

K-12 Race-Conscious Student Assignment Policies: Law, Social Science, and Diversity

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This fall, the Supreme Court will consider the constitutionality of race-conscious K-12 student assignment policies. At a time when schools nationwide have become more racially isolated, some districts have used such policies to mitigate segregation. This article examines these policies in light of the Supreme Court's recent decisions concerning affirmative action at universities. It explores the legal implications of differences between higher education and K-12 schooling, considering what the differences might mean for particular diversity goals and for policies designed to meet those goals. Beginning with a concise summary of research on the effects of K-12 student diversity, the article places the research in a current legal context, explaining relevant law, what the courts consider important, and how research addresses evidentiary issues.

KEYWORDS: equal protection, integration, race, segregation, student assignment.

Court-ordered desegregation was a dominant force in the educational landscape of the 1960s and 1970s. At that time, most school districts fought desegregation policies; accordingly, few observers pondered the legality of desegregation efforts implemented voluntarily, without a court order. Courts assumed that districts were entitled to make such choices. For instance, the Supreme Court in *Swann* (1971) stated in dictum¹ that school authorities, "in order to prepare students to live in a pluralistic society," have the discretion to adopt a student assignment policy mandating that each school "have a prescribed ratio of [African American] to white students reflecting the proportion for the district as a whole" (*Swann*, 1971, p. 16; see also *Bustop*, 1978). Yet, such invitational language notwithstanding, few districts were bold enough to head down that road.

What was merely an academic question in the 1970s, however, took on practical importance a decade later. In the 1980s and 1990s, school districts began pursuing voluntary efforts for desegregation. This happened at a time when affirmative action policies affecting higher education and government employment were under severe scrutiny from the courts (see *Croson*, 1989; *Adarand*, 1995). Legal challenges to voluntary K-12 integration policies soon followed and became increasingly successful (*Wessmann*, 1998; *Eisenberg*, 1999).

Courts were now presented with a quandary. School districts under court-ordered desegregation plans were generally required to use race-conscious student assignment policies as a remedy for past discrimination. In the past, policies in these districts had segregated students based on race. Now their policies were designed to make sure that students were not segregated. Could those same districts

be violating the constitution if they voluntarily pursued antisegregation policies the day after the court order had been ended? A federal court in Louisville, Kentucky, recently confronted the dilemma and concluded that the school district could keep its race-conscious policy: "In 1975, an integrated school system and all the benefits it promised were thought so essential that various federal courts required [Louisville schools] to create and maintain it. It would seem rather odd that the concepts of equal protection, local control and limited deference are now only one-way streets to a particular educational policy, virtually prohibiting the voluntary continuation of policies once required by law" (*McFarland*, 2004, p. 851).

Similar decisions were recently handed down in favor of voluntary race-conscious student assignment policies in Massachusetts and in Seattle, Washington (*Comfort*, 2005; *Parents Involved in Community Schools [PICS]*, 2005). Two of these cases—the *McFarland* case from Louisville and the *PICS* case from Seattle—will be considered by the U.S. Supreme Court during the term that begins in October of 2006 (*Meredith*, 2006; *PICS*, 2006).²

My purpose in this article is to apply social science research to an important policy context. I explore the legality of K–12 race-conscious student assignment policies in light of the Supreme Court's recent decisions concerning the University of Michigan's affirmative action policies. As discussed below, the K–12 legality determination appears to depend on whether courts sufficiently consider and acknowledge the contextual differences between race-conscious policies in higher education and those in K–12 schooling. Before exploring the legal issues, however, I present a summary of social science scholarship concerning the benefits of racial diversity in K–12 schools. The scope of the literature review is determined by the needs of the subsequent legal discussion. Accordingly, this review includes extensive citations, but it is not comprehensive.

Race-Conscious Student Assignment Policies

The litigation of voluntarily adopted race-conscious student assignment policies (RCSAPs) began only a decade ago. Most early RCSAPs resembled the type at issue in *Tuttle* (1999), one of the first cases, where the federal appellate court struck down a student assignment policy from Arlington County, Virginia. That policy used a weighted lottery to decide admissions for a popular, oversubscribed alternative kindergarten school. The weighting formula included race as well as English-language ability and low-income status, designed to add students classified in groups that had been underrepresented at the school. The more recent RCSAP policies, including the ones in Seattle and Louisville, turn to race only as a tiebreaker within choice-based systems.

For instance, the Seattle policy, which applies only to its high schools, sets up a sequential series of four tiebreakers that kick in if a school is oversubscribed. Establishing the RCSAP was part of a larger plan to create unique, themed high schools and to make transfers easier. Approximately half of the schools were oversubscribed, thus implicating the tiebreaker system. Students with a sibling attending the chosen school receive first priority for admission. Next, the race-based tiebreaker kicks in if the school enrollment differs by more than 15% from the overall racial composition of the school district. In 2001–2002, the race-based tiebreaker was applied to three of the high schools. It is important to note that this system can enhance admissions chances for Whites (as happened at one of the three

schools) or non-Whites (as happened at two). The Seattle policy also has what it calls a "thermostat," which turns the racial tiebreaker off immediately whenever the school's enrollment comes within the 15%, plus or minus variance. The third tiebreaker gives priority to students who live closer to the school. And the fourth tiebreaker, which is virtually never used, is a simple lottery.

The Louisville system, which applies at all grade levels after kindergarten, is fairly complex. Various categories of schools each have their own admissions rules. But Louisville's race-conscious elements resemble Seattle's in most important ways. The RCSAP was combined with an enhancement in parental choice and a focus on magnet schools. It allows for a broad range of student enrollment diversity (15% to 50% African American, reflecting the overall district population), focusing on avoiding extreme segregation rather than on racial balancing. Local residence (distance) and parental choice are the key criteria, accounting for the vast majority of enrollment decisions. The litigation in Louisville concerned mainly some back-to-basics (called "traditional") schools that were oversubscribed.

Applicants to these traditional schools are sorted into four separate lists at each grade level: female White, female African American, male White, and male African American. Each list is randomly ordered. Subject to the school district's final approval, each school's principal generally follows a process whereby he or she starts at the top of each list, drawing candidates and trying to stay within the 15% to 50% racial guidelines, which are applied at the school (not the grade) level.

Methods

The literature examined in this article falls into three main categories: legal cases, legal scholarship, and educational scholarship. The presentation of legal cases is exhaustive; there is a confined body of precedents, and an analysis of all major cases is included. The presentation of the extensive legal and educational scholarship is necessarily abridged, although I have attempted to point the reader to the key literature in both fields. Most notably, Michal Kurlaender and her colleagues (Kurlaender & Yun, 2005; Ma & Kurlaender, 2005) have recently published excellent reviews of the educational literature. In addition, the law review articles cited herein present additional and worthwhile discussions of the legal issues, as do the recent appellate cases. The review of research presented here used all of these resources, as well as Lexis searches, media searches, ERIC searches, and the like. This combined approach began with a survey of the literature in the reviews cited above as well as several others. The most productive Lexis searches used key case names to yield law review articles and additional cases. Searches for additional education research literature focused on terms related to specific issues, such as "segregation and achievement" and "integration and life chances." Decisions about which education research literature to include were based on two primary factors: their authoritative nature (i.e., publication in peer-reviewed publications) and their relevance to the issues framed by the legal analysis.

Racial Diversity Research

When a school district adopts an RCSAP, it does so on the basis of a theory of action (Argyris & Schön, 1978). That is, district policymakers have (at least implicitly) concluded that the RCSAP will lead, through a particular causal mechanism, toward particular beneficial outcomes. As discussed later in this article, the

theory of action takes on great importance if the RCSAP becomes the subject of litigation. Courts will require the school district to state a "compelling interest" furthered by the policy, and they will also require that the policy be "narrowly tailored" to advance that compelling interest. For this reason (among others), policymakers should carefully consider their goals and examine the research connecting racial diversity to those goals. A school district's rationale for an RCSAP—its compelling interest—should be based on that research.

There exists, in fact, a wealth of research demonstrating the benefits of avoiding or mitigating a segregated educational environment (see Eckes, 2003; Kurlaender & Yun, 2005; Ma & Kurlaender, 2005; Zahler, 1999). It is important to note that most of these benefits apply equally to Whites and students of color. For instance, a more racially diverse school environment is associated, for all students, with improvement of outlooks and viewpoints concerning race relations (Kurlaender & Yun, 2001; Schofield, 1981, 1991; Slavin & Madden, 1979; Wells et al., 2004). Similarly, such a diverse school environment is associated with reduced negative racial stereotypes among young children of all racial and ethnic backgrounds (Black, 2002; Ellison & Powers, 1994; Killen & Stangor, 2001; Sigelman & Welch, 1993). Additional benefits for all children include the following:

1. Development of interracial friendships (Hallinan & Williams, 1989; Jackman & Crane, 1986; Wells et al., 2004)
2. Greater civic engagement (Kurlaender & Yun, 2001; Ma & Kurlaender, 2005; Wells & Crain, 1994)
3. Greater likelihood of residing in integrated neighborhoods and of maintaining regular interracial contacts (Kurlaender & Yun, 2001; Schofield, 1991, 1995; Orfield & Eaton, 1996; Trent, 1997; Wells & Crain, 1994)
4. Increased likelihood of working in an integrated environment and of having positive experiences in the integrated workplace (Braddock, Crain, & McPartland, 1994; Braddock & McPartland, 1989; Kurlaender & Yun, 2001; Schofield, 1981, 1995; Trent, 1997)
5. More positive intergroup attitudes in general (outside the workplace) (Black, 2002; Schofield, 1981, 1995; Wells et al., 2004)
6. The potential for a "critical mass" enabling students to learn racial tolerance by building cross-racial relationships (Eaton, 2001; McConahay, 1981)

In addition to these benefits for all students, researchers have articulated a societal benefit. Segregated schooling is associated with the development of a lifelong and even intergenerational, self-perpetuating process of segregation that institutionalizes inequality (Braddock, 1980; Braddock & McPartland, 1989; Crain, 1970; McConahay, 1981; Wells & Crain, 1994). Reducing segregation has the beneficial effect of helping to break this cycle.

Of course, the most direct educational harm of segregation is felt by students of color, who tend to be enrolled in schools with fewer resources and lower expectations. Research concerning racial diversity has accordingly identified, specific to these children, numerous benefits of greater integration. For instance, students of color attending more integrated schools tend to have access to improved educational resources and opportunities, as well as to an environment stressing higher achievement (Braddock, 1980; Carter, 1996; Dawkins & Braddock, 1994; Natriello,

McDill, & Pallas, 1990). Not surprisingly, these students then demonstrate improved critical thinking skills (Schofield & Sagar, 1985). In fact, the Seattle court relied on expert testimony indicating that integrated schools also enhance the critical thinking skills of White students, defined as "the ability to both understand and challenge views which are different from their own" (PICS, 2005, p. 1174).

Many researchers have also found improved academic outcomes for students of color in integrated schools (Boozer, Krueger, & Wolkon, 1992; Crain & Mahard, 1983; Hochschild & Scovronick, 2003; Schofield, 1995, 2001; Trent, 1997). These works use data from the desegregation era, inquiring into the effects of court-ordered reform. Other research of this era, however, found no significant improvement in the academic outcomes of African American children who participated in school desegregation (see discussion in Crain & Mahard, 1978; for an excellent examination and critique of this research, see Wells et al., 2004).

More recent analyses, conducted by Borman et al. (2004) and by Hanushek, Kain, and Rivkin (2006), make use of new state-level data available from standards-based accountability policies. These new databases allow for sophisticated statistical modeling to explore the relationship between school segregation and student achievement.

Borman et al. (2004) analyzed Florida data, asking whether school segregation is associated with the percentage of students at the school passing the math and reading portions of the Florida Comprehensive Assessment Test (FCAT), independent of other important predictors such as instructional quality, average class size, and per pupil expenditures. Their findings suggest an important relationship between racial enrollment and achievement, but the relationship does not appear to be linear. Instead, little if any achievement difference is seen between schools that have very high White enrollment (85% or more) and those with only 50% White enrollment. But for schools with more than 50% African American students, increases in African American enrollment are associated with a decreased percentage of students passing the FCAT. Based on this study by Borman and her colleagues, a sensible policy designed to improve academic outcomes for African American students would ensure that they not be enrolled in majority-minority schools. Hanushek, Kain, and Rivkin (2006) used a similar, comprehensive database from Texas to explore these questions about the effects of school segregation. They controlled for factors such as class size and teacher experience, deriving a model that estimates that if the African American racial balance in Grades 5–7 of all Texas schools mirrored that of the state as a whole, the Black–White test score gap would narrow by 15%.

These findings from Texas and Florida are consistent with a study by Armor (2005), who analyzed data from the 2003 National Assessment of Educational Progress (NAEP). He conducted a state-by-state analysis and found that African American student achievement tends to be negatively associated with school segregation, even after controlling for the poverty level of the individual students. Similarly, Brown (2006) analyzed data from the High School Effectiveness Study, another national database, and found that racially balanced schools had the smallest racial gap in achievement and the highest average achievement schoolwide. Using comprehensive data from one key school district, the Charlotte-Mecklenburg district in North Carolina, Mickelson (2001) also found that, even after controlling for family background and individual characteristics, both African American and White students had lower achievement if they attended segregated, African American schools.

These new, statistically sophisticated analyses of high-quality databases provide strong evidence that segregated schools harm the achievement of African American students. However, the association between achievement test scores and desegregation depends on many factors, not the least of which is whether students are resegregated within school sites by means of such practices as tracking and ability grouping (Welner, 2001).

Beyond core academics, integrated environments benefit students of color by providing access to networks, career information, and advice—factors that improve overall life chances. Research shows that these children benefit from the following:

1. Greater access to informal networks that provide information about educational opportunities and methods of attaining specific educational and career goals (Dawkins & Braddock, 1994; Wells & Crain, 1994)
2. Increased social capital with regard to matters such as contacts and college-and-career counseling (Braddock, Crain, & McPartland, 1994; Orfield & Eaton, 1996; Taylor, 1997; Wells & Crain, 1994)
3. Increased and realistic occupational and educational aspirations (Hallinan & Williams, 1990; Hoelter, 1982; Schofield, 1995, 2001; Wells & Crain, 1994; Yun & Kurlaender, 2004)
4. Greater success in college and employment (Orfield & Eaton, 1996; Trent, 1997)

Expert Testimony

This research, taken together, has provided the empirical foundation for several recent court decisions in favor of school districts defending RCSAPs. Washington state's *PICS* (2003) court also turned to social science evidence for two key points: (a) "Most students educated in racially diverse schools demonstrated improved critical thinking skills"; and (b) "diverse educational experience improves race relations, reduces prejudicial attitudes, and achieves a more democratic and inclusive experience for all citizens" (*PICS*, 2003, p. 162).

The *Comfort* (2003, 2005) decisions (from Lynn, Massachusetts) also provide a clear example of how research evidence can be presented in support of compelling interests. Key testimony was provided by three experts: a developmental psychologist, a social psychologist, and a political scientist. Together, they convinced the courts (trial court and appellate court) that the RCSAP was narrowly tailored to serve the following compelling governmental interests:

fostering integrated public schools and what Lynn believes are [their] positive effects; reducing minority isolation and avoiding segregation and what Lynn believes are their negative effects; promoting a positive racial climate at schools and a safe and healthy school environment; fostering a cohesive and tolerant community in Lynn; promoting diversity; ensuring equal education and life opportunities and increasing the quality of education for all students. (*Comfort*, 2005, p. 14)

The following list uses the disciplinary categories of the *Comfort* expert witnesses to group together various areas of potential evidence, most of which are covered by the research discussed above. (Note that in this list the evidentiary issues are assigned to rough categories, but overlap is possible if not likely. A sociologist might, for example, address the issues categorized as political science.)

Political science:

1. Segregation trends
2. Achievement gap trends
3. Effects of school choice on segregation
4. Disparate educational resources and opportunities

Sociology and education research:

1. Academic effects of segregation
2. Effects of segregation on life chances
3. Classroom learning dynamics in segregated and integrated environments
4. Effects of segregation on civic engagement
5. Development of a lifelong, self-perpetuating process with intergenerational effects of segregation that institutionalize inequality (perpetuation theory)
6. Access to informal networks in segregated and integrated environments
7. Increased and realistic occupational and educational aspirations in integrated environments

Social and developmental psychology:

1. Value inculcation
2. Friendships and intergroup contact
3. Critical mass for cross-racial friendships
4. Racial stereotyping
5. Improvement of outlooks and viewpoints concerning race relations in integrated environments
6. Likelihood of embracing (or accepting) an integrated neighborhood and workplace

Potential expert testimony on behalf of a school district therefore includes most or all of the following:

1. *Descriptions*, demonstrating that the RCSAP arose out of a segregated educational environment
2. *Causes*, demonstrating that the segregated educational environment developed as a result of factors and policies over which the government maintained some responsibility and control
3. *Processes*, demonstrating that the segregation played out in ways that are theoretically understood and empirically documented
4. *Outcomes*, demonstrating harms of the segregation to students and to society
5. *Remedies*, presenting the RCSAP policy and demonstrating that schools with greater diversity offer benefits to students and society

One final point about the role of education research: The most powerful research will usually be that which is conducted using data from the particular school district whose RCSAP is being considered by the court. This was true of *Comfort*, where the court repeatedly noted that the district's experts examined and then testified about the Lynn school district's specific needs, history, and policies. The expert testimony on behalf of the party challenging the policy was found to be less useful because it was not as specific to the district.

As discussed below, the Supreme Court in *Grutter* emphasized context—it cautioned that each court must consider the unique facts of the specific institution and policy at issue. A given RCSAP may be constitutionally acceptable in one district but not in the next, because the needs may be more or less compelling, and the particular policy may thus vary in how narrowly tailored it is to meet those needs. In fact, this context-specific process should begin long before a court challenge. The leadership of a school district that is considering adopting an RCSAP should examine the research on school integration and then identify the benefits (if any) that it desires to achieve. Only then should the district design and adopt a plan, and that plan should be crafted to maximize the identified benefits. District policymakers contemplating an RCSAP will invariably be wary of the political and legal challenges (and costs) awaiting them; but these cautious measures—as well as guidance provided by the Supreme Court during the upcoming term—should help to ease the journey.

Diversity Interests: The University of Michigan and Beyond

Just as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters. (*Grutter*, 2003, p. 333)

The Supreme Court's opinion in *Grutter*, rejecting a constitutional challenge to the University of Michigan Law School's affirmative action policy, continued as follows: "The Law School has determined, based on its experience and expertise, that a 'critical mass' of underrepresented minorities is necessary to further its compelling interest in securing the educational benefits of a diverse student body" (2003, p. 333). In a nutshell, the *Grutter* Court held that an institution of higher education can have a compelling interest in securing the educational benefits of a diverse student body, and a critical mass of underrepresented minorities may be necessary to further that interest. But the Court also focused on a variety of details that could doom an affirmative action policy. The Seattle court summarized five "hallmarks" that the Supreme Court in *Grutter* identified as part of a constitutional affirmative action policy: "(1) individualized consideration of applicants; (2) the absence of quotas; (3) serious, good-faith consideration of race-neutral alternatives to the affirmative action program; (4) that no member of any racial group was unduly harmed; and (5) that the program had a sunset provision or some other end point" (PICS, 2005, p. 1180). Litigation concerning the constitutionality of RCSAPs largely hinges on the application of these factors to the K-12 context.

Critical Mass in Different Contexts

For the University of Michigan, achieving a critical mass meant admitting underrepresented minority students in sufficient numbers to ensure that they would not feel isolated or like spokespersons for their race. The degree of diversity also should be sufficient to allow for the reexamination of stereotypes, for critical thinking, and for educationally beneficial interactions (*Grutter*, 2003).

The concept of a critical mass presented by the Court in *Grutter* is different from the K-12 concept set forth by McConahay (1981), which was noted earlier in the summary of diversity research. McConahay suggests that a school's norms and behaviors are in danger of being dictated by one group once that group exceeds 70% of the school's population (see Ma & Kurlaender, 2005). The federal district

court in *Comfort* (2003) adopted a McConahay-like concept of critical mass, relying on the expert opinions of social and developmental psychologists:

There is no "magical number" . . . that indicates a critical mass, but [the social psychologist who testified] cited studies describing a 20% figure below which members of a racial minority in a given setting feel isolated or stigmatized. [The developmental psychologist who testified] underscored a critical mass estimate of 20%—a number well-established in the literature and affirmed in his own research as a prerequisite to making a meaningful amount of inter-group contact possible. (*Comfort*, 2003, p. 357)

The court then explained that these benefits increase "along a continuum," as the number moves from critical mass toward an even balance between White and non-White students (*Comfort*, 2003, p. 357).

The court carefully distinguished the critical mass concept from the higher education concept that was later accepted by the Court in *Grutter*, noting that the goal of the school leaders in *Lynn* was not viewpoint diversity:

The value of a diverse classroom setting at these ages does not inhere in the range of perspectives and experience that students can offer in discussions; rather, diversity is valuable because of its potential to enable students to learn racial tolerance by building cross-racial relationships. In this context a meaningful presence of racial minorities—and of whites at minority-dominated schools—is crucial not only to reducing feelings of tokenism, but also to disarming stereotypes that students in the classroom majority might harbor about students of other races. (*Comfort*, 2003, p. 381, fn. 90)

As this court recognized, a diversity interest at the K-12 level can be as much about issues of socialization as about academic instruction.

The Law Leading Up to Grutter

For institutions of higher education, *Grutter* was important because it reaffirmed Justice Lewis Powell's opinion in *Bakke* (1978) allowing for affirmative action in pursuit of diversity goals. *Bakke* had been under serious legal and political attack for a decade. Now, with five Supreme Court justices signed on to the *Bakke-Grutter* framework, colleges and universities may adopt carefully designed affirmative action plans with a greater degree of certainty.

But the same certainty has not existed for K-12 schools that are considering RCSAPs. It is true that public-school choice policies can be, and have been, designed with race-conscious elements intended to preclude segregation (Moses, 2002; Note, 1996; Rinas, 1997). For instance, a school district might choose to use a weighted lottery—one that varies weights based in part on race or ethnicity so as to result in a school with less segregation. Or a district may limit student admissions or transfers, again on the basis of race or ethnicity, if the enrollment change would result in greater segregation. (The growth of charter schools has seen a related set of legal provisions, in several states, designed to promote a diverse enrollment in those schools—although such laws stop short of RCSAPs; see Frankenberg & Lee, 2003, Table 1, pp. 20-22.) Yet, by the time the Court issued its decision in *Grutter* and its companion case, *Gratz* (2003), these policies were quickly disappearing. They had been repeatedly found unconstitutional by judges at the circuit court level. The federal court system is divided into three levels: the Supreme Court, the circuit courts

of appeals, and the trial courts, called "district courts." The Courts of Appeals are divided into eleven circuits, each responsible for a given geographic area.

For example, the Fifth Circuit covers Texas, Louisiana, and Mississippi. That court issued one of the most important pre-*Grutter* decisions (*Hopwood*, 1996) prohibiting affirmative action policies in university admissions. The First Circuit covers Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island, and it issued a key anti-RCSAP ruling called *Wessman* (1998). Two similar opinions were handed down by the Fourth Circuit, covering Maryland, North Carolina, South Carolina, Virginia, and West Virginia (*Eisenberg*, 1999; *Tuttle*, 1999; see also *Belk*, 2001). These courts were all attempting to read the tea leaves left by Supreme Court affirmative action cases restricting race-conscious policies in hiring and contracting, including *Croson* (1989), an employment decision, and *Adarand* (1995), a decision concerning a contractor hired for a public construction contract (see *Boger*, 2000).

The anti-affirmative action movement was further pushed along by voter initiatives in California (Proposition 209, passed in 1996) and Washington State (Initiative 200, passed in 1998) and by a 1999 executive order from Governor Bush in Florida (called the "One Florida" plan). These three laws effectively banned the consideration of race as a factor in hiring and admissions. The key language in California's Proposition 209, for instance, requires that no public institution or official shall "grant preferential treatment" to "any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."

Notably, some courts bucked this trend. One, for instance, upheld a race-conscious enrollment policy at a UCLA laboratory school on the basis of a diversity interest unique to the school's status as a lab school (*Hunter*, 1999), holding that the school had a compelling interest in maintaining a diverse student body in order to develop practices that would improve the quality of education in urban public schools. Another upheld a race-conscious urban-suburban student transfer policy in Rochester, New York (*Brewer*, 2000). And then there were the Seattle and Lynn (Massachusetts) cases. The state Supreme Court in Washington upheld the legality of Seattle's RCSAP against a challenge based on Initiative 200 (the anti-affirmative action law passed by voters) (*PICS*, 2003). The federal trial court in Lynn, rejecting an equal protection challenge to that district's race-conscious student transfer policy, explained as follows:

To say that school officials in the K-12 grades, acting in good faith, cannot take steps to remedy the extraordinary problems of *de facto* segregation and promote multiracial learning, is to go further than ever before to disappoint the promise of *Brown*. It is to admit that in 2003, resegregation of the schools is a tolerable result, as if the only problems *Brown* addressed were bad people and not bad impacts. (*Comfort*, 2003, pp. 172-173)

All these decisions preceded the Supreme Court's *Grutter* decision.

Three additional courts have considered RCSAPs in light of *Grutter*, and each case found the RCSAP to be constitutional: *Comfort* (Lynn, Massachusetts), 2005; *McFarland* (Louisville, Kentucky), 2005; and *PICS* (Seattle, Washington), 2005.³ These were all appellate-level decisions, each affirming pro-RCSAP decisions at the trial level. In each case, the judges applied the rules set forth by the Supreme Court in *Grutter*, carefully considering the contextual differences between K-12 schools and institutions of higher education.

Together, these cases paint the legal landscape for RCSAPs in the wake of *Grutter*—a landscape that remains hazy notwithstanding the three victories for school districts. Both the Lynn and Seattle school districts suffered initial court defeats at the appellate level, before their ultimate victories.⁴ Higher education may have a compelling interest in “diversity” and may be legally allowed to use a “critical mass” policy to pursue that interest. But the K–12 context is different, lacking direct parallels regarding diversity interests and critical mass. Simply stated, public K–12 schools differ from colleges and universities in important ways, and these differences have significance for future policies and for litigation (see NAACP Legal Defense Fund and Educational Fund, Civil Rights Project at Harvard University, & Center for the Study of Race and Law, 2005).

Strict Scrutiny

When government places burdens or advantages on people because of their race, ethnicity, or national origin, equal protection jurisprudence demands that the governmental policy be narrowly tailored in pursuit of a compelling state interest (*Johnson*, 2005). Whatever the government identifies as its “compelling” interest becomes the focus when the court inquires into the question of how narrowly tailored the policy is. For instance, if the CIA were recruiting agents to spy in Afghanistan, a policy requiring that all such employees be of Afghan descent may be justified by the interest that the spy be able to maintain his or her cover. Such a policy may be found to be narrowly tailored. But suppose that the government asserts the same interest (successful infiltration) for a broader policy requirement that *all* CIA employees be of Afghan descent. That broader policy is not narrowly tailored to serve the interest. It is not enough to assert a compelling interest; the policy must be carefully designed to serve the interest.

In upholding the Michigan Law School’s affirmative action policy, the *Grutter* Court agreed that the critical-mass law school admissions policy was narrowly tailored to serve the School’s compelling interest in diversity. The University of Michigan defined this diversity interest in terms of the educational environment and presented evidence about the harms of a nondiverse educational environment as well as the benefits of enrolling a critical mass of underrepresented students. After examining the particular elements of the admissions policy, the Court considered how well the policy matched the particular diversity interest. In doing so, the Court stressed that each situation has to be judged on its own merits: “Context matters when reviewing race-based governmental action under the Equal Protection Clause” (*Grutter*, 2003, p. 328). The Court continued, “Not every decision influenced by race is equally objectionable and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decision-maker for the use of race in that particular context” (pp. 331–332).

The *Grutter* Court’s opinion cited a considerable amount of social science research conducted in the wake of the *Bakke* decision in 1978. It observed, for instance, that “numerous studies show that student body diversity promotes learning outcomes, and ‘better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals’ ” (*Grutter*, 2003, p. 330, citing the amicus brief filed by the AERA and additionally citing Bowen & Bok, 1998; Orfield & Kurlaender, 2001; and Chang et al., 2003). The Court’s endorsement of Michigan’s diversity rationale was grounded on a factual record that sub-

stantiated the educational benefits of having a critical mass of racially and ethnically diverse students.

A narrowly drawn statement of the *Grutter* decision might read as follows: Racial classifications in higher education may be acceptable if used as part of an individualized admissions process, as a means of pursuing a critical mass of minority students from groups historically subject to discrimination. An individualized process is one in which each application file is considered as a whole, with each applicant's strengths and weaknesses independently considered. It is notable that no sensible approach exists for applying this principle directly to the K–12 context (Robinson, 2004). Public K–12 schools are not universities. They serve different educational and societal roles, they function differently, and only a select few use admissions processes tied to academic merit and competition. Most important, the educational purposes of the two types of institutions differ greatly. It follows, then, that different governmental interests will be furthered by K–12 RCSAPs than by affirmative action in higher education. The remainder of this article explores those differences and their evidentiary implications.

Context and Comparisons: K–12 and Higher Education

The *Grutter* Court's acceptance of the "critical mass" approach to race-conscious diversity policies was grounded in a higher education context that shares some, but not all, characteristics with the K–12 context. One point of comparison is provided by the rationale offered by the Jefferson County (Louisville) Public Schools in Kentucky for its RCSAP policy: "(1) a better academic education for all students; (2) better appreciation of our political and cultural heritage for all students; (3) more competitive and attractive public schools; and (4) broader community support for all [district] schools" (McFarland, 2004, p. 836). Each of these items may arguably be applied to higher education, but the similarities fade with closer scrutiny. The following discussion explores the possible rationales for RCSAPs, comparing and contrasting the higher education and K–12 environments.

To understand the differences between the K–12 context and the higher education context, a good place to start is with an examination of how students are assigned to K–12 schools. The nation recently marked the 50th anniversary of *Brown v. Board of Education* (1954), a decision that focused attention on the issue of racial discrimination student assignment in public education. Progress came slowly. But, after a decade of intransigence, desegregation began in earnest around 1965 (Orfield & Lee, 2004). For public school children throughout the nation, the school became the one place where they began to realize the American ideal of a multiracial community.

The Evolution of School Choice

Part of the student assignment story thus concerns the old system of intentional, de jure segregation, as well as the court intervention to end that system. Another part of the story concerns school choice, a policy that played two contrasting roles in the desegregation movement. Initially, it arose as a mechanism to evade desegregation orders (see *Green v. School Board of New Kent County*, 1968). "Freedom of choice" plans in Southern school districts ostensibly allowed each student (whether Black or White) to choose a school—a reform that might have appeared on the surface to do away with the old segregated system. Yet each group chose its

own segregated schools, in large part because of unambiguously applied pressure from defenders of the Jim Crow status quo (Green, 1968).

Important to note, however, is that school districts and courts also used school choice as a mechanism to decrease segregation. Magnet schools, generally located in inner-city, high-minority neighborhoods, were established to attract White, suburban students to minority schools by offering exceptional programs or resources (American Institutes for Research, 1993; West, 1994). "Controlled choice" plans also arose, usually asking parents to rank the top three or four schools for their child. The highest choice is honored to the extent that it does not result in segregation, as defined in the plan (Alves & Willie, 1990).

In the push-and-pull between segregative and desegregative policies, a clear winner emerged by 1990. Resegregation began in earnest in the late 1980s because of shifting priorities for policymakers as well as antipathy, or at least apathy, toward further desegregation from many federal courts (Orfield & Lee, 2004). School choice, too, saw a change in emphasis. As a tool for desegregation, choice had once combined two core American values: liberty and equity. Parents were given greater say over which schools their children would attend, while the constraints placed on parental choices furthered the societal goal of racial integration. In most states, this is no longer the case; current open enrollment and charter school policies do little if anything to directly advance desegregation. Of course, just because a choice law is not expressly designed to further integration does not mean that it cannot do so. Yet the result has often been increased segregation (see Cobb & Glass, 1999; Frankenberg & Lee, 2003; Hochschild & Scovronick, 2003; Horn & Miron, 2000; Howe, Eisenhart, & Betebeener, 2001; Welner & Howe, 2005).

Individualized Admissions

These shifts provide important background for consideration of the differences between the K-12 context and that of higher education. Competitive public colleges and universities receive applications from across their states (and often from around the nation and world). Admissions staff members sift through the applications, applying a set of rules to decide who receives the public benefit, as well as the private benefit, of admission. Usually, the rules are structured around school grades and scores on standardized tests (e.g., SAT and ACT). Consideration of diversity criteria is usually seen as a deviation from the core aspect (rankings based on scores and grades) of the admissions process.

In contrast, public school K-12 student assignment is not an academic competition. (Schools like Boston Latin, New York's Bronx Science, and San Francisco's Lowell High are exceptions to this general rule.) The individualized admissions process required by the *Grutter* Court as part of a higher education affirmative action process therefore makes little or no sense as applied to K-12 schools. This does not mean, however, that an RCSAP could systemically elevate a student's race beyond a variety of other important factors. Instead, the "individualized attention" provided as part of a K-12 student assignment plan is "of a different kind in a different context than the Supreme Court found in *Grutter*" (McFarland, 2004, p. 859):

Rather than excluding applicants, the Board's goal is to create more equal school communities for educating all students. But, like the law school, the [school district] assignment process focuses a great deal of attention upon

the individual characteristics of a student's application, such as place of residence and student choice of school or program. (p. 859)

These are categorizable aspects of a student's file. The fact that John or Mary lives in a school's catchment area may be relevant to school assignment decisions. The fact that John and Mary and their families have chosen to rank a given school highly should also be relevant. Whether a student has siblings at a school is often included as a relevant factor. As with higher education applications, the students' academic interests may also be relevant—but those interests would play out in the student choices rather than in points and preferences granted by admissions officers. Similarly, students' hobbies, test scores, or career plans will rarely be relevant to assignment decisions, although they may influence student choices. Most important, if a public school makes no pretense of admitting only the most meritorious students, then it would be nonsensical to evaluate their files individually in search of merit.

In summary, race can be considered as one factor among many in an individualized examination of a student's file by a university that is focused primarily on merit; for K–12, race is considered alongside factors focused not on merit but rather on family choice and efficiency-minded concerns such as residence. The viability and sensibility of considering various factors should depend on the district and its policy goals. That is, individualized examination of application files by a university makes sense if the goal is wide-ranging diversity. But in the K–12 context, the goal might more directly be racial diversity, so—given that there is no merit-based competition for admission—an individualized examination would be little more than a pretense. As the court explained in *Comfort* (2005, p. 18), “Unlike the [University of Michigan] policies, the Lynn Plan is designed to achieve racial diversity rather than viewpoint diversity. The only relevant criterion, then, is a student's race; individualized consideration beyond that is irrelevant to the compelling interest” (footnote omitted).

This presents an interesting tension for school districts considering RCSAPs. They are required to carefully and seriously consider alternative policies that are race-neutral but which accomplish the same compelling interest as the RCSAP. But if the goal is racial integration, these alternatives will almost always involve proxies for race (e.g., a policy designed to create more economic diversity; see Kahlenberg, 2000). At least one court expressly excused the school district from such an exercise: “Because racial diversity is a compelling interest, the District may permissibly seek it if it does so in a narrowly tailored manner. We do not require the District to conceal its compelling interest of achieving racial diversity and avoiding racial concentration or isolation through the use of ‘some clumsier proxy device’ such as poverty” (*PICS*, 2005, p. 1189).

Notwithstanding this logic, other courts may not be so lax. As discussed later in this article, school districts that are considering adopting RCSAPs should first engage in a careful examination of their fundamental policy goals. If school goals focus on general diversity, then application systems that consider a variety of diversity data, including race, may be the most sensible (and legal) options. Of course, “[c]ash-strapped public school systems are unlikely to decide to devote significant sums to hiring professionals to staff huge admissions offices charged with conducting individualized reviews of student applications to the elementary and sec-

ondary schools in the system” (Levine, 2003, pp. 520–521). Alternatively, a system based on proxy categories may be appropriate (Levine, 2003; Anderson, 2004). If, however, the district’s focus is limited to a goal of racial diversity, then an RCSAP policy may be necessary and legal.

RCSAPS as a Means to Avoid Causing Harm

Student Assignment Policies as Active Policy Choices

Policymakers deciding on student assignment systems have usually considered practical issues such as residence within a given school district and proximity of the school to the child’s home. More recently, policymakers have considered the value that parents place on being able to choose their child’s school, as well as the benefit of having siblings attend the same school. But when school districts elect to base student assignment on residential catchment areas or parental choice, district officials are making an active choice, themselves. That is, decisions about how to place students in schools are not self-apparent or derivative of some natural law. Furthermore, adopting or continuing any policy known to result in segregation is certainly not a neutral, value-free decision.

Such knowledge of a policy’s consequences can have legal implications, as evidence of active discrimination. Violations of the equal protection clause of the Fourteenth Amendment are very difficult to prove. The Supreme Court has limited such violations to cases where the government has been proved to have acted with discriminatory intent and this proof of intent goes beyond just the foreseeability of segregative consequences. However, the Court has also held that such foreseeability is relevant evidence of discriminatory intent (*Washington*, 1976, pp. 241–243 [discriminatory purpose may be inferred from the totality of the circumstances, including disparate impact]; *Dayton*, 1979, p. 536 n. 9 [“proof of foreseeable consequences is one type of quite relevant evidence of racially discriminatory purpose”]; *Penick*, 1979, pp. 461–462, 464–465 [“foreseeable and anticipated disparate impact” is relevant evidence to prove discriminatory purpose]).

But considering discriminatory intent confuses the issue. The question here is not whether school districts can be forced to adopt RCSAPs, it is only whether some districts can do so voluntarily. Figure 1 shows some of the student assignment options available to policymakers. The two boxes to the far right of the figure represent extremes. Forced busing was, during the 1970s, a dominant feature of big-city school districts; however, it is no longer a significant part of the education landscape. Racial quotas are almost always unconstitutional, outside the realm of remedial orders directed at dual systems. Vouchers for private, religious schools were, until recently, generally assumed to be unconstitutional. The Supreme Court’s *Zelman* (2002) decision removed the federal constitutional hurdle, but state constitutions (as well as political resistance) still stand in the way of publicly funded voucher policies, which serve very few students in the United States.

In contrast, neighborhood schools were the unquestioned norm for most of the past century. But many states and school districts have moved away from that model, toward greater choice, thus presenting policymakers with a dilemma. Is it acceptable to pursue choice without constraints on segregation because parents (not the government) are making the decisions that most directly cause any segregation? On the other hand, is it acceptable to constrain choices, balancing parents’ interest in “liberty” with the societal goal of mitigating segregation? Answers to

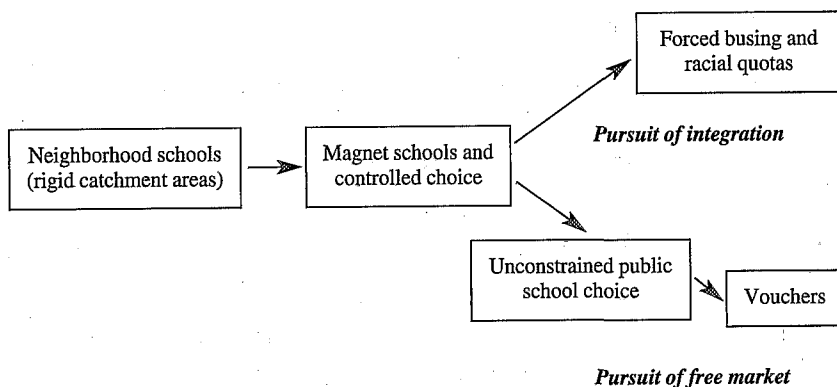


FIGURE 1. *The movement away from neighborhood schools.*

these questions seem to depend, in part, on one's premise concerning the natural alternative. Most debate of this issue assumes that the alternative is residential catchment areas, resulting in a high level of school segregation due to housing segregation. But parents in states and districts with choice policies have shown a willingness to opt for schools that are not the closest to their homes. Distance from home is, for most of these parents, a relevant factor, but perceptions regarding school quality, curriculum, and instructional approach can also play key roles in the choice decision. In short, the old rule concerning catchment area assignments is being rewritten, at least when it comes to making room for parental choice. The rule is not sacred; it is simply a convenient way that things have been done in the past. And it should not necessarily have precedence over a school district's decision to mitigate segregation in pursuit of educational benefits. As the Seattle court noted, "The Fourteenth Amendment in this context does not preclude the District from honoring racial diversity at the expense of geographical proximity" (*PICS*, 2005, p. 1183).

Accordingly, consider a different assumption about the natural alternative to assignment policies based on residence or choice: The desired and natural status of our schools should reflect the racial diversity of the state or the school district. Starting with that assumption, any policy facilitating segregation would undermine this desired and natural status and would be suspect. Such a policy would be scrutinized, with policymakers asking, *Under what conditions is it an acceptable exercise of state power to facilitate segregation?* A policy of constrained choice, then, would be looked at from the reverse perspective: *Under what conditions is it unacceptable for the government to place constraints on a policy that would otherwise segregate—constraints designed to mitigate foreseeable segregation?*

Integration Versus Free Market Goals

Magnet and controlled choice policies stand as a key fusion in the midst of this series of options (see Figure 1). On the one hand, they constitute movement away from neighborhood schools and toward market-based resource allocation. On the other hand, they place constraints on the marketplace, designed to minimize segregation. They therefore are best understood as pursuing both goals: free market and integration.

Yet noting that a controlled choice policy pursues these dual goals leaves open the important question as to which goal is preeminent. In general, school districts with choice plans have given priority to the parental-autonomy (free market) justification, making diversity a secondary goal at best (Frankenberg & Lee, 2003). This is analogous to the way that diversity issues have been seen as a modification of the pursuit of high grades and test scores in higher education admissions. Julie Mead (2002), among others, denounces this past emphasis, arguing that a school district should choose to pursue school choice with the primary goal of obtaining a diverse student enrollment. The honoring of parental choice then becomes a secondary goal: "Choice is offered to parents to serve an educational end, and only those parental choices that are consistent with that end should be honored" (Mead, 2002, p. 129). As Mead and others (see, e.g., Brown, 2000) have pointed out, the mission of schools is educational, and diversity can powerfully serve that mission; it follows that the mission should be paramount over the goal of parental autonomy. In such a system, school choice would be welcomed if it enhanced the educational mission, allowed if it had no effect on the mission, and prohibited or modified if it impaired the mission.

Segregation and No Child Left Behind

School districts might also need RCSAPs to counter segregation pressure due to an unintended consequence of the federal No Child Left Behind Act (NCLB) of 2001 and the various state laws mirroring and implementing NCLB (Ryan, 2004). These laws create a series of incentives and disincentives designed to pressure schools toward academic improvement. In a nutshell, the NCLB system penalizes schools whenever any subgroup fails to achieve test scores above a threshold. If a school has significant numbers of White, Latino, and African American students, then the school will be penalized if insufficient percentages of any of these subgroups—Whites, Latinos, or African Americans—score above the threshold. But if a school is ultra-segregated, then the school need not worry about clearing any additional subgroup hurdles. For instance, consider School A, with a student enrollment that is 60% White, 20% Latino, and 20% African American. School B, in contrast, has a student enrollment that is 95% White, with a scattering of other racial and ethnic groups. School A has three racial subgroups, each of which must demonstrate proficiency on the state exam; School B only has one. This means that School A is much more likely to be labeled as failing under NCLB. This is an unintended and perverse incentive that NCLB offers to school districts: *If you want a better chance of avoiding sanctions, you should segregate your schools.* James Ryan (2004) explains this incentive system in detail and warns:

Parents with options will be reluctant to choose schools that are failing to make AYP [the NCLB's requirement of "adequate yearly progress," requiring schools to clear a given threshold]. In some places, this will lead those parents to shy away from more integrated schools, given that racially and socioeconomically integrated schools are more likely to fail to make AYP than predominantly or exclusively white and middle class schools. (Ryan, 2004, p. 964)

The incentives that are created by test-based accountability systems like NCLB are the result of a policy choice made by government officials. Like the school

choice systems described earlier, these policies are neither necessary nor neutral. A school district that recognizes the policies' segregative effects and attempts to mitigate those effects through an RCSAP is arguably engaging in an action qualitatively different from that undertaken by the University of Michigan. The district would be acting as a governmental body attempting to limit segregation *caused by its own policies*. In other words, residential segregation may not be caused by governmental policies, but the decision to assign students to schools on the basis of segregated residential patterns is indeed such a policy. The University of Michigan, in contrast, did not argue that its admissions policies were attempting to mitigate any damage that the university or even the government was responsible for causing. Keeping in mind the *Grutter* Court's statement that "[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause" (*Grutter*, 2003, p. 327), these differences have potentially powerful legal significance.

Comparing K-12 Schooling With Higher Education and Employment

Table 1 presents a comprehensive comparison of the K-12 educational context with the contexts of higher education and employment (hiring decisions). The first section of the table presents characteristics of higher education that are absent from K-12 education; the second section presents characteristics of K-12 education that are absent from higher education. The third section presents some similarities between the two. As this table demonstrates, higher education shares more of these key characteristics with employment than it does with K-12 education. Perhaps most important, the burden of an RCSAP is qualitatively different from that imposed by an affirmative action policy in employment or higher education. A K-12 school choice plan incorporating an RCSAP simply assigns a student to a public school. Although children tend to get their top choice, some do not. Those who do not are assigned to a school that is their second choice or lower. In contrast, affirmative action policies in the higher education and employment context generally involve a decision that completely rejects an applicant.

Further, with the exception of exam schools such as Boston Latin, no school choice plan should place a child in an inferior school because of a denied choice. Whereas it may be acceptable that Podunk College is inferior to UCLA, K-12 attendance is compulsory and it should not be acceptable that one district school is inferior to another. In fact, if denying (or granting) the parent's request relegates the child to a substantially inferior neighboring school, then the system itself has serious problems of inequality and is in need of reform, whether or not an RCSAP is used (Ladd, Chalk, & Hansen, 1999). This issue was discussed by the court in *Comfort* (2003, p. 365, footnotes and citations omitted):

Amici point out that in the present case, the evidence shows that each Lynn school provides equal educational opportunities to students. Indeed, the parties even stipulate, "the education provided to Lynn's regular education students in each of the elementary, middle, and high schools in Lynn is comparable in quality, resources, and curriculum, even though schools do offer and provide varying academic programs." Thus, this is not a case, as in *Adarand* (government contracting), *Bakke* (medical school admissions), or *Grutter* . . . (law school admissions), in which the defendant, in the distribution of limited resources, gives preference to some persons on the basis of race. Students like the plaintiffs may not be able to attend the specific school they want, but no student is advantaged over another on the basis of race.

TABLE 1

Comparisons among K-12 education, higher education, and employment

Characteristics	K-12 education	Higher education	Employment (hiring decisions)
<i>Characteristics of higher education and employment that are absent from K-12 education</i>			
Burden of denial (or delay) of opportunity	No	Yes	Yes
Burden of substandard alternative	No	Yes	Yes
Element of entitlement or merit-based competition for a limited resource	No	Yes	Yes
Burden of stigma attached to a negative decision	No	Yes	Yes
<i>Characteristics of K-12 education and employment that are absent from higher education</i>			
Universal attendance	Yes	No	No
Compulsory attendance	Yes	No	No
Institutional goal of value inculcation	Yes	No	No
Ability to reach all residents (opportunity to influence race relations)	Yes	No	No
Ability to reach children (when racial impressions form)	Yes	No	No
Ability to affect college plans	Yes	No	No
<i>Similarities among K-12, higher education, and employment</i>			
Curricular benefits of diversity	Yes	Yes	NA
Discretionary decisions about curriculum made by educational experts	Yes	Yes	NA
Opening networks for employment and other future opportunities	Yes	Yes	Yes
Goal of exposure to a wide range of people, experiences, and ideas (preparation to work and live in an increasingly diverse society)	Yes	Yes	Yes, but less consequential
Robust exchange of ideas	Yes, but less so in earlier grades	Yes	Yes, in some areas of employment

Note. The "Yes" and "No" in this table indicate the relationship between the institution and the item. For example, "No" for K-12 education in the first row means that a K-12 RCSAP places on the student no burden of denial of opportunity. The "Yes" in this first row for higher education means that affirmative action policies can, in fact, place such a burden on a denied applicant. NA = not applicable.

Similarly, although there are sometimes high stakes attached to denial of a first choice under an RCSAP system (e.g., some schools are more prestigious or have better reputations), there is no stigma attached to the denial—nothing comparable to denial of admission to Michigan or denial of a job application.

This point, however, can be overstated. While school districts can point to the lack of a quality disadvantage and the lack of a stigma, the equal protection clause is nonetheless implicated. Whenever student assignment decisions are made on the basis of racial or ethnic group membership, there is a denial of individuality and consequently an equal protection harm (*Miller v. Johnson*, 1995, pp. 904–905).

Also important is the nature of compulsory, universal K–12 education. Higher education is a voluntary activity chosen by a subgroup of the American population. Potential students weigh options and make choices about whether they want to attend college and, if so, what sort of college environment they want. As a result of those choices, combined with the stark inequality of K–12 educational opportunities and other resources for children, many colleges lack diversity. In contrast, K–12 students are legally required to attend school, and nearly all children do so. A child attending public school is generally limited to schools in his or her local school district. This makes school district policymakers *active participants* in determining student assignment—in creating students' educational environment. A family may choose to live in a given neighborhood or a given home, but it is the government that decides what sort of implications to attach to that residency. Government policy dictates which school a student attends.

For a court confronted with a K–12 RCSAP policy as opposed to a higher education affirmative action policy, no longer is the question whether policymakers may step into a situation—one that is arguably created by others—to enhance diversity. Rather, the question becomes whether K–12 policymakers may consider the array of available student assignment policies that they themselves may enact and then avoid those that foreseeably result in segregation. Are K–12 policymakers legally entitled to avoid or mitigate the harm of policies that *create* segregation? School districts clearly have the right and the obligation to make educational decisions concerning the student composition of a classroom or a school. Such decisions are presently made on the basis of age, disability, perceived ability, and (although not for educational reasons) residence and parental preference. Discrimination against a child because of her disability is clearly illegal; but disability-conscious student assignment serves educational needs and is thus legal and appropriate. Similarly, RCSAPs may constitute a legal and appropriate use of an otherwise suspect category.

Moreover, because K–12 education is universal and compulsory, America's public schools offer society the best opportunity to positively influence race relations. This is particularly important because research shows that it is easier to overcome racial stereotypes in children than in adults (Killen & Stangor, 2001). Further, because many students, particularly minority students, never attend college, the societal interest in a diverse environment is magnified in K–12 schools. The highly influential military amicus brief in *Grutter*, which stressed the importance of being able to draw from a racially diverse pool of officer candidates, has a strong analogy in the K–12 context: Enlisted soldiers, most of whom are high school (not college) graduates, also must work in a multiracial environment. (For a further discussion of these and other differences between K–12 and higher edu-

cation, see Brown, 2000; Ma & Kurlaender, 2005; Mead, 2002.) The court upholding Seattle's RCSAP noted the fact that many students do not continue on to a college or university:

We reject the notion that only those students who leave high school and enter the elite world of higher education should garner the benefits that flow from learning in a diverse classroom. Indeed, it would be a perverse reading of the Equal Protection Clause that would allow a university, educating a relatively small percentage of the population, to use race when choosing its student body but not allow a public school district, educating all children attending its schools, to consider a student's race in order to ensure that the high schools within the district attain and maintain diverse student bodies. (PICS, 2005, p. 1176)

One final difference shown by the comparisons in Table 1 is important to highlight. As Kevin Brown (2000) explains, the Supreme Court has recognized "that the primary purpose of public education is the inculcation of fundamental values necessary for the maintenance of our democratic society" (p. 51; see also Brown, 2000, pp. 57-61; Welner, 2003). "Public education," he notes, "is the one place where government is supposed to be actively involved in the socialization of the next generation of adult citizens" (p. 75). Although colleges and universities present opportunities for such socialization, that mission is deemphasized in favor of individual exploration, personal development, and independent thought.

Brown stresses "the importance of respecting and recognizing everyone as an individual, rather than as a member of their racial or ethnic group," which he identifies as the "core value that comes from the Equal Protection Clause that should be inculcated by public elementary and secondary schools" (2000, pp. 72-73). This creates a paradox, similar to that noted by Justice Harry Blackmun in *Bakke*: "[I]n order to get beyond racism, we must first take account of race" (1978, p. 407). RCSAPs raise a straightforward tension between two core constitutional concerns. On the one hand, school districts should avoid segregation; on the other, they should avoid racial categorization. Brown notes that several lower federal courts reacted to this dilemma by rejecting RCSAPs. These courts, he writes, have "commented on the irony that, in an effort to teach students to see themselves and others as individuals, it is necessary to classify them as members of racial and ethnic groups" (Brown, 2000, pp. 75-76). However, he responds,

[I]t is equally ironic and contradictory to expect that an Asian child going to school with only Asians, a black child going to school with only other blacks, a Latino child going to school with only other Latinos, or a white child going to school with only other whites will come to see people from different racial or ethnic groups as individuals, rather than as members of their various racial or ethnic groups. In racially isolated schools, education officials face a situation where their ability to teach students the values of respecting everyone's individuality will be difficult, if not impossible. (Brown, 2000, p. 76)

RCSAPs also help schools to socialize students in a way that values individual self-determination, as opposed to racial and ethnic group solidarity. But to accomplish this, in order to fulfill a key aspect of the schools' role of values inculcation and in order for individual self-determination to be meaningfully pursued, schools

must actively ensure that their student assignment policies do not facilitate a segregated student body. If a quality education is, in part, defined as one in a diverse environment, then in many districts White and Black and Latino students may all be denied a quality education without the RCSAP.

Notwithstanding the above-described differences between K–12 and higher education, the two share some important similarities. As noted in Table 1, both see curricular benefits in diversity (an issue discussed in greater detail below). Both aspire to the broad goal of exposing students to a wide range of people, experiences, and ideas—in preparation for work and citizenship in an increasingly diverse society. And both, it is important to add, entrust professionals, perceived as educational experts, with discretionary decisions about curriculum. The *Grutter* Court noted that its trust in the discretionary decisions of university officials “is in keeping with our tradition of giving a degree of deference to a university’s academic decisions, within constitutionally prescribed limits” (p. 328). The Court has a similar history of granting deference to K–12 policymakers and educators concerning decisions about curriculum and educational environment (see *Bethel*, 1986; *Dayton*, 1977; *Earls*, 2002; *Hazelwood*, 1988; *Parker*, 2004; *Milliken*, 1974). As the Seattle court explained, “The Supreme Court repeatedly has shown deference to school officials at the intersection between constitutional protections and educational policy. . . . [S]econdary schools occupy a unique position in our constitutional tradition. For this reason, we afford deference to the District’s judgment similar to that which *Grutter* afforded the university” (*PICS*, 2005, p. 1188). Moreover, although courts have been reluctant to mandate and oversee school reforms (see Welner, 2001), this hesitancy is alleviated or removed when the reform decision is made by the school district itself (Liu, 2004).

The *Grutter* Court considered several additional characteristics of higher education and justifications for affirmative action, many of which have counterparts at the K–12 level. For instance, the “critical mass” concern about minority students’ feeling like isolated representatives for a group is equally present for younger students. Also, the higher education diversity interest in students’ exposure to a wide range of ideas, backgrounds, and perspectives extends to K–12 schools. The overlapping list of compelling interests also includes the following:

- Sustaining “our political and cultural heritage” (*Grutter*, 2003, p. 331)
- Promoting the goal of “effective participation by members of all racial and ethnic groups in the civic life of our Nation”—described as “essential if the dream of one Nation, indivisible, is to be realized” (*Grutter*, 2003, p. 332)
- Cultivating “a set of leaders with legitimacy in the eyes of the citizenry” (*Grutter*, 2003, p. 332)
- “[D]iminishing the force of [racial] stereotypes” (*Grutter*, 2003, p. 333)

As Liu (2004) explained, the last interest listed above is all the more compelling in elementary and secondary schools, “for the very premise of *Grutter*’s diversity rationale is that students enter higher education having had too few opportunities in earlier grades to study and learn alongside peers from other racial groups” (p. 755).

Given the above-discussed differences and similarities between K–12 and higher education, the remaining sections of this article return to the legal framework and evidentiary considerations.

Compelling Interests in Diversity

The *Grutter* definition of diversity is tied to the concept of a critical mass of underrepresented minority students. The law school at the University of Michigan supported this proposed compelling interest with evidence that a lack of diversity would lead to undesirable consequences: minority students' feeling isolated and like ostensible spokespersons for their race; inadequate opportunities for gaining the educational benefits of healthy, diverse interaction; and little chance for students to reexamine their stereotypes. This process of identification and defense of a rationale for pursuing diversity necessarily lies at the heart of all the RCSAP and affirmative action cases.

As a legal matter, the rationale must be found by the court to be a "compelling interest," and the actual policy must be determined to be narrowly tailored to achieve that compelling interest. Although policymakers may consider a variety of interests that may underlie the policy goal of racial diversity, the actual policy decided upon must be narrowly tailored to achieve the particular compelling interest articulated by the school district. The following discussion of legal defenses of RCSAPs ties back to the summary, at the beginning of this article, of the research on the effects of racial diversity. Legal defenses must be linked to compelling interests, which must in turn be linked to empirical research.

Each of the higher education diversity consequences identified in *Grutter* is also relevant in the K-12 context. For instance, the second consequence (inadequate opportunities for gaining the educational benefits of healthy, diverse interaction) is what Mead (2002) calls the "free speech" rationale for diversity—the robust exchange of ideas championed in Justice Powell's *Bakke* decision. As Mead points out, however, this defense runs the danger of essentializing race—of assuming that a person of a given race will have given experiences, express given viewpoints, or have given ideas. In contrast, a similar concept can be more safely and accurately stated in the negative: Without diversity, a school has little or no chance to achieve these goals. Diversity is *necessary but not sufficient* to gain exposure to a wide range of people, experiences, and ideas or to achieve Powell's robust exchange of ideas.

True to Powell's description, Mead (2002) characterizes the free-speech rationale as a robust exchange of ideas in general. This presents a problem for those defending RCSAPs, because such policies cannot be considered to be narrowly tailored to achieve such "free speech." As Mead explains, it would be "difficult, if not impossible, to make the connection that using race in student selections is an essential and precisely crafted mechanism to ensuring a multiplicity of ideas in the classroom" (2002, p. 134). Accordingly, Mead advises that the free-speech rationale be abandoned. Instead, she advocates that school districts be guided by their compelling interest in curricular control, relying in large part on Court precedents vesting discretion over curriculum and school environment with school leaders and educators. She describes this compelling interest as "education for success in a diverse society" (Mead, 2002, pp. 131 et seq.). Brown (2000) reaches a similar conclusion, but his curricular focus is more specifically placed on the schools' role of value inculcation.

Before turning to these other options, however, the "free speech" rationale should be given a bit more consideration. If the interest is more specifically defined as creating an environment with a diverse set of ideas, experiences, and perspec-

tives surrounding issues of race and ethnicity, then RCSAPs may be the only policy available to achieve the goal. That is, although RCSAPs may be a blunt tool to advance a broad interest in a robust exchange of ideas, they are more narrowly tailored to advance the particular interest in a robust exchange of ideas about matters implicating race.

The Curricular Rationale for Diversity

Returning, however, to the curricular interests explored by Mead (2002) and Brown (2000), they observe that the role played by a student's peers is a key aspect of the curriculum. As noted above, one key purpose of schooling in the United States is to prepare students to be citizens and workers in a multiracial society. A segregated school teaches lessons at odds with core American values. Diverse schools, on the other hand, have a greater potential to teach these important value lessons as well as to enhance lessons in areas such as literature and social studies.

All of these curricular concepts fit within the broad definitions of curriculum generally used by educational scholars (see Welner, 2003, describing the "unwieldy inclusiveness of the learning process," p. 1009, n. 277). Bobbitt (1918/1971), for instance, defined curriculum as including that which occurs in society at large: "that series of things which children and youth must do and experience by way of developing abilities to do the things well that make up the affairs of adult life; and to be in all respects what adults should be" (as quoted in Jackson, 1992, p. 7).Sizer (1992) notes that the school itself is part of the curriculum. The concepts of "null" and "hidden" curricula are particularly relevant here; what is left out of the curriculum can be as important as what is included (Eisner, 1992). That is, the absence of students with different racial or ethnic backgrounds can be as important as their inclusion. Recent court decisions have also taken a fairly expansive view of curriculum, presumptively including such school activities as newspapers (*Hazelwood*, 1988), plays (*Boring*, 1998), and bulletin board material (*Newton*, 2000).

As one aspect of the discretion that courts give to school officials concerning curricular decisions, parental objections have been subordinated to legitimate educational decisions. For instance, in *Smith* (1987), fundamentalist Christian parents found several books objectionable because the books purportedly taught children to use the scientific method and to think independently. The court, while not questioning the sincerity of the parents' objections, nonetheless rejected the legal claim, reasoning that a school decision to give students an opportunity to think for themselves was at the heart of the schools' mission (similar cases include *Mozert*, 1987; *Brown*, 1995; and *Triplett*, 1997). The parental objection in *Smith* was grounded in important constitutional (free exercise) concerns, yet the school's curricular concerns were paramount.

Types of Rationales: Creation Versus Restoration Versus Mitigation

In addition to the governmental interest in curricular control, a second interest arises out of the distinct context of K-12 schooling. As noted earlier, public school policymakers are active participants in the creation of students' educational environment. In fulfilling their duties, they may legally consider available student assignment policies and avoid those that foreseeably result in segregation. This gives rise to a governmental interest in the avoidance or mitigation of policies that create de facto segregation. Note here the overlap: Among the main reasons why the govern-

ment has a compelling interest in avoiding de facto segregation are the curricular issues just discussed. Accordingly, consider the following three closely related rationales potentially supporting a school district's decision to adopt an RCSAP:

1. The *creation* of an integrated, diverse environment that will serve various educational (e.g., curricular) interests;
2. The elimination of de facto segregation, in order to *restore* the natural human environment of integration and diversity, which will serve various educational (e.g., curricular) interests; and
3. The ongoing *mitigation* of the segregative effects of a state policy (e.g., choice or any student assignment policy), in order to maintain or enhance an integrated, diverse environment that will serve various educational (e.g., curricular) interests.

The first interest is clearly proactive, involving the affirmative creation of a diverse environment. The second interest more firmly sets forth the school district's contextual need for such a proactive step (i.e., the need follows from the damage caused by de facto segregation), but the policy is still presented as an affirmative intervention. This approach can be persuasive, as seen in the Seattle case (*PICS*, 2005, p. 1178) ("school districts have a compelling interest in ameliorating real, identifiable de facto racial segregation"). The third interest is set forth in a way that ties the remedy to the ongoing state role in creating school segregation. Even if residential segregation is de facto rather than de jure, the only links between school assignments and segregated residential choices are created by governmental (student assignment) policies. Compulsory school attendance and assignment policies that ratify and reinforce the segregatory effects of residential choice are therefore suspect. The argument here is that we are a diverse nation, so our schools should naturally reflect that diversity. Any school assignment policy that results in segregated schools should be modified as necessary to return the schools to their natural, integrated state.

Do RCSAPs Really Present an Equal Protection Problem?

Soon after the *Grutter* ruling, Justice Sandra Day O'Connor and the late Chief Justice William Rehnquist retired from the Supreme Court. They were replaced by Justice Samuel Alito and Chief Justice John Roberts. Because Justice O'Connor wrote the *Grutter* opinion, which gained a slim 5-4 majority (Rehnquist was among the four dissenters), one can speculate that the case might be decided differently if it were heard today. However, the Court rarely reconsiders matters that have been recently decided. The interval between *Bakke* and *Grutter*, for example, was 25 years. Rather than a reversal, it is more likely that the newly appointed justices—if they disagree with the *Grutter* decision—would work to narrow its effects on related issues, such as the constitutionality of RCSAP policies. This is an important part of the backdrop for the Court's upcoming decisions in the Louisville and Seattle cases.

Another part of the backdrop concerns a legal issue that has practical as well as technical legal import. As noted earlier, the Supreme Court has repeatedly stated that all racial classifications must be subject to what is called "strict scrutiny," meaning that the policy must be narrowly tailored to serve a compelling state inter-

est (see *Johnson*, 2005). However, concurring opinions in both the Lynn and Seattle cases argued that RCSAPs should not be treated the same as other types of racial classifications. In *PICS* (2005), this contention was articulated by Judge Alex Kozinski, a judicial conservative whose intellect is well respected by the justices on the Supreme Court. For this reason, it is worth noting the following extended quotation from Judge Kozinski's concurrence:

When the government seeks to use racial classifications to oppress blacks or other minorities, no conceivable justification will be sufficiently compelling. . . . When government seeks to segregate the races, . . . the courts will look with great skepticism at the justifications offered in support of such programs, and will reject them when they reflect assumptions about the conduct of individuals based on their race or skin color. . . . Programs seeking to help minorities by giving them preferences in contracting . . . and education, see, e.g., *Bakke*, benign though they may be in their motivations, pit the races against each other, and cast doubts on the ability of minorities to compete with the majority on an equal footing. The Seattle plan suffers none of these defects. It certainly is not meant to oppress minorities, nor does it have that effect. No race is turned away from government service or services. The plan does not segregate the races; to the contrary, it seeks to promote integration. There is no attempt to give members of particular races political power based on skin color. There is no competition between the races, and no race is given a preference over another. That a student is denied the school of his choice may be disappointing, but it carries no racial stigma and says nothing at all about that individual's aptitude or ability. The program does use race as a criterion, but only to ensure that the population of each public school roughly reflects the city's racial composition. Because the Seattle plan carries none of the baggage the Supreme Court has found objectionable in cases where it has applied strict scrutiny and narrow tailoring, I would consider the plan under a rational basis standard of review. By rational basis, I . . . [mean a] robust and realistic rational basis review . . . where courts consider the actual reasons for the plan in light of the real-world circumstances that gave rise to it. (*PICS*, 2005, pp. 1193–1194)

Implicit in this passage is the fact that RCSAP policies are undoubtedly not what the drafters of the 14th Amendment's equal protection clause were trying to protect against. These are not policies that use race to segregate—they use race to avoid segregation. Moreover, they do not use race to grant advantages, as in the case of Jim Crow laws or even affirmative action. Again, they use race only to avoid school segregation. Given the particular history of desegregation policies in the United States, it is also important to note that no current voluntary race-conscious student assignment policy uses forced busing. All are choice-based plans containing limits on the amount of segregation that the district will tolerate.

Applying *Grutter* to Strike Down RCSAPs

Several judges have written opinions that set forth lines of argument that the Supreme Court might use if it finds the RCSAPs in Louisville and Seattle to be unconstitutional. In both the Lynn, Massachusetts, case and the Seattle case, the policies were originally stricken down by appellate panels. Those opinions (*Comfort*, 2004; *PICS*, 2004), as well as the dissenting opinions from the full, “*en banc*,” appellate court decisions (*Comfort*, 2005; *PICS*, 2005), offer a roadmap illustrating how

Grutter and *Gratz* might be applied by the Supreme Court to strike down the Louisville and Seattle RCSAPs.

These earlier Lynn and Seattle opinions stress that RCSAPs involve an “inflexible use of race” and “racial balancing” (see *Comfort*, 2005, p. 31; *PICS*, 2005, p. 1197). In the context of higher education admissions, the *Grutter* Court upheld the law school policy because race was used in “a flexible, non-mechanical way” (*Grutter*, 2003, p. 334). This issue of flexibility was at the heart of the distinction that the Court drew between the University of Michigan’s undergraduate admissions program (unconstitutional) and its law school admissions program (constitutional).

Because the student assignment policies at issue in places such as Seattle tend not to use race in an individualized, flexible way, they may be found to fail this part of the *Grutter* test. The judges who reached this conclusion earlier in the Lynn and Seattle cases offered examples of what a flexible or race-neutral policy might look like. The *Comfort* (2005) dissent suggests “creating a strong but non-determinative ‘plus’ factor for [racially] integrative transfers but permitting other transfers based on the strength of individual requests” (p. 31). The first *PICS* (2004) appellate court suggested a randomized, citywide high school admissions lottery (pp. 970–971). The dissent in the later *PICS* (2005) decision pointed to a plan adopted in San Francisco, which has a choice system similar to that in Seattle and Louisville but instead of using race as a tie-breaker uses a “diversity index,” which yields a numerical profile of all student applicants without including race. The index is composed of six binary factors: socioeconomic status, academic achievement status, mother’s educational background, language status, academic performance index, and home language (see *PICS*, 2005, p. 1215, n. 24). This consideration of alternatives is important because the degree to which the Supreme Court will require school districts to adopt such plan will depend, in part, on any empirical evidence introduced about how successful (and feasible) they have been or are likely to be at achieving the compelling interests of the school districts.

Another contention of the judges who concluded that the Lynn and Seattle plans were not constitutional concerned the ideal of color-blind policies. These judges contended that “when government indulges in the automatic and unflinching use of race in the bestowal of any benefit, that usage counteracts the ultimate goal of relegating racial distinctions to irrelevance [citation omitted]” (*Comfort*, 2005, pp. 30–31). They cited a recent Supreme Court case rejecting a prison’s policy of racially segregating prisoners as a prophylactic against violence: “[R]acial classifications threaten to stigmatize individuals by reason of their membership in a racial group” and to perpetuate “the notion that race matters most” (*Johnson*, 2005, p. 507; internal citations omitted). This harkens back to the earlier discussion about whether the nation’s goal of ending racial divisions is best accomplished by avoiding segregation, even if this requires race-conscious policymaking.

A final point made by these judges is that the type of discretion granted in *Grutter* to higher education officials should not be granted to K-12 officials. For instance, in rejecting the argument that local school districts should be given the discretion to “stir the melting pot” (imagery used in Judge Kozinski’s concurrence), the dissent in *PICS* (2005) explained,

Up to now, the American “melting pot” has been made up of people voluntarily coming to this country from different lands, putting aside their differences and embracing our common values. To date it has not meant people

who are told whether they are white or non-white, and where to go to school based on their race. (*Grutter*, 2005, p. 1199)

Setting aside the historical account of voluntariness that would surprise many African Americans and Indigenous Americans, the dissent's point is that racial discrimination should never be an option, even in the name of local control. Another argument against deference to K-12 school boards was made by the earlier *PICS* (2004) court, which contrasted the University of Michigan's diversity goals, characterized as focused on internal academics, with Seattle's goals, characterized as focused on broader social benefits about which school administrators have no special expertise. "[We] believe that while limited deference to educational institutions arguably could be due when they pursue core goals, such deference is entirely unwarranted when they court tangential ones" (*PICS*, 2004, p. 982).

The above contentions are by no means the only ones that will be made against the Louisville and Seattle RCSAPs, but they are likely to be the primary and most forceful arguments. A ruling from the Supreme Court reversing any key elements of *Grutter* is very unlikely, because of the doctrine of *stare decisis* ("let the decision stand"). However, a ruling that effectively erects a fence around *Grutter*, keeping it from applying to other situations, is very much within the realm of possibility. The above lines of reasoning provide bases for distinguishing *Grutter* from the RCSAP cases and thus limiting its influence.

Conclusion

"Universities," the *Grutter* Court observed, "represent the training ground for a large number of our Nation's leaders. . . . In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the *path to leadership* be visibly open to talented and qualified individuals of every race and ethnicity" (*Grutter*, 2003, p. 332; emphasis added). This path to leadership, however, "begins much earlier in high-quality elementary and secondary schools that are too rarely found in communities where minority students live" (Liu, 2004, p. 706). This is an important connection between the diversity interests endorsed by the Court in *Grutter* and the K-12 diversity interests explored here.

Notwithstanding the fact that *Grutter* is a higher-education case, the opinion cites two K-12 cases (*Brown*, 1954, and *Plyler*, 1982) as the sole authority for asserting the "overriding importance of preparing students for work and citizenship" (*Grutter*, 2003, p. 331). Carrying this line of reasoning forward, Justice Ruth Bader Ginsberg's concurrence points to the interconnection between the educational inequities in K-12 education and the ongoing need for affirmative action in higher education:

However strong the public's desire for improved education systems may be . . . it remains the current reality that many minority students encounter markedly inadequate and unequal educational opportunities. Despite these inequalities, some minority students are able to meet the high threshold requirements set for admission to the country's finest undergraduate and graduate educational institutions. As lower school education in minority communities improves, an increase in the number of such students may be anticipated. From today's vantage point, one may hope, but not firmly forecast, that over the next generation's span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action. (*Grutter*, 2003, p. 346)

Such issues concerning the equality and adequacy of educational opportunities for students of color are now before the Supreme Court in the Louisville and Seattle cases. Just as the Court took serious notice of higher education research in *Grutter*, it is likely to look in these new cases to the K-12 research discussed in this article. This research reveals that, while attaining improvement of education in minority communities has been and remains an elusive goal for policymakers, one reasonable approach is to avoid policies and practices that increase racial isolation. To accomplish this goal, race-conscious student assignment policies may well be necessary, and the Court's decision in *Grutter* appears to lend legal support to such policies.

Race-conscious policies are not inherently desirable. Ideally, the United States would have no need for them. Ideally, there would be no racial achievement gap. Ideally, there would be no segregation, de facto or otherwise. Ideally, this would not be a society "in which race unfortunately still matters," at least with regard to life chances (*Grutter*, 2003, p. 333). Yet the nation cannot move toward these ideals while concurrently educating generations of students in racially isolated schools. For policymakers willing to acknowledge and confront this reality, RCSAPs might be an important policy option for the near future. Whether this option will be available, however, depends on the constitutional determination that will soon be made by the Supreme Court.

Notes

¹A statement made *in dictum* is a supplementary commentary to a court case, not crucial to the ruling and therefore not legally binding. In fact, the Supreme Court has never directly addressed the issue of K-12 race-conscious student assignment policies.

²Very few cases can be appealed to the Supreme Court. Instead, a party can petition the Court to hear a case, filing something called a "writ of certiorari." In 2005, the Court denied such a writ in the *Comfort* case (out of Massachusetts). But in June of 2006, it granted certiorari in the Louisville and Seattle cases.

³A fourth post-*Grutter* RCSAP case, *Cavalier* (2005), was defended by the school district as remedial. That is, the district argued that *Grutter* was not relevant, because the RCSAP was in place as a remedy for past discrimination—not as a voluntary attempt to advance diversity interests. The *Cavalier* court rejected this argument, finding as a factual matter that the district was no longer under a legal desegregation obligation. The RCSAP (which included quota-like procedures) was therefore declared unconstitutional.

⁴The appellate process in the federal court system begins with a panel of three judges. Usually, their decision is final. However, the losing party can seek a "rehearing *en banc*," which is a request for the case to be reconsidered by a larger panel of judges—usually the entire group of judges in a given circuit. The rehearing in *PICS*, for example, was heard by 11 judges. The majority opinion was joined by five judges in addition to the opinion's author; one additional judge concurred, and four dissented.

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