are significant predictors of teachers reporting that turnover is a serious problem in their school.[93]

In sum, teacher turnover occurs at a much higher rate in heavily black and Latino schools, and students in those schools are more likely to be taught by inexperienced teachers. The detrimental effects on learning and school climate are well-documented. Despite ongoing debate over how to measure teacher quality, there is broad consensus that teacher experience matters. Beginning teachers "perform significantly worse than more experienced teachers" regardless of how

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86 *See* Benjamin Scafidi et al., Race, Poverty, and Teacher Mobility 5, 13-14 (2005), *available at* http://ssrn.com/abstract=902032 (forthcoming in *Economics of Education Review*); *see id.* at 6-9 (describing data set).

87 *See id.* at 5, 14-16.

88 Hanushek et al., *Why Public Schools Lose Teachers*, *supra* note 85, at 343.

89 Scafidi et al., *supra* note 86, at 16.

90 *See* STEPHEN CARROLL ET AL., RAND, THE DISTRIBUTION OF TEACHERS AMONG CALIFORNIA'S SCHOOL DISTRICTS AND SCHOOLS 8-11 (2000) (describing data set).

91 *See id.* at 76, 114-15.

92 *See* Loeb et al., *supra* note 62, at 62-65.

93 *See id.* at 61 tbl.5.

effective they become later in their careers.[94] In addition, frequent reliance on substitute teachers to fill vacancies makes for "little curricular coherence" and "low quality of instruction."[95] Throughout the school, high turnover "creates continual hiring needs and instability; a lack of mentors, because few teachers are experienced or fully prepared; and an erosion of professional development for other teachers in the building, as the basic training needed for untrained novices must be repeated year after year, impeding progress on other pedagogical needs."[96] Further, schools with high turnover "must continually allocate funds for recruitment efforts and professional support for new teachers without reaping dividends from these investments."[97]

Although states and districts have sought to address these problems by offering monetary and other inducements to encourage teachers to work in high-minority schools, there is "little evidence that using financial incentives to entice teachers to certain jobs actually reduces turnover or raises student achievement."[98] Researchers have calculated varying estimates of the bonuses required to attract and retain high-quality teachers in high-minority schools.[99] But the efficacy of these strategies has not been empirically established.[100] The influence of school racial composition on the distribution of high-quality teachers has a far stronger basis in evidence than the ability of financial incentives to alter existing patterns.

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[94] Rivkin et al., *supra* note 82, at 447; *accord* RICE, *supra* note 82, at 16-19; Larry V. Hedges & Rob Greenwald, *Have Times Changed? The Relation Between School Resources and School Performance*, *in* DOES MONEY MATTER? THE EFFECT OF SCHOOL RESOURCES ON STUDENT ACHIEVEMENT AND ADULT SUCCESS 74, 87 (Gary Burtless ed., 1996); Linda Darling-Hammond, *Teacher Quality and Student Achievement: A Review of State Policy Evidence*, EDUC. POL'Y ANALYSIS ARCHIVES, Jan. 1, 2000, http://epaa.asu.edu/epaa/v8n1/.

[95] Loeb et al., *supra* note 62, at 49.

[96] *Id.* at 48.

[97] *Id.* at 49; *see also* ESCH ET AL., *supra* note 83, at 64 (high teacher turnover "erod[es] schools' professional culture" and requires schools to "spend precious resources each year hiring and inducting new teachers").

[98] *See* Linda Jacobson, *Teacher-Pay Incentives Popular But Unproven*, EDUC. WK., Sept. 27, 2006, at 1.

[99] *See, e.g.*, ROBERT GORDON ET AL., BROOKINGS INST., IDENTIFYING EFFECTIVE TEACHERS USING PERFORMANCE ON THE JOB 17-18 (2006) (collecting studies); Hanushek et al., *The Revolving Door*, *supra* note 85, at 81-82 (showing that salary increases of 25% to 40% would be needed to retain female teachers in high-minority urban schools, "an enormously expensive reform").

[100] If financial incentives are ineffective, one might argue that school districts, before resorting to race-conscious school assignment, should simply restrict or eliminate seniority-based teacher transfers. To my knowledge, this has never been seriously attempted. Such a measure is highly unlikely to survive collective bargaining and may aggravate the difficulty of attracting teachers to high-minority schools. *Cf. Grutter*, 539 U.S. at 339 (strict scrutiny "does not require exhaustion of every conceivable race-neutral alternative").

The upshot of this analysis is an equity argument for racial integration that avoids inviting problematic inferences of cultural deficits and instead highlights the salience of race in structuring the distribution of a critical educational resource. The observed patterns of teacher mobility arguably resemble the dynamics of housing segregation. Just as neighborhood racial composition "continues to be significant in the residential decision-making process,"[101] school racial composition is a key predictor of teacher mobility. Further, the effect of racial composition on teacher transfers, like its effect on housing choices, differs according to the race of the teacher or household. Just as whites prefer neighborhoods with fewer blacks compared to the neighborhoods blacks prefer,[102] the positive association between minority enrollment and teacher transfers is found only among white teachers, not among black or Latino teachers.[103] According to the Texas teacher study, higher black and Latino enrollment is associated with *lower* turnover among black and Latino teachers, respectively.[104]

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[101] Reynolds Farley et al., *The Residential Preferences of Blacks and Whites: A Four-Metropolis Analysis*, 8 HOUSING POL'Y DEBATE 763, 791 (1997); *see* HOWARD SCHUMAN ET AL., RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATIONS 147-50 (1998).

[102] *See* Freeman v. Pitts, 503 U.S. 467, 495 (1992) (crediting evidence that "whites prefer a racial mix of 80% white and 20% black, while blacks prefer a 50-50 mix"); MASSEY & DENTON, *supra* note 40, at 88-96 (demonstrating large gap between blacks' and whites' preferences for racially mixed neighborhoods).

[103] *See* Hanushek et al., *Why Public Schools Lose Teachers*, *supra* note 85, at 343, 345, 347; Scafidi et al., *supra* note 86, at 19-20. The implication is not that high-minority schools are worse off because black and Hispanic teachers are necessarily worse than white teachers. *See* Thomas S. Dee, *The Race Connection: Are Teachers More Effective with Students Who Share Their Ethnicity?*, EDUC. NEXT, Spring 2004, at 53 (finding that having a teacher of the same race is associated with higher test scores for black and white children). *But cf.* Donald Boyd et al., *The Draw of Home: How Teachers' Preferences for Proximity Disadvantage Urban Schools*, 24 J. POL'Y ANALYSIS & MGMT. 113, 127 (2005) (observing that teachers prefer to teach near their hometowns and that "if, historically, the graduates of urban high schools have not received adequate education, then the cities face a less-qualified pool of potential teachers"). Whatever the quality of minority teachers, the fact is that white teachers comprise the lion's share of the teaching force even in high-minority schools. *See* Hanushek et al, *The Revolving Door*, *supra* note 85, at 81. Thus, the mobility pattern of experienced white teachers away from high-minority schools is a serious concern despite the opposite pattern of mobility among black and Latino teachers.

[104] *See* Hanushek et al., *Why Public Schools Lose Teachers*, *supra* note 85, at 343. These differential effects by teacher's race are unaffected by controls for district personnel practices that may tend to place minority teachers in high-minority schools, *see id.* at 345, 347, leading the study to conclude that racial composition effects on teacher transfers "are more deeply rooted in individual teacher decisions," *id.* at 347. It is possible that teacher mobility is explained not directly by teacher preferences for schools with particular racial mixes, but by how far away teachers live from schools of varying racial composition. *See id.* at 340 ("if there is extensive residential segregation and teachers prefer to work closer to where they live, blacks may rank predominantly black schools much more highly than Hispanic and white colleagues, other things equal"); Scafidi et al., *supra* note 86, at 25 ("white teachers may tend to live further from black schools than black teachers"). Yet even under this explanation, school integration is a pertinent strategy for mitigating racial com-

In sum, racially integrated schools serve a compelling interest in promoting equality of educational opportunity by countering the detrimental effects of minority concentration on the distribution of high-quality teachers. This articulation of the equitable goal of school integration does not assume the racial inferiority of minority students or otherwise ascribe cultural deficits to a particular race. Instead, it rests on the empirically substantiated role that school racial composition plays in teacher labor markets. With schooling, as with housing, racial segregation structures opportunity through the aggregate influence of racial attitudes and preferences throughout society. Racial integration of public schools alters the playing field on which these attitudes and preferences operate.

Finally, does this compelling interest support the specific 15% to 50% black enrollment guideline in Louisville and the 25% to 55% white enrollment guideline in Seattle? One might be inclined to demand evidence that these particular ranges are ideal racial mixes for attracting and retaining high-quality teachers. But the answer need not turn on such evidence. The importance of ensuring that school racial composition approximates districtwide demographics lies in the simple fact that white enrollment concentration in some schools necessarily means minority enrollment concentration in others—with the foreseeable result that high-quality teachers will gravitate toward the former schools and away from the latter. Whatever racial mix teachers may prefer in the abstract, the reality is that, in any district with substantial numbers of black or Latino students, rough congruence between school and district demographics is the optimal enrollment pattern that a district can *practically* achieve in order to secure an equitable distribution of high-quality teachers.

II. NARROW TAILORING

If one or more compelling interests justify race-conscious school assignment, then the constitutional question turns on how, and how much, race may be used. Given the strength of the interracial socialization and educational equity interests discussed above, narrow tailoring is likely to be the ground on which a particular policy stands or falls.

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position effects on teacher mobility. As the Court has recognized, school segregation is not only a consequence but also a cause of residential segregation (presumably no less among teachers than among the general population). *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 20-21 (1971) ("People gravitate toward school facilities, just as schools are located in response to the needs of people. The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner-city neighborhoods."); Social Science Statement, *supra* note 34, at App. 25-27 (reviewing evidence that "integrated schools can help reduce residential segregation").

A. *Tailoring Narrow Tailoring*

The Seattle and Louisville cases have been billed as a sequel to the Michigan affirmative action cases, as if the constitutionality of voluntary K-12 integration should be determined by a straightforward application of the narrow tailoring framework in *Grutter* and *Gratz*.[105] Were this the correct approach,[106] the Seattle and Louisville plans would be vulnerable under two familiar narrow tailoring criteria: the prohibition on quotas and the requirement of holistic, individualized consideration. The school districts abjure the existence of a quota by pointing to the broad range of school demographics allowed by the racial guidelines and by comparing the guidelines favorably to the minority enrollment ranges approved in *Grutter*.[107] But the racial guidelines set lower and upper bounds for black enrollment in Louisville and white enrollment in Seattle, and these explicit minima and maxima arguably fit *Grutter*'s definition of a quota.[108] Moreover, the somewhat mechanical use of race in the school assignment plans[109] would seem to violate the individualized consideration requirement for the same reasons that *Gratz* rejected the automatic twenty points awarded to underrepresented minorities in the Michigan undergraduate admission process.[110]

While these issues are debatable, my point is a different one: The reflexive application of *Grutter* and *Gratz* to K-12 school assignment approaches the problem of narrow tailoring from the wrong starting point. Narrow tailoring factors do not exist as standardized legal requirements. Instead, they are fashioned in response to specific legal problems within a doctrine, strict scrutiny, whose "fun-

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[105] *See* Grutter v. Bollinger, 539 U.S. 306, 333-43 (2003); Gratz v. Bollinger, 539 U.S. 244, 270-75 (2003).

[106] Some of *Grutter* and *Gratz*'s narrow tailoring elements—minimizing burdens on affected parties, consideration of race-neutral alternatives, and durational limits—sensibly apply to K-12 school assignment on the principle that race should be used no more than necessary. I will not discuss these elements here.

[107] *See* McFarland v. Jefferson County Pub. Schs., 330 F. Supp. 2d 834, 857-58 (W.D. Ky. 2004) (favorably comparing school district's racial guidelines to the law school's minority enrollment range approved in *Grutter* and to the Amherst College minority enrollment range cited approvingly by Justice Kennedy in his *Grutter* dissent); *Meredith* Brief for Respondents, *supra* note 11, at 42-43; *Seattle* Brief for Respondents, *supra* note 11, at 44.

[108] *See Grutter*, 539 U.S. at 335 ("Quotas impose a fixed number or percentage which must be attained, or which cannot be exceeded." (internal quotation marks and citation omitted)).

[109] *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 426 F.3d 1162, 1169-70 (9th Cir. 2005) (en banc) (describing race-based tiebreaker); Hampton v. Jefferson County Bd. of Educ., 72 F. Supp. 2d 753, 769 (W.D. Ky. 1999) ("If the school lies near the 15% minimum black enrollment, it could accept black applicants but it would deny admission to a disproportionate number of non-black students. Conversely, if the school approaches the 50% maximum black enrollment, it would deny admission to a disproportionate number of black students.").

[110] *See Gratz*, 539 U.S. at 271-75.

damental purpose" is to "take 'relevant differences' into account."[111] The proper starting point is the principle that narrow tailoring criteria must be drawn by reference to the harm the test aims to prevent. In other words, narrow tailoring itself must be tailored to the legal harm at issue. Without inquiry into the relevant harm, there is no meaningful way to define what narrow tailoring should require.

To quote Judge Kozinski, application of the no-quota and individualized consideration requirements to race-conscious school assignment produces "the thud of square pegs being pounded into round holes."[112] Those narrow tailoring criteria evolved in the context of competitive selection processes based on individual qualifications.[113] In such processes, affirmative action in the form of quotas or other inflexible racial preferences unfairly insulate some applicants from competition with all others[114] and potentially stigmatize racial minorities as "unable to achieve success without special protection."[115] They also carry the risk of minimizing relevant non-racial qualifications that all individuals may possess[116] and, in the case of broadcast licensing and university admissions, indulging the stereotype that members of a particular race think alike.[117]

By contrast, K-12 school assignment (outside of magnet or other specialized schools) does not involve merit-based competition. It is a sorting, not a selection, process. School assignment decisions, whether race-conscious or not, do not reflect judgments about the merit, qualifications, or talents of individual children. Nor do they reflect judgments about children's viewpoints or beliefs, since the interracial socialization interest that motivates race-conscious school assignment is not the same as the interest in wide-ranging educational diversity that supports affirmative action in higher education.[118] Further, as Judge Kozinski explained, "[n]o race is turned away from government service or services. . . . That a stu-

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[111] Adarand Constructors v. Peña, 515 U.S. 200, 228 (1995).

[112] *Seattle*, 426 F.3d at 1193 (Kozinski, J., concurring in the result).

[113] *See Grutter*, 539 U.S. at 334-39; *Gratz*, 539 U.S. at 271-75; City of Richmond v. J.A. Croson Co., 488 U.S. 469, 507-08 (1989); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 315-18 (1978) (opinion of Powell, J.).

[114] *See Grutter*, 539 U.S. at 334 (citing *Bakke*, 438 U.S. at 315-16 (Powell, J.)).

[115] *Bakke*, 438 U.S. at 298 (Powell, J.); *see* Metro Broad., Inc. v. FCC, 497 U.S. 547, 636 (1990) (Kennedy, J., dissenting) ("Special preferences . . . can foster the view that members of the favored groups are inherently less able to compete on their own.").

[116] *See Bakke*, 438 U.S. at 317 (Powell, J.) (race-conscious admissions must be "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant").

[117] *See Gratz*, 539 U.S. at 271; *Metro Broadcasting*, 497 U.S. at 636 (Kennedy, J., dissenting) ("[T]he FCC policy seems based on the demeaning notion that members of the defined racial groups ascribe to certain 'minority views' that must be different from those of other citizens.").

[118] *See Bakke*, 438 U.S. at 313 (Powell, J.); *supra* text accompanying note 45.

dent is denied the school of his choice may be disappointing, but it carries no racial stigma and says nothing at all about that individual's aptitude or ability."[119]

If this is correct, then what is the nature of the constitutional harm that properly limits the use of race in school assignment? With only two discredited historical exceptions,[120] the Court has never approved the *unqualified* use of race to further a compelling interest. If the no-quota and individualized consideration requirements have no applicability to race-conscious school assignment, then what limiting principle should apply?

B. *The Redistricting Analogy and the Predominance Test*

The answer, I argue, begins with the observation that K-12 school assignment is better analogized not to affirmative action but to electoral redistricting. The analogy is far from perfect since race-conscious redistricting poses difficulties having to do with dividing voters by race,[121] whereas the use of race in school assignment is intended to bring students together in racially integrated schools. But redistricting is a much closer analogy than affirmative action because school assignment, like redistricting, is fundamentally a sorting, not a selection, process. Both sorting processes involve a complex range of factors and require local authorities to exercise judgment in balancing competing interests.[122] Like state legislatures assigning voters to districts, school officials making decisions that affect where students go to school are invariably aware of racial demographics, just as they are aware of myriad non-racial considerations.[123] The

[119] *Seattle*, 426 F.3d at 1194 (Kozinski, J., concurring in the result). These differences between affirmative action and K-12 school assignment have been ably explained elsewhere. *See id.* at 1180-84 (en banc) (finding individualized consideration requirement inapplicable because of contextual differences between university admissions and school assignment); James E. Ryan, *Voluntary Integration: Asking the Right Questions*, 67 OHIO ST. L.J. 327, 341-42 (2006) (same); Neil Siegel, *Race-Conscious Student Assignment Plans: Balkanization, Integration, and Individualized Consideration*, 56 DUKE L.J. (forthcoming 2006) (manuscript at 45-46, on file with author) (same).

[120] *See* Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943).

[121] *See* League of United Latin Am. Citizens v. Perry, 126 S. Ct. 2594, 2663 (2006) (Roberts, C.J., concurring in part, concurring in the judgment, and dissenting in part) ("It is a sordid business, this divvying us up by race."); Shaw v. Reno, 509 U.S. 630, 647 (1993) ("A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid.").

[122] *See* Miller v. Johnson, 515 U.S. 900, 915 (1995) ("Electoral districting is a most difficult subject for legislatures, and so the States must have discretion to exercise the political judgment necessary to balance competing interests.").

[123] *See id.* at 916 ("Redistricting legislatures will . . . almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process."); *Shaw v. Reno*, 509 U.S. at 646 ("[T]he legislature always is *aware* of race when it draws district lines, just as it is

Court's treatment of race-conscious redistricting seems more likely than its affirmative action jurisprudence to point the way to a sensible limit on the use of race in school assignment.

A few examples help to show that redistricting and school assignment are problems with a similar texture. Suppose a school district with residential segregation is considering where to locate a new school. Many considerations go into a school siting decision: the cost of financing, the character of nearby development and facilities, the distance to school from where children and teachers live, parents' preferences, programmatic needs, traffic patterns, crime rates, transportation, predicted population growth or decline, and many other factors. Would it be unconstitutional for a school board to take into account these conventional factors and, as an additional factor, the racial composition of the resulting school? All else equal, it seems entirely permissible for a school board that seeks racial integration to deliberately site the school at the border of segregated neighborhoods instead of deep inside one of those neighborhoods.

Consider an even more suggestive scenario. Suppose a school district with residential segregation—for example, my local community of Berkeley—is trying to draw school attendance zones. Like school siting, drawing attendance zones involves many factors: minimizing transportation time for children and families (akin to "compactness"), encompassing comparable facilities within each zone (*e.g.*, schools, parks, libraries), preserving non-racial communities of interest, and other factors. In Berkeley, whites live predominantly in the eastern hillside, and blacks and Latinos live predominantly in the western flatland. All else equal, it seems unproblematic for the school district to deliberately draw east-west zones that achieve racial integration instead of north-south zones that track residential segregation.

But all else is rarely equal. In a given community, the cost studies may show that it would be a little cheaper to build a new school within a segregated neighborhood instead of at the neighborhood border. Maybe it would be slightly more convenient for parents if the Berkeley district drew north-south rather than east-west attendance zones. Would it be unlawful for the school board to pay a little more money or to impose some inconvenience on the district's residents for the sake of racially integrated schools? To answer this question, we would want to know how much more it would cost or how much inconvenience is involved. If the marginal burdens are slight, then a racially integrative decision would not be troubling. If the burdens are very high, however, the costs may require cuts elsewhere in the educational program, the inconvenience may substantially diminish parental involvement in the school system, and the pursuit of integrated schools may seem inflexibly single-minded. At that point, race will have become

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aware of age, economic status, religious and political persuasion, and a variety of other demographic factors.").

the predominant factor in the siting or zoning decision, subordinating the conventional non-racial factors. When this occurs, I argue, the race-conscious decision is presumptively unconstitutional. (I explain the presumption in a moment.)

This analytical pattern roughly resembles the Court's approach to race-conscious redistricting. In *Miller v. Johnson*, the Court held that strict scrutiny does not apply to race-conscious redistricting unless

> race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations.[124]

In redistricting, the predominance test is a trigger for strict scrutiny instead of a narrow tailoring factor. But the Court has posited only two bases that might justify the predominant use of race in redistricting: eradicating the effects of identified discrimination and achieving compliance with the federal Voting Rights Act.[125] Thus the doctrine essentially holds that consideration of race as a predominant factor in redistricting is presumptively unconstitutional and, further, that the presumption may be overcome, if at all, when necessary to remedy past discrimination or when compelled by federal statute.

This rule achieves a balance between the reality that "[r]edistricting legislatures will . . . almost always be aware of racial demographics"[126] and the expressive harms that occur when "race for its own sake, and not other districting prin-

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[124] *Miller*, 515 U.S. at 916.

[125] The Court has never squarely held that these interests can justify the predominant use of race in redistricting, but it has assumed this on several occasions where it held that the plan at issue served no interest in remedying identified discrimination or ensuring compliance with the Voting Rights Act. *See* Bush v. Vera, 517 U.S. 952, 976-82 (1996) (plurality opinion); Shaw v. Hunt, 517 U.S. 899, 908-18 (1996); *Miller*, 515 U.S. at 920-27; *cf.* King v. Ill. Bd. of Elections, 522 U.S. 1087 (1998) (summarily affirming three-judge district court decision holding that racially gerrymandered Chicago "ear muff" district was narrowly tailored to avoid violation of Section 2 of the Voting Rights Act). Justices Stevens, Souter, Ginsburg, and Breyer would hold that compliance with the Voting Rights Act does justify the predominant use of race in redistricting. *See Vera*, 517 U.S. at 1033-35 (Stevens, J., dissenting, joined by Ginsburg & Breyer, JJ.); *id.* at 1065 (Souter, J., dissenting, joined by Ginsburg & Breyer, JJ.). Four additional Justices agree that "compliance with § 5 of the Voting Rights Act" can justify the predominant use of race in redistricting on the principle that "race may be used where necessary to remedy identified past discrimination." *LULAC v. Perry*, 126 S. Ct. at 2667 (Scalia, J., concurring in the judgment in part and dissenting in part, joined by Roberts, C.J., and Thomas & Alito, JJ.).

[126] *Miller*, 515 U.S. at 916.

ciples, was the legislature's dominant and controlling rationale in drawing its district lines."[127] Chief among those harms, the predominant use of race reinforces the stereotype that "members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls."[128] This, in turn, "may balkanize us into competing racial factions" and "threatens to carry us further from the goal of a political system in which race no longer matters."[129]

Although race-conscious school assignment does not stereotype children's viewpoints based on race, it may pose a related concern. A school assignment plan driven overwhelmingly by race, while benignly motivated by an interest in racial integration, may nevertheless convey the message that children come to school with racial ignorance or insensitivity so dire that a substantial demotion of other important educational values is required to cure it.[130] When non-racial factors in school assignment, such as efficiency or parental involvement, are subordinated to racial considerations, the policy tends to "perpetuat[e] the notion that race matters most"[131] in the educational process. Besides unduly minimizing the possible influence of teachers, family, and religious institutions in shaping children's interracial socialization,[132] such a perspective arguably fosters a pervasive

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127 *Id.* at 913.

128 *Shaw v. Reno*, 509 U.S. at 647. Further, according to the Court, when racial considerations subordinate conventional redistricting factors, the resulting scheme "may exacerbate . . . patterns of racial bloc voting" and encourages elected officials "to believe that their primary obligation is to represent only the members of [one racial] group, rather than their constituency as a whole." *Id.* at 648.

129 *Id.* at 657.

130 *Cf.* Johnson v. California, 543 U.S. 499, 508 n.2 (2005) (racially segregative prison policy improperly " 'assumes that every incoming prisoner is incapable of getting along with a cell mate of a different race' " (quoting Brief for Former State Corrections Officials as *Amici Curiae* at 19-20)). Of course, this is not to deny that children form racial identity and attitudes early in life. *See* LAWRENCE A. HIRSCHFELD, RACE IN THE MAKING: COGNITION, CULTURE, AND THE CHILD'S CONSTRUCTION OF HUMAN KINDS (1996); FRANCES E. ABOUD, CHILDREN AND PREJUDICE (1988); James A. Banks, *Multicultural Education: Historical Development, Dimensions, and Practice*, *in* HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION 3, 16 (James A. Banks & Cherry McGee Banks eds., 2d ed. 2004) (collecting research).

131 *Johnson*, 543 U.S. at 507.

132 The role of religious institutions in interracial socialization should not be overstated despite the historical role of many churches and prominent clergy in advocating for a racially integrated society. *See* MICHAEL O. EMERSON & RODNEY M. WOO, PEOPLE OF THE DREAM: MULTIRACIAL CONGREGATIONS IN THE UNITED STATES 34-46 (2006) (finding that "more than nine out of every ten congregations in the United States are racially homogenous" (defined as having 80% or more members from a single racial group) and that religious congregations are far less racially diverse than public schools and surrounding neighborhoods).

race-consciousness throughout the community that may reinforce, by overemphasizing, racial and ethnic divisions.

Of course, students come to school with varying degrees of interracial exposure and understanding, and every student stands to benefit from a racially integrated learning environment, whether the benefit takes the form of new learning or reinforcement of lessons learned at home or elsewhere. But the subordination of other considerations in school assignment to the overriding pursuit of this goal cultivates the perception, which in turn can shape the reality, that the community and its children are intractably riven by racial difference absent the ameliorating influence of racially integrated education. For a Court committed to "encourag[ing] the transition to a society where race no longer matters,"[133] there is a fine line between the healthy interracial understanding taught by integrated schools and the heightened race-consciousness generated by a school assignment policy with a predominantly racial emphasis. To balance these concerns, the Court should hold that a school board seeking to achieve racial integration may consider race as one *non-predominant* factor among many factors in school assignment.[134] Beyond that, the use of race is presumptively unconstitutional.

The unfortunate reality, however, is that significant racial division does pervade the history and social dynamics of some communities—in particular, communities previously found liable for unconstitutional segregation in their public schools. Strong measures may be required to extirpate entrenched legacies of *de jure* segregation, and where this is so, the presumption against using race as a predominant consideration in school assignment is overcome. This explains the constitutionality of court-ordered desegregation remedies that treat school racial composition as the predominant concern. Where judicial remedies end and formerly segregated districts achieve unitary status, the predominance of race in school assignment should turn on a showing by the district that a lesser, non-predominant use of race would result in substantial resegregation. Absent this showing, the district should be held to the non-predominance standard. But where this showing is made, the legal framework should incorporate an anti-backsliding principle, permitting the district to use race as a predominant factor to maintain integrated schools. Although such use of race carries the risk of perpetuating race-consciousness, the risk is modulated by the special significance of racially integrated schools as symbols of racial reconciliation in communities with long histories of *de jure* segregation. As the district court in the Louisville case observed, racially integrated schools are a hard-won emblem of the commu-

[133] Georgia v. Ashcroft, 539 U.S. 461, 490 (2003) (citing *Shaw v. Reno*, 509 U.S. at 657).

[134] Unlike the redistricting context, where it is the plaintiff's burden to show that race was the legislature's predominant motivation in order to trigger strict scrutiny, *see Miller*, 515 U.S. at 916, here the school board bears the burden of showing non-predominance in order to satisfy narrow tailoring.

nity's good faith in repudiating unlawful segregation.[135] These conditions for allowing race to play a predominant role in school assignment are roughly analo-

[135] *See* Hampton v. Jefferson County Bd. of Educ., 102 F. Supp. 2d 358, 380 (W.D. Ky. 2000) ("Good faith was required in the use of race to remedy the former imbalances. If the Constitution somehow prohibits a school board from maintaining a desegregated school system, the good faith factor becomes something of a sham."). The Louisville community overcame enormous obstacles to achieve its current pattern of racially integrated schools:

> A full telling of that story would begin by describing the pain, inhumanity, and social degradation caused by state imposed school segregation. It would describe the individual potential which segregation suppressed; the spirit and determination of those who overcame the obstacles it imposed; and the moral strength of those who fought the legal, social, and political battle against it and other forms of discrimination. It would necessarily describe the confusion and outrage at Judge Gordon's busing order which seemed to tear this community apart as it sent children from their own neighborhoods to places that many of both races had never before seen. Finally, it would describe a school community which in many respects came together for a common purpose and worked at understanding one another well enough to overcome all these traumatic events. In doing so, at the very least, the Jefferson County schools created something positive and workable.

Hampton v. Jefferson County Bd. of Educ., 72 F. Supp. 2d 753, 755 (W.D. Ky. 1999); *see also* Br. for Prichard Committee for Academic Excellence as *Amicus Curiae* Supporting Respondents at 7-8, Meredith v. Jefferson County Bd. of Educ., No. 05-915 (U.S. Oct. 10, 2006) (describing violent riots in Louisville with over 10,000 people protesting court-ordered desegregation in 1975); *id.* at 8-9 ("While the great majority of Louisvillians opposed desegregation in 1975, the vast majority of parents polled in 2000—77%—supported the use of race in student assignment, and 82% of parents believed that students benefited from a racially diverse school environment."). The testimony of school board member Carol Haddad also describes the special significance of integrated schools to Louisville, especially to its children:

> Q. Do you personally believe in the importance of desegregation, Miss Haddad?
>
> A. I really do.
>
> Q. Why?
>
> A. Well, I believe for the children today—when my children—they were in segregated schools, and then when the merger and desegregation came and they were put into desegregated schools, they thrived, and now my grandchildren, who are now in the public schools, we are starting to see some of the things we wanted to accomplish back in 1975 because they could not understand why you would ever have a school that didn't have diversity. So many of their friends are—they bring them home with them, African American, Spanish. So they don't understand what all the problem would be. They couldn't understand having a school system that didn't have all kids in it.

Joint Appendix at 113-14, Meredith v. Jefferson County Bd. of Educ., No. 05-915 (U.S. *cert. granted* June 5, 2006) [hereinafter *Meredith* Joint Appendix].

gous to the remedial and non-retrogression goals that the Court has entertained as possible justifications for the predominant use of race in redistricting.[136]

My narrow tailoring proposal may be summed up as follows: Local school boards may consider race as a non-predominant factor in school assignment to attain racially integrated schools. But the use of race as a predominant factor in school assignment is presumptively unconstitutional. The presumption may be overcome in the limited context of court-ordered desegregation or where a previously *de jure* segregated, now unitary district is able to show that the non-predominant use of race would result in substantial resegregation.[137] Like the Court's redistricting doctrine, this legal framework achieves a practical accommodation of competing concerns. It allows districts to use race enough to promote meaningful integration in public schools, but not so much as to exacerbate the perception or reality of racial difference and division in our society.[138]

An objection to this proposal might be that the non-predominance standard provides insufficient latitude to achieve integration in some school districts with severe residential segregation but no past liability for *de jure* school segregation. In such districts, the non-predominant use of race may not be potent enough to bring the racial composition of all schools roughly in line with districtwide demographics, whereas more robust uses of race would closely fit the compelling goal of integration.[139] This claim is difficult to evaluate in the abstract, since the

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[136] *See supra* note 125 and accompanying text (discussing compliance with Voting Rights Act and remedying past discrimination as possible bases for predominant use of race in redistricting).

[137] This framework assumes the applicability of other narrow tailoring factors, *i.e.*, burdens on affected parties, race-neutral alternatives, and durational limits. *See supra* note 106.

[138] I recognize there are reasons for skepticism toward the claim of diffuse social harm arising from governmental race-consciousness, not least of which is that the empirical basis for the claim is uncertain. For example, California's experience with Proposition 209, *see* CAL. CONST. art. I, § 31, hardly confirms that ending racial preferences reduces societal race-consciousness. *See* ELLIS COSE, KILLING AFFIRMATIVE ACTION: WOULD ENDING IT REALLY RESULT IN A BETTER, MORE PERFECT UNION? (2006) (chronicling 10-year impact of Proposition 209). Moreover, perceptions of racial divisiveness are highly subjective; some people see an intolerable risk of divisiveness even in widely accepted governmental practices such as collection of racial data. *See* Rebecca Trounson, *Prop. 54: Coping with Race Distinctions*, L.A. TIMES, Sept. 28, 2003, at S3 (discussing California ballot measure to prohibit public entities from collecting racial data). Although the Supreme Court has not gone that far, in many contexts it has made clear its worry that the use of race by government tends to perpetuate or exacerbate race-consciousness and racial division throughout society. *See* Grutter v. Bollinger, 539 U.S. 306, 341-43 (2003); Miller v. Johnson, 515 U.S. 900, 912 (1995); Edmonson v. Leesville Concrete Co., 500 U.S. 614, 630-31 (1991). Instead of trying to dislodge this element of current doctrine, I accept it here as part of the framework that the Court will likely apply to race-conscious school assignment.

[139] *See Grutter*, 539 U.S. at 333 ("The purpose of the narrow tailoring requirement is to ensure that 'the means chosen "fit" . . . th[e] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.' " (quoting *Croson*, 488 U.S. at 493 (plurality opinion))). *But cf. infra* note 140.

efficacy of any policy will depend on the racial geography of the community and the particulars of the policy, especially the flexibility of any racial guidelines. More fundamentally, however, the legal framework I propose does not understand narrow tailoring to be merely a test of close fit between race-conscious means and compelling governmental ends. In application, if not in theory, the Court has made clear that narrow tailoring imposes substantive constraints on the use of race beyond proof of its fit with a valid compelling interest.[140] Thus, even where robust uses of race may produce integration in more schools or more ideal levels of integration in all schools, the risk of divisiveness associated with officially sanctioned race-consciousness *independently* constrains the use of race under narrow tailoring. The non-predominance standard reflects a pragmatic recognition of this constraint. As such, it is an admittedly imperfect calibration of the latitude that some districts might need to achieve desired levels of integration.

Note, finally, that the narrow tailoring framework I propose does not imply that non-predominant uses of race for *segregative* purposes will pass muster. In contrast to electoral redistricting, where the non-predominant use of race does not trigger strict scrutiny,[141] I have proceeded from the assumption that strict scrutiny applies whenever race is a factor in school assignment. Thus, even if a non-predominant use of race satisfies narrow tailoring, it cannot survive strict scrutiny unless it furthers a compelling interest with a strong basis in evidence. Given the

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[140] In the university admissions context, for example, consider the narrow tailoring criteria that race-conscious affirmative action must "not unduly harm members of any racial group," *Grutter*, 539 U.S. at 341, and "must be limited in time," *id.* at 342. Neither requirement probes the "fit" between a specific use of race and a university's interest in educational diversity; both are motivated by legal norms extrinsic to the concept of "fit." As the Court explained in *Grutter*, the first requirement is based on the idea that " 'there are serious problems of justice connected with the idea of preference itself,' " *id.* at 341 (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 298 (1978) (opinion of Powell, J.)), and the second reflects the belief that " '[a] core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race,' " *id.* at 341-42 (quoting Palmore v. Sidoti, 466 U.S. 429, 432 (1984)). Thus, despite its assertion that the purpose of narrow tailoring "is to ensure that the means chosen [closely] fit . . . th[e] compelling goal," *id.* at 333 (internal quotation marks and citation omitted), it is clear that the Court has interpreted narrow tailoring to include other substantive requirements. *See also* Ian Ayres, *Narrow Tailoring*, 43 UCLA L. REV. 1781 (1996) (arguing, in the context of government contracting, that the Court's preference for race-neutral means and aversion to racial quotas do not follow logically from, and thus implicate values other than, the principle that the size of racial preferences should be tailored to the remedial need).

[141] *See* Easley v. Cromartie, 532 U.S. 234, 241 (2001) ("Race must not simply have been '*a* motivation for the drawing of a majority-minority district,' but 'the "*predominant* factor" motivating the legislature's districting decision.' " (quoting Bush v. Vera, 517 U.S. 952, 959 (1996) (plurality opinion) (quoting Miller v. Johnson, 515 U.S. 900, 916 (1995))); *see also* Vieth v. Jubelirer, 541 U.S. 267, 335 (2004) (plurality opinion) ("Under the *Shaw* cases, then, the use of race as a criterion in redistricting is not *per se* impermissible, but when race is elevated to paramount status—when it is the be-all and end-all of the redistricting process—the legislature has gone too far." (citations omitted)).

"sorry history" of stigmatization and inequality associated with racial segregation,[142] it is difficult to imagine what compelling interest could possibly support the use of race to segregate public schools.

C. *When Is Race a Predominant Factor in School Assignment?*

Taking the legal framework one step further, how should the Court evaluate whether racial considerations predominate in a school assignment policy? As a starting point, the examples above concerning race-conscious school siting and attendance zoning decisions are susceptible to analysis under the Court's basic approach to electoral redistricting. In determining whether racial considerations predominate, the Court looks to the decision's enactment history, statements in the legislative record, possible race-neutral explanations for the decision, the analytical methods used in the decision-making process, and, in the case of attendance zones, the shape and demographics of the zones.[143] As in the redistricting context, the totality of the evidence, both direct and circumstantial, provides an adequate basis for the Court to render a judgment on whether racial considerations predominate.

The influence of race in school siting and zoning decisions often occurs at a wholesale level, not through case-by-case determinations of where individual students go to school. In many instances, however, the use of race in school assignment takes a more overt and definite form that makes clear at the individual level when race has been a decisive factor. Under the Seattle plan, for example, the school district knows with precision how many students (and presumably which students) were admitted to oversubscribed high schools based on the racial tiebreaker.[144] It is likewise clear that the racial guidelines in Louisville were the basis on which the district denied the school transfer application of the plaintiff in that case.[145] How should the concept of predominance be applied in these circumstances?

To begin with, it makes little sense to treat race as a predominant factor simply because it is decisive in certain instances. Decision-making that takes race

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[142] *Bakke*, 438 U.S. at 396 (Marshall, J., dissenting); *see id.* at 392-94 (describing history of racial segregation from *Plessy* to *Brown*, including segregation in K-12 public schools and public graduate and professional schools).

[143] For examples of how the Court has analyzed these factors to decide whether race is the predominant factor in redistricting, see *Easley*, 532 U.S. at 243-57; *Vera*, 517 U.S. at 959-76 (plurality opinion); *Shaw v. Hunt*, 517 U.S. at 905-07; and *Miller*, 515 U.S. at 917-20.

[144] *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 426 F.3d 1162, 1170 (9th Cir. 2005) (en banc) (observing that race affected the school assignments of 305 students in four schools in 2000-01).

[145] *See* McFarland v. Jefferson County Pub. Schs., 330 F. Supp. 2d 834, 844 n.15 (W.D. Ky. 2004).

into account means that race will be decisive somewhere. Even the modest use of race as a plus-factor that Justice Powell endorsed in the context of selective admissions entails the reality that " 'the race of an applicant may tip the balance in his favor' " decisively for some applicants.[146] If race made no difference at all, then the consideration of race would be pointless. Yet if the individual cases where race is decisive were to control the predominance inquiry, then predominance would always be found, and narrow tailoring would collapse into a blanket prohibition.

In selective admissions, it appears that predominance occurs not simply when race is decisive but when it is automatically so. Race as "one, nonpredominant factor" may tip the balance in an applicant's favor after all other individual qualities are properly considered.[147] But, as the Court's opinion in *Gratz* suggests, race becomes an impermissible predominant factor when it predetermines the outcome for any applicant.[148] The bottom-line results of using plus-factors, point systems, or quotas may be similar, but the methods differ in how deterministically race affects individual outcomes. The more deterministic the role of race, the stronger the inference of predominance and the greater the likelihood of invalidation.

The Court's refusal to approve deterministic uses of race is rooted in the belief that "[a]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class."[149] But the consequences of this principle for permissible policy design differ from one context to another. In university admissions, the requirement that government "treat citizens as individuals" forbids the deterministic use of race *for any applicant* because the selection process is understood to convey individual judgments about each applicant's merits. In redistricting, however, there is no suggestion that government must "treat citizens as individuals" in an equally strict sense. A legislature does not violate equal protection when it assigns an individual voter or even a few voters to an electoral district predominantly based on race.[150] The

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[146] *Bakke*, 438 U.S. at 316 (quoting Harvard College admissions plan).

[147] *Grutter*, 539 U.S. at 387 (Kennedy, J., dissenting) (citing with approval Justice Powell's opinion in *Bakke*).

[148] *See Gratz*, 539 U.S. at 272 ("the [university's] automatic distribution of 20 points has the effect of making the factor of race . . . decisive for virtually every minimally qualified underrepresented minority applicant" (internal quotation marks omitted)).

[149] Miller v. Johnson, 515 U.S. 900, 912 (1995) (quoting Metro Broad., Inc. v. FCC, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting)) (internal quotation marks omitted).

[150] Were it otherwise, the plurality in *Bush v. Vera* would not have needed to examine the wide range of evidence it did to find predominance after observing that the redistricters "availed themselves fully of th[e] opportunity" to "make more intricate refinements on the basis of race than on the basis of other demographic information" using a computer program with "block-by-block racial

concern arises only when "race was the predominant factor motivating the legislature's decision to place *a significant number of voters* within or without a particular district" in derogation of traditional districting principles.[151]

Does this latter statement imply that *de minimis* racial discrimination is permitted in redistricting? Of course not. It implies that the stringent norm of individualized treatment developed in the admissions context does not extend to redistricting because the use of race in sorting does not present the same hazards as the use of race in selection.[152] The predominance inquiry in redistricting examines not how race affects the placement of individual voters, but rather how the plan as a whole balances racial considerations with non-racial districting criteria. Race may be the predominant factor in the placement of some voters, but where it is not the predominant factor shaping the district as a whole, the implication is that the legislature has recognized the political importance of voters' non-racial attributes and affinities, and thereby avoided the stereotype that "members of the same racial group . . . think alike, share the same political interests, and will prefer the same candidates at the polls."[153] In redistricting, it is clear that the Court evaluates a plan at the wholesale (aggregate) not retail (individual) level in determining whether government has treated citizens as individuals and not simply as members of a racial group.

If K-12 school assignment is properly understood as a sorting process like redistricting rather than a selection process like university admissions, then it should not matter whether the role of race is opaque or imprecise, as in school siting and attendance zoning decisions, or more transparent and deterministic, as in school choice or transfer decisions. The pertinent inquiry is whether racial considerations predominate in the school assignment plan *as a whole*. In addition to inspection of the plan's enactment history, the inquiry requires most importantly a careful assessment of the role of non-racial factors in school assignment and the relative influence of racial and non-racial considerations in determining outcomes.[154] Where it is possible to quantify the assignments decided by race, predominance is indicated when a plan assigns "a significant num-

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data." 517 U.S. at 961-62 (plurality opinion). The plurality made clear that the "manipulat[ion] [of] district lines to exploit unprecedentedly detailed racial data" was not "independently sufficient" to show that race predominated in redistricting. *Id.* at 962.

[151] *Miller*, 515 U.S. at 916 (emphasis added).

[152] *See supra* notes 118-119 and accompanying text.

[153] Shaw v. Reno, 509 U.S. 630, 647 (1993).

[154] Professor Siegel proposes a similar narrow tailoring test, *see* Siegel, *supra* note 119 (manuscript at 49) ("the district's use of race, as a statistical matter, [must] not predominate over its use of these other factors in the assignment process for the district as a whole"), but he reaches his conclusion through a different analytical path that calibrates narrow tailoring to the risk that a given race-conscious policy will encourage racial balkanization, *see id.* (manuscript at 43-49).

ber"[155] of students in the district based on race. Defining "a significant number" is a line-drawing problem not unlike others the Court has resolved.[156] In general, the numerical limit should be far less than half of all assignments in the district.[157] One commentator has suggested that "[w]hen race was decisive more than one fifth of the time, . . . the plan should probably be regarded as suspect."[158] Whatever answer the Court may give, it should reflect a pragmatic judgment that balances the benefits of achieving a meaningful degree of school integration against the risks of reinforcing the perception or reality of racial division in society through officially sanctioned race-consciousness.

D. *The Seattle and Louisville Plans*

As the redistricting cases suggest, the predominance inquiry is highly fact-intensive. If the Court were to adopt the framework I propose, it may be inclined to remand the *Seattle* and *Louisville* cases to the lower courts given their familiarity with the school assignment plans, their enactment history, their actual operation and effect, and the history and characteristics of the communities they

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[155] *Miller*, 515 U.S. at 916.

[156] *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003) ("[I]n practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."); Zadvydas v. Davis, 533 U.S. 678, 701 (2001) (holding that detention beyond six months is presumptively unreasonable under a federal statute authorizing detention of aliens pending removal); County of Riverside v. McLaughlin, 500 U.S. 44, 56-58 (1991) (adopting presumption, based on lower court estimate of time needed to process arrestee, that 48-hour delay in probable cause hearing after arrest is reasonable and thus constitutionally permissible).

[157] An example may help to provide a feel for the magnitude of a sensible numerical limit on race-based assignments under the non-predominance standard. Suppose a district with 60 white and 40 black students consists of two schools of equal size, *A* and *B*. Suppose also that residential segregation is so severe that, if students were assigned to neighborhood schools, school *A* would enroll 45 whites and 5 blacks while school *B* would have 15 whites and 35 blacks. To achieve the districtwide ratio of whites to blacks in each school, 15 students of each race—or 30% of district enrollment—would need to switch schools, resulting in 30 whites and 20 blacks in both school *A* and school *B*. The non-predominance standard limits the share of assignments that may be decided by race by prohibiting school districts from using race with the type of rigidity and primacy necessary to produce uniform school enrollments that *exactly* mirror district demographics. Were the hypothetical district to give proper weight to important non-racial considerations and non-predominant weight to race, its assignment plan would produce integrated school enrollments within a broad and flexible range. For example, only 10 students of each race—or 20% of total enrollment—would need to move to achieve 30% to 50% black enrollment in each school (*i.e.*, 35 whites and 15 blacks in school *A*, 25 whites and 25 blacks in school *B*). This example is of course highly simplified, but it provides a rough sense of the kind of number that would be a reasonable limit on race-based assignments under the predominance inquiry.

[158] Siegel, *supra* note 119 (manuscript at 40).

affect.[159] Without pretending to offer a complete analysis, let me conclude with a few thoughts on relevant features of the plans that should inform the predominance inquiry.

In Seattle, there is no doubt that the racial tiebreaker denies some students the opportunity to attend the school of their choice. But the history of the Seattle plan is a story of increasingly modest uses of race. In 1977, the school board divided the district into zones that paired predominantly white with predominantly minority elementary schools and then linked mandatory high school assignments to elementary school assignments.[160] This plan involved mandatory busing, contributing to white flight and triggering a state initiative blocking its implementation.[161] In 1988, the district adopted a controlled choice plan that allowed parents to rank choices within a cluster of schools that met desegregation guidelines.[162] The clusters involved non-contiguous boundaries and resulted in continued busing.[163] In 1994, the school board sought "to simplify assignments, reduce costs and increase community satisfaction" by devising a new plan with "choice, diversity and predictability" as "guiding factors."[164] After reviewing various options, the district in 1998-99 adopted an initial version of the current open choice plan, limited to high schools, with a series of tiebreakers for sibling attendance, racial diversity, and distance from home to assign students to oversubscribed schools.[165] In 2001-02, the district further attenuated the use of race by loosening the racial guidelines to require white enrollment in each oversubscribed high school to be within fifteen instead of ten percentage points of white enrollment districtwide.[166] It also created a "thermostat" that " 'turns-off' the race-based tiebreaker" once enrollment falls within the fifteen percentage point range.[167]

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159 *Cf.* Adarand Constructors v. Peña, 515 U.S. 200, 227 (1995) (remanding to the lower courts because "our decision today alters the playing field in some important respects" and because "unresolved questions remain concerning the details of the complex regulatory regimes"); Shaw v. Reno, 509 U.S. 630, 657-58 (1993) (remanding to the district court for application of newly clarified legal standards for determining the existence and constitutionality of a racial gerrymander).

160 *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 426 F.3d 1162, 1168 (9th Cir. 2005) (en banc).

161 *See id.* at 1168 & n.4; *see also* Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982) (holding the state initiative unconstitutional).

162 *See Seattle*, 426 F.3d at 1168.

163 *See id.*

164 *Id.*

165 *See id.* at 1168-69.

166 *See id.* at 1170.

167 *Id.*

The actual operation of the plan provides few hints that racial considerations predominate. In 2001-02, the racial tiebreaker was used in only three of the district's ten high schools, and in 2000-01, when the racial guidelines specified a narrower, ten percentage point range, race determined the assignments of 305 students in four schools, "account[ing] for about 10 percent of admissions to Seattle's high schools as whole [sic]."[168] In those four schools, the consideration of race changed the white/non-white composition of ninth-graders by fourteen to twenty-one percentage points.[169] The vast majority of high school assignments are determined by school choice, structured by the sibling and distance tiebreakers.[170] Given these facts as well as the plan's enactment history, racial considerations appear subordinate to the district's overriding commitment to choice as well as simplicity, cost-efficiency, and community satisfaction.[171]

The Louisville plan also evolved from a historical trajectory of greater to lesser uses of race.[172] In the wake of *Brown* and a judicial finding of unremedied vestiges of *de jure* segregation in Jefferson County public schools, the school district throughout the 1970s and 1980s implemented a wide array of court-ordered strategies—including school closings, gerrymandered attendance zones, school pairings and clusterings, magnet schools, and busing—with the overriding purpose of achieving racial integration.[173] Beginning in 1984, the school board started to revise the court-ordered plan to enhance stability in enrollment, to expand choice, and to relax the use of race. In 1991, the district eliminated mandatory busing.[174] In 1996, the school board adopted a "managed choice" plan that sought "to accommodate a range of competing interests, including allowing par-

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[168] *Id.*

[169] *See id.* at 1171.

[170] *See id.* at 1169 ("In any given oversubscribed school, the sibling tiebreaker accounts for somewhere between 15 to 20 percent of the admissions to the ninth grade class."); *id.* at 1171 ("In any given oversubscribed schools, the distance-based tiebreaker accounts for between 70 to 75 percent of admissions to the ninth grade.").

[171] If anything, the use of race in the Seattle plan has been criticized for being too modest because it does not alleviate segregation in high-minority, undersubscribed high schools. *See* Br. for United States as *Amicus Curiae* Supporting Petitioner at 15, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, No. 05-908 (U.S. Aug. 21, 2006) [hereinafter *Seattle* Brief of United States]. This criticism must be viewed with some skepticism, however, since it carries no implication (at least not in the United States' brief) that the plan would be more constitutionally sound if it used more aggressive race-conscious means to reduce segregation in schools that most parents do not choose. Although limiting the racial guidelines to oversubscribed schools has drawbacks, it is surely evidence that the district takes seriously a host of non-racial considerations in school assignment instead of subordinating them to an inflexible, paramount goal of racial integration.

[172] For a detailed history, see Hampton v. Jefferson County Bd. of Educ., 72 F. Supp. 2d 753, 755-67 (W.D. Ky. 1999).

[173] *See id.* at 762-66.

[174] *See id.* at 767.

ents the opportunity to participate in the selection of their child's school, affording stable and integrated student assignments, and offering specialized programs including magnet schools, optional programs, and career academies."[175] The current plan, adopted in 2001 after the district achieved unitary status, maintains these basic goals by drawing racially integrated attendance zones called "resides areas."[176] School assignment then occurs through a multistep process beginning with initial assignment to a resides school, followed by an opportunity to choose among resides schools (for elementary students) and among magnet or optional programs, and finally, for any parent dissatisfied with the initial or choice-based placement, an option to request a transfer to another school in the district.[177]

Although school capacity and other non-racial factors shape the outcomes of choice and transfer requests, so does the 15% to 50% black enrollment guideline.[178] Yet the application of the racial guideline to choice and transfer requests plays a small part in the overall scheme. In 2003-04, nearly all elementary students attended either their initially assigned resides school or their first choice school in their resides area.[179] Most middle and high school students likewise attend their resides school.[180] Only 10% of students districtwide applied to magnet or optional programs; half of the applications were granted, and "decisions are influenced by space and program limitations much more often than by the racial guidelines."[181] Further, only 7% of students in 2002-03 applied for a transfer, and the majority of requests (though not the plaintiff's) were granted.[182]

These data suggest that the influence of race primarily occurs not in the evaluation of individual choice and transfer applications, but instead in the drawing of resides areas. The maintenance of 15% to 50% black enrollment across schools is largely the result of attendance zones drawn to produce a racially inte-

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[175] *Id.*

[176] McFarland v. Jefferson County Pub. Schs., 330 F. Supp. 2d 834, 842-43 (W.D. Ky. 2004). At the elementary level, multiple schools are clustered into a single resides area; at the secondary level, there is only one middle or high school in each resides area. *See id.*

[177] *See id.* at 843-45. Although the district distinguishes between magnet schools and magnet or optional programs, *see id.* at 843 (describing 13 magnet schools, 18 magnet programs, and optional programs in 22 schools), I include magnet schools within the term "magnet or optional programs" for simplicity.

[178] *See id.* at 842, 844-45 & n.15.

[179] *See Meredith* Brief for Respondents, *supra* note 11, at 8 & n.11.

[180] *Id.* at 8 & n.10.

[181] *Id.* at 7, 9.

[182] *See id.* at 7, 10; *McFarland*, 330 F. Supp. 2d at 844 n.15 ("[Joshua McFarland's] transfer request was denied under the racial guidelines . . . .").

grated assignment pattern.[183] The predominance inquiry, then, should examine the role of racial considerations in shaping resides areas relative to non-racial factors such as transportation, communities of interest, and proximity between home and school. One factor indicating the strong influence of racial considerations is the existence of non-contiguous boundaries drawn to improve integration.[184] But the significance of the boundaries should be considered together with how many non-contiguous zones there are, how many students they encompass, and how much variation in racial composition exists across resides areas. All of these factors bear on the extent to which racial considerations determine the configuration of resides areas.

Further, in deciding whether racial considerations predominate in school assignment, the denominator of the inquiry should take into account the district's efforts to ensure basic equality among its schools.[185] School quality, no less than parental choice or attendance zones, plays an important role in structuring school assignment.[186] The stability of the district's integrated enrollment pattern, as evidenced by parents' infrequent resort to choice and transfer options,[187] suggests that school assignment is significantly influenced not only by racial considerations but also by the district's attention to educational quality.

If racial considerations are found to predominate, then the question becomes whether lesser, non-predominant uses of race would result in substantial resegregation. There is some evidence that eliminating race as a factor in school assignment would produce a large number of racially identifiable schools,[188] but it

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[183] *See Meredith* Brief for Respondents, *supra* note 11, at 8 ("Racial integration in resides middle schools and high schools . . . is accomplished primarily through the drawing of attendance areas, some of which have non-contiguous boundaries. In elementary schools, it is accomplished by the cluster plan . . . ."); *McFarland*, 330 F. Supp. 2d at 843 ("The geographic boundaries of resides areas and cluster schools determine most school assignments.").

[184] *See McFarland*, 330 F. Supp. 2d at 842; *Hampton*, 72 F. Supp. 2d at 768. Maps of the elementary, middle, and high school resides areas appear in the *Meredith* Joint Appendix, *supra* note 135, at 64-66, but it is unclear from these maps how many non-contiguous zones there are.

[185] *See McFarland*, 330 F. Supp. 2d at 860 (discussing "JCPS policy of creating communities of equal and integrated schools"); *Meredith* Brief for Respondents, *supra* note 11, at 2-3 (describing basic equality among all schools in funding, instructional staff, curriculum, accountability, discipline, dress code, homework policies, and extracurricular activities).

[186] This is the basis for the use of magnet schools as a desegregation strategy. *See, e.g.*, Magnet Schools Assistance Program, 20 U.S.C. §§ 7231-7231j; 34 C.F.R. § 280.1. As the United States suggests, enhancing school quality can be an important race-neutral element of an overall strategy to produce racially integrated schools. *See Seattle* Brief of United States, *supra* note 171, at 25-27.

[187] As further evidence of stable integration, "[t]he percentage of Jefferson County students attending public school has stabilized since 1984, and the percentage of *white* students in JCPS has likewise remained stable, despite a relative decline in white births." *Meredith* Brief for Respondents, *supra* note 11, at 9 (citing record).

[188] *See* Hampton v. Jefferson County Bd. of Educ., 102 F. Supp. 2d 358, 371 n.29 (W.D. Ky. 2000) (discussing evidence that "a policy of strictly neighborhood schools" or the use of "current

is unclear whether a more attenuated use of race could substantially maintain current levels of integration. If additional evidence showed that such an option exists, then the existing plan would be unconstitutional. If not, then the predominant use of race in school assignment would be constitutionally permissible. Given the long road traveled by Jefferson County to overcome *de jure* segregation and achieve racially integrated schools,[189] it is fitting that the legal framework be one that allows the community's achievement to endure while requiring the least race-conscious means.

CONCLUSION

The narrow tailoring test I propose may be criticized as a malleable, imprecise standard. It may spawn further litigation and may encumber the federal courts with difficult fact-intensive inquiries. But the standard is not unlike others that the Court has developed in areas where complexity and variation in problems and attempted solutions warrant an adaptable, responsive legal standard instead of a bright-line rule.[190] Over time, judicial interpretation may refine the legal standard while also refining the policies in question toward a set of best practices. Providing room in legal analysis for careful, socially situated judgments seems especially important in the context of race-conscious school assignment. As the nation's demographics continue to change, and as racial attitudes change with them, public schools will remain at the forefront of our society's ongoing struggle to reconcile the demands of colorblindness and color-consciousness. By steering a middle course that judiciously mediates this struggle, the Court best serves the interests of constitutional democracy in this difficult and delicate area.

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choice programs . . . in conjunction with basic neighborhood school assignment" would produce a significant number of racially identifiable schools).

[189] *See supra* note 135.

[190] *See, e.g.*, Rapanos v. United States, 126 S. Ct. 2208, 2236 (2006) (Kennedy, J., concurring in the judgment) (concluding that a water or wetlands constitutes "navigable waters" under the Clean Water Act if it has a "significant nexus" to waters that are navigable in fact or could reasonably be made navigable); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425-26 (2003) (holding that "courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered" but "declin[ing] . . . to impose a bright-line ratio which a punitive damages award cannot exceed"); City of Boerne v. Flores, 521 U.S. 507, 520 (1997) (holding that validity of legislation under Section 5 of the Fourteenth Amendment requires "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end"); Miller v. Johnson, 515 U.S. 900, 916 (1995) (defining racial predominance standard for application of strict scrutiny to race-conscious redistricting).