RACE-CONSCIOUS STUDENT ASSIGNMENT PLANS: BALKANIZATION, INTEGRATION, AND INDIVIDUALIZED CONSIDERATION

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ABSTRACT

In deciding Meredith v. Jefferson County Board of Education *and* Parents Involved in Community Schools v. Seattle School District No. 1, *the Supreme Court of the United States will likely confront a critical issue to emerge from the lower court opinions on voluntary integration plans: whether school districts that use race as a factor in student assignment must comply with a legal requirement of individualized consideration. The Court has imposed such a requirement in other contexts, but it has not clearly explained what the concept of individualized consideration means and why particular forms of it matter.*

This Article clarifies the meaning and function of individualized consideration as both a concept and a legal requirement. After defining the concept apart from any legal requirements, the Article surveys the Court's cases—from affirmative action in higher education, to race-conscious redistricting, to affirmative action in government contracting—in order to identify the principal concern to which different requirements of individualized consideration respond.

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This survey reveals the key determinant of the type of individualized consideration that the Court requires in a given context: its judgment about how the use of racial criteria will likely impact racial balkanization in America over the long run. Accordingly, this Article assesses the constitutionality of the two plans before the Court in light of this concern. The question is how the use of race in student assignment affects balkanization.

After identifying three compelling interests that support race-conscious assignment plans, this Article recommends an individualized consideration requirement that is modest in its demands. This is because voluntary integration plans likely reduce balkanization when school boards make only limited use of racial classifications in granting or denying student requests for certain schools and do not impose significant burdens on individuals and families.

Finally, this Article applies the standard it proposes to the plans before the Court. It concludes that the Seattle, Washington plan is more suspect than the Jefferson County, Kentucky plan, but that both likely meet the individualized consideration requirement that the Court's cases suggest is most appropriate in this setting.

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INTRODUCTION

Two cases before the Supreme Court of the United States during its October 2006 Term may result in landmark rulings.[1] They concern the extent to which school boards may use racial criteria—whether explicit racial classifications or implicit race consciousness—in assigning students to schools on a nonmerit basis in order to advance integration. The Court's decisions "could affect hundreds of school systems in all areas of the country."[2] Its rulings could also determine the final legacy of *Brown v. Board of Education*[3] in American society. The stakes are enormous.

The interests potentially supporting race consciousness in student assignment include (1) securing the civic, social, and educational benefits thought to be associated with racially integrated schools, (2) reducing minority student isolation in educationally inferior schools, and, I will suggest, (3) expressively affirming the value of integrated schools as an American moral ideal. The threshold question before the Court is whether any of these interests is compelling.

If the Court answers affirmatively, another key question is whether school districts that use racial criteria in student assignment violate a "right to individualized consideration without regard to . . . race."[4] The latter issue will not prove decisive if the Court concludes that none of the proffered interests is compelling. But if the Court holds otherwise—and I argue that there is a strong basis for so holding—then the Court will likely confront whether to apply a so-called "individualized consideration" requirement as part of the narrow tailoring inquiry. This issue is "perhaps the most important one to emerge from the lower court opinions on voluntary integration plans,"[5] and it has generated great confusion. Even courts that agree

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1. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 426 F.3d 1162 (9th Cir. 2005) (en banc), *cert. granted*, 126 S. Ct. 2351 (June 5, 2006) (No. 05-908); McFarland v. Jefferson County Pub. Sch., 330 F. Supp. 2d 834 (W.D. Ky. 2004), *aff'd*, 416 F.3d 513 (6th Cir. 2005), *cert. granted sub nom.* Meredith v. Jefferson County Bd. of Educ., 126 S. Ct. 2351 (June 5, 2006) (No. 05-915).

2. Linda Greenhouse, *Court to Weigh Race as Factor in School Rolls*, N.Y. TIMES, June 6, 2006, at A1.

3. 347 U.S. 483 (1954).

4. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 318 n.52 (1978).

5. James E. Ryan, *Voluntary Integration: Asking the Right Questions*, 67 OHIO ST. L.J. 327, 341 (2006).

on the constitutionality of race-conscious assignments disagree about whether school districts must afford individualized consideration.[6]

The district court in *Meredith v. Jefferson County Board of Education*, the case involving Jefferson County, Kentucky, determined that it had to decide whether the assignment plan "incorporates some sufficient form of individualized attention." The court "conclude[d] that it does" because the "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."[7] The Sixth Circuit approved this reasoning.[8] By contrast, the Ninth Circuit in *Parents Involved in Community Schools v. Seattle School District No. 1*, the case involving Seattle, Washington, concluded that "if a noncompetitive, voluntary student assignment plan is otherwise narrowly tailored, a district need not consider each student in an individualized, holistic manner."[9] The court so held because "the dangers that are present in the university context—of substituting racial preference for qualification-based competition—are absent here."[10] The dissent argued that race-conscious assignment plans must afford individualized consideration of merit and other contributions to general diversity because "equal protection requires the District to focus upon the individual's whole make up, rather than just a group's skin color; this protects each student's right to equal protection under the law."[11]

This dissensus is unsurprising. The Supreme Court has imposed a legal requirement of individualized consideration in several decisions, but it has not clearly explained what the concept of individualized consideration means and why particular forms of it matter. In this Article, I clarify the meaning and function of individualized consideration as both a concept and a legal requirement. I first define the concept apart from any legal requirements. I then survey the

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6. Throughout this Article, I use the terms "voluntary integration plans" and "race-conscious student assignment plans" interchangeably.

7. McFarland v. Jefferson County Pub. Sch., 330 F. Supp. 2d 834, 858–59 (W.D. Ky. 2004).

8. McFarland v. Jefferson County Pub. Sch., 416 F.3d 513, 514 (6th Cir. 2005).

9. 426 F.3d 1162, 1183 (9th Cir. 2005) (en banc), *cert. granted*, 126 S. Ct. 2351 (June 5, 2006) (No. 05-908).

10. *Id.* at 1181.

11. *Id.* at 1212 (Bea, J., dissenting). The First Circuit agrees with the Ninth. *See* Comfort v. Lynn Sch. Comm., 418 F.3d 1, 18–19 (1st Cir. 2005), *cert. denied*, 126 S. Ct. 798 (2005). No other circuit has weighed in since *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Gratz v. Bollinger*, 539 U.S. 244 (2003).

Court's cases in order to identify the principal concern to which different legal requirements of individualized consideration respond. Finally, I assess the constitutionality of the voluntary integration plans before the Court in light of this concern.

In Part I, I explain what it means conceptually for government to afford individualized consideration. It is critical to begin with a definition because it is easy to confuse the concept itself with particular legal requirements in particular settings, and because jurists and commentators sometimes press a false distinction between individualized consideration and consideration of group characteristics.

In Part II, I turn from the concept of individualized consideration to the legal requirements articulated by the Court. I examine various contexts in which government uses racial criteria for the benefit of racial and ethnic minorities, and I identify the rationales animating the Court's imposition of particular kinds of individualized consideration requirements in these settings. The presence or absence of one variant of individualized consideration, a variant rooted in a partial appreciation of the virtues of color consciousness, caused Justice Powell to endorse only certain affirmative action admissions programs in *Regents of the University of California v. Bakke*.[12] The Court's insistence on compliance with this same type of individualized consideration requirement distinguished its approval of affirmative action admissions in *Grutter v. Bollinger*[13] from its rejection of them in *Gratz v. Bollinger*.[14] I revisit Powell's opinion in *Bakke*, drawing upon Paul Mishkin's pathmarking analysis of Powell's account of individualized consideration.[15] I then analyze the role of individualized consideration in *Grutter* and *Gratz*, noting the close

12. 438 U.S. 265 (1978).

13. 539 U.S. 306 (2003).

14. 539 U.S. 244 (2003).

15. Paul J. Mishkin, *The Uses of Ambivalence: Reflections on the Supreme Court and the Constitutionality of Affirmative Action*, 131 U. PA. L. REV. 907 (1983). Mishkin anticipated the view that sometimes "appearances do matter" in constitutional law. Shaw v. Reno, 509 U.S. 630, 647 (1993). *See* Elizabeth S. Anderson, *Integration, Affirmative Action, and Strict Scrutiny*, 77 N.Y.U. L. REV. 1195, 1236 (2002); Samuel Issacharoff, *Can Affirmative Action Be Defended?*, 59 OHIO ST. L.J. 669, 693 (1998); Pamela S. Karlan, *Easing the Spring: Strict Scrutiny and Affirmative Action After the Redistricting Cases*, 43 WM. & MARY L. REV. 1569, 1601 (2002); Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts" and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 MICH. L. REV. 483, 506–07 (1993); Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 74–76 (2003).

correspondence between Robert Post's reading of these decisions in his *Foreword* to the *Harvard Law Review*[16] and Mishkin's interpretation of *Bakke* two decades earlier.

Despite suggestions to the contrary,[17] I show that a requirement of individualized consideration does not disable government from treating people in part as members of racial groups in every context in which government would like to use racial criteria. Government lawfully treats individuals in part as members of racial groups in the context of affirmative action in higher education and elsewhere, including race-conscious redistricting. No notion of individualized consideration is thought to be implicated in reapportionment, even when government constitutionally uses racial criteria, on the ground that redistricting is a process in which government sorts groups of people, not individuals. I suggest that this understanding is incorrect. Government affords individualized consideration in the context of reapportionment by determining whether individuals meet the selection criteria for inclusion in a given district based on their relevant characteristics. As for the legal requirements, the de facto prohibition on using race as "the predominant factor"[18] functions as an individualized consideration requirement because it polices the extent to which government may deem racial criteria to be relevant criteria.

I next demonstrate that in another area of equal protection jurisprudence—affirmative action in government contracting—the Court has imposed a different sort of individualized consideration requirement, one sounding in a constitutional commitment to colorblindness.[19] Thus, although courts sometimes seem to assume that individualized consideration carries one specific set of legal requirements, the requirements set forth in the Court's cases are in

16. Post, *supra* note 15, at 68–76.

17. *See, e.g.*, Brief for the United States as Amicus Curiae Supporting Petitioner at 17, Meredith v. Jefferson County Bd. of Educ., No. 05-915 (U.S. Aug. 21, 2006) (asserting that the district "fails to treat individual students *as* individuals, which is a fatal flaw under the Court's cases").

18. Miller v. Johnson, 515 U.S. 900, 916 (1995) ("The plaintiff's burden is to show . . . that race was the predominant factor motivating the legislature's decision.").

19. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 224 (1995) ("[A]ny person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny."); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493–94 (1989) ("The standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification.").

fact context-sensitive. At times, individualized consideration permits a good measure of color-conscious state action when government distinguishes among people based on relevant criteria, but only if government creates the appearance of a good measure of colorblindness. At other times, individualized consideration requires government to act in a colorblind fashion.

My scrutiny of the case law suggests that the type of individualized consideration required in a given context turns on the Court's judgment about how the use of racial criteria is likely to impact racial balkanization in America over the long run. "Balkanization" references the extent to which Americans identify as members of separate racial or ethnic groups that view one another with hostility.[20] The Court, I submit, has implicitly rendered the judgment that two factors determine the level of balkanization in American society: (1) the effect of using racial criteria on the condition of racial and ethnic minorities, and (2) the effect of using racial criteria on the degree of hostility present in members of the racial majority. The Court has sought to reduce balkanization by registering simultaneously that "race unfortunately still matters"[21] in America and yet that racial criteria "may balkanize us into competing racial factions."[22] It has endeavored not "to perpetuate the hostilities that proper consideration of race is designed to avoid."[23]

I turn in Part III to race-conscious student assignment plans and suggest that the critical question is whether and when the use of race in student assignment exacerbates or ameliorates racial balkanization in America. The answer depends on the interests that school districts advance when they use race and the extent and impact of such use.

I first explain why the Court should conclude that voluntary integration plans advance a compelling interest. School districts have a compelling interest in ensuring that public schools fulfill their primary mission. Both the Court and commentators have instructed that in addition to facilitating academic achievement, public schools are charged principally with socializing students to values of assimilation, national unity, and social harmony, and thus to the ideal

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20. To balkanize is "to break up (as a region or group) into smaller and often hostile units." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 87 (10th ed. 2001). The Justices conceive the concept this way. *See infra* notes 22–23, 97–98, 245–47 and accompanying text.

21. Grutter v. Bollinger, 539 U.S. 306, 333 (2003).

22. Shaw v. Reno, 509 U.S. 630, 657 (1993).

23. *Grutter*, 539 U.S. at 394 (Kennedy, J., dissenting).

that Americans of every race and ethnicity must learn to live together. The interests that school boards can advance by integrating their schools are compelling because they are closely tied to the basic mission of public education in America.

I next argue that the kind of individualized consideration required by the Court's cases depends on how voluntary integration plans likely affect racial balkanization over the long term. I recommend an individualized consideration requirement that is modest in its demands because such plans can be expected to reduce balkanization so long as they make only limited use of racial classifications in granting or denying student requests for particular schools and do not impose significant burdens on individuals and families. Analyzed according to the three-part standard that I recommend, the Jefferson County plan likely meets the individualized consideration requirement that is most appropriate in this setting. The Seattle plan presents a closer case because of the greater burdens it may impose, but it too likely meets the requirement.

I. DEFINING INDIVIDUALIZED CONSIDERATION

Several of the Court's equal protection opinions use the term "individualized consideration," but they do so without defining the concept. This lack of clarity can affect the quality of legal analysis by conflating relevant differences and encouraging false distinctions. I therefore begin with a definition.

Whenever government seeks to accomplish an objective that requires it to distinguish among individuals—whether granting admission to a public university, awarding a government contract, placing persons in a legislative district, collecting census data, or assigning a student to a public school—government must articulate relevant criteria. These criteria may include standardized test scores, grade point averages, financial bids, political affiliations, places of residence, race, preferences for particular schools, and many other things. It is by applying the relevant criteria that government distinguishes among individuals.

Conceptually, and putting aside constitutional law for the moment, "individualized consideration" means that government must determine whether a given individual meets the selection criteria by examining all of the individual's relevant characteristics or circumstances, not just one characteristic that (like all individual

characteristics) is also a group characteristic. Whenever a government decision requires choices among individuals, this same two-step process is implicated: first government establishes the selection criteria; then it affords individualized consideration to the extent that it determines whether individuals meet these criteria based on all of their relevant characteristics.

Definitionally, therefore, individualized consideration entails assessing an individual's relevant characteristics against a standard of measurement. This is sometimes a purely mechanical exercise, requiring no discretionary choices. An example is determining whether a person lives within certain legislative boundaries. At other times, step two is highly discretionary. An example is deciding whom to hire to a law school faculty.

The key normative question in any setting is implicated at step one: determining what the selection criteria should be. For example, are standardized tests and bidding wars unfair to economically disadvantaged individuals? Does a perfect grade point average from school *A* convey the same information as a perfect grade point average from school *B*? Turning to constitutional law, one of the most controversial normative questions in many settings is whether and when government may deem race a relevant selection criterion.

What should not be controversial, however, is the basic analytical point that the concept of individualized consideration is perfectly consistent with the consideration of group characteristics, including race. Government cannot govern through generally applicable laws without distinguishing among individuals based on group characteristics; the criteria—any criteria—are defined by groups. For example, every potential criterion discussed above (test scores, grades, race, etc.) is both an individual characteristic or circumstance and a group characteristic or circumstance. Government distinguishes among individuals by valuing certain group characteristics over others. Accordingly, it is incorrect to suggest that individualized consideration necessarily includes a requirement of near colorblindness and thus is in serious tension with the consideration of race.[24] If a public theater company were to perform a play on the life of Dr. Martin Luther King, Jr., the company would afford individualized consideration in selecting the best actor for the lead

24. *See, e.g.*, Brief for the United States as Amicus Curiae Supporting Petitioner, *supra* note 17, at 16–17 (criticizing the Jefferson County Board of Education for not "minimizing the use of race in its assignment plan and maximizing the concept of individualized consideration").

role, and this consideration would likely entail using race as a selection criterion.

Again, the normative task is to decide which criteria are relevant to government's choices among individuals. This task includes determining whether government should choose based on one criterion or multiple criteria, whether race may operate as one criterion, and if so, what weight race should be given and whether this weight may be publicly declared. Each of these questions is analytically separate from the existence of individualized consideration as a concept; nothing in the definition itself indicates whether government constitutionally may consider race. Rather, the extent to which race may be considered turns on the kind of individualized consideration that the Court deems the Constitution to require.

The Court has spoken to this issue several times, and its answers have been context-sensitive. I begin with the cases concerning affirmative action in higher education. They involve the use of racial classifications to achieve certain social benefits, and the Court's insistence on individualized consideration originates with them. Not coincidentally, this is a context in which the Court's attention to racial balkanization has driven the formulation of legal doctrine.

II. LESSONS OF THE PAST

A. Justice Powell's Requirement of Individualized Consideration

The story of individualized consideration as a legal requirement begins with the case in which the Court first addressed the constitutionality of affirmative action in higher education, *Regents of the University of California v. Bakke*.[25] At issue was a challenge to the admissions program of the medical school of the University of California at Davis. The program openly set aside sixteen spots for minority applicants out of a class of one hundred.[26] The Court divided three ways—four to one to four—and Justice Powell wrote the controlling, singular opinion.

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25. 438 U.S. 265 (1978). For further discussion, see Robert C. Post & Neil S. Siegel, *Theorizing the Law/Politics Distinction: Neutral Principles, Affirmative Action, and the Enduring Legacy of Paul Mishkin*, 95 CAL. L. REV. (forthcoming 2007) (manuscript at 23–52), *available at* http://eprints.law.duke.edu/archive/00001588/01/95_Cal._L._Rev._(2007).pdf.

26. *Bakke*, 438 U.S. at 279 (opinion of Powell, J.).

Powell rejected the argument that the use of racial classifications in affirmative action programs should not trigger strict scrutiny. He concluded that "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination."[27] He also resisted the University's attempt to justify affirmative action in higher education using the remedial logic of past discrimination.[28] Instead, Powell focused on the "academic freedom" of universities to choose a student body that would ensure "'wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples." He thus developed a rationale for affirmative action in higher education that would allow universities to fulfill their "mission" of selecting "those students who will contribute the most to the 'robust exchange of ideas.'"[29] Powell conceived this kind of diversity as serving a compelling educational interest.

On Powell's account, diversity in higher education did not imply

> simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, with the remaining percentage an undifferentiated aggregation of students. The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.[30]

Powell concluded that universities could use "race or ethnic background" as a "'plus' in a particular applicant's file," but could not use race to "insulate the individual from comparison with all other candidates for the available seats."[31] That latter approach would deny each applicant his or her "right to individualized consideration without regard to . . . race."[32]

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27. *Id.* at 291.

28. *See* Brief of Petitioner University of California, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (No. 76-811), 1977 WL 189474, at *8–10, *13.

29. *Bakke*, 438 U.S. at 313 (opinion of Powell, J.) (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)). Powell believed that this academic freedom of universities was of First Amendment concern. *Id.*

30. *Id.* at 315.

31. *Id.* at 317. Powell thought that such an admissions program was "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight." *Id.*

32. *Id.* at 318 n.52.

By contrast, a program that gave individuals a "plus" for their race

> treats each applicant as an individual in the admissions process. The applicant who loses out on the last available seat to another candidate receiving a "plus" on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname. It would mean only that his combined qualifications, which may have included similar nonobjective factors, did not outweigh those of the other applicant. His qualifications would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment.[33]

Powell concluded that "[s]o long as the university proceeds on an individualized, case-by-case basis, there is no warrant for judicial interference in the academic process."[34] He would approve affirmative action programs even if universities paid "some attention" to the numbers of minority students they admitted.[35] The Davis program, however, set aside a certain number of slots for the admission of racial minorities. Thus, the program unconstitutionally created "the functional equivalent of a quota system."[36]

It may seem curious that Powell's rationale would approve affirmative action programs only if they complied with the legal requirements of a system of "individualized consideration," even though such a system would produce almost the same "net operative results" as explicit "set-aside[]" plans.[37] Paul Mishkin, who had

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33. *Id.* at 318.

34. *Id.* at 319 n.53.

35. *Id.* at 323.

36. *Id.* at 318. Although Mr. Bakke won his case, Powell's opinion preserved affirmative action in higher education. Because affirmative action admissions programs did not need to use the features that Powell deemed fatal, *Bakke*'s primary effect, "by far, was to sustain race-conscious special admissions programs throughout the nation." Mishkin, *supra* note 15, at 921–22.

37. Mishkin, *supra* note 15, at 928. Mishkin explained why, in the overwhelming majority of cases, there is little functional difference between "'plus'-type" and "set-aside" systems:

> If an admissions committee is allowed to give a "plus" for race as a means of achieving diversity in the student body, that "plus" must be large enough to make a difference in the outcome in some cases. But if that is so, isn't it clear that the size of the "plus" will determine the number of minority students admitted? In those circumstances, it is virtually inevitable that the authorities that determine the size of the "plus" will set that size in terms of the number of minority students likely to be produced at the level set.

Id. at 926.

drafted the University's brief, explained this puzzle by suggesting that "[e]ven when the net operative results may be the same, the use of euphemisms may serve valuable purposes; . . . they may facilitate the acceptance of needed measures."[38] Specifically, "[t]he indirectness of the less explicitly numerical systems may have significant advantages" in terms of "the felt impact of their operation over time":

> The description of race as simply "another factor" among a lot of others considered in seeking diversity tends to minimize the sense that minority students are separate and different and the recipients of special dispensations; the use of more explicitly separate and structured systems might have the opposite effect. These perceptions . . . . can facilitate or hamper the development of relationships among individuals and groups; they can advance or retard the educational process for all—including, particularly, minority students whose self-image is most crucially involved.[39]

"Indirectness," Mishkin wrote, may also help to mute public resentment of racial preferences:

> The use of overt numbers . . . greatly tends to trigger the symbolism of . . . exclusionary devices of past invidious . . . discrimination. The incorporation of such features . . . tends continually to keep alive consciousness of the program and the relevance of race therein; it tends to maintain and exacerbate latent and overt hostility to these efforts to overcome the effects of past racial discrimination. A program formulated along the lines Justice Powell's opinion approves would, by the very lack of "sharp edges," avoid such visibility in its operations and tend to enhance the acceptability of the program.[40]

Regarding both the students enrolled and the public at large, different kinds of affirmative action programs would affect pre-existing social beliefs about racial issues in critically different ways, even when they produced virtually identical results.[41]

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38. *Id.* at 927–28.

39. *Id.* at 928.

40. *Id.*

41. John Jeffries has recorded similar observations:

> If the advantages accorded racial and ethnic minorities are not explicitly stated, they need not be explicitly undone. If adjustments are not announced and contested, a steady progression of divisive debates can perhaps be avoided. The burying of racial preferences in "plus" factors for certain individuals obscures and softens the sense of injury that even the most dedicated proponents of affirmative action must acknowledge will be felt by those who are disadvantaged for reasons they cannot control.

The unstable logic animating Powell's distinction between constitutional and unconstitutional affirmative action programs was thus central to his attempt to craft "a wise and politic resolution of an exceedingly difficult problem."[42] His decisive differentiation between a quota and a "plus" factor enabled him "to equate race with other variables" that "do not carry the same emotional freight as racial or ethnic lines do."[43] He charged his individualized consideration requirement with diminishing the potential of affirmative action to "exacerbate latent and overt hostility to these efforts to overcome the effects of past racial discrimination."[44]

B. The Individualized Consideration Requirement of Grutter *and* Gratz

Twenty-five years after *Bakke*, the Court revisited the constitutionality of affirmative action in higher education. In *Grutter v. Bollinger*,[45] the Court sustained the affirmative action admissions program of the University of Michigan Law School.[46] Because the program used racial classifications, Justice O'Connor reiterated for the Court that the Fourteenth Amendment "protect[s] persons, not groups," and thus that all "governmental action based on race—a group classification long recognized as in most circumstances irrelevant and therefore prohibited—should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed."[47] To protect this right, the Court reaffirmed—in agreement with Justice Powell in *Bakke*—that racial classifications trigger strict scrutiny,[48] meaning that they "are constitutional only if they are narrowly tailored to further compelling governmental interests."[49] The Court then held—also seemingly in

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John C. Jeffries, Jr., Bakke *Revisited*, 55 SUP. CT. REV. 1, 20 (2003). *Cf.* CHRISTOPHER EDLEY, JR., NOT ALL BLACK AND WHITE 149 (1996) ("[C]ontroversy has a price, and divisiveness takes its toll. In race matters, the price may be too high to justify the supposed benefits of transparency anyway.").

42. Mishkin, *supra* note 15, at 929.

43. *Id.* at 924.

44. *Id.* at 928.

45. 539 U.S. 306 (2003).

46. *Id.* at 343–44.

47. *Id.* at 326 (alteration in original) (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (citation and internal quotation marks omitted)).

48. *Id.* (quoting *Adarand*, 515 U.S. at 227).

49. *Id.*

agreement with Powell—"that the Law School has a compelling interest in attaining a diverse student body."[50] It so held because "a diverse student body is at the heart of the Law School's proper institutional mission."[51]

The Court determined that the Law School's "proper institutional mission" includes three goals, each of which depends on a racially diverse student body for its realization. First, the Law School "promotes learning outcomes" by producing lawyers trained to function "as professionals" and prepared to work within "an increasingly diverse workforce," an objective whose attainment requires legal education to facilitate "cross-racial understanding."[52] Second, the Law School prepares "students for . . . citizenship" as part of its "fundamental role in maintaining the fabric of society,"[53] a purpose whose fulfillment requires "[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation . . . if the dream of one Nation, indivisible, is to be realized."[54] Third, the Law School trains "our Nation's leaders," a cadre that possesses "legitimacy in the eyes of the citizenry" only insofar as "the path to leadership [is] visibly open to talented and qualified individuals of every race and ethnicity."[55]

Although the Court purported merely to be endorsing Justice Powell's rationale in *Bakke*,[56] Robert Post has shown that the *Grutter* Court's understanding of diversity is distinctive. Because "Powell conceptualized diversity as a value intrinsic to the educational process itself,"[57] and because most public institutions in America are not designed to promote the "'robust exchange of ideas'"[58] characteristic of a university education, "Powell's explanation of the compelling interest of diversity did not reach very far beyond the specific context

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50. *Id.* at 328.

51. *Id.* at 329.

52. *Id.* at 330 (quoting Brief for American Educational Research Association et al. as Amici Curiae at 3, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241)).

53. *Id.* at 331.

54. *Id.* at 332.

55. *Id.* The Court stressed that "[a]ll members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training." *Id.*

56. *Id.* at 325 ("[W]e endorse Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions.").

57. Post, *supra* note 15, at 59–60.

58. *Id.* at 60 (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978) (opinion of Powell, J.)).

of higher education."[59] The *Grutter* Court, by stark contrast, "conceives of education as instrumental for the achievement of extrinsic social goods like professionalism, citizenship, or leadership"[60]—goods that many public institutions in America seek to advance. Because "the Law School can have a compelling interest in using diversity to facilitate the attainment of these social goods only if there is an independently compelling interest in the actual attainment of these goods,"[61] these justifications seem pregnant with implications well beyond university life.

The *Grutter* Court, unlike Powell in *Bakke*, "endorse[d] the practice of affirmative action for university admissions in terms that closely correspond to the reasons that actually sustain the practice."[62] These reasons were animated almost entirely by "the felt need to remedy deep social dislocations associated with race."[63] The Court nonetheless used the narrow tailoring prong of strict scrutiny to limit the de facto remedial options available. It stated that race-conscious affirmative action programs (1) must "not unduly harm members of any racial group";[64] (2) may be used only after a "serious, good faith consideration of workable race-neutral alternatives";[65] (3) "must be limited in time";[66] and (4) must afford "truly individualized consideration."[67]

It is plain that the Court placed primary importance on the fourth constraint. The Court adopted the individualized consideration

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59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 65.

63. *Id.* at 63. The *Grutter* Court thus invoked "our Nation's struggle with racial inequality," 539 U.S. at 338, even as it declined to rely on remedial concerns explicitly.

64. *Grutter*, 539 U.S. at 341. The Court held that the University met this requirement by satisfying the individualized consideration requirement. *Id.*

65. *Id.* at 339 (citing City of Richmond v. J.A. Croson Co., 488 U.S. 469, 507 (1989)). The Court did not view this requirement as onerous. *See id.* ("Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative. Nor does it require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups.").

66. *Id.* at 342. It is hard to justify a time limit unless the purpose of the program is remedial or the purpose of the limit is to reduce the potential for racial balkanization. The interests that the Court attributed to the Law School are not time-sensitive. *See infra* notes 128, 273, 294.

67. *Grutter*, 539 U.S. at 334. The Court conceived individualized consideration itself as prohibiting quotas. *Id.* ("[T]ruly individualized consideration demands . . . . that universities [not] establish quotas for members of certain racial groups . . . .."). Sometimes courts present the ban on quotas as a separate requirement of narrow tailoring.

requirement from Powell's opinion in *Bakke*, making "no independent effort to explain or justify" it,[68] even though the Court's articulation of the Law School's compelling interests focused more specifically on race than Powell had. The Court simply mandated that "a university's admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application."[69] The Court declared that "[t]he importance of this individualized consideration in the context of a race-conscious admissions program is paramount,"[70] despite the fact that its identification of the Law School's compelling interests appeared to "point in the opposite direction from an individualized consideration requirement."[71] If the Court was prepared to accept that the Law School requires a racially diverse student body in order to advance its compelling interests in professionalism, citizenship, and leadership, then it would seem sensible to conclude that the school "should precisely and decisively focus on race to the extent necessary to achieve these objectives."[72]

Following Powell's lead in *Bakke*, however, the Court used the narrow tailoring inquiry to distinguish affirmative action programs that evaluate "each applicant . . . as an individual" from those that make "an applicant's race or ethnicity the defining feature of his or her application."[73] Thus the Court in *Gratz v. Bollinger*[74] wielded the individualized consideration requirement to invalidate the University of Michigan undergraduate affirmative action program, which awarded "20 points, or one-fifth of the points needed to guarantee admission, to every single 'underrepresented minority' applicant solely because of race."[75]

As with Powell's opinion in *Bakke*, it may seem difficult to explain what the Court in *Grutter* and *Gratz* was seeking to accomplish by insisting that universities afford a certain kind of individualized consideration to applicants. The *Grutter* Court

68. Post, *supra* note 15, at 69.
69. *Grutter*, 539 U.S. at 337.
70. *Id.*
71. Post, *supra* note 15, at 69.
72. *Id.* at 70.
73. *Grutter*, 539 U.S. at 337.
74. 539 U.S. 244 (2003).
75. *Id.* at 270.

declared that universities could use affirmative action to assemble "a critical mass of underrepresented minority students,"[76] which meant the quantity of minority students needed to achieve "the educational benefits that diversity is designed to produce."[77] Thus, universities must "be free to regard race as an especially salient dimension of diversity."[78] This freedom, however, "seems inconsistent with the constitutional requirement that they treat applicants as unique persons rather than as members of racial groups."[79] As Mishkin noted,[80] universities cannot use race to "assemble a critical mass of minority students unless race is the defining factor in a student's application, even if it is 'decisive' only at the margins."[81]

Accordingly, the Court in *Gratz* likely invalidated Michigan's undergraduate affirmative action program "because the program accorded to race the 'specific and identifiable' value of twenty points."[82] But because the Court upheld the Law School's program, "which assigns race the specific value necessary to achieve a critical mass of minority students," the fatal flaw of the undergraduate program must have been that the University made this value "'identifiable.'"[83] The implication is reminiscent of Powell's logic in *Bakke*: if both programs "assign the same 'specific' value to race . . . and if the undergraduate program does so explicitly and the Law School implicitly, the former is unconstitutional, but not necessarily the latter."[84] By allowing universities to use race as a factor in ensuring a critical mass of minority students only to the extent that the exact size of this factor is unknown to the public, the Court effectively held that universities can engage in affirmative action but must occlude the extent to which they do so.

Post accounts for this repudiation of transparency in much the same way that Mishkin did in analyzing Powell's opinion in *Bakke*:

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76. *Grutter*, 539 U.S. at 335.

77. *Id.* at 330. The Court deferred to the Law School regarding the need for a critical mass. *Id.* at 333 ("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 education benefits of a diverse student body.").

78. Post, *supra* note 15, at 72.

79. *Id.*

80. *See supra* note 37.

81. Post, *supra* note 15, at 72.

82. *Id.* at 73 (quoting Gratz v. Bollinger, 539 U.S. 244, 271 (2003)).

83. *Id.*

84. *Id.*

"the twenty-point bonus sends a message to applicants and to the world that being a member of a racial group is worth a certain, named amount, and it therefore invites members of that group to feel entitled to that amount."[85] Mishkin might have added that such a visible bonus invites resentment.[86] But "[t]he potential for balkanization is muted within the Law School program . . . because the value assigned to race is camouflaged by an opaque process of implicit comparisons."[87] Although transparency is a core virtue of the rule of law,[88] the Court in the Michigan cases, like Powell in *Bakke*, made a virtue of opacity.[89]

The late Rehnquist Court registered that there were compelling reasons "for using affirmative action programs to address the social dislocations of race,"[90] but it also feared that racial entitlements would encourage balkanization. The Court thus applied strict scrutiny

> so as to minimize the likelihood of racial balkanization by requiring affirmative action programs to accord symbolic priority to individuals, as distinct from racial groups, through the ideological assertion that each candidate is receiving "individualized consideration." . . . Racial inequalities can be addressed, but only in ways that efface the social salience of racial differences.[91]

The use of racial classifications in university admissions might exacerbate balkanization if such use were more apparent than necessary to accomplish the objective at hand. The Court endorsed an individualized consideration requirement that was designed to ameliorate this concern.

Post, like Mishkin before him, focuses on the potential for balkanization caused by public reactions to race-conscious interventions by government. I suggest, however, that the

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85. *Id.* at 74.

86. *See supra* note 40 and accompanying text.

87. Post, *supra* note 15, at 74.

88. *Id. See, e.g.*, Neil S. Siegel, *A Theory in Search of a Court, and Itself: Judicial Minimalism at the Supreme Court Bar*, 103 MICH. L. REV. 1951, 2015–16 (2005) (discussing rule-of-law values). *Cf.* Gratz v. Bollinger, 539 U.S. 244, 298 (2003) (Souter, J., dissenting) ("Equal protection cannot become an exercise in which the winners are the ones who hide the ball."); *id.* at 304 (Ginsburg, J., dissenting) ("If honesty is the best policy, surely Michigan's accurately described, fully disclosed College affirmative action program is preferable to achieving similar numbers through winks, nods, and disguises.").

89. Post, *supra* note 15, at 74.

90. *Id.*

91. *Id.* at 75.

individualized consideration requirement of *Bakke*, *Grutter*, and *Gratz* is actually rooted in a two-fold appreciation: while the use of racial classifications might exacerbate balkanization if the magnitude of such use were publicly apparent, inequalities in part responsible for extant balkanization would go unaddressed if government were disabled from using race.[92]

The above discussion does not mean, however, that the Court in *Grutter* and *Gratz* cared only about public perceptions. Stressing the importance of appearances is likely the most persuasive way to reconcile these decisions. But in *neither* case would the Court have allowed the University to use racial classifications as much as it wanted even if it had maintained proper appearances. For example, if the Law School had defined critical mass as, say, a 40 or 50 percent minority student population, the Court almost certainly would have invalidated its program. Indeed, Justice Kennedy's disagreement with the *Grutter* Court was not over whether race could be used explicitly, but over whether it had in fact been used too much.[93] He read Powell in *Bakke* as allowing the use of "race as one, nonpredominant factor in a system designed to consider each applicant as an individual," a use that was "modest" and "limited."[94]

C. Redistricting and Contracting

Although never explicitly stated by the Court, the basic function of the individualized consideration requirement of *Bakke*, *Grutter*, and *Gratz* is to allay "the fear of racial 'balkanization'"[95] by reducing social controversy over affirmative action while simultaneously sustaining the constitutionality of legislative redress for the present effects of past discrimination. The Justices sought to achieve this

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92. I express no view here on whether it is of paramount importance to maintain fidelity to such rule-of-law values as transparency in all circumstances, or whether rule-of-law virtues are appropriately trumped at times by other values and purposes of law, including the need for law to legitimate itself and the need to maintain social cohesion. For a theorization of the problem, see Post & Siegel, *supra* note 25. Similarly, I do not inquire whether the Court and commentators have overstated the importance of appearances in constitutional law. A critic might argue that citizens are able to "pierce the veil" and to apprehend that there is little functional difference between, say, a quota and a "plus" for race whose size is not identified publicly.

93. *See* Grutter v. Bollinger, 539 U.S. 306, 395 (2003) (Kennedy, J., dissenting) ("I reiterate my approval of giving appropriate consideration to race in this one context . . . .").

94. *Id.* at 387. Justice Kennedy stressed that "individual consideration" ensures "that race does not become a predominant factor in the admissions decisionmaking." *Id.* at 393.

95. Issacharoff, *supra* note 15, at 691.

balancing act by insisting that government use racial classifications in a way that is both limited and less apparent than it might otherwise be. In so insisting, the Court symbolically endorsed an ideological commitment to individualism when government was in fact treating people in part as members of racial groups in order to redress enduring social dislocations ultimately related to past racial injustices.[96]

The Court explicitly spoke to the importance of social appearances in the area of legislative redistricting. Writing for the Court in *Shaw v. Reno*, Justice O'Connor revealed the Court's hand in a way that she declined to do in *Grutter*:

> [R]eapportionment is one area in which appearances do matter. A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group . . . think alike, share the same political interests, and will prefer the same candidates at the polls. . . . By perpetuating such notions, a racial gerrymander may exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract.
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> The message that such districting sends to elected representatives is equally pernicious.[97]

Because "appearances do matter," one way to characterize the difference between *Grutter* and *Gratz* is that in *Gratz* the University

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96. Social acceptance of affirmative action in higher education plainly mattered to Justices Powell and O'Connor. They likely believed that the institution served important societal interests, *see generally* Jeffries, *supra* note 41, and they may have wanted to avoid triggering a legislative backlash. *Cf.* Sandra Day O'Connor, *A Tribute to Justice Lewis F. Powell, Jr.*, 101 HARV. L. REV. 395, 396 (1987) ("Perhaps most vivid in my mind is the acute appreciation that [Powell] has always shown for the *delicate* and profoundly important legacy of *Brown v. Board of Education*." (emphasis added)). Justice Powell was exquisitely attuned to the importance of public acceptance of governmental action on racial questions:

> Our people instinctively resent coercion, and perhaps most of all when it affects their children and the opportunities that only education affords them. It is now reasonably clear that the goal of diversity that we call integration, if it is to be lasting and conducive to quality education, must have the support of parents who so frequently have the option to choose where their children will attend school.

Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 489 (1979) (Powell, J., dissenting).

97. Shaw v. Reno, 509 U.S. 630, 647–48 (1993) (citations omitted).

had created a scheme of using racial criteria that the Court feared might "balkanize us into competing racial factions."[98]

No concept of individualized consideration is thought to be implicated in the context of reapportionment. This is because redistricting, by its very nature, is a process in which only groups of voters, not individuals, are considered in drawing district lines regardless of whether race comes into play. This understanding, however, confuses government's establishment of the selection criteria (the first step identified in Part I) with government's determination of who meets these criteria (step two, which concerns individualized consideration). In redistricting, controversy surrounds the issue of which criteria—especially race—should be deemed relevant, not whether a particular individual meets the criteria. The criteria, once established, can be applied mechanically (that is, without exercising discretion): one is either in the district or is not.[99] But because government places the individual in one district or another based on all of the relevant selection criteria, the conduct of government in the reapportionment process meets the definition of individualized consideration.

The Court has policed the extent to which government may use race as a selection criterion by holding that strict scrutiny is triggered when the plaintiffs

> show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness,

98. *Id.* at 657.

99. In terms of the exercise of discretion, the distinction between redistricting and university admissions is far from crisp. Groups of applicants with high (or low) test scores and grades receive little or no consideration of their other attributes—they are near automatically admitted (or rejected). Such consideration primarily occurs regarding applicants in the middle group, who are also the most likely to be helped or hurt by the existence of the affirmative action program. In both contexts, the people who are clearly in or out based on factors other than race—whether street address or grades—receive little consideration of their other qualities or circumstances but are also not affected by the use of racial criteria.

> contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations.[100]

The notion of race as the predominant factor, though used by the Court to decide whether to apply strict scrutiny (and not as part of the application of strict scrutiny[101]), is a kind of individualized consideration requirement because it functions to prevent government from using race too much as a proxy for political interests. Indeed, Justice Kennedy explicitly used the "predominant factor" language in *Grutter*.[102]

In a different equal protection context, the Court demands that government not use race as a proxy *at all* when individualized consideration is feasible. The Court makes robust use of this colorblindness conception of individualized consideration in the context of affirmative action in government contracting. In *City of Richmond v. J.A. Croson Co.*,[103] the Court applied strict scrutiny and struck down a city plan that required prime contractors awarded city construction contracts to subcontract at least 30 percent of the dollar amount of each contract to one or more Minority Business Enterprises (MBEs).[104] Writing for the Court, Justice O'Connor stressed the importance of "an individualized procedure" in this setting:

> Since the city must already consider bids and waivers on a case-by-case basis, it is difficult to see the need for a rigid numerical quota. . . . [T]he Richmond Plan's waiver system focuses solely on

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100. Miller v. Johnson, 515 U.S. 900, 916 (1995) (emphasis added). In *Easley v. Cromartie*, 532 U.S. 234 (2001), the Court wrote that in order to establish that race and not politics predominated

> where majority-minority districts . . . are at issue and where racial identification correlates highly with political affiliation, the party attacking the legislatively drawn boundaries must show at the least that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles. That party must also show that those districting alternatives would have brought about significantly greater racial balance.

Id. at 258.

101. It is not clear whether this doctrinal distinction makes much of a relevant difference. The Court has never held that a redistricting scheme uses race as "the predominant factor" but survives strict scrutiny. Several Justices, however, have assumed or suggested that the predominant use of race in redistricting would be constitutional when necessary to remedy past discrimination or to comply with the Voting Rights Act. *See, e.g.*, Bush v. Vera, 517 U.S. 952, 982–83 (1996) (plurality opinion); *id*. at 992 (O'Connor, J., concurring).

102. *See supra* note 94 and accompanying text.

103. 488 U.S. 469 (1989).

104. *Id.* at 511.

> the availability of MBE's; there is no inquiry into whether or not the particular MBE seeking a racial preference has suffered from the effects of past discrimination by the city or prime contractors.[105]

The Court appeared to say that government should not use race at all because the only defensible interest that could possibly be implicated (in *Croson*, remedying the effects of prior proven discrimination) could be advanced through individualized consideration.[106] Suspecting that Richmond had created a racial spoils system,[107] the Court subordinated the social salience of race; it deemed individualism and merit paramount. The Court crafted constitutional principles that it believed were animated by "[t]he dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement."[108]

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105. *Id.* at 508 (citations omitted). In this passage, Justice O'Connor referenced *Fullilove v. Klutznick*, 448 U.S. 448 (1980), a case in which the Court sustained a federal law requiring local-government recipients of federal public works monies to set aside 10 percent of the funds for minority-owned businesses, *id.* at 492. *Fullilove* almost certainly has not survived *Croson* and *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), a contracting case in which the Court held that strict scrutiny also applies to federal affirmative action. Besides *Fullilove*, the only other case in which the Court has upheld a set-aside is *United States v. Paradise*, 480 U.S. 149 (1987), which involved a court-ordered remedy for proven discrimination, *id.* at 153.

106. *Cf. Adarand*, 515 U.S. at 238 ("[U]nresolved questions remain concerning the details of the complex regulatory regimes implicated by the use of subcontractor compensation clauses. For example, the [law's] 8(a) program requires an individualized inquiry into the economic disadvantage of every participant, whereas the . . . regulations implementing [another law] do *not* require certifying authorities to make such individualized inquiries. And the regulations seem unclear as to whether 8(d) subcontractors must make individualized showings, or instead whether the race-based presumption applies both to social *and* economic disadvantage." (citations omitted)).

107. *See Croson*, 488 U.S. at 493, 495–96, 510–11 (plurality opinion).

108. *Id.* at 505–06 (majority opinion). The Court recently stressed the importance of a similar kind of individualized consideration in holding that strict scrutiny controls an equal protection challenge to a state prison policy of racially segregating prisoners in double cells for up to sixty days each time they enter a new correctional facility:

> Indeed, the United States argues . . . that it is possible to address "concerns of prison security through individualized consideration without the use of racial segregation, unless warranted as a necessary and temporary response to a race riot or other serious threat of race-related violence." As to transferees, in particular, whom the [state] has already evaluated at least once, it is not clear why more individualized determinations are not possible.

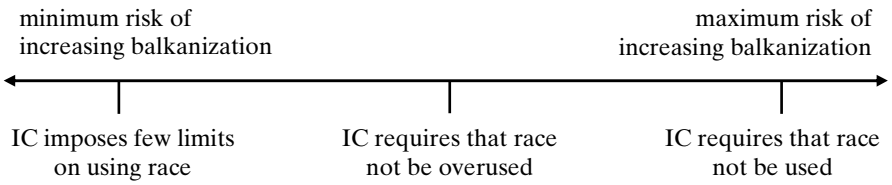
Johnson v. California, 543 U.S. 499, 509 (2005) (citation omitted). Likewise, Justice Stevens, who would have "h[e]ld the policy unconstitutional on the current record," *id.* at 517 (Stevens, J., dissenting), rather than remanding for application of strict scrutiny, concluded that "the [state] has failed to explain why it could not, as an alternative to automatic segregation, rely on an individualized assessment of each inmate's risk of violence when assigning him to a cell in a reception center," *id.* at 521. The context is different from *Croson* and *Adarand*, but the *Johnson* Court also seemed to insist on individualized consideration in a colorblind sense. Not

D. The Pattern in the Case Law

The case law permits a generalization. When government makes distinctions among people based on relevant criteria, the legal requirement of individualized consideration insists that government not overuse race: it must not treat individuals "too much" as members of racial groups, whether by literally overusing race or by needlessly impressing upon them and others that it is treating them in part as members of racial groups. What varies by context is the Court's answer to the question of how much use of race is too much. At one extreme, not using race too much imposes few constraints. At the other, not using race too much means not using race at all.

Considering the foregoing strands of equal protection doctrine together, it is possible to discern a pattern regarding the kind of individualized consideration (IC) that the Court demands. The key consideration, I suggest, is the Court's judgment about how government's use of race is likely to impact racial balkanization in America over the long run. I capture the pattern in Figure 1:

Figure 1. Effect of Perceived Potential for Greater Balkanization on Court's Allowance of Using Race as a Selection Criterion



At the left end of the spectrum are cases in which the Court views the robust—indeed, potentially exclusive—use of race as a selection criterion as compatible with the legal requirement of individualized consideration, either because such use will reduce balkanization by providing a constitutional remedy for race-based wrongs, or because the use of race is functional and will not cause balkanization. In *United States v. Paradise*, a remedial example, the Court upheld a federal court order that the Alabama Department of Public Safety hire or promote a qualified African American every

using race as a proxy for the state's interest in security likely means not using race at all, except in an emergency.

time it hired or promoted a white person as a remedy for proven racial discrimination.[109] Functional uses of race include collecting racial statistics like census data[110] or responding to a social emergency like a prison race riot.[111] In these functional instances, race is the only selection criterion, and yet there is no violation of the individualized consideration requirement. Also likely in the functional category would be a preference for Arab Americans when the purpose was to select undercover agents who would infiltrate a Middle Eastern terrorist organization.

Toward the middle of the continuum are the cases in which the use of race possesses the potential both to reduce pre-existing balkanization and to exacerbate balkanization by distinguishing among people along racial lines. An example is affirmative action in higher education. The Court in this setting insists that government not overuse race as a factor in admissions. This insistence includes a requirement that the use of race be no more salient than necessary. By attending to symbolic considerations and to the compromising of conventional notions of merit, the Court frees itself to give legal voice to its recognition of the social benefits associated with affirmative action admissions. In allowing the discreet use of race, the Court expects that the net effect on balkanization in American society will be negative because universities will ameliorate a balkanizing status quo (which exists when they enroll few minorities) without provoking severe racial hostilities and increasing balkanization on balance. The Court does not appear very concerned about the individual burdens imposed by affirmative action in this setting, perhaps because compliance with the individualized consideration requirement eases

109. *See supra* note 105.

110. *See, e.g.*, Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 18 (2003) ("[C]ourts seem to act on the belief that a group-based classification must inflict some dignitary or distributive harm to violate the anticlassification principle when they uphold the use of race in census or suspect descriptions on the ground that the classification is permissible because it merely describes social realities.").

111. *See, e.g.*, *Croson*, 488 U.S. at 521 (Scalia, J., concurring in the judgment) ("[O]nly a social emergency rising to the level of imminent danger to life and limb—for example, a prison race riot, requiring temporary segregation of inmates—can justify an exception to the principle embodied in the Fourteenth Amendment that '[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens.'" (citations omitted)).

the felt impact of the burdens, and because the consequences of not gaining admission to a specific school are seldom severe.[112]

The Court also seeks to prevent the overuse of race in redistricting. The predominant factor test in effect prohibits government from using race too much in drawing district lines. The idea of merit is irrelevant in reapportionment and the social benefits of empowering minorities to cast a more effective vote are at least partially offset by the social costs of reducing the voting power of whites placed in majority-minority districts. Accordingly, the Court seems concerned about the burdens imposed on certain groups of white voters by the use of race and especially about the balkanizing message that race-conscious redistricting can send.[113]

Toward the other end of the continuum, for instance where affirmative action in government contracting is at issue, the Court requires compliance with an individualized consideration requirement that precludes government from using race as a selection criterion in choosing among individuals. The Court seems most attracted to this approach in contexts where conventional notions of merit are socially salient, the use of race imposes definite burdens on individuals, and the Court suspects that government is using race in the service of a balkanizing racial politics rather than in the public interest.

Judging from the case law, therefore, the type of individualized consideration required by the Court turns on a judicial judgment about the probable net effect of using racial criteria on balkanization in American society. Because balkanization is no doubt a phenomenon that is difficult, if not impossible, to measure, this judgment is likely resistant to empirical falsification.[114] Such a judgment is also relative because intergroup hostility is always a matter of degree. The Court does not—indeed, cannot—articulate what degree of racial hostility is constitutionally unacceptable, but it

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112. It is also true that any given white applicant suffers only a modest decrease in his or her chances of being admitted by virtue of the existence of the program. *See generally* Goodwin Liu, *The Causation Fallacy:* Bakke *and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045 (2002). Whether white applicants perceive the situation this way, however, is another matter. For whites in the middle range of applicants, moreover, the existence of the affirmative action program has a greater impact on their chances of gaining admission. *See supra* note 99.

113. *See supra* note 97 and accompanying text.

114. This is not to say, however, that judgments about balkanization are merely intuitive, impressionistic, and thus incapable of rational persuasion. *See infra* Part III.B.1 (analyzing the potential for balkanization in the context of voluntary integration plans relative to affirmative action in higher education).

does seem consistently concerned about whether the use of racial criteria is likely to make matters better or worse on balance.

There is a temporal dimension to this determination. The Court seems attuned to the net impact on racial balkanization over the long haul.[115] For example, the Court no doubt anticipated that the race-conscious remedies mandated by *Brown v. Board of Education*[116] would increase interracial hostility in the short run because of white resistance. The Court, however, likely believed that these costs were acceptable in part because it expected that dismantling a regime of apartheid would encourage a long-term reduction in balkanization.[117]

Another difficulty is that the same use of racial criteria may cause race-based hostility to increase among members of one racial group and to decrease among members of another racial group. For example, an affirmative action program may cause more resentment among some whites but less resentment among some minorities than would exist in the absence of the program. No decision rule is available to explain how the Court's judgment about balkanization proceeds in these circumstances. The Court seems to make an all-things-considered determination regarding the overall effect of using race on balkanization, a determination whose principal focus varies depending on the circumstances. When invidious discrimination on the basis of race has been proven, the Court is more concerned about

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115. Of course, the long run cannot be so long that the exercise in anticipating balkanization becomes entirely speculative. Accordingly, concerns about a short-term increase in balkanization when government uses race cannot be overcome by only a remote possibility of gains in the distant future.

116. Brown v. Bd. of Educ. (*Brown I*), 347 U.S. 483 (1954).

117. To be sure, a noninstrumental moral judgment animated the Court in *Brown I* and *Brown II*, 349 U.S. 294 (1955). I submit, however, that a long-term instrumental judgment about balkanization was also implicated in *Brown*. After all, *Brown I* said nothing of implementation, and Chief Justice Warren campaigned for unanimity in order to reduce Southern resistance. *See* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 686 (Vintage Books 2004) (1975) ("Warren did not want dissents or concurrences if he could help it."). Put differently, if the *Brown* Court had been persuaded that the country would never accept the overruling of *Plessy v. Ferguson*, 163 U.S. 537 (1896), it is unlikely that *Brown* would have come out the way that it did. This suggestion may make some squeamish about the notion of balkanization as a normative criterion, but its descriptive accuracy helps to explain where constitutional law comes from, how it legitimates itself, and why it changes over time. *See, e.g.*, Michael J. Klarman, Brown *and* Lawrence *(and* Goodridge*)*, 104 MICH. L. REV. 431, 488 (2005) ("This seismic shift in *Brown*'s status—from a much-criticized ruling that divided public opinion to a sacrosanct decision that is well-nigh universally applauded—may suggest that the Court's legitimacy flows less from the soundness of its legal reasoning than from its ability to predict future trends in public opinion."); *see also infra* notes 134–35.

the potential hostility among members of minority groups if government does not allow explicit use of racial criteria in providing a remedy. In educational settings and redistricting, the Court seems concerned about ameliorating the potential hostility among members of all racial groups. In government contracting, the potential hostility among whites appears paramount.

The Court's judgment about the net effect of using racial criteria on balkanization seems to depend on several considerations. One is the Court's view of the symbolic message conveyed by the use of race. The Court can be "uncomfortable"[118] with robust expressions that "race matters" because it views them as potentially self-fulfilling: when government stresses the significance of race, this may cause citizens and public officials to act in ways that render race more salient. The country would then move farther away from the ideal of an America in which race no longer matters in public life. As Parts II.A and II.B demonstrated, this concern animated the Court's distinction between racial quotas and the use of race as a "plus" factor in *Bakke*, *Grutter*, and *Gratz*. And as Part II.C showed, the Court explicitly invoked this concern in the contexts of redistricting and government contracting.[119]

Another consideration apparent from the cases is the Court's view of the burdens that using race imposes on individuals. Racial classifications that impose substantial burdens on individuals by virtue of their membership in certain racial groups are particularly likely to cause race-based hostility. Thus the Court in *Wygant v. Jackson Board of Education*[120] invalidated a board of education's effort to increase teacher diversity in its schools by laying off certain white faculty with greater seniority than certain African American teachers who were retained.[121] Writing for the plurality, Justice Powell underscored the burdens involved in using race as a criterion of job termination. "[A]s a means of accomplishing purposes that otherwise may be legitimate," he stated, "the Board's layoff plan is not sufficiently narrowly tailored. Other, less intrusive means of accomplishing similar purposes—such as the adoption of hiring goals—are available."[122] Individual burdens that attract the Court's

118. *See supra* note 97 and accompanying text.
119. *See id.*; *see also supra* note 108 and accompanying text.
120. 476 U.S. 267 (1986) (plurality opinion).
121. *Id.* at 284.
122. *Id.* at 283–84 (footnote omitted).

attention tend to be tangible and distributive, as in *Wygant*, but they may also be dignitary,[123] as in the several affirmative action cases in which certain Justices opine that racial classifications are inherently demeaning.[124]

The Court also considers the extent to which consideration of individual merit is possible. The Court seems concerned about what it regards as the unfairness of distorting a competitive process of evaluation, whether the relevant merit-based qualifications are grades, as in *Bakke*, *Grutter*, and *Gratz*, or the ability to submit a low bid on a government contract, as in *Croson* and *Adarand*. Such concerns are not always paramount (or even implicated) in the case law, but when consideration of individual merit is possible and the Court regards the social benefits of using race as small, the merit factor can be important.

Also significant is the degree to which the Justices believe that the use of race would facilitate the realization of significant social benefits. Such benefits might accrue because race or ethnicity is functionally central to some contemporary, important purpose of government that has no relation to balkanization—for example, selecting Arab American agents to infiltrate certain terrorist organizations or compiling racial statistics or census data. But the use of race could also secure significant social benefits by remedying the social dislocations of race and thus reducing balkanization that pre-exists the current use of racial classifications (and is often related to the past use of very different kinds of racial classifications). In such circumstances, the Court has been prepared to register that America is a society "in which race unfortunately still matters."[125] The more the Court deems it important to allow sensitivity to social problems either caused in part by a history of racial apartheid or related to the broader salience of race in our increasingly multiracial society, the less the Court will demand in terms of an individualized consideration requirement that limits the ability of government to use race as a selection criterion. Remedies for de jure segregation are apt

123. *See supra* note 110.

124. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 353 (2003) (Thomas, J., joined by Scalia, J., concurring in part and dissenting in part) ("The Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all.").

125. *Id.* at 333 (majority opinion).

examples. So are *Paradise* and the previously documented remedial logic that partially animates *Bakke* and *Grutter*. When, by contrast, the Court believes that the use of race will likely increase balkanization, it demands compliance with an individualized consideration requirement that prohibits government from using race as a selection criterion at all. *Croson* and *Adarand* illustrate this phenomenon.[126]

The above considerations—expressive message, individual burdens, relevance of merit, and social benefits—collectively determine the Court's view of the likely net effect of using racial criteria on balkanization and thus the kind of individualized consideration that it requires. Accordingly, these factors determine where a case falls along the continuum shown in Figure 1.[127]

The foregoing analysis suggests a striking relationship among anticipated balkanization, individualized consideration, and government's use of race as a selection criterion. The Court's view of the likely long-term effect of using race on balkanization determines the kind of individualized consideration that it requires, which in turn polices the extent to which government may use racial criteria as relevant criteria in distinguishing among individuals.

Of course, some of the considerations discussed in the previous pages are ordinarily categorized in the doctrine as elements of narrow tailoring, and individualized consideration is typically conceived as just one element of narrow tailoring. But my interpretation of the doctrine suggests that something else is going on: what the Court says it is doing to ensure a proper fit[128] is often being done to minimize

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126. One might suggest that I have repeatedly referenced "the Court" when I am really referencing the idiosyncratic influence of Justice O'Connor. Her *Grutter* opinion, however, attracted five votes. Justice Breyer, moreover, joined all but the last sentence of her concurrence in *Gratz*. *See* Gratz v. Bollinger, 539 U.S. 244, 276 (2003) (O'Connor, J., concurring). More importantly, there is nothing unique about the influence of Justice O'Connor. Whenever the Court is divided five to four in an area, the possibility exists that one Justice will control outcomes. *See* Neil S. Siegel, Dole*'s Future: A Strategic Analysis*, 16 SUP. CT. ECON. REV. (forthcoming 2007) (manuscript at 14 n.46, on file with the author) ("[T]he Court is not a unitary actor."). When this happens, the majority opinions remain those of the Court, not of one Justice. In any event, my framework provides a way to understand the Court's decisions regardless of whether the views of a particular Justice drove them.

127. Figure 1 reduces a multi-dimensional problem to one dimension because a concern with balkanization underlies the Court's consideration of each factor.

128. The Court has stated that narrow tailoring requires the means to "'fit'" the compelling end "'so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.'" *Grutter*, 539 U.S. at 333 (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989)). The analysis of *Bakke*, *Grutter*, and *Gratz* in Part

balkanization, so that the other components of the narrow tailoring inquiry serve the same function as the individualized consideration requirement.

This reading of the doctrine reveals the error in the assertion that controlling principles of equal protection prohibit government from treating individuals as members of racial groups.[129] Colorblindness is not a reasonable interpretation of the case law because it collapses the context-sensitive continuum defined by the Court's decisions. The claim animating the colorblindness position is either that the level of racial balkanization in American society is irrelevant to constitutional analysis, or that the only source of balkanization that matters is social hostility to racial criteria. Neither assertion can be reconciled with the Court's decisions.[130]

Indeed, colorblindness discourse cannot make sense of even the most settled constitutional understandings. In the student assignment cases before the Court, for example, the United States has declared that it "remains deeply committed to th[e] objective" of "effectuat[ing] a transition to a racially nondiscriminatory school system."[131] But from the colorblind perspective that heavily influences the federal government's briefs,[132] it is not clear why the use of race to remedy even proven de jure school segregation is constitutionally permissible. If equal protection means that government must not treat individuals as members of racial groups (except perhaps in an emergency), and if a race-conscious remedy burdens individual students who are not guilty of racial discrimination and benefits individual students who may not have been victims of racial

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II, however, shows that the narrow tailoring inquiry constrains the use of racial criteria in ways that have nothing to do with "fit" and that are instead responsive to the potential for racial balkanization. *See supra* note 66; *infra* notes 273, 294.

129. *See, e.g.*, Missouri v. Jenkins, 515 U.S. 70, 120–21 (1995) (Thomas, J., concurring) ("At the heart of this interpretation of the Equal Protection Clause lies the principle that the government must treat citizens as individuals, and not as members of racial, ethnic, or religious groups.").

130. Of course, some Justices and commentators disagree with the normative premise of this Article and reject the Court's relevant decisions as constitutionally authoritative.

131. Brief for the United States as Amicus Curiae Supporting Petitioner at 29, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, No. 05-908 (U.S. Aug. 21, 2006) (quoting Brown v. Bd. of Educ., 349 U.S. 294, 300–01 (1955)).

132. *But see infra* notes 204–05 and accompanying text (noting the view of the United States that the interest in avoiding minority student isolation is "unquestioned" and "undoubtedly legitimate and important").

discrimination, as remedies for de jure segregation typically do,[133] then the use of race in remedying the constitutional violation ought to be ruled out of bounds. Because almost everyone approves the use of race in this context, and because those who do not would be ostracized from the interpretive community if they said so publicly, it follows that a commitment to colorblindness does not accurately capture the circumstances in which race-conscious state action comports with equal protection.

The Court has deemed permissible the use of race to remedy de jure segregation, even when innocent individuals are burdened and nonvictims are helped, in part because the Court expects that such use will reduce balkanization over the long run (even if it may provoke fierce resistance in the short run) by dismantling the primary historical cause of such balkanization.[134] But if this is right, it is not evident why the Court should restrict such a judgment to instances of de jure segregation. And in fact the Court has not done so.[135]

I turn now to race-conscious student assignment plans. The key question is where such plans lie along the balkanization continuum in Figure 1. The answer depends on (1) the interests supporting the plans and (2) the extent, impact, and salience of the use of race.[136]

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133. *Cf.* Balkin & Siegel, *supra* note 110, at 24 n.53 ("To apply *Brown* in a meaningful way, courts had to invalidate school assignment practices in districts where there was some degree of racial mixing in school attendance patterns.").

134. If resistance persists, however, the Court eventually pulls back. *See* CHARLES T. CLOTFELTER, AFTER *BROWN*: THE RISE AND RETREAT OF SCHOOL DESEGREGATION 181–85 (2004) (reporting that white opposition and conservative judicial appointments limited increases in interracial contact during the post-*Brown* era); Balkin & Siegel, *supra* note 110, at 29 ("Beginning in the 1970s the federal courts . . . slowed the project of disestablishing racial hierarchy, thus achieving a compromise on race relations that large numbers of whites sought."); Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over* Brown, 117 HARV. L. REV. 1470, 1475 (2004) ("The debates over *Brown*'s implementation show the complex ways in which concerns about legitimacy have moved courts to mask and to limit a constitutional regime that would intervene in the affairs of the powerful on behalf of the powerless.").

135. I do not examine why the Court has employed balkanization as a normative criterion of constitutional judgment in its equal protection jurisprudence. Elsewhere I have explored this question with Robert Post. *See* Post & Siegel, *supra* note 25 (theorizing the dialectic between legal legitimacy and public legitimacy). I merely suggest here that the primary considerations appear to have been the need for the Court to preserve the preconditions of its public legitimation over time, as well as a felt responsibility to reduce social conflict over racial issues. *See id.*; *supra* note 96 (quoting Justices Powell and O'Connor); *supra* note 134 (quoting Reva Siegel's historical work on race and legitimation); Siegel, *supra* note 134, at 1544–46 (discussing the legitimacy concerns that pervade constitutional discourse on equality).

136. The Court's concerns about balkanization are relevant under both prongs of strict scrutiny. The Court is more likely to view an end as compelling if it believes that pursuing the

III. CHALLENGES OF THE PRESENT

A. Compelling Interest

1. *Two Voluntary Integration Plans*. School districts that use race as a factor in student assignment typically assert that racially integrated schools (1) confer civic, social, and educational benefits of great importance and (2) reduce minority student isolation in educationally inferior schools.[137]

For example, the case involving the Jefferson County Public Schools (JCPS) in Kentucky concerns the constitutionality of the school board's "managed choice" plan. It requires, with a few exceptions, that all elementary, middle, and secondary schools "seek a Black student enrollment of at least 15% and no more than 50%, . . . reflect[ing] a broad range equally above and below [the 34%] Black student enrollment systemwide."[138] The plan categorizes students into integrated attendance zones, called "resides areas," and uses the zones in making initial assignments. The plan then permits students to express preferences among schools and programs within the zones. Students who are not satisfied with their initial assignment or preference-based placement can request a transfer within or beyond their attendance zone. Before considering a student's race, the JCPS makes assignments based on "place of residence, school capacity, program popularity, random draw and the nature of the student's choices."[139] The racial guidelines are used mostly at the elementary school level, though they also apply to transfer requests at

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end will reduce balkanization. And in evaluating which means are acceptable, the Court implicitly insists that any race-conscious means chosen be no more balkanizing than necessary to achieve the end.

137. *See, e.g.*, Comfort v. Lynn Sch. Comm., 418 F.3d 1, 14 (1st Cir. 2005) ("The negative consequences of racial isolation that Lynn seeks to avoid and the benefits of diversity that it hopes to achieve are rooted in the same central idea: that all students are better off in racially diverse schools. We therefore restate the interests at stake here as obtaining the educational benefits of a racially diverse student body."), *cert. denied*, 126 S. Ct. 798 (2005). Under the Lynn, Massachusetts plan, which the Court declined to review before Justice O'Connor retired, *see supra* note 11, "each student is entitled to attend his or her neighborhood school. Students who do not wish to attend their neighborhood school may apply to transfer to another school. Approval of a transfer depends, in large part, on the requesting student's race and the racial makeup of the transferor and transferee schools," *Comfort*, 418 F.3d at 6.

138. McFarland v. Jefferson County Pub. Sch., 330 F. Supp. 2d 834, 842 (W.D. Ky. 2004), *aff'd*, 416 F.3d 513 (6th Cir. 2005), *cert. granted sub nom.* Meredith v. Jefferson County Bd. of Educ., 126 S. Ct. 2351 (June 5, 2006) (No. 05-915).

139. *Id.*

every level and to high school freshmen who apply for "open enrollment" at a school outside their residential area.[140]

According to the district court, the plan reflects the "JCPS's ongoing commitment to racial integration within its individual schools."[141] Chief Judge Heyburn described the school board's interests as sounding in the virtues of integration, perhaps in part because the district had been subject to a desegregation decree from 1975 until 2000:

> The occasion of the fiftieth anniversary of *Brown v. Board of Education* has generated much discussion regarding whether that ruling has fulfilled its original promise. To give all students the benefits of an education in a racially integrated school and to maintain community commitment to the entire school system precisely express the Board's own vision of *Brown*'s promise. The benefits the JCPS hopes to achieve go to the heart of its educational mission: (1) a better academic education for all students; (2) better appreciation of our political and cultural heritage for all students; (3) more competitive and attractive public schools; and (4) broader community support for all JCPS schools.[142]

The court determined that the *Grutter* Court's emphases on professionalism, citizenship, and leadership were equally relevant "to students in racially integrated public schools."[143] It further determined that "[o]ther benefits" sought by the school board were "quite different from those articulated in *Grutter*" but "seem equally compelling"—namely, "educational benefits for students of all races," including "academic achievement"[144] and the creation of "a system of

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140. *Id.* at 844–45. I omit discussion of specialized schools and programs not at issue in the cases before the Court.

141. *Id.* at 840.

142. *Id.* at 836 (footnote omitted).

143. *Id.* at 853. According to the court, "[s]everal JCPS witnesses testified that, in a racially integrated learning environment, students learn tolerance towards others from different races, develop relationships across racial lines and relinquish racial stereotypes." *Id*. "These values," the court reported, "carry over to their relationships in college and in the workplace. As a result, these students are better prepared for jobs in a diverse workplace and exhibit greater social and intellectual maturity with their peers in the classroom and at their job." *Id.*

144. *Id.* The court did not "resolve th[e] ongoing debate" about the extent to which integration benefits black students "in terms of academic achievement," deferring instead to the school board's judgment that integration benefits all students academically because there were "valid reasons for believing its policies have succeeded"—namely, that "[o]ver the past twenty-five years, White and Black students in JCPS have progressed by every measure." *Id.* at 853–54 & n.39.

roughly equal components, not one urban system and another suburban system, not one rich and another poor, not one Black and another White."[145] The court concluded that "the arguments favoring the Board's compelling interest are so objectively overwhelming" that the question whether it would accord "deference" to the board's educational judgment was "immaterial."[146]

In contrast to the JCPS, Seattle School District Number 1 has never been adjudicated guilty of de jure segregation,[147] and its "open choice" race-conscious assignment plan applies only to secondary schools. The plan allows incoming ninth-graders to select any of the ten high schools in the district. The plan provides that if the racial composition of an oversubscribed high school (i.e., a school that more students want to attend than capacity allows) "differs by more than 15 percent from the racial make up of the students of the Seattle public schools as a whole," and "if the sibling preference does not bring the oversubscribed high school within plus or minus 15 percent of the District's demographics" of 60 percent minority and 40 percent white, then "the race-based tiebreaker is 'triggered' and the race of the applying student is considered."[148]

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145. *Id.* at 854. "It creates a perception, as well as the potential reality, of one community of roughly equal schools. Student choice and integrated schools, the Board believes, invest parents and students alike with a sense of participation and a positive stake in their schools and the school system as a whole." *Id.*

146. *Id.* at 852.

147. The atmospherics of the two cases are different. While the *McFarland* court touted integration, the Ninth Circuit stressed racial diversity. This may be because only the JCPS had been subject to a desegregation decree, and the primary goal of its assignment plan was to maintain integrated schools once the decree was lifted. Legally, however, this distinction would not seem to make a relevant difference. It is certainly counterintuitive that the same state action that was required by law before the decree was lifted became prohibited by law the moment that decree was lifted. *See* Ryan, *supra* note 5, at 329 ("Have we reached a point of 'terminal silliness' in constitutional law where school districts are prohibited from doing what federal courts were ordering them to do just a few years ago?" (quoting Romer v. Evans, 517 U.S. 620, 639 (1996) (Scalia, J., dissenting))). But this rationale for "play in the joints" between what equal protection requires and what it prohibits would seem to suggest not that the JCPS plan is less suspect than the Seattle plan, but that neither is constitutionally dubious. *Cf.* Locke v. Davey, 540 U.S. 712, 718–19 (2004) ("[T]here are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause.").

148. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 426 F.3d 1162, 1169–70 (9th Cir. 2005) (en banc), *cert. granted*, 126 S. Ct. 2351 (June 5, 2006) (No. 05-908). After sibling preference and race, "students are admitted according to distance from the student's home to the high school. . . . In any given oversubscribed school, the distance-based tiebreaker accounts for between 70 to 75 percent of admissions to the ninth grade." *Id.* at 1171.

The Ninth Circuit described the school district's interests as (1) "the affirmative educational and social benefits that flow from racial diversity" and (2) "avoid[ance of] the harms resulting from racially concentrated or isolated schools."[149] As to the first set of interests, the court approved the district's expert testimony that a racially diverse educational experience causes "improved critical thinking skills" for students of all races; an "improvement in race-relations" and "the reduction of prejudicial attitudes"; and the opening of "opportunity networks in areas of higher education and employment," as well as a greater likelihood that graduates will "live in integrated communities" and "have cross-race friendships later in life."[150]

The Ninth Circuit concluded that "[t]he District's interests in the educational and social benefits of diversity are similar to those of a law school as articulated in *Grutter*," but the court also identified reasons why "public secondary schools have an equal if not more important role" in "'preparing students for work and citizenship.'"[151] First, "underlying the history of desegregation in this country is a legal regime that recognizes the principle that public secondary education serves a unique and vital socialization function in our democratic society."[152] Second, "a substantial number of Seattle's public high school graduates do not attend college. For these students, their public high school educational experience will be their sole opportunity to reap the benefits of a diverse learning environment."[153] And third, "the public school context involves students who, because they are younger and more impressionable, are more amenable to the benefits of diversity."[154] The court deemed all three "compelling educational and social benefits of [racial] diversity unique to the public secondary school context."[155]

Regarding the second cluster of interests asserted by the District, the Ninth Circuit noted the research indicating "that racially concentrated or isolated schools are characterized by much higher levels of poverty, lower average test scores, lower levels of student achievement, with less-qualified teachers and fewer advanced

149. *Id.* at 1174.
150. *Id.* at 1174–75.
151. *Id.* at 1175 (quoting Grutter v. Bollinger, 539 U.S. 306, 331 (2003)).
152. *Id.*
153. *Id.* at 1176 (footnote omitted).
154. *Id.*
155. *Id.* at 1177.

courses."[156] The court observed that "because of Seattle's housing patterns, high schools in Seattle would be highly segregated absent race conscious measures."[157] It held the interest in reducing racial isolation "clearly compelling."[158]

2. *Analysis*. In considering whether these courts are correct that voluntary integration plans advance one or more compelling interests, it is important to frame the proffered interests with some precision. One type of diversity interest may not be as compelling in the K–12 context as another. Regarding assignment plans, the alleged interests concern integration or *racial* diversity, not *general* diversity as in *Bakke*, *Grutter*, and *Gratz*.[159]

While Chief Judge Heyburn and the Ninth Circuit noted important similarities and differences between voluntary integration plans and affirmative action in higher education, the two courts overstated the similarities in some respects. Race-conscious assignment plans do not seek to secure viewpoint diversity to anywhere near the extent that universities do. Nor are such plans primarily concerned with maintaining a visibly open path to leadership.[160] Moreover, the Ninth Circuit appeared at times to conflate the *Grutter* interest in *general* diversity with the public school interest in *racial* diversity.[161] These problems notwithstanding, both courts properly concluded that voluntary integration plans advance compelling interests.

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156. *Id.*

157. *Id.* at 1178.

158. *Id.* at 1179.

159. *Cf. generally* Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057 (1990) (analyzing the problem of abstraction in constitutional law).

160. *See* Ryan, *supra* note 5, at 335 ("[T]o the extent that *Grutter* and *Gratz* also rely on viewpoint diversity, or on making sure that the 'path to leadership' is visibly open to all, those decisions do not answer the precise question raised by voluntary integration plans at the public school level."). Yet universities may find it difficult to maintain a visibly open path to leadership in the face of severe racial isolation in primary and secondary education. *See infra* notes 202–08 and accompanying text.

161. *See, e.g.*, *supra* notes 153–54 and accompanying text. This conflation is understandable in light of the *Grutter* Court's arguable inconsistency. It stated that it was adopting Justice Powell's general diversity rationale, but it in fact focused more specifically on racial diversity than Powell had. *See supra* note 68 and accompanying text.

a. The Mission of Public Education. The mission of public education in American society includes instilling cultural values,[162] and school districts have a compelling interest in enabling their schools to fulfill this mission. The Court has repeatedly stated that the institution of public education is very special in light of the civic, social, and educational functions it performs. The Court in *Bethel School District No. 403 v. Fraser*[163] insisted that "'inculcation'" of "the 'fundamental values necessary to the maintenance of a democratic political system'"[164] is "truly the work of the schools."[165] The Court in *Plyler v. Doe*[166] declared that "[w]e have recognized the public schools as a most vital civic institution for the preservation of a democratic system of government";[167] that "education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all"; and that "education has a fundamental role in maintaining the fabric of our society."[168] The Court in *Ambach v. Norwick*[169] proclaimed "[t]he importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests."[170]

Almost all would agree that public schools are charged with educating students in the sense of empowering them to achieve academically (e.g., teaching the "three Rs"). When one turns to socialization, however, matters become more controversial. Although there is always disagreement about the values that public schools should be instilling, most would agree that they include (1) socializing students to the value of individualism in the sense that citizens should not be treated by government as members of racial groups, and (2) socializing them to the value that "[a]ll members" of our racially and ethnically "heterogeneous society"[171] must learn to live together in

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162. *See* ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 189 (1995) (observing that the "process of socialization . . . . most typically occurs through institutions like the family and the elementary school"); *id*. at 190 (noting the role of "the institution of coercive public education" in "instill[ing] [principles] in persons as part of their socialization into community values").

163. 478 U.S. 675 (1986).

164. *Id.* at 683, 681 (quoting Ambach v. Norwick, 441 U.S. 68, 77 (1979)).

165. *Id.* at 683.

166. 457 U.S. 202 (1982).

167. *Id.* at 221 (quoting Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 230 (1963)).

168. *Id.*

169. 441 U.S. 68 (1979).

170. *Id.* at 76.

171. Grutter v. Bollinger, 539 U.S. 306, 332 (2003).

peace and maybe even in harmony,[172] so that "our society [can] continue to progress as a multiracial democracy."[173] These values can of course be in tension at times, but surely public schools can affirm them both. A critical issue is which value predominates in public education when they conflict.

One possible answer is socialization to the value that an individual's race or ethnicity is irrelevant in this country when government imposes private burdens in pursuit of public benefits, regardless of the degree and kind of these burdens and benefits and regardless of the context. American public education is hardly indifferent to the importance of valuing the unique qualities and aspirations of each person and not treating people simply as members of racial groups. As Justices Scalia and Thomas have expressed in their affirmative action opinions,[174] individualism in this sense is a deeply embedded aspect of America's collective commitments. In dissent in the Seattle case, Judge Bea drew powerfully from this cultural store:

> The District's use of the racial tiebreaker to achieve racial balance in its high schools infringes upon each student's right to equal protection and tramples upon the unique and valuable nature of each individual. We are not different because of our skin color; we are different because each one of us is unique. That uniqueness incorporates our opinions, our background, our religion (or lack thereof), our thought, and our color.[175]

In Judge Bea's view, "[t]he District's stark racial classifications . . . offend intrinsic notions of individuality."[176] Because public schools are principal sites of cultural reproduction,[177] teaching individualism in

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172. *See, e.g.*, JOINT COMM. FOR REVIEW OF THE MASTER PLAN FOR HIGHER EDUC., CAL. LEGISLATURE, CALIFORNIA FACES . . . CALIFORNIA'S FUTURE: EDUCATION FOR CITIZENSHIP IN A MULTIRACIAL DEMOCRACY, at ii, 7 (1989) (describing an "educational system [that] liberates and sustains our capacity to live together" and "forge[s] a creative and productive society of mutual respect and accommodation").

173. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 630 (1991).

174. *See, e.g.*, *supra* note 124.

175. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 426 F.3d 1162, 1221 (9th Cir. 2005) (en banc) (Bea, J., dissenting), *cert. granted*, 126 S. Ct. 2351 (June 5, 2006) (No. 05-908).

176. *Id.* at 1205.

177. *See supra* note 162 and accompanying text.

this sense has to be one facet of the function of public education in America.[178]

It is nonetheless difficult to reconcile such a vigorously individualist understanding of the role of public education in America with the Court's past interpretations of American culture. As already noted, when the Court has considered the institution of public education, it has focused consistently on the values of democracy, citizenship, and the public good. Public schools, the Court has declared, are "the most powerful agency for promoting cohesion among a heterogeneous democratic people."[179] The Court has repeatedly recognized the nation-building function of public education, authoring this declaration of interdependence in *Brown*:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.[180]

The *Brown* Court, after "consider[ing] public education in the light of its full development and its present place in American life throughout the Nation,"[181] was explicit that the primary role of *public* education in America is to advance the *public* good.

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178. It was thus in a school case that the Court proclaimed: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

179. Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 216 (1948).

180. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

181. *Id.* at 492–93.

In all of these cases and elsewhere,[182] the Court has made clear that the public good advanced by public education is not best understood in primarily individualistic terms; rather, it has declared that public schools socialize students to values of mutual understanding, social cooperation, and social unity.[183] Judge Kozinski voiced a similar point in focusing explicitly on the value of racial harmony:

> [T]ime spent in school . . . has a significant impact on [a] student's development. The school environment forces students both to compete and cooperate . . . . Schoolmates often become friends, rivals and romantic partners; learning to deal with individuals of different races in these various capacities cannot help but foster the live-and-let-live spirit that is the essence of the American experience. . . . Schools . . . don't simply prepare students for further education . . . ; good schools prepare students for life, by instilling skills and attitudes that will serve them long after their first year of college.[184]

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182. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 30 (1973) (reaffirming "our historic dedication to public education"); Wisconsin v. Yoder, 406 U.S. 205, 213 (1972) ("Providing public schools ranks at the very apex of the function of a State."); *id.* at 221 ("[A]s . . . pointed out early in our history, . . . some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence."); Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 230 (1963) (Brennan, J., concurring) (recognizing "the public schools as a most vital civic institution for the preservation of a democratic system of government"); Meyer v. Nebraska, 262 U.S. 390, 400 (1923) ("The American people have always regarded education and [the] acquisition of knowledge as matters of supreme importance.").

183. Public schools are the primary institutions in America that instill such values across racial and ethnic lines. *See* CLOTFELTER, *supra* note 134, at 181 (reporting that between 1976 and 2000, "[s]chools represented the most important source of contact for these [black and white] young people. Two-thirds of blacks and more than one-third of whites said they had gotten to know people of other races a lot in school. Next most important as venues for this contact were employment, sports teams, and clubs, in that order."); *id.* at 188 ("In light of the high degree of residential segregation that characterizes most urban areas of the country, schools are for most children the first opportunity to have significant contact with individuals of other racial and ethnic groups."). It is thus difficult to characterize the benefits alleged to be associated with integrated schools as "a lesson of life," not a lesson learned at school. *Cf.* Grutter v. Bollinger, 539 U.S. 306, 347 (2003) (Scalia, J., concurring in part and dissenting in part) ("For it is a lesson of life rather than law—essentially the same lesson taught to (or rather learned by, for it cannot be 'taught' in the usual sense) people three feet shorter and 20 years younger than the full-grown adults at the University of Michigan Law School, in institutions ranging from Boy Scout troops *to public-school kindergartens*." (emphasis added)).

184. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 426 F.3d 1162, 1195 (9th Cir. 2005) (en banc) (Kozinski, J., concurring in the result), *cert. granted*, 126 S. Ct. 2351 (June 5, 2006) (No. 05-908). In considering the import of Judge Kozinski's reference to "romantic

Chief Judge Heyburn deemed such lessons "pretty important for most people who are fortunate enough to learn them early in life."[185]

These judicial interpretations are supported by any faithful rendition of the history of American educational ideals. John Dewey emphasized cooperative learning and engagement in his educational philosophy. He began with the observation that "our chief business with [the young] is to enable them to share in a common life."[186] Alexander Bickel wrote in analyzing *Brown* that "the public school . . . fails in its mission if it teaches the races separately."[187] He characterized this mission as "equalizing, socializing, nationalizing—assimilationist and secular," and he traced "[t]he implication that the public schools are charged with" this mission to "the history of public education in the United States—or at least [to] the history of what men have thought about public education in the United States."[188] Bickel cogently captured "[t]he full-blown conception of the public school as a secular, nationalizing, assimilationist agent," which "dates more or less to the post-Civil War years of the great immigrations."[189]

Amy Gutmann, to note one more example, argues that de facto segregated schools should be integrated even when the majority

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partners," one might bear in mind the reasons for the Court's controversial disposition of *Naim v. Naim*, 350 U.S. 985 (1956) (dismissing for want of a substantial federal question a challenge to a Virginia antimiscegenation statute despite its incompatibility with the equal protection principles articulated in *Brown*). *See* Siegel, *supra* note 88, at 2017 ("*Naim* . . . . constituted a rare accommodation that principle made with pragmatism for the ultimate purpose of vindicating *Brown*'s promise. Principle lost the battle for a few more years, a significant—and perhaps intolerable—cost, but at least principle put itself in a position not to lose the war." (footnotes omitted)). When the legitimacy of *Brown* was more secure, the Court unanimously invalidated the Virginia law. Loving v. Virginia, 388 U.S. 1, 12 (1967).

185. McFarland v. Jefferson County Pub. Sch., 330 F. Supp. 2d 834, 853 n.35 (W.D. Ky. 2004), *aff'd*, 416 F.3d 513 (6th Cir. 2005), *cert. granted sub nom.* Meredith v. Jefferson County Bd. of Educ., 126 S. Ct. 2351 (June 5, 2006) (No. 05-915). These statements resonate with the admonition that "unless our children begin to learn together, there is little hope that our people will ever learn to live together." Milliken v. Bradley, 418 U.S. 717, 783 (1974) (Marshall, J., dissenting).

186. JOHN DEWEY, DEMOCRACY AND EDUCATION 8 (1916); *see id.* at 1 ("While the living thing may easily be crushed by superior force, it none the less tries to turn the energies which act upon it into means of its own further existence. If it cannot do so, it does not just split into smaller pieces . . . but loses its identity as a living thing.").

187. ALEXANDER BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 120–21 (1970).

188. *Id.* at 121.

189. *Id. See* POST, *supra* note 162, at 183 (noting the function of "authoritative cultural institutions, like state educational systems, . . . to articulate the norms that reciprocally define individual and social identity and inculcate these norms in a manner than spans social divisions").

opposes integration. She regards de facto segregation as "unacceptable by democratic principles even if it is often supported by democratic politics."[190] She so concludes "for reasons that return us to the main purpose of primary schooling: educating democratic citizens."[191] The moral component of this education, Gutmann argues, requires continuing efforts by government to reduce enduring racial prejudice.[192] It seems, therefore, that American public schools are concerned less centrally with individualism and colorblindness and more centrally with socializing students to values of racial and ethnic harmony.[193]

Even if one disagrees about how these cultural commitments trade off, the values of federalism suggest that school districts should be afforded leeway to work out the relation between them.[194] The Court has instructed that "[n]o single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process."[195] Justice Kennedy in particular has noted the "well established" understanding "that education is a traditional concern of the States," and he has submitted that "the theory and utility of our federalism are revealed" when "considerable disagreement exists about how best to accomplish [a]

190. AMY GUTMANN, DEMOCRATIC EDUCATION 162 (1987).

191. *Id.*

192. *Id.*

193. *See* Goodwin Liu, Brown, Bollinger, *and Beyond*, 47 HOW. L.J. 705, 752 (2004) ("In some sense, the question [whether the Constitution permits voluntary race-conscious student assignment to achieve diversity in public schools] should hardly seem vexing at all. The goal of creating racially integrated learning environments resonates deeply with our ideal of the common school and its mission of educating students for citizenship in a multiracial society. This goal has particular importance given our historical experience with racial segregation.").

194. For discussions of the values that federalism is commonly thought to serve, see generally STEPHEN G. BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 56–59 (2005); DAVID L. SHAPIRO, FEDERALISM: A DIALOGUE (1995); Neil S. Siegel, *Commandeering and Its Alternatives: A Federalism Perspective*, 59 VAND. L. REV. 1629 (2006); Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903 (1994); Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism after* Garcia, 1985 SUP. CT. REV. 341. For an overview of the normative federalism debate in constitutional law and citations to the literature, see ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 109–12 (2d ed. 2005).

195. Milliken v. Bradley, 418 U.S. 717, 741–42 (1974).

goal."[196] This is because "the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear."[197] In the context of voluntary integration plans, where core and conflicting American ideals are implicated, federalism values counsel judicial respect for the way in which a school district prioritizes them.[198]

b. Whether Integration Advances the Mission. Even if school districts have a compelling interest in fulfilling their mission, and even if this mission, properly conceived, is more centrally concerned with teaching cross-racial unity than with instilling colorblindness, it does not necessarily follow that integrated schools actually advance this mission. It is therefore important to consider the constitutional significance of whether integrated schools do in fact produce civic, social, and educational benefits.[199]

There is disagreement about whether racially diverse public schools advance academic achievement among all students.[200] It is extremely difficult to establish causation in this context: isolating the independent impact of each causal variable is a formidable challenge, and there is no one phenomenon known as a racially integrated

196. United States v. Lopez, 514 U.S. 549, 580–81 (1995) (Kennedy, J., concurring) (citing *Milliken*, 418 U.S. at 741–42).

197. *Id.* at 581.

198. This is not an argument for deference to local control regardless of context. Rather, deference is warranted when core and conflicting American educational ideals are at stake. Racial segregation, which apparently still has its proponents, is not such an ideal. *See* Sam Dillon, *Law to Segregate Omaha Schools Divides Nebraska*, N.Y. TIMES, Apr. 15, 2006, at A9.

199. For a careful review of the literature examining the impact of interracial contact on academic achievement, self-esteem, intergroup relations, and long-term educational attainment and employment, see CLOTFELTER, *supra* note 134, at 186–96.

200. *Compare* Statement of American Social Scientists of Research on School Desegregation, Appendix to Brief of 553 Social Scientists as Amici Curiae in Support of Respondents at 12–20, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, No. 05-908; Meredith v. Jefferson County Bd. of Educ., No. 05-915 (U.S. Oct. 10, 2006), *and* Brief of the American Educational Research Association as Amicus Curiae in Support of Respondents at 9–13, *Parents Involved* and *Meredith*, *with* Brief of David J. Armor, Abigail Thernstrom & Stephan Thernstrom as Amici Curiae in Support of Petitioners at 12–21, *Parents Involved* and *Meredith*, *and* Brief of Drs. Murphy, Rossell & Walberg as Amici Curiae in Support of Petitioners at 8–13, *Parents Involved*, *and* David J. Armor, *The End of School Desegregation and the Achievement Gap*, 28 HASTINGS CONST. L.Q. 629, 653 (2001). Studies that have sought to determine the effect of desegregation on student achievement "have come up with a decidedly mixed set of results. In general, the research suggests no effect on mathematics achievement for blacks and some modest positive effect on reading for blacks. The achievement of whites does not appear to be harmed." CLOTFELTER, *supra* note 134, at 187.

school.[201] Because the degree and kind of interracial contact in American public schools vary tremendously even among racially diverse schools, it is unsurprising that the evidence on academic achievement is conflicting.

What has been empirically demonstrated, however, is that racially isolated schools—specifically, public schools with high black or Latino concentration—offer inferior educational opportunities.[202] Congress has rendered this judgment.[203] And in its briefs *attacking* the plans before the Court, even the United States labels the interest in avoiding minority student isolation "unquestioned"[204] and "undoubtedly legitimate and important."[205] This problem exists not simply because racially isolated schools are more likely to be high-poverty schools, but because teacher quality is sensitive to racial composition independent of other factors that affect teacher quality,

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201. For an accessible discussion of some of the analytic difficulties, including omitted variable bias and the enormous diversity of experiences signified by the terms "desegregation" and "interracial contact," see CLOTFELTER, *supra* note 134, at 194–96. *See also* McFarland v. Jefferson County Pub. Sch., 330 F. Supp. 2d 834, 853 (W.D. Ky. 2004), *aff'd*, 416 F.3d 513 (6th Cir.), *cert. granted sub nom*. Meredith v. Jefferson County Bd. of Educ., 126 S. Ct. 2351 (June 5, 2006) (No. 05-915) ("The Court cannot be certain to what extent the policy of an integrated school system has contributed to these [academic] successes.").

202. *See* Statement of American Social Scientists of Research on School Desegregation, Appendix to Brief of 553 Social Scientists as Amici Curiae in Support of Respondents, *supra* note 200, at 28–40.

203. In the Magnet Schools Assistance Act, Congress stressed the importance of voluntary efforts to secure the benefits of integrated schools and to reduce minority student isolation:

> It is in the best interests of the United States—
>
> (A) to continue the Federal Government's support of . . . local educational agencies that are voluntarily seeking to foster meaningful interaction among students of different racial and ethnic backgrounds, beginning at the earliest stage of such students' education;
>
> . . .
>
> (C) to continue to desegregate and diversify schools by supporting magnet schools . . . .

20 U.S.C. § 7231(a)(4) (Supp. III 2003). Congress stated that "[t]he purpose of this part is to assist in the desegregation of schools served by local educational agencies by providing financial assistance to eligible local educational agencies for," among other things, "the elimination, reduction, or prevention of minority group isolation in elementary schools and secondary schools with substantial proportions of minority students, which shall include assisting in the efforts of the United States to achieve voluntary desegregation in public schools." *Id.* § 7231(b)(1).

204. Brief for the United States as Amicus Curiae Supporting Petitioner, *supra* note 131, at 7.

205. Brief for the United States as Amicus Curiae Supporting Petitioner, *supra* note 17, at 15.

including school poverty.[206] Specifically, "[w]hite teachers—who comprise 85% of the teaching force—often transfer to schools with a lower minority percentage."[207] Research shows that recognition of a compelling interest in reducing racial isolation in public schools is not premised on unconstitutional stereotypes and assertions of inherent racial inferiority.[208] Rather, the interest is based on the empirically demonstrated reality that racially isolated schools afford inferior educational opportunities in substantial part because experienced white teachers decline to work in such schools for extended periods of time.

Turning to the civic and social benefits alleged to be associated with integrated schools, one might be inclined to think that a rigorous empirical demonstration of benefits is unnecessary. It seems intuitively plausible that a promising way to combat racial and ethnic prejudice, stereotyping, and polarization is to have children of different races and ethnicities spend productive time together at school. Putting aside for the moment whether it is a lesson of social science,[209] it is a widely-shared lesson of life that time well spent with people of different races and ethnicities helps to ameliorate the ignorance and fear that fuel racialized and ethnocentric thinking. There would seem to be much wisdom in Judge Kozinski's words to this effect:

> It is difficult to deny the importance of teaching children, during their formative years, how to deal respectfully and collegially with peers of different races. Whether one would call this a compelling

206. *See* Brief of 19 Former Chancellors of the University of California as Amici Curiae in Support of Respondents at 3, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, No. 05-908; Meredith v. Jefferson County Bd. of Educ., No. 05-915 (U.S. Oct. 10, 2006) ("[P]ublic schools with high black or Latino concentration have serious difficulty attracting and retaining high-quality teachers, and this problem is directly related to the racial make-up of schools *independent* of other factors such as teacher salaries, school poverty, or student achievement."). *Cf.* Sam Dillon, *Schools Slow in Closing Gaps Between Races*, N.Y. TIMES, Nov. 20, 2006, at A1 (reporting the conclusions of experts and recent reports that poor teacher quality in racially isolated schools is a principal cause of the persistent achievement gap between the races).

207. Statement of American Social Scientists of Research on School Desegregation, Appendix to Brief of 553 Social Scientists as Amici Curiae in Support of Respondents, *supra* note 200, at 31.

208. *Cf.* Missouri v. Jenkins, 515 U.S. 70, 114 (1995) (Thomas, J., concurring) ("[T]he court has read our cases to support the theory that black students suffer an unspecified psychological harm from segregation that retards their mental and educational development. This approach not only relies upon questionable social science research rather than constitutional principle, but it also rests on an assumption of black inferiority.").

209. *See infra* notes 213–14 and accompanying text.

> interest or merely a highly rational one strikes me as little more than semantics. The reality is that attitudes and patterns of interaction are developed early in life and, in a multicultural and diverse society such as ours, there is great value in developing the ability to interact successfully with individuals who are very different from oneself. It is important for the individual student, to be sure, but it is also vitally important for us as a society.[210]

This view seems more substantial than "a faddish slogan of the cognoscenti."[211] As Judge Bea wrote *in dissent* in the Seattle case, "[t]he idea that children will gain social, civic, and perhaps educational skills by attending schools with a proportion of students of other ethnicities and races, which proportion reflects the world in which they will move, is a notion grounded in common sense."[212]

One might think it plausible to believe that racially integrated schools confer important civic and social advantages, but still insist that the alleged benefits are unproven. Although the virtues of intergroup contact in public schools are evident to many educators and citizens, and while hundreds of social scientists have concluded that "racially integrated schools tend to provide benefits that are not available in segregated schools,"[213] these claims are in fact disputed.[214]

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210. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 426 F.3d 1162, 1174 (9th Cir. 2005) (en banc) (Kozinski, J., concurring in the result), *cert. granted*, 126 S. Ct. 2351 (June 5, 2006) (No. 05-908).

211. Grutter v. Bollinger, 539 U.S. 306, 350 (2003) (Thomas, J., concurring in part and dissenting in part).

212. *Parents Involved*, 426 F.3d at 1196 (Bea, J., dissenting).

213. Statement of American Social Scientists of Research on School Desegregation, Appendix to Brief of 553 Social Scientists as Amici Curiae in Support of Respondents, *supra* note 200, at 2. The civic and social benefits identified by social scientists include not only academic achievement and cross-racial understanding, but also better life opportunities, preparation for a diverse workforce, reduced residential segregation, and greater parental involvement in schools. *See id.* at 2–28; Brief of 19 Former Chancellors of the University of California as Amici Curiae in Support of Respondents, *supra* note 206, at 7–10; Brief of the American Educational Research Association as Amicus Curiae in Support of Respondents, *supra* note 200, at 5–9, 14–17; James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 296–307 (1999) (identifying various benefits of racial and socioeconomic integration).

214. *See, e.g.*, Brief of David J. Armor, Abigail Thernstrom & Stephan Thernstrom as Amici Curiae in Support of Petitioners, *supra* note 200, at 21–29; Brief of Drs. Murphy, Rossell & Walberg as Amici Curiae in Support of Petitioners, *supra* note 200, at 13–14; David J. Armor & Christine H. Rossell, *Desegregation and Resegregation in the Public Schools*, *in* BEYOND THE COLOR LINE: NEW PERSPECTIVES ON RACE AND ETHNICITY IN AMERICA 252 (Abigail Thernstrom & Stephan Thernstrom eds., 2002). For a critique of the theory and empirics associated with the "contact hypothesis" in the social sciences, see H.D. FORBES, ETHNIC CONFLICT: COMMERCE, CULTURE, AND THE CONTACT HYPOTHESIS 42–141 (1997).

Some of the above statements are tautological: suggesting that "productive" time and time "well spent" at school with persons of other races and ethnicities will improve intergroup relations assumes the conclusion that the time will be productive and well spent. Whether the civic and social benefits alleged to be associated with integration are in fact realized depends on what actually happens when children of different races and ethnicities attend school together, and the results can vary widely depending on the circumstances of the interaction.[215]

The key *legal* question is what the Court should do in light of the empirical uncertainty that is unavoidable given the complexity of the world, the current state of knowledge, and the inherent limits of social science.[216] One option is to wield the Constitution to end local democratic experimentation in search of workable solutions to difficult problems. A more sensible approach is constitutionally to cabin the kinds of experiments that school boards may conduct, but nonetheless to allow them real room to take place—hopefully, with care and caution and informed by social scientific knowledge of how

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After reviewing the research on "the great social experiment of desegregation" in America, Forbes writes that "if any simple conclusion can be drawn from more than a generation of social science research on the attitudinal effects of desegregation, it is that no simple conclusion about its effects is possible." *Id.* at 61. Forbes describes the methodological obstacles that impede empirical research: observing developments over a relatively long period of time; securing the cooperation of a random sample of school officials, parents, and students; using valid measures of racial attitudes; avoiding the contamination of attitude measures by "history"; and avoiding the contamination of children's responses by the opinions of parents and teachers. *Id.* at 51. Yet Forbes distinguishes "short-term effects on attitudes," which are "the most important effects . . . [f]or testing the contact hypothesis," from "longer-term effects, both direct (for example, the effects of attending a desegregated school on the probability of attending college or living in an integrated neighborhood) and indirect (the effect of the policy itself on social norms and expectations)," which "must also be taken into account" in "evaluating the policy of desegregation." *Id.* at 56. Forbes favorably quotes research documenting the "'revolution in intergroup relations . . . since World War II.'" *Id.* at 56–57 (citation omitted).

215. *See* Statement of American Social Scientists of Research on School Desegregation, Appendix to Brief of 553 Social Scientists as Amici Curiae in Support of Respondents, *supra* note 200, at 2 ("Racially desegregated schools are not an educational or social panacea and the extent of benefits will depend on how desegregation is structured and implemented."); CLOTFELTER, *supra* note 134, at 189 ("In schools using teams and emphasizing cooperative work, for example, cross-race friendships are more common."); *id.* at 190–91 ("Whites tend to have more positive attitudes toward minority students when they associate with them on an equal basis, and their views are more negative in situations where minority students have low academic performance.").

216. *See supra* notes 201, 214 and accompanying text.

best to structure integrated environments—so long as local constituencies continue to approve them.

If, as in *Grutter*,[217] the Court is prepared to defer to a reasonable educational judgment of the JCPS and the Seattle School Board on the question of causation, then this issue will not doom the plans. There is a reasonable basis in evidence for the educational judgments of the school officials,[218] even if some social scientists disagree.[219] Moreover, even if the Court were to repudiate *Grutter*'s deference to state decisions regarding the admissions policies of its universities, federalism values counsel judicial respect for the reasonable judgments of locally elected school boards that integrated schools secure the proffered benefits.[220]

c. A Constitutive Compelling Interest. It is particularly appropriate for the federal courts not to eviscerate local autonomy in the context of race-conscious assignment plans. This is because ongoing voluntary efforts by school districts to integrate the nation's public schools are genuinely and primarily aimed at the social

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217. Grutter v. Bollinger, 539 U.S. 306, 328 (2003) ("The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer. The Law School's assessment that diversity will, in fact, yield educational benefits is substantiated by respondents and their *amici*."). The *Grutter* Court also deferred on the issue of substantiation by declining seriously to engage the empirical debate.

218. *See supra* note 213 and accompanying text.

219. *See supra* note 214 and accompanying text.

220. *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 426 F.3d 1162, 1174 (9th Cir. 2005) (en banc) (Kozinski, J., concurring in the result) ("Not only does a plan that promotes the mixing of races deserve support rather than suspicion and hostility from the judiciary, but there is much to be said for returning primacy on matters of educational policy to local officials."), *cert. granted*, 126 S. Ct. 2351 (June 5, 2006) (No. 05-908); *id.* at 1196 ("When it comes to a plan such as this—a plan that gives the American melting pot a healthy stir without benefiting or burdening any particular group—I would leave the decision to those much closer to the affected community, who have the power to reverse or modify the policy should it prove unworkable."); Comfort v. Lynn Sch. Comm., 418 F.3d 1, 28 (1st Cir. 2005) (Boudin, C.J., concurring) ("[O]ne of the advantages of our federal regime is that different communities try different solutions to common problems and gravitate toward those that prove most successful or seem to them best to suit their individual needs."), *cert. denied*, 126 S. Ct. 798 (2005); *id.* at 29 ("The problems that the Lynn plan addresses are real, and time is more likely than court hearings to tell us whether the solution is a good one . . . ."); *see also supra* note 96 (quoting a Powell opinion in a desegregation case); Liu, *supra* note 193, at 758–59 ("[A]fter several decades in which the Court has repeatedly invoked local control to limit school desegregation, it would be ironic, to say the least, if the Court now closed the door on locally driven efforts to achieve racially integrated schools.").

transformation of race in America.[221] The very *telos* of assignment plans that pursue racial integration is to reduce balkanization by teaching impressionable young Americans of all races and ethnicities to learn and to work together as one people.

Indeed, this discussion reveals a compelling interest advanced by voluntary integration plans that does not turn on matters of empirical causation. Regardless of whether it can be proven empirically that the alleged benefits of education in an integrated setting materialize to a significant extent, *a compelling interest exists in having school districts affirm the value of education in an integrated setting*. In other words, school boards advance a compelling interest when they express a message of integration—the message that Americans constitute one people who learn and work together, not apart, and that government should afford all students the same public educational opportunities without racial separation. It is for this reason that young people assigned to public schools pursuant to voluntary integration plans are appropriately regarded as the twenty-first century children of *Brown v. Board of Education*.[222] The cases before the Court do not involve remedies for de jure segregation, but they are very much about the American moral ideal of integration that *Brown* has come to symbolize.[223] Not only does respect for local autonomy support the

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221. There can be little doubt that the Court's post-*Brown* equal protection jurisprudence was suffused with concern to encourage the social transformation of race in America. *See, e.g.*, Anderson v. Martin, 375 U.S. 399, 402 (1963) ("But by placing a racial label on a candidate at the most crucial stage in the electoral process—the instant before the vote is cast—the State furnishes a vehicle by which racial prejudice may be so aroused as to operate against one group because of race and for another.").

222. 347 U.S. 483 (1954). *Accord* McFarland v. Jefferson County Pub. Sch., 330 F. Supp. 2d 834, 851 (W.D. Ky. 2004) ("Viewing voluntary school integration as an extension of the Supreme Court's school desegregation jurisprudence makes sense. In 1975, an integrated school system and all the benefits it promised were thought so essential that various federal courts required JCPS to create and maintain it. . . . 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.").

223. Regardless of whether *Brown* as originally understood was primarily about integration or the end of state-mandated segregation, *Brown* has come to embody American ideals that transcend the Court's holding:

> Integrated schools, better academic performance, appreciation for our diverse heritage and stronger, more competitive public schools are consistent with central values and themes of American culture. Access to equal and integrated schools has been an important national ethic ever since *Brown v. Board of Education* established what Richard Kluger described as "nothing short of a reconsecration of American ideals." What Kluger and others have articulated is that *Brown*'s symbolic, moral and now historic significance may now far exceed its strictly legal importance. . . . *Brown*'s

authority of school officials to express a message of integration, but the interest advanced by such expression is compelling precisely because the message engages the concern with balkanization that has animated the Court's decisions in every setting canvassed in Part II.[224]

A key advantage of conceptualizing the compelling interest this way is that it helps the interpretive community to focus on what is primarily at stake in the constitutional debate over voluntary integration plans. The controversy is first and foremost not instrumental in nature, but constitutive. The central disagreement concerns not whether a proposed policy will in fact achieve a set of goals, but rather which elements of American collective identity should prevail in an instance of genuine value conflict. Defenders of the plans view integration as the enduring moral legacy of *Brown*, and they conceive living together across racial and ethnic lines as essential if America is ever going to be the kind of society that it strives to be. Many critics of the plans view colorblindness—or, at a minimum, a

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> original moral and constitutional declaration has survived to become a mainstream value of American education and . . . the [School] Board's interests are entirely consistent with these traditional American values. They reinforce our intuitive sense that education is about a lot more than just the "three-R's."

McFarland, 330 F. Supp. 2d at 852 (quoting KLUGER, *supra* note 117, at 710). *See* Ryan, *supra* note 5, at 336–37 ("[R]acially integrated schools carry forward what might be called the moral ideal of *Brown*, namely that schools should not simply be desegregated but also integrated."). This moral ideal embodies the post-*Brown* judgment of "courts and federal officials, not to mention a large segment of the public" and now communities around the nation "that black and white [and Latino and Asian American] children should actually go to school together." *Id*. at 336.

224. To be clear, the interests include both the benefits of education in an integrated setting and affirmance of the value of an integrated setting. But they have different legal logics and only the former can be falsified empirically.

In light of these interests (and the interest in reducing racial isolation), it would be inappropriate to conclude that the school districts are "engaged in simple race balancing," Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 426 F.3d 1162, 1197 (9th Cir. 2005) (en banc) (Bea, J., dissenting). Race balancing as an end in itself is "patently unconstitutional." Grutter v. Bollinger, 539 U.S. 306, 330 (2003); *see also* Freeman v. Pitts, 503 U.S. 467, 494 (1992) ("Racial balance is not to be achieved for its own sake."); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978) (opinion of Powell, J.) ("Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake."). But the interests discussed here are not properly described as balancing "for its own sake." *See* Comfort v. Lynn Sch. Comm., 418 F.3d 1, 15 (1st Cir. 2005) ("Where a community does not seek racial diversity for its own sake, but rather to advance a compelling interest in the educational benefits that diversity provides, there is no absolute bar to pursuing racial diversity."). It would therefore also not be fair to say that the districts seek a racial "aesthetic." *Contra Grutter*, 539 U.S. at 354 n.3 (Thomas, J., concurring in part and dissenting in part) ("I refer to the Law School's interest as an 'aesthetic.' That is, the Law School wants to have a certain appearance, from the shape of the desks and tables in its classrooms to the color of the students sitting at them.").

repudiation of racial classifications—as both the true legacy of *Brown* and the embodiment of the sort of society that the nation should want to be on matters of race regardless of who associates with whom. Neither side is likely to be persuaded by contrary empirical evidence, at least as long as the evidence remains open to reasonable disagreement.[225] Nor is the Court likely to decide the cases before it based on empirics. Each side makes claims not merely on the Constitution as hard law, but on the Constitution as the embodiment of our "fundamental nature as a people," which "is sacred and demands our respectful acknowledgement."[226] Each side embraces hallowed national ideals. And each of these ideals was "purchased at the price of immeasurable human suffering."[227]

If the Court concludes that a compelling interest supports the plans before it,[228] then the decisive issue becomes narrow tailoring. As part of its inquiry, the Court will likely consider whether some kind of individualized consideration is required in the assignment context.[229] In answering this question, the probable effect on balkanization is key.[230]

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225. Much of the evidence will remain disputed due to the various methodological challenges. *See supra* notes 201, 214 and accompanying text (discussing some of the difficulties). The point is not that conceptions of identity are necessarily indifferent to empirical truth, but that constitutive claims will predominate when the empirics cannot provide decisive guidance.

226. Hanna Fenichel Pitkin, *The Idea of a Constitution*, 37 J. LEGAL EDUC. 167, 169 (1987).

227. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 240 (1995) (Thomas, J., concurring in part and concurring in the judgment). The empirical debate over the various potential benefits and harms of integrated schools echoes in some ways the debate over the Court's use of social science evidence in *Brown*. *See* Siegel, *supra* note 134, at 1480–89.

228. An alternative would be for the Court to adopt Judge Kozinski's recommendation to apply "robust and realistic rational basis review." *Parents Involved*, 426 F.3d at 1194 (Kozinski, J., concurring in the result). This seems unlikely, however, in light of all the case law holding that racial classifications trigger strict scrutiny. For a recent pronouncement, see *Johnson v. California*, 543 U.S. 499, 505–06 (2005).

229. The Court could avoid addressing the applicability of an individualized consideration requirement by holding that the plans at issue are not narrowly tailored for some other reason. *See supra* notes 64–66 and accompanying text (flagging the other requirements). It seems unlikely, however, that the Court would decline to discuss the issue of individualized consideration when it was decisive in *Bakke*, *Grutter*, and *Gratz* and the lower federal courts are divided over it.

230. I do not analyze separately most of the other narrow tailoring factors, including whether schools can achieve the compelling interests I have identified without using race explicitly. It is noteworthy, however, that the distinction between the benefits of integration and affirmance of integration may be important in considering the issue of race-neutral alternatives. Proxy variables like geography or socioeconomic status may achieve some measure of integration under some circumstances—because they are not in fact race neutral when the purpose of using them is to achieve racial integration. But such proxies are less likely than the

B. Individualized Consideration

1. *Deriving the Standard*. If one or more compelling interests supports voluntary integration plans, where, if anywhere, should such plans be situated along the balkanization continuum set forth at the end of Part II? Should the Court view the robust and explicit use of race as compatible with the legal requirements of individualized consideration, or should it analogize to *Bakke*, *Grutter*, and *Gratz* by requiring school districts not to overuse race, in part by rendering such use opaque? Should the Justices deploy the individualized consideration requirement to prohibit school boards from using race at all, or should the Court reject all of these options and fashion a different individualized consideration requirement for this different setting?

The proper resolution of these questions turns not on a mechanical application of controlling precedent. Race-conscious assignment plans are unlike racial discrimination laws of the past, which subordinated racial minorities. And for reasons I will explore in detail, they are unlike laws of the present that impose burdens on members of one race in order to benefit members of another.[231] Rather, the appropriate resolution rests on either a sweeping constitutional judgment about racial questions generally in America, or a contextual judgment about the likely effect of voluntary integration plans on racial balkanization in American society.

For the reasons offered in Part II, it is difficult to argue that a global judgment about race should determine the kind of individualized consideration requirement that is appropriate in this setting. The Court does not render such judgments. Instead, it has made clear in *Grutter* and elsewhere that "[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause"; that "[n]ot every decision influenced by race is

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explicit use of race to advance the cause of having government expressively endorse the value of integration. Affirming the value of integrated schools requires public recognition of the reality of race. Colorblindness discourse wars with the American moral ideal of racial integration.

231. *See, e.g.*, *Parents Involved*, 426 F.3d at 1193 (Kozinski, J., concurring in the result) ("But there is something unreal about . . . efforts to apply the teachings of prior Supreme Court cases, all decided in very different contexts, to the plan at issue here. I hear the thud of square pegs being pounded into round holes."); Comfort v. Lynn Sch. Comm., 418 F.3d 1, 27 (1st Cir. 2005) (Boudin, J., concurring) ("[The plan] is not, like old-fashioned racial discrimination laws, aimed at oppressing blacks; nor, like modern affirmative action, does it seek to give one racial group an edge over another. . . . [T]he plan does not segregate persons by race. Nor does it involve racial quotas." (citations omitted)), *cert. denied*, 126 S. Ct. 798 (2005).

equally objectionable"; and that "strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context."[232]

If the kind of individualized consideration requirement appropriate in this setting does not follow from a general judgment about race, then the Court must render a contextual judgment about the net expected effect of using racial criteria on racial balkanization. This judgment, in turn, requires the Court to consider not only the social benefits of integrated schools discussed in Part III.A, but also the relevance of merit, the symbolic message, and the individual burdens in this setting. As Part II demonstrated, these considerations are at least as relevant to the tailoring inquiry as they are to the interest analysis. This is because the narrow tailoring inquiry imposes substantive limits that often have little to do with ensuring fit and much to do with reducing balkanization.

It is instructive in this regard to compare the potential for balkanization in the context of affirmative action in higher education with the potential for balkanization in the context of race-conscious student assignments.[233] The universe of potential social threats that

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232. Grutter v. Bollinger, 539 U.S. 306, 327 (2003). *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 228 (1995) ("[S]trict scrutiny *does* take 'relevant differences' into account—indeed, that is its fundamental purpose."); Gomillion v. Lightfoot, 364 U.S. 339, 343–44 (1960) ("[I]n dealing with claims under broad provisions of the Constitution, which derive content by an interpretive process of inclusion and exclusion, it is imperative that generalizations, based on and qualified by the concrete situations that gave rise to them, must not be applied out of context in disregard of variant controlling facts.").

Justices Scalia and Thomas, by contrast, do tend to make global judgments about racial questions. *See, e.g.*, *supra* note 124 and accompanying text. Would they object to a policy that took race into account in dividing students up *within* a public school? Imagine that a random draw resulted in six African American children and two white children being assigned to one first-grade class, while the other first-grade class was all white. Would it be constitutionally problematic to reshuffle the children so that each class would consist of five white children and three African American children, and to do this for all the reasons that Jefferson County and Seattle take race into account? If Justices Scalia and Thomas would conceive the reshuffling as unconstitutional, then their views would seem out of touch with how most people would likely regard the situation because they would think the potential harm miniscule. If Justices Scalia and Thomas would perceive no constitutional infirmity, then they do not really mean what they say about the inherently invidious nature of racial classifications regardless of context.

233. The analysis here actually requires several comparisons: (1) between K–12 education and higher education; (2) between achieving the compelling interests identified in Part III.A without using race and achieving them by using race; and (3) between the effects of using race explicitly and the effects of using race implicitly. I leave the second question to others. *But see supra* note 230. I merely note that in general, there are good reasons for skepticism that school districts can achieve similar levels of *racial* integration without using racial criteria to some

the Court was seeking to head off in *Bakke* (via Justice Powell), *Grutter*, and *Gratz* are familiar now, but the high level of abstraction at which these threats are frequently described conflates important distinctions.[234] I categorize the potential dangers of concern to the Court as follows: (1) the social stigmatization of minority students as incapable of succeeding without the intervention of government on their behalf; (2) the associated internalization of a sense of unworthiness by minority students; (3) the internalization of a sense of entitlement to preferences by minority students; (4) the stereotypical assumption that all members of a racial group think the same way; (5) hostility generated in whites caused by their reaction to being judged unworthy of admission potentially because of the existence of the program; (6) hostility in whites caused by their reaction to not getting what they want (i.e., admission) potentially because of the existence of the program; and (7) cross-racial tension caused by the very act of distributing benefits and burdens in part based on race.

Viewed in light of these considerations, the school assignment context is very different from affirmative action in university admissions. To begin with, conventional understandings of merit are not at stake in the assignment process; an applicant's various abilities are given no weight in determining placements.[235] Notions of student entitlement and desert thus have no applicability, and the concerns they can raise do not impede the efforts of government to improve race relations by taking race into account, whether explicitly or implicitly. Accordingly, considerations one, two, and five pose no

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extent. *See* Statement of American Social Scientists of Research on School Desegregation, Appendix to Brief of 553 Social Scientists as Amici Curiae in Support of Respondents, *supra* note 200, at 41–54. I discuss the third comparison at the end of this section.

234. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493–94 (1989) (plurality opinion of O'Connor, J.) ("Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility. See *University of California Regents* v. *Bakke*, 438 U. S., at 298 (opinion of Powell, J.) ("[P]referential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relation to individual worth.")). In *Grutter*, Justice O'Connor reproduced the above quote from *Croson* in rejecting the apparent implication that racial classifications must be "strictly reserved for remedial settings." *See* 539 U.S. at 328.

235. *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 426 F.3d 1162, 1181 (9th Cir. 2005) (en banc) ("Students' relative qualifications are irrelevant . . . ."), *cert. granted*, 126 S. Ct. 2351 (June 5, 2006) (No. 05-908).

reasonable risk of balkanization.[236] When school officials administer the Seattle plan, for example, assignments are certainly competitive in the sense that race comes into play only when demand exceeds supply at a particular school. Judge Bea made much of this fact in his dissent.[237] But this argument conceptualizes the phenomenon of competition at too high a level of generality.[238] In Seattle, as in Jefferson County, assignments are not competitive in the evaluative sense. *Bakke*, *Grutter*, and *Gratz* are thus inapt in this regard. So are *Croson* and *Adarand*.

In addition, the assignment prospects of members of all races are generally helped or hurt to roughly the same extent, so that the third factor raises no concerns.[239] In light of the nature of the public school educational process, moreover, a school district's interests do not include securing viewpoint diversity in the classroom as part of the "robust exchange of ideas,"[240] so that the fourth concern is less significantly implicated than in the university setting. The only potentially strong threats to social acceptance of the use of race, therefore, arise from the sixth and seventh considerations, although in

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236. This difference between affirmative action in higher education and race-conscious student assignments is quite significant. It makes no sense to assert that one has "earned" a coveted assignment. Whatever one thinks of university admissions, in the assignment context no student has earned anything. That said, some parents may feel entitled to send their children to highly coveted local schools on the ground that they "paid their way in" to the wealthy neighborhoods surrounding the schools.

237. *See Parents Involved*, 426 F.3d at 1211–12 (Bea, J., dissenting) ("The District insulates applicants belonging to certain racial groups from competition for admission to those schools perceived to be of higher quality.").

238. *Cf. generally* Tribe & Dorf, *supra* note 159 (analyzing levels of generality in the definition of fundamental rights). Competition for scarce assignments may nonetheless increase balkanization. This concern is covered by the sixth and seventh factors discussed in the text.

239. *See, e.g.*, *Parents Involved*, 426 F.3d at 1170 (stating that "[t]he race-based tiebreaker is applied to both white and nonwhite students" and providing the relevant data for a particular school year). One might respond that the Court rejected the notion of equally shared burdens based on race in *Plessy* and *Loving*. But to so respond is to erase collective memory. There was nothing equal about the burdens imposed by a regime of racial apartheid that mandated racial separation in order to subordinate African Americans. One cannot plausibly suggest that the assignment cases before the Court have anything to do with the maintenance of a caste system or the practice of racial subordination. *Johnson v. California* is less off point, *see supra* note 108, but it too involved racial segregation, the opposite of what voluntary integration plans aim to produce.

240. *See, e.g.*, *Parents Involved*, 426 F.3d at 1182 ("[V]iewpoint diversity in the law school and high school contexts serves different albeit overlapping ends. In the law school setting, viewpoint diversity fosters the 'robust exchange of ideas.' In the high school context, viewpoint diversity fosters racial and civic understanding." (quoting Grutter v. Bollinger, 539 U.S. 306, 324 (2003) (citations omitted))).

the assignment context even these concerns seem less acute to the extent that the burdens imposed on individual students and families are not great.[241] This is because any resulting social hostility is distributed across members of all races when they do not receive the assignments that they desire. Compared with affirmative action in higher education, therefore, responsibly crafted voluntary integration plans are more likely to send a message of integration and less likely to increase balkanization.[242] This message, to reiterate,[243] is that Americans of every race and ethnicity constitute one people who learn and work together, not apart, and that they deserve the same public educational opportunities without racial separation.[244]

The differences between affirmative action in higher education and voluntary integration plans suggest that the sort of "[p]referment by race" employed by such plans is very unlikely to prove "the most divisive of all policies, containing within it the potential to destroy confidence in the Constitution and in the idea of equality."[245] At least when school districts limit both the use of race and the burdens imposed, voluntary integration plans do not run a reasonable risk of "perpetuat[ing] the hostilities that proper consideration of race is designed to avoid."[246] Rather, such plans likely prove "effective in bringing about the harmony and mutual respect among all citizens that our constitutional tradition has always sought."[247]

One might object that even the limited use of race in student assignment creates the wrong kind of politics; the message it sends

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241. *See infra* notes 276–86 and accompanying text (analyzing the issue of individual burdens).

242. *Cf.* Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 636 (Kennedy, J., dissenting) ("[T]he FCC policy seems based on the demeaning notion that members of the defined racial groups ascribe to certain 'minority views' that must be different from those of other citizens. Special preferences also can foster the view that members of the favored groups are inherently less able to compete on their own.").

243. *See supra* text following note 221.

244. Of course, whether children actually receive this message depends in part on how parents explain the school district's use of race to their children. Those who believe that any use of race by government sends the wrong message will probably not stress the virtues of integration to their children. *See, e.g.*, Brief for Pacific Legal Foundation et al. as Amici Curiae Supporting Petitioners at 2, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, No. 05-908; Meredith v. Jefferson County Bd. of Educ., No. 05-915 (U.S. Oct. 10, 2006) ("The wrong message is being sent to our children: A child's race is more important than equal protection of the laws, and the racial makeup of a student's school determines his or her academic success.").

245. Grutter v. Bollinger, 539 U.S. 306, 388 (2003) (Kennedy, J., dissenting).

246. *Id.* at 394. "The perpetuation, of course, would be the worst of all outcomes." *Id.*

247. *Id*. at 394–95.

constitutes an incremental stop on the way to deeming race significant in every aspect of American life. This assertion strives toward an important point, but in so striving it overstates its case. Race-conscious state action can send a message that increases balkanization, but then so can the refusal of government to act. There is nothing necessarily wholesome about the status quo.[248] Indeed, the status quo is disturbing: *America is a country many of whose public schools are becoming more and more segregated each year*.[249] When children of different races and ethnicities spend almost no time together, the long-term effect on American society can be quite balkanizing. The appearance and potential reality of balkanization are evident when segregated neighborhoods produce segregated

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248. *See, e.g.*, Gratz v. Bollinger, 539 U.S. 244, 298 (2003) (Ginsburg, J., dissenting) ("But we are not far distant from an overtly discriminatory past, and the effects of centuries of law-sanctioned inequality remain painfully evident in our communities and schools."); Comfort v. Lynn Sch. Comm., 418 F.3d 1, 28 (1st Cir. 2005) (Boudin, J., concurring) ("Some may be offended by any express use of race as a touchstone for transfers, believing that a race-based criterion is the wrong lesson for school boards to teach and students to absorb. But ours is a society with a heritage of racial problems growing out of generations of slavery and post-slavery segregation, and it may be unrealistic to suppose that everything will work out well if only race is ignored in every context."). Justice Ginsburg added this useful reminder in *Gratz*:

> In the wake of a system of racial caste only recently ended, large disparities endure. Unemployment, poverty, and access to health care vary disproportionately by race. Neighborhoods and schools remain racially divided. African-American and Hispanic children are all too often educated in poverty-stricken and underperforming institutions. Adult African-Americans and Hispanics generally earn less than whites with equivalent levels of education. Equally credentialed job applicants receive different receptions depending on their race. Irrational prejudice is still encountered in real estate markets and consumer transactions. Bias both conscious and unconscious, reflecting traditional and unexamined habits of thought, keeps up barriers that must come down if equal opportunity and nondiscrimination are ever genuinely to become this country's law and practice.

539 U.S. at 299–301 (Ginsburg, J., dissenting) (footnotes, citations, and quotation marks omitted); *see also Grutter*, 539 U.S. at 345–46 (Ginsburg, J., concurring).

249. *See, e.g.*, Jeffrey Rosen, *School Colors*, N.Y. TIMES MAG., Sept. 24, 2006, at 15 (documenting that the percentage of black students attending schools with a majority nonwhite population has increased in every region of the country over the past fifteen years or so); CLOTFELTER, *supra* note 134, at 196 ("Racial segregation remains an ever-present fact, demarcating neighborhoods, urban jurisdictions, and thus many public schools. Middle schools and high schools that are desegregated often include classrooms and school activities that reveal obvious racial disparities."). *But see* Charles T. Clotfelter et al., *Federal Oversight, Local Control, and the Specter of "Resegregation" in Southern Schools*, 8 AM. LAW & ECON. REV. 1 (Summer 2006) (examining the largest 100 school districts in the South and Border regions and finding that segregation measured as imbalance generally has not increased in the previous decade, excepting Charlotte and Winston Salem, North Carolina).

schools.[250] Properly formulated, therefore, the concern about expressive harm counsels caution, not abandonment.

Relatedly, a proponent of colorblindness might insist that the imposition of burdens based on race is inevitably balkanizing because those who must bear the burdens resent the fact that they would not have to endure them but for the color of their skin. Like the objection that stresses the expressive harm of using racial criteria, this is hardly an insubstantial concern, and it advises prudence and restraint. But this concern is shortsighted in its focus on some immediate resentment to the exclusion of long-term social benefits, and it proves too much because desegregation is all the more balkanizing in this way when courts impose race-conscious remedies for de jure segregation. Voluntary integration plans would not exist for any significant period of time if they did not enjoy broad community support, and reasonable concerns that government not increase balkanization can be addressed by constitutional and prudential attention to how the plans use race. Prohibiting any consideration of race as balkanizing would be overkill that itself would likely increase balkanization on balance because, to reiterate, the status quo is characterized by rampant racial segregation.

This discussion suggests that the prospect of greater balkanization poses much less of a concern in the context of voluntary integration plans than in the context of affirmative action in higher education. By using racial criteria intelligently in the assignment process in order to integrate their schools, districts can reduce balkanization in American society.

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250. *See Parents Involved*, 426 F.3d at 1194 (Kozinski, J., concurring in the result) ("The record shows, and common experience tells us, that students tend to select the schools closest to their homes, which means that schools will reflect the composition of the neighborhood where they are located. Neighborhoods, however, do not reflect the racial composition of the city as a whole. In Seattle, 'as in many other cities, minorities and whites often live in different neighborhoods.' *Comfort*, 418 F.3d at 29 (Boudin, C.J., concurring). To the extent that students gravitate to the schools near their homes, the schools will have the same racial composition as the neighborhood. This means that student patterns of interacting primarily with members of their own race that are first developed by living in racially isolated neighborhoods will be continued and exacerbated by the school experience."); *see also Comfort*, 418 F.3d at 29 (Boudin, J., concurring) ("Lynn's aim is to preserve local schools as an option without having the housing pattern of *de facto* segregation projected into the school system."); Ryan, *supra* note 5, at 327 ("Until residential integration increases dramatically, most public schools will remain racially isolated unless school boards adopt conscious measures to achieve integration. It is that simple." (footnote omitted)).

Historical experience, including past judicial practice, substantiates this comparative analysis of racial balkanization. In the decades after *Brown*, the Court and individual Justices repeatedly declared, albeit in dicta, that the Constitution permits voluntary efforts to integrate local public schools well beyond what the Constitution requires. I refer not only to *Brown* itself,[251] but also to decisions like *Swann v. Charlotte-Mecklenburg Board of Education*,[252] *North Carolina State Board of Education v. Swann*,[253] *Keyes v. School District No. 1*,[254] and *Washington v. Seattle School District No. 1*.[255] The Court in these cases was validating the then-uncontroversial

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251. 347 U.S. 483, 494 (1954) ("Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is *greater* when it has the sanction of law.") (emphasis added). *See* BICKEL, *supra* note 187, at 119–20 (discussing the implications of the Court's choice of language).

252. 402 U.S. 1, 16 (1971) ("School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities . . . ."). Chief Justice Burger authored these words.

253. 402 U.S. 43, 45 (1971) ("[A]s a matter of educational policy school authorities may well conclude that some kind of racial balance in the schools is desirable quite apart from any constitutional requirements.").

254. 413 U.S. 189, 242 (1973) (Powell, J., concurring in part and dissenting in part) ("School boards would, of course, be free to develop and initiate further plans to promote school desegregation . . . . Nothing in this opinion is meant to discourage school boards from exceeding minimal constitutional standards in promoting the values of an integrated school experience.").

In *Bustop, Inc. v. Board of Education*, 439 U.S. 1380 (1978), Justice Rehnquist, acting as a Circuit Justice, rejected the argument of a stay applicant that "'California in an attempt to racially balance schools [may not] use its doctrine of independent state grounds to ignore the federal rights of its citizens to be free from racial quotas and to be free from extensive pupil transportation that destroys fundamental rights of liberty and privacy,'" *id.* at 1382 (quoting stay application). Justice Rehnquist's reasoning is directly on point:

> But this is not the traditional argument of a local school board contending that it has been required by court order to implement a pupil assignment plan which was not justified by the Fourteenth Amendment to the United States Constitution. The argument is indeed novel . . . . While I have the gravest doubts that the Supreme Court of California was required by the United States Constitution to take the action that it has taken in this case, I have very little doubt that it was permitted by that Constitution to take such action.

Id. at 1382–83. Coming from one of the most conservative jurists on the Court, this language should give pause to those who would obliterate the "play in the joints" between what the Equal Protection Clause requires and what it prohibits. *See supra* note 147 (discussing this point and analogizing to the Court's religion jurisprudence).

255. 458 U.S. 457, 473 (1982) ("Attending an ethnically diverse school . . . prepar[es] minority children for citizenship in our pluralistic society, while, we may hope, teaching members of the racial majority to live in harmony and mutual respect with children of minority heritage.") (internal quotation marks and citations omitted).

conclusions of many federal courts that the Constitution permits local efforts to integrate a community's public schools when the Constitution does not require such action.[256] The collective lesson of many school desegregation decisions is that voluntary integration plans do not raise grave constitutional concerns.

Subsequent decisions limiting the remedies that federal courts may impose in school desegregation cases[257] or requiring that federal desegregation remedies end[258] are entirely consistent with this reading of the historical record. The Court in these cases gave voice to local resistance[259] and limited the extent to which the federal courts could impose integration on communities. The Court stated that it was doing so in order to preserve "local control over the operation of schools."[260] When local communities themselves opted to integrate their public schools, the federal courts perceived no constitutional impediment.

Significantly, when the composition of the federal judiciary and the ambient political climate changed in the 1970s and "courts began to reshape the presumption against racial classification into a constitutional constraint on voluntary efforts to combat segregation,"[261] this reshaping was directed not at race-conscious student assignment plans, but at the significantly more divisive issue of affirmative action in higher education.[262] Reva Siegel has convincingly shown that "the legal system was beginning to treat differently what was at stake in two potentially similar cases," and

256. *See* Siegel, *supra* note 134, at 1511–12 (noting the "federalism question" informing "the view that would prevail throughout the 1960s: a state or local government might adopt race-conscious districting plans to alleviate de facto segregation, when courts had not construed the Constitution to require them"); *id*. at 1517 (documenting that "[d]uring the 1960s, courts routinely upheld the right of state and local governments to act in a race-conscious fashion to ameliorate de facto segregation in public school assignments"); *id*. at 1518 ("[T]here was hardly a pressing sense that the Fourteenth Amendment was a constraint on voluntary efforts to desegregate.").

257. *See, e.g.*, Milliken v. Bradley, 418 U.S. 717 (1974) (prohibiting interdistrict remedies in the absence of interdistrict violations and effects).

258. *See, e.g.*, Missouri v. Jenkins, 515 U.S. 70 (1995); Freeman v. Pitts, 503 U.S. 467 (1992); Bd. of Educ. of Okla. City v. Dowell, 498 U.S. 237 (1991).

259. *See supra* note 134.

260. *Milliken*, 418 U.S. at 741–42.

261. Siegel, *supra* note 134, at 1521.

262. *Id*. at 1526 ("In the 1960s and early 1970s, courts had not imposed significant constitutional limits on race-conscious action undertaken to ameliorate segregation in public schools and in the construction industry, but they began to respond differently when plaintiffs challenged new race-conscious measures designed to help integrate the nation's universities.").

that "[m]ajority-group objections to race-conscious professional school admissions policies played an important role in the policies' emergent characterization as racial classifications subject to the presumption of unconstitutionality."[263] The historical record, therefore, confirms that voluntary integration plans have been less balkanizing than affirmative action in university admissions.[264]

If it is correct as a matter of both analysis and history that race-conscious assignment plans are less potentially balkanizing than affirmative action in higher education, it follows that the Court need not be as concerned with public perceptions in this context as it was in *Bakke*, *Grutter*, and *Gratz*. This implication is significant because creating an appearance of minimal color consciousness poses special challenges in this setting for two reasons. First, the balkanizing potential of explicit racial criteria cannot be diminished by equating race to place of residence, student choice, sibling preference, etc., in the same way that race can be equated to various talents (e.g., intellectual, musical, or athletic) or other dimensions of general diversity (e.g., geography).[265] Residence, student choice, and siblings have little to do with racial diversity, but various talents and geography arguably have something to do with general diversity.

Second, in *Bakke*, *Grutter*, and *Gratz* it was impossible to know for sure whether race was decisive in particular cases. With voluntary integration plans, by contrast, one can often know with certainty.[266] In

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263. *Id*. at 1528–29. *See id*. at 1529 n.204 (noting the public "perception that race-conscious desegregation initiatives in post-secondary education were constitutionally problematic in ways that such initiatives in elementary and secondary education were not").

264. *Cf., e.g.*, Brief for the Prichard Committee for Academic Excellence as Amicus Curiae Supporting Respondents at 8–9, Meredith v. Jefferson County Bd. of Educ., No. 05-915 (U.S. Oct. 10, 2006) ("While the great majority of Louisvillians opposed desegregation in 1975, the vast majority of parents polled in 2000—77%—supported the use of race in student assignment, and 82% of parents believed that students benefited from a racially diverse school environment."); McFarland v. Jefferson County Pub. Sch., 330 F. Supp. 2d 834, 854 n.41 (W.D. Ky. 2004) ("In 2000, a confidential survey of high school juniors was conducted for JCPS to record the benefits of a racially integrated school system. Over 90% of the students who received the survey responded. Approximately 92% of White students and 96% of Black students reported that they were 'very comfortable' or 'comfortable' working with students from different racial and ethnic backgrounds. Over 80% of Black and White students who responded said their school experience helped them learn how to relate to students from other racial groups.").

265. *See supra* note 43 and accompanying text (explaining that Justice Powell's distinction between a quota and a "plus" factor enabled him to equate race with other characteristics that are less emotionally freighted).

266. *See, e.g.*, Comfort v. Lynn Sch. Comm., 418 F.3d 1, 31 (1st Cir. 2005) (Selya, J., dissenting) ("In one sense, then, this plan is even more harmful than the racially inflexible

other words, it may not be easy to reconcile the *publicly apparent* use of race in student assignment in order to advance *racial* diversity with the appearance of not treating individuals in part as members of racial groups. In the Kentucky case, the district court put great weight on its determination that for the most part "the Board has undertaken considerable effort to achieve its goals without the *overt* use of race in student assignments,"[267] and that "the racial guidelines play a *muted* role in the assignment process along with other factors."[268] But the court did not seem to register that such statements are in tension with its ability to determine that the JCPS denied "Plaintiff Crystal Meredith's son, Joshua McDonald, . . . his transfer from Young to Bloom under the racial guidelines."[269]

The primary way that school districts can render the use of race less overt in the assignment process is in the drawing of attendance zones to increase integration. In Jefferson County, for example, the school district ensures compliance with the racial guidelines primarily by drawing attendance zones with race in mind.[270] This is probably why Chief Judge Heyburn wrote that the district avoided "the *overt* use of race" and that "the racial guidelines play a *muted* role."[271] The school district may have concluded, similar to the implicit rationale of Justice Powell in *Bakke* and the Court in *Grutter* and *Gratz*, that implicit uses of race are less divisive—because less apparent and less seemingly "personal"—than granting or denying assignment or transfer requests explicitly based on the requesting student's race.

To reiterate, however, it is less important to submerge the use of race in this setting than in the context of affirmative action in higher education because the risk of increasing balkanization is significantly

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program struck down in *Gratz*. There, prospective non-minority students could be admitted by the terms of the policy itself and thus those who were rejected could look to something other than race as a reason for their failure."), *cert. denied*, 126 S. Ct. 798 (2005). Toward the end of this section, I suggest a way to address this issue if it is deemed constitutionally problematic.

267. *McFarland*, 330 F. Supp. 2d at 861 (emphasis added).

268. *Id.* at 862 (emphasis added). The court contrasted sharply such use of race with the racial classifications deployed in the one part of the plan that it held unconstitutional: "The significance of separating traditional school applicants into *explicit* racial categories is that students are placed on separate assignment tracks where race becomes 'the defining feature of his or her application.'" *Id.* (emphasis added) (quoting Grutter v. Bollinger, 539 U.S. 306, 337 (2003)).

269. *Id.* at 860 n.48.

270. *See id.* at 843 ("The geographic boundaries of resides areas and cluster schools determine most school assignments.").

271. *Id.* at 861, 862 (emphasis added).

lower as a general matter. There are two principal ways that race-conscious assignment plans could increase balkanization. First, they could subordinate all other traditional assignment factors to race in granting or denying student requests for assignment or transfer, thereby sending the balkanizing message that the racial divide in the community is so severe "that race matters most"[272] in public education. Second, they could impose severe burdens on individual students and families because of the use of race, whether in disposing of individual requests or in drawing attendance zones. Individualized consideration must therefore attend to these concerns.[273]

Accordingly, the Court should impose a modest individualized consideration requirement in the context of race-conscious assignment plans, one less demanding than the requirement articulated in *Bakke*, *Grutter*, and *Gratz*, but more demanding than the requirement employed in remedial or functional settings.[274] Under this approach, school districts would not need to avoid making any assignments in which race was obviously decisive. The critical inquiry, rather, would be how much of an impact district-wide the use of racial classifications has in disposing of individual requests, and how much of a burden the use of racial criteria imposes on students and families.

Stated more precisely, the individualized consideration requirement that I recommend would allow school districts to use race in assigning students to public schools so long as: (1) the school district's use of racial criteria in making assignments constitutes only

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272. Johnson v. California, 543 U.S. 499, 507 (2005).

273. One might object that the individualized consideration requirement and the undue burden analysis are separate components of narrow tailoring. In *Grutter*, however, the Court's undue burden inquiry was parasitic on its application of the individualized consideration requirement. *See supra* note 64 and accompanying text. If concerns about the imposition of undue burdens are satisfied because a program affords individualized consideration, it must be because the individualized consideration inquiry appropriately incorporates an undue burden analysis as part of its requirements. A concern with racial balkanization animates each component of narrow tailoring. *See supra* notes 66, 128; *infra* note 294.

274. Some defenders of voluntary integration plans would prefer to argue that the concept of individualized consideration is inapplicable in assessing the plans. While this approach is tempting, it is based on a misunderstanding of the concept of individualized consideration. As developed in Part I, individualized consideration requires a determination of whether an individual satisfies the selection criteria that are deemed relevant to the government decision. School districts thus afford individualized consideration in deciding which students should attend which schools. The controversial normative question is what role, if any, race can play in student assignment. Contrary to the assumption of the opponents of these plans, the concept of individualized consideration cannot provide the answer. The question, in other words, is the extent to which race may be part of individualized consideration.

one of several factors; (2) the district's use of racial classifications in granting or denying individual assignment or transfer requests, as a statistical matter, does not predominate over its use of other factors across the district as a whole;[275] and (3) the use of racial criteria in disposing of individual requests and in drawing attendance zones (if applicable) does not impose substantial burdens on individual students and families.[276]

The first factor provides one way of ensuring that school districts do not overuse racial criteria. No specific criteria should be required; that is for the districts themselves to decide. But if a district elects to consider race in pursuit of racial integration, then individualized consideration requires the district also to employ other relevant criteria. These include, for example, student preferences for certain schools, student residence, student interests, school capacity, presence of siblings in a school, where the student attended school the previous year, family hardship, ease of parental involvement, socioeconomic status, and lottery.

Under the second factor, race may be decisive in individual cases in which the school district grants or denies student requests for particular schools, just as it is decisive in particular cases in *Bakke*- or *Grutter*-type admissions programs. But race may not be decisive too much of the time. As with most line-drawing problems in constitutional law, it may be impossible to specify in advance how much is too much. The answer in particular cases would depend on how segregated the school district is, and on how necessary it is to use racial classifications to a particular extent in order to achieve a significant measure of integration.[277] Race should not be dispositive

275. Although in redistricting a finding of predominance triggers strict scrutiny, here strict scrutiny would be triggered by government's use of a racial classification. A finding of predominance in this setting would be dispositive of the constitutional inquiry. Here, moreover, the defendant school board would have the burden of proving non-predominance in order to survive the narrow tailoring inquiry.

276. Each factor is derived from the Court's past decisions discussed in Part II. They reflect the view (to which no court has ascribed) that the redistricting cases are relevant. But they also reflect the view that the redistricting cases are not exactly on point. As discussed in the text, race-conscious redistricting separates voters based on race. Moreover, the burdens are potentially higher in the assignment context because there is no redistricting analogue to a long bus commute or an inferior education.

277. A potential paradox lurks here because the perceived need for integration is likely correlated with the individual burdens imposed by a race-conscious plan. The more segregated a school district is, the greater will be the felt need for governmental action to achieve integration, but the greater may also be the burdens imposed by a plan—for example, bus commutes may be longer. The individualized consideration requirement may thus limit the use of race to the

regarding "a significant number"[278] of assignment or transfer requests, and this surely means far fewer than half of them.

In narrowing the permissible range further, the relevant tradeoff entails allowing districts to secure and to affirm meaningful levels of racial integration while avoiding the expressive harms and significant burdens that racial classifications can impose. The Court should probably draw a rough line in order to provide guidance to school boards. As a general matter, no constitutional problem would seem to be presented when race proved decisive in granting or denying up to fifteen or twenty percent of individual assignments or transfer requests. When race was decisive more than roughly one-fifth of the time, the plan should probably be regarded as suspect.

While it is difficult to avoid claims of arbitrariness in proposing a rough limit of fifteen or twenty percent (or any other limit), the only reasonable way to resolve a line-drawing problem is to draw a reasonable line. The Court has sought to do just that on several occasions.[279] A constraint of fifteen or twenty percent would likely allow many school districts to achieve significant levels of integration in the face of segregated housing patterns while avoiding the symbolic and material harms of robust race consciousness. As discussed in the next section, for example, both plans before the Court have stayed within a fifteen percent upper bound in disposing of student requests, and both have achieved meaningful levels of integration.

The details of specific plans would also matter in light of the third factor, which focuses on the burdens imposed on students and families when government uses racial criteria in the assignment process, whether in disposing of individual requests or in drawing attendance zones (if the plan so requires). Whether a given plan met this component of the individualized consideration requirement would be determined by an evaluation of several factors. These include quality differences among the schools in the district;[280] the

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greatest extent when residential segregation is most severe. A way to ameliorate this problem would be to allow the scope of the permissible use of race to vary somewhat with the scope of the segregation at which the use of race is directed.

278. Miller v. Johnson, 515 U.S. 900, 916 (1995).

279. *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003) (ratio limits on punitive damages); Zadvydas v. Davis, 533 U.S. 678, 701 (2001) (time limit on detaining aliens pending removal); County of Riverside v. McLaughlin, 500 U.S. 44, 56–58 (1991) (time limit on delay between arrest and probable cause hearing).

280. The burdens can be particularly high when a school district allocates scarce slots in a highly sought-after magnet school, whether operated by lottery or otherwise.

amount of student time spent on a school bus each day as a result of the use of race; the impact of using race on parental convenience and involvement; and the availability of hardship exceptions or appeals. For example, the *Swann* Court's holding regarding the use of bus transportation as a "tool of desegregation" is apt here: bus transportation is constitutionally permissible unless "the time or distance of travel is so great as to either risk the health of the children or significantly impinge on the educational process."[281] The constitutional concern is not whether a plan as a whole imposes burdens greater than the benefits it provides; rather, the burden factors are probative of whether the plan is sufficiently sensitive to the circumstances of each student and family. In other words, an assessment of individual burdens must be part of the selection criteria when government makes race a relevant criterion in student assignment.

If my proposal were deemed to impose insufficient limits on the use of explicit racial criteria in student assignment, whether in appearance or reality, an alternative would be to soften the use of racial classifications by making race more of a *Bakke*- or *Grutter*-type "plus" factor. Under this individualized consideration requirement, the granting of an assignment or transfer request would never turn explicitly and exclusively on race, but would depend instead on an implicit and opaque evaluation of several factors, such as commute distance, family hardship, and the relation between program offerings and student interests. Race could still be a factor, but it would never be obviously decisive when the district denied a student request. Because of the differences between voluntary integration plans and affirmative action in higher education in terms of their relative potential for balkanization, I do not endorse this kind of individualized consideration requirement. But such a requirement would be more responsive to the conflicting constitutional values at stake than a requirement that prohibited any explicit use of race as an assignment criterion.

While the burden inquiry I propose extends to the use of race both in granting or denying individual requests and in drawing attendance zones, I have limited the predominance inquiry to the former aspect of voluntary integration plans. Unlike race-conscious redistricting, therefore, I have not recommended a requirement of

281. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 30–31 (1971).

nonpredominance in drawing attendance zones. This is because the redistricting cases are inapt in a significant respect: while race-conscious redistricting separates racial groups in order to give members of one group a more effective vote,[282] race-conscious attendance zones of the sort before the Court in the Jefferson County case integrate racial groups in order to benefit students of every race and ethnicity.[283] The expressive message and the potential for balkanization, therefore, are quite different. As long as school boards do not impose significant burdens on individuals and families by using race in drawing attendance zones—for example, by drawing zones with non-contiguous boundaries that require long bus commutes—the zoning should survive judicial scrutiny. Under my approach, therefore, courts would not have to comb the legislative record and the enactment history for evidence of the predominant use of race in drawing attendance zones.

Because I would impose a predominance inquiry at the micro-level of individual requests but not at the macro-level of attendance zones, the necessary implication is that a given degree of race consciousness should be regarded as more suspect when deployed at the micro-level than when used at the macro-level. It may seem perplexing why this should be so. The answer lies in the concern animating Justice Powell's distinction between using racial quotas and using race as a "plus" factor, and the Rehnquist Court's distinction between a publicly declared award of twenty points and a publicly undefined "plus" factor.[284] Judging from the Court's previous interventions, the felt impact of race-consciousness on those who are burdened by it is less acute when it is less publicly apparent. In other words, the individualized consideration requirement that I endorse would apply the lesson of *Bakke*, *Grutter*, and *Gratz* to a different setting: racial criteria are less likely to be balkanizing when government does not needlessly impress on people that they (or their children) are being treated in part as members of racial groups. In the assignment context, moreover, the use of race is more general and

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282. *See, e.g.*, League of United Latin Am. Citizens v. Perry, 126 S. Ct. 2594, 2663 (2006) (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part) ("It is a sordid business, this divvying us up by race."); *supra* note 97 and accompanying text (quoting Shaw v. Reno, 509 U.S. 630, 647 (1993)).

283. If school districts drew attendance zones that separated the races in order to give minorities more control over the public schools that their children attended, the analogy to redistricting would be stronger. *See supra* note 198 (referencing a recent Nebraska law).

284. *See supra* Parts II.A–B (discussing *Bakke*, *Grutter*, and *Gratz*).

diffuse—that is, less seemingly "personal"—in drawing attendance zones than in disposing of individual requests for certain schools.

Accordingly, a given degree of race-consciousness is less constitutionally problematic in drawing attendance zones for large numbers of students than in granting or rejecting individual assignment or transfer requests. Even if in certain situations the two uses of race would achieve the same "net operative results,"[285] the perception and thus the potential for balkanization can be quite different. Race must not predominate in disposing of individual requests, but no such requirement should limit the drawing of attendance zones. Rather, a burden analysis should constrain the use of racial criteria in drawing attendance zones.[286]

In evaluating colorblindness discourse in this setting, it is important to bear in mind that a genuine commitment to colorblindness would prohibit any race consciousness even in drawing attendance zones, siting schools to increase integration, establishing magnet schools to prevent white flight, etc. Districts could be hard-pressed to achieve even modest levels of integration.[287] The Justices presumably know this and care. If the Court invalidates the Jefferson County and Seattle plans, therefore, it is more likely to prohibit explicit racial classifications that impose obvious individual burdens (e.g., a race-based denial of an assignment request) than it is to prohibit implicit race consciousness that imposes non-obvious individual burdens (e.g., race-conscious attendance zones)—even when the former use of race is more limited than the latter. Justices Powell and O'Connor are gone, but appearances may matter to several current Justices.

Although my analysis accepts (as it must) the constitutional relevance of social appearances, I do not advise prohibiting any use of racial classifications in student assignment. First, the Court has allowed them in the more divisive area of affirmative action in higher education. It would therefore make scant sense to impose a flat prohibition here. Second, banning even the modest use of racial classifications in student assignment would ignore the significant benefits that they can produce, both in achieving greater levels of

285. *See supra* notes 37–38 (quoting Mishkin's analysis of *Bakke*).

286. For a contrary view of the appropriate scope of the predominance inquiry in the context of voluntary integration plans, see generally Goodwin Liu, *Seattle and Louisville*, 95 CAL. L. REV. (forthcoming 2007) (manuscript on file with the author).

287. *See supra* note 233.

integration and in expressively affirming the value of integration.[288] As Part II demonstrated, the Court's opinions display sensitivity not just to the costs, but also to the benefits of using racial classifications to a limited extent.

Finally, a complete ban on using racial classifications might make everyone within a school district worse off by forcing school boards to decide between pursuing integration and enhancing student choice. Districts that focused on integration would leave all students with fewer options. For example, high school students in Seattle enjoy more choices than do students in Jefferson County, and the Seattle plan uses race more explicitly than does the JCPS plan, precisely because the Seattle School District does not use the attendance zones that the JCPS employs. The JCPS, moreover, is able to allow some measure of student choice because it too makes limited use of racial classifications. Without using racial classifications to some extent in order to prevent student choices from unraveling the integration produced by the attendance zones, the JCPS might have to either strictly limit student choices or abandon integration as a goal. The Constitution should not impose on communities an acute trade-off between racial integration and student choice.

2. *Applying the Standard*. With these considerations in mind, I turn now to the plans before the Court.[289] Although the district court in the case involving Jefferson County, Kentucky, fixated inappropriately on the requirement of individualized consideration articulated in *Grutter* and *Gratz*, the court nonetheless tracked much of my recommended approach. It stated that "the Court must determine whether the 2001 Plan incorporates some sufficient form of individualized attention in the assignment process," and "conclude[d] that it does."[290] This was because "the JCPS assignment process focuses a great deal of attention on the individual characteristics of a student's application, such as place of residence and student choice of school or program. It is individualized consideration of a different

288. *See supra* note 224.

289. Because I have not comprehensively reviewed the lower court records, the following evaluations should be deemed incomplete. If the Court were to adopt an approach similar to mine, a remand would probably be warranted in order to enable the lower courts to apply the standard in the first instance.

290. McFarland v. Jefferson County Pub. Sch., 330 F. Supp. 2d 834, 858 (W.D. Ky. 2004), *aff'd*, 416 F.3d 513 (6th Cir. 2005), *cert. granted sub nom.* Meredith v. Jefferson County Bd. of Educ., 126 S. Ct. 2351 (June 5, 2006) (No. 05-915).

kind in a different context than the Supreme Court found in *Grutter*."[291] The court then identified similarities to *Grutter*:

> In significant ways, the 2001 Plan actually operates like the "plus" system of which the Supreme Court has spoken so approvingly. Many factors determine student assignment, including address, student choice, lottery placement, and, at the margins, the racial guidelines. But, race is simply one possible factor among many, acting only occasionally as a permissible "tipping" factor in most of the JCPS assignment process.[292]

Putting aside the propriety of the court's distinguishing and then analogizing almost exclusively to *Grutter*, the important point is that the school district's use of racial classifications in granting or denying assignment or transfer requests is modest in scope, as are the race-based burdens imposed by the assignment process as a whole. Race affects the district's disposition of some student requests, but not many, and other factors such as student preferences and school capacity weigh more heavily in the process. The court specifically pointed to "[d]ata showing that the majority of students attend their resides schools and that only a very small percentage of students are not assigned to one of the schools they preferred," which "suggest[ed] the minimal impact of race on this process."[293]

In addition, the court found that all JCPS schools are "equal and integrated" and "have similar funding, offer similar academic programs and comprise more similar ranges of students than possible in neighborhood schools."[294] As far as I can tell, moreover, the use of race does not require onerous bus commutes. These considerations more than suffice to satisfy the individualized consideration requirement appropriate in this setting.[295]

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291. *Id.* at 859.

292. *Id.*

293. *Id.* at 861–62. Earlier in its opinion, the court specifically noted that "[g]enerally, about 95–96% of all elementary students receive their first or second choice cluster school," *id.* at 845 n.18, and that "most" middle school and high school students "choose to attend their resides school, for which the only selection criteria are [elementary or] middle school graduation and place of residence," *id.* at 845.

294. *Id.* at 860, 862. The court recorded these observations as part of its "undue harm" analysis, but the different dimensions of the narrow tailoring inquiry can bleed together in light of the concern with racial balkanization that unites them. *See supra* note 273 (discussing the *Grutter* Court's treatment of the narrow tailoring inquiry); *supra* notes 66, 128.

295. The United States misunderstands the concept of individualized consideration and misapplies *Grutter* when it chides the JCPS for not "minimizing the use of race in its assignment

To be sure, the district uses race much more in drawing attendance zones than in disposing of individual assignment or transfer requests. Some of these zones have non-contiguous boundaries that are designed to increase integration.[296] In this regard, the district court's reference to "the minimal impact of race on this process"[297] was not accurate. But for the reasons already discussed, race consciousness in drawing attendance zones is constitutionally unproblematic in the absence of significant burdens on students and families.

The Ninth Circuit came to a different conclusion than the *McFarland* district court regarding the applicability of individualized consideration in this setting. The Ninth Circuit concluded that "if a noncompetitive, voluntary student assignment plan is otherwise narrowly tailored, a district need not consider each student in an individualized, holistic manner."[298] It so held because "the dangers that are present in the university context—of substituting racial preference for qualification-based competition—are absent here."[299] The court of appeals made an important point. As discussed, however, higher education is not the only context in which the Court has imposed an individualized consideration requirement, and the relevance of individual merit is not the only determinant of whether the Justices have demanded some form of individualized consideration. I therefore assess the compatibility of the Seattle plan with the form of individualized consideration that is most appropriate in light of the Court's decisions.

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plan and maximizing the concept of individualized consideration." Brief for the United States as Amicus Curiae Supporting Petitioner, *supra* note 17, at 16–17. For the reasons stated in Part I, there is nothing about the use of racial criteria that is incompatible with the concept of individualized consideration. And for the reasons discussed in Part II, the federal government's rendition has little to do with the use of race approved by Justice Powell in *Bakke* and by the Court in *Grutter*.

296. Brief for Respondents at 8, Meredith v. Jefferson County Bd. of Educ., No. 05-915 (U.S. Oct. 10, 2006) ("Racial integration in resides middle schools and high schools . . . is accomplished primarily through the drawing of attendance areas, some of which have non-contiguous boundaries. In elementary schools, it is accomplished by the cluster plan . . . .").

297. *McFarland*, 330 F. Supp. 2d at 861–62.

298. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 426 F.3d 1162, 1183 (9th Cir. 2005) (en banc), *cert. granted*, 126 S. Ct. 2351 (June 5, 2006) (No. 05-908).

299. *Id.* at 1181.

The Seattle plan is on par with the JCPS plan in some ways, but it is more suspect in other ways.[300] Like the JCPS, the district uses race with care and the resulting impact on the disposition of individual assignment requests is modest. Specifically, before the plan was modified to *decrease* the impact of race,[301] around 300 (or 10 percent) of the roughly 3,000 incoming high school students were assigned to an oversubscribed high school because of the race-based tiebreaker.[302]

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300. Neither plan makes distinctions among minority groups, but this fact is potentially more problematic from the standpoint of narrow tailoring in the case of the Seattle plan. While Seattle is a racially and ethnically diverse community, *id.* at 1166, the JCPS is populated almost entirely by black and white students, *McFarland*, 330 F. Supp. 2d at 840 n.6. Judge Bea decried that the Seattle School District "does not even consider the student's actual race." *Parents Involved*, 426 F.3d at 1210 (Bea, J., dissenting). The Ninth Circuit determined that "the District's choice to increase diversity along the white/nonwhite axis is rooted in Seattle's history and current reality of de facto segregation resulting from Seattle's segregated housing patterns," and that "[t]his white/nonwhite focus is also consistent with the history of public school desegregation measures throughout the country." *Id.* at 1187. Although Judge Bea's concern is hardly trivial in light of the expressive dimension of racial classifications, the fact remains that white/nonwhite segregation is the most significant dimension of racial segregation in Seattle. Moreover, attending to levels of diversity among minority groups would require greater use of race than Seattle attempted and would therefore impose more substantial burdens. It would be counterproductive for narrow tailoring to require this. *Accord* Comfort v. Lynn Sch. Comm., 418 F.3d 1, 22 (1st Cir. 2005), *cert. denied*, 126 S. Ct. 798 (2005).

More troubling in some respects are arguments that the district has done little to ameliorate racial isolation in its most segregated schools. *See* Petitioner's Brief at 37, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, No. 05-908 (U.S. Aug. 21, 2006) (criticizing the District's use of race for its "underinclusiveness"). It is unclear why the district purports to be concerned with reducing racial isolation and yet has done nothing to address such isolation in its most segregated, less popular high schools. *See id.* at 37 (reporting that Rainier Beach High School is 8 percent white and Cleveland High School is 10 percent white). From the standpoint of ensuring a proper fit between means and ends, these facts raise questions about the genuineness of the district's stated interest in reducing isolation. But from the perspective of reducing balkanization potentially caused by racial classifications, the district's approach is defensible. If the alleged constitutional problem is *any* use of race, the less suspect course cannot be *more* use of race. *See id.* at 19 ("At a minimum, the District could have . . . narrow[ed] the use of race by broadening to 20 percent the band of permissible deviation from 'balance.'"). Moreover, it cannot be the case that the Constitution prohibits the district from addressing any problems of racial isolation unless it addresses all or even most problems of racial isolation.

301. The Ninth Circuit explained that initially "schools that deviated by more than 10 percent" from the racial make up of Seattle public schools as a whole "were deemed racially imbalanced. For the 2001–2002 school year, however, the triggering number was increased to 15 percent, softening the effect of the tiebreaker." *Parents Involved*, 426 F.3d at 1170 (footnote omitted). Moreover, "the District also developed a 'thermostat,' whereby the tiebreaker is applied to the entering ninth grade student population only until it comes within the 15 percent plus or minus variance." *Id.* Finally, "[t]he tiebreaker does not apply, and race is not considered, for students entering a high school after the ninth grade (e.g., by transfer)." *Id.*

302. *Id.*

On the other hand, although the Ninth Circuit noted that "the District implemented the Plan as part of a comprehensive effort to improve and equalize the attractiveness of all the high schools," it also observed that "the high schools vary widely in desirability."[303] The burdens imposed on individual students by the use of racial criteria are significant when race determines placement in a school that offers a far inferior education.[304] It may also be troubling that, as Judge Bea stressed, the operation of the race-based tiebreaker confronted the children of two plaintiffs with the prospect of "a daily multi-bus round-trip commute of over four hours."[305]

Yet the en banc majority observed that all students could choose to attend a school close to where they live: "Because there are multiple schools in the north and south of Seattle, students for whom proximity is a priority may elect as their first choice one of the schools in their residential area that is not oversubscribed and be guaranteed an assignment to that school."[306] From the standpoint of individual burdens, however, the plan remains problematic to the extent that students can access quality schools only if they endure long commutes.[307]

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303. *Parents Involved*, 426 F.3d at 1169. The court of appeals continued:

> Three of the northern schools—Ballard, Nathan Hale and Roosevelt—and two of the southern schools—Garfield and Franklin—are highly desirable and oversubscribed, meaning that more students wish to attend those schools than capacity allows. The magnitude of the oversubscription is noteworthy: For the academic year 2000–01, approximately 82 percent of students selected one of the oversubscribed schools as their first choice, while only about 18 percent picked one of the undersubscribed high schools as their first choice. Only when oversubscription occurs does the District become involved in the assignment process.

Id. (footnote omitted); *see also* Petitioner's Brief, *supra* note 300, at 4 (documenting quality differences among the high schools of the Seattle School District).

304. *Cf. Comfort*, 418 F.3d at 20 ("Every child in Lynn is guaranteed a seat in a district where, as the parties have stipulated, every school provides a comparable education.").

305. *Parents Involved*, 426 F.3d at 1216 (Bea, J., dissenting). Judge Bea reported that "[t]he parents instead enrolled their children in private schools." *Id.*; *see also* Petitioner's Brief, *supra* note 300, at 7–9 (discussing the cases of these two families). The fact that both Judge Bea and the petitioners elected to focus on the same two families may suggest that their stories are extraordinary. This is an important question, and the answer is presumably ascertainable.

306. *Parents Involved*, 426 F.3d at 1181 n.21.

307. *See* Brief in Opposition to Petition for Writ of Certiorari at 6, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 126 S. Ct. 2351 (2006) (No. 05-908) ("Due to the extraordinarily high demand for assignment to Ballard High School . . . , there was considerable unhappiness about the effect of the integration tiebreaker in the adjacent (predominantly white) . . . areas of Seattle. . . . It was uncontested, however, that families from these neighborhoods could have elected to send their children to Franklin High School, which PICS admits and the record demonstrates is a 'very impressive' school, or they could have sought assignment to Garfield High School, regarded by many as Seattle's most prestigious high school,

In other respects, Judge Bea's treatment of the individualized consideration inquiry is misguided:

> Here, the racial tiebreaker works to admit or exclude high school students from certain oversubscribed schools solely on the basis of their skin color. No other consideration affects the operation of the racial tiebreaker; when it operates, it operates to admit or exclude either a white or nonwhite student, depending upon how the admission will affect the preferred balance at the oversubscribed school. Such a program is precisely what *Grutter* warned against, and what *Gratz* held unconstitutional: a mechanical, predetermined policy "of automatic acceptance or rejection based on a[] single 'soft' variable," that being the student's skin color.[308]

Judge Bea not only ignored the differences between the university context and the public school setting, but he also focused on the operation of the racial tiebreaker in isolation from the rest of the plan.[309] The sibling tiebreaker accounts for 15 to 20 percent of assignments to the ninth grade class, and the distance of a chosen school from a student's home accounts for 70 to 75 percent of assignments to the ninth grade.[310] The racial tiebreaker is thus one modest factor in the assignment process. To be sure, it is decisive in some individual cases, but the same was of course true of the admissions process at issue in *Grutter* and the type of program that Justice Powell approved in *Bakke*. Potential decisiveness is necessarily entailed whenever race operates as one factor.

Judge Bea also concluded that voluntary integration plans must consider individual talents and other contributions to general diversity:

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which was integration neutral at the time." (citations omitted)). Although the two students discussed in the text live north of downtown, Franklin and Garfield are located south of downtown. Petitioner's Brief, *supra* note 300, at 4–5.

308. *Parents Involved*, 426 F.3d at 1210 (Bea, J., dissenting).

309. The United States offers the same misguided analysis. *See* Brief for the United States as Amicus Curiae Supporting Petitioner, *supra* note 17, at 19 ("Far from ensuring individualized consideration 'through the entire process,' the District's racial tiebreaker simply labels applicants based on race alone, and makes assignment decisions to oversubscribed schools based solely on those labels. Students are thus automatically accepted or rejected based on their race." (quoting Grutter v. Bollinger, 539 U.S. 306, 337 (2003))). By the time race comes into play, student choices, school capacity, and sibling preferences have already influenced the process. If race does not come into play, geography and lotteries determine the rest of the assignments. *Parents Involved*, 426 F.3d at 1169–71.

310. *Id.* at 1169, 1171.

> The constitutional guarantee of equal protection requires the District to focus upon the individual's whole make up, rather than just a group's skin color; this protects each student's right to equal protection under the law. *See Grutter*, 539 U.S. at 326 . . . .
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> . . . .
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> . . . [T]hirteen- or fourteen-year-old students are not so young that they have not yet developed unique traits to set themselves apart from other students and add greater diversity to the student body. The student's race is a factor in assessing the student as an individual, but the student may also speak English as a second language, come from a different socioeconomic stratum than other students, have overcome adversity, be a talented baseball player, musician, or have participated in community service.[311]

Judge Bea failed to register that the *Grutter*-type individualized consideration requirement that he would impose has nothing to do with the district's compelling interest in racial integration (as opposed to general diversity), whose existence he assumes "[f]or argument's sake" in this portion of his dissent.[312] The Constitution cannot require a school district to replace a nonevaluative student assignment plan that seeks racial integration with an admissions process that pursues general diversity before school officials lawfully may use race. The point of narrow tailoring is not to alter fundamentally the nature of the compelling interest that government seeks to advance. Thus, Judge Bea's purported analysis of individualized consideration actually constitutes little more than a reiteration of his conclusion that racial integration does not advance a compelling interest.[313]

Because of the greater disparity in the perceived quality of the various schools in the district and the possibility that students may face a choice between short commutes and quality schools, the Seattle plan presents a closer case than does the JCPS plan. The Seattle plan's use of race would be less suspect if the district were to reduce the quality differences among its high schools.[314] A system of equal schools should not be required before government may use race in

311. *Id.* at 1212 (Bea, J., dissenting) (footnote omitted).

312. *Id.* at 1209.

313. Given that *Grutter* was decided in 2003, it is remarkable that Judge Bea describes the decision as one of "two exceptions still standing" to "a landscape littered with rejected asserted 'compelling interests' requiring race-based determinations." *Id.* at 1201.

314. I recognize that this is much easier said than done and that more funding is hardly sufficient.

order to advance integration, because one of the very reasons that school districts pursue integration is to make their schools less unequal.[315] But this reality does not change the Court's likely judgment that requiring a student to attend a far inferior school (or to endure a long commute in order to access a quality school) in part because of the use of race imposes a substantial burden on the individual. Regardless of whether one agrees with this view of the matter, the Court's decisions reflect sensitivity to such burdens.[316]

In any event, it does not appear that students in Seattle typically must attend far inferior schools because of the District's use of race. Nor does it appear that they typically must endure long bus commutes because of the use of race. If either occurred in particular instances, or if certain students confronted acute tradeoffs between commutes and quality, then an as-applied constitutional challenge might lie. But for the reasons discussed, the Seattle plan on its face likely meets the individualized consideration requirement appropriate in this setting.

CONCLUSION

I began by defining the concept of individualized consideration apart from any legal requirements. I then turned to these requirements by engaging the Court's equal protection decisions on their own terms. I demonstrated that the primary concern animating the Court's imposition of a particular kind of individualized consideration requirement in a given setting is its assessment of the probable net effect of using racial criteria on balkanization in America. The relationship I identified among anticipated balkanization, individualized consideration, and the use of race as a selection criterion should prove useful in analyzing instances of race-conscious decision making that have arisen in the past and that undoubtedly will arise in the future.

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315. *See supra* notes 202–08 and accompanying text (documenting the sensitivity of teacher quality to the racial composition of a public school independent of other variables that affect teacher quality, including school poverty).

316. The Court aside, defenders of voluntary integration plans should be concerned about the individual burdens that such plans impose based on race. Even if one disagrees that the burdensome use of racial criteria raises equality and fairness concerns in this context, such use imperils the long-term viability of the plans. They cannot survive if large segments of a district's population find them unacceptable and the community is fueled by resentment. *Cf. supra* notes 96, 134 (stressing the importance of social acceptance in the context of court-ordered desegregation plans).

Focusing on the present, I next examined how the Court's concern about balkanization plays out in the context of race-conscious student assignment plans. I suggested that the stakes are high for America because the central disagreement concerns which elements of national identity should prevail in an instance of genuine value conflict. Defenders of the plans conceive integration as the enduring moral legacy of *Brown*, and they view living together across racial and ethnic lines as critical if America is ever going to be the kind of nation that it aspires to be. Many critics of the plans view colorblindness—or, at a minimum, a repudiation of racial classifications—as both the true legacy of *Brown* and the embodiment of the sort of community that the nation should aspire to be regardless of who associates with whom. Each side embraces hallowed national ideals, and each of these ideals was "purchased at the price of immeasurable human suffering."[317]

After explaining why voluntary integration plans advance several compelling interests, I recommended an individualized consideration requirement that accords with the constitutional concerns underlying past decisions. This form of individualized consideration is modest in its demands because race-conscious assignment plans likely reduce racial balkanization when they do not subordinate other considerations to race in granting or denying student requests for particular schools and do not impose substantial burdens. Under this variant of individualized consideration, school districts may use racial criteria in making assignments so long as race constitutes only one of several factors, race does not predominate district-wide in disposing of assignment or transfer requests, and the use of race does not impose substantial burdens on individual students and families.

I have not purported to resolve this instance of acute value conflict as an original matter. Rather, the standard I have proposed reflects the constitutional concerns of the Rehnquist Court. It believed simultaneously that America is a society "in which race unfortunately still matters"[318] and that we should "encourage the transition to a society where race no longer matters."[319] If the Roberts Court values fidelity to the Court's past encounters with race-conscious state action, then the analysis I commend, or something like

317. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 240 (1995) (Thomas, J., concurring in part and concurring in the judgment).

318. Grutter v. Bollinger, 539 U.S. 306, 333 (2003).

319. Shaw v. Reno, 509 U.S. 630, 657 (1993).

it, should guide its resolution of these potentially historic cases. If the Roberts Court elects instead to forge a new path, then the foregoing analysis will have provided a framework for assessing the magnitude of the departure.