

## Diversity in Lower Education as a Compelling Government Interest

By: Amy Hammerman

In this day and age, there are very few people who would argue about the importance of excellence in education in America. An education can open doors to opportunities that would otherwise never be possible. With the current economic downturn, it is more important than ever for our nation's children to receive the finest education and training that will allow them to acquire an excellent job that will allow them to attain the income needed to thrive. Unfortunately, there are many problems facing our education system today that are preventing children from reaching their full potential. In 1954, the Supreme Court found in Brown v. Board of Education, that racial segregation was one of these obstacles.<sup>1</sup>

Prior to Brown, racial segregation in public facilities including schools was the norm. In 1896, the Court in Plessy v. Ferguson held that as long as separate facilities for the races were equal, segregation did not violate the Fourteenth Amendment, which states that "No state shall deprive any person of life, liberty or property without due process of the law, or deny any person equal protection of the laws."<sup>2</sup> About sixty years later, Brown overturned Plessy, finding that segregation in public schools has a detrimental effect on African American children and that separate facilities are inherently unequal.<sup>3</sup> The Court relied on psychological reports and social opinion and said that to separate children solely on the basis of race generates a feeling of inferiority.<sup>4</sup> Following Brown, the Court

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<sup>1</sup> Brown v. Board of Education, 347 U.S. 483 (1954).

<sup>2</sup> Plessy v. Ferguson, 163 U.S. 537 (1896), U.S. Const. Amend. XIV.

<sup>3</sup> Brown, 347 U.S. 483.

<sup>4</sup> Erwin Chemerinsky, *Constitutional Law* 670 (2d ed. 2005).

retained jurisdiction of school segregation cases to ensure that school districts took steps to integrate public schools.<sup>5</sup> This was the beginning of affirmative action, which refers to policies that take race into consideration in an attempt to promote equal opportunity.<sup>6</sup> Although segregation in public schools was clearly an obstacle on the achievement of children, it has been difficult for the Court to determine constitutional ways for schools to desegregate. The Court determined that like race classifications in other facets of life, race classifications in schools must meet strict scrutiny.

## *II. Equal Protection for Race Classifications*

Education is just one of the facets of American society where African Americans were discriminated against throughout American history. Because of this the Court has declared that all racial classification whether disadvantaging or helping racial minorities must meet strict scrutiny.<sup>7</sup> The Court noted that the long history of racial discrimination makes it likely that racial classifications will be based on stereotypes and prejudices.<sup>8</sup> Heightened scrutiny is also justified because of the relative powerlessness of racial minorities.<sup>9</sup> Prejudice and the history of discrimination make it less likely that racial minorities can protect themselves through the political process.<sup>10</sup> Also race is an immutable trait.<sup>11</sup> It is unfair to discriminate against people for a characteristic that is acquired at birth and cannot be changed.<sup>12</sup>

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<sup>5</sup> Id.

<sup>6</sup> Black's Law Dictionary, 2008

<sup>7</sup> Korematsu v. United States, 323 U.S. 214 (1944).

<sup>8</sup> Id.

<sup>9</sup> Id.

<sup>10</sup> Id.

<sup>11</sup> Id.

<sup>12</sup> Id.

Under strict scrutiny, a law is upheld if it is proven necessary to achieve a compelling government interest.<sup>13</sup> While the Court has not created a bright line test for what constitutes a compelling government interest, it can be defined as something that is necessary or crucial rather than simply preferred.<sup>14</sup> The government must have a truly significant reason for discriminating and it must show that it cannot achieve its objective through any less discriminatory alternative.<sup>15</sup>

In Regents of the University of California v. Bakke, the Court held that student body diversity in higher education serves a compelling state interest that can justify the use of race in the admissions process but to withstand a constitutional challenge, a race based admissions policy must be narrowly tailored to achieve that compelling interest.<sup>16</sup> In Gratz v. Bollinger, for example, the Court struck down the admissions program at the University of Michigan, which had a formula that gave such a substantial amount of bonus points to racial minority groups, that if you were a member of one, you would likely get in.<sup>17</sup> The Court reasoned that it was unconstitutional to accept or reject students based solely on race.<sup>18</sup>

In Grutter v. Bollinger, however, the Court analyzed a law school's admissions process and led by Justice Powell, held that colleges and universities may use race as one factor, among many, in admissions decisions.<sup>19</sup> The Court reasoned that racial diversity is essential to law school education and that having a diverse student body is "at the heart of

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<sup>13</sup> Chemerinsky, *Supra* note 4, at 652.

<sup>14</sup> Id.

<sup>15</sup> Id.

<sup>16</sup> Regents v. University of California v. Bakke, 438 U.S. 265 (1978).

<sup>17</sup> Gratz v. Bollinger, 539 U.S. 244 (2003).

<sup>18</sup> Id.

<sup>19</sup> Grutter v. Bollinger, 539 U.S. 306 (2003).

the law school's proper instructional mission" and there is a presumption of good faith unless there is proof of the contrary.<sup>20</sup>

The Court also stated that there are educational benefits to racial diversity in higher education that "produce cross-racial understanding and break down stereotypes," and that an abundance of exports reports and studies illustrated that diversity "promotes learning outcomes and better prepares students for an increasingly diverse work force, for society and for the legal profession."<sup>21</sup> Major American businesses have expressed that the essential skills for today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.<sup>22</sup> High-ranking retired officers and civilian military leaders have declared that highly qualified, racially diverse officer training is necessary for national security. Furthermore, because universities, and in particular, law schools, prepare many of the Nation's leaders, the path to leadership must be open to able and skilled individuals of every race and ethnicity.<sup>23</sup>

### *III. Race Classifications in Elementary and Secondary Education?*

Many cases such as Bokke, Gratz and Grutter have analyzed the importance of racial diversity at the university level, but research appears to differ on the significance of racial diversity in elementary and secondary education. Although the majority agrees that racial diversity in higher education is a compelling governmental interest, there has been wide disagreement as to whether the same is true for integration in lower education such as public elementary, middle, and high schools.

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<sup>20</sup> Id.

<sup>21</sup> Id.

<sup>22</sup> Id.

<sup>23</sup> Id. See Sweat v. Painter, 339 U.S. 629 (1950).

The first case to really address this issue since Brown v. Board of Education was Parents Involved in Community Schools v. Seattle School Dist. No. 1 in 2007. In Parents Involved, the Court pointed out that prior cases involving the use of racial classifications in the school context have only recognized two interests that qualify as compelling: (1) remedying the effects of previous intentional discrimination, and (2) the interest in diversity in higher education laid out in Grutter v. Bollinger.<sup>24</sup>

This paper will argue that racial diversity in primary and secondary education should be a third compelling government interest recognized by the Court in cases involving race classifications in education and school districts should be permitted to use race as a classification in desegregating schools as long as it does not harmfully exclude anyone solely on the basis of their race.

#### *IV. Does Racial Diversity In Primary and Secondary Education Significantly Benefit Children?*

The question of whether racial diversity in public primary and secondary schools is one that scholars have been attempting to answer for decades. Historically, one of the most influential early studies of the relationship between desegregation and areodetic achievement was contained in the Coleman report in 1966, *Equality of Education Opportunity*.<sup>25</sup> From his report Coleman concluded that socioeconomic composition

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<sup>24</sup> Parents Involved in Community Schools v. Seattle Sch. Dist. No 1, 127 S. Ct. 2738 (2007).

<sup>25</sup> David J. Armor, Christine H. Rossell, Herbert J Walberg, *School Desegregation in the 21<sup>st</sup> Century* 149 (2003).

rather than racial composition had a more substantial effect on minority achievement.<sup>26</sup> The problem with the Coleman research, however, was that it was based on a one time, non-experimental survey.<sup>27</sup> It therefore did not show achievement changes over time.<sup>28</sup>

Post- Coleman research relied on more experimental studies.<sup>29</sup> In 1972 one such experiment reviewed a Boston busing program where students could voluntary choose to be transferred from the city to the suburbs along with six other evaluations of mandatory desegregation plans from different parts of the country.<sup>30</sup> The conclusion was that none of these desegregation plans created significant gains in achievement for the children. Another experiment was done three years later with similar results.<sup>31</sup>

The most expansive national data has been compiled by the National Assessment of Educational Programs (NAEP), which has been administering achievement tests to national representative samples since 1970.<sup>32</sup> These tests, however, also appear to have had unsatisfactory results because they have used relatively small numbers of students and the data does not mention desegregation plans.<sup>33</sup>

Case studies have also been done over the years that have studied the effects on desegregation in particular school districts.<sup>34</sup> One such case study was done on Dallas, Texas. Scholars began researching the effects of desegregation plans in Dallas, such as

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<sup>26</sup> Id.

<sup>27</sup> Id.

<sup>28</sup> Id.

<sup>29</sup> Id. at 153.

<sup>30</sup> Id.

<sup>31</sup> Id.

<sup>32</sup> Id. at 154.

<sup>33</sup> Id.

<sup>34</sup> Id. at 160.

busing, in the 1970s.<sup>35</sup> The results were that black achievement gains occurred in both desegregated and majority minority schools.<sup>36</sup> Therefore it was not racial balance of the schools by itself that caused the improvement, but other factors as well.<sup>37</sup>

Other scholars argue that children benefit greatly from racial diversity in schools. According to Arthur Coleman, partner at Holland & Knight and former deputy assistant secretary of education for civil rights, elementary education prepares students for the future and grants them opportunities to achieve and prepares to be successful citizens in a diverse democratic society.<sup>38</sup> Coleman's research demonstrates that like in higher education, racial and ethnic diversity in elementary and secondary education "promotes cross-racial understanding, breaks down stereotypes, and enables students to better understand persons of a different race."<sup>39</sup> Coleman argues that although it has been almost seven decades since Brown, the bottom line is race still matters.<sup>40</sup> Accordingly state and local school districts should have discretion to decide the most effective means of achieving racial diversity provided that they are consistent with constitutional legal standards.<sup>41</sup>

Similarly, Michael Kurlaender, assistant professor of education at the university of California at Davis, argues that racial diversity in lower education is extremely important.<sup>42</sup> He suggests that most of the previous social science research on the impact

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<sup>35</sup> Id. at 161.

<sup>36</sup> Id.

<sup>37</sup> Id.

<sup>38</sup> The Benefits of Racial and Ethnic Diversity in Elementary and Secondary Education, Briefing Report for the U.S. Committee on Civil Rights 6 (July 28, 2006).

<sup>39</sup> Id.

<sup>40</sup> Id.

<sup>41</sup> Id.

<sup>42</sup> Id. at 7.

of desegregation on elementary and secondary education has suffered from methodological problems and design limitations.<sup>43</sup> For example, most were cross-sectional rather than longitudinal, they did not involve control groups, and had unclear terminology as researchers used different definitions for key terms.<sup>44</sup>

According to Kurlaender, there are four areas where students benefit from racial and ethnic diversity in elementary and secondary education.<sup>45</sup> The first is enhanced learning. Kurlaender points to three conclusions that research in this area have led to: (1) voluntary desegregation plans impact African-American achievement more positively than mandatory school placements; (2) integration leads to greater achievement at an earlier age and at lower grades; (3) Desegregation has never had any negative effects on children.<sup>46</sup>

The second benefit of diversity in lower education is long-term education and occupational gains.<sup>47</sup> According to Kurlaender, desegregated schooling leads to higher professional aspirations and an increase in degree completion for African American students.<sup>48</sup> African-Americans who attend segregated schools appear to find lower paying and more racially isolated jobs than whites.<sup>49</sup>

The third category is increased social interaction.<sup>50</sup> Kurlaender claims that when students are exposed to racial diversity in education, they will lead more diversified lives

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<sup>43</sup> Id.

<sup>44</sup> Id.

<sup>45</sup> Id.

<sup>46</sup> Id.

<sup>47</sup> Id.

<sup>48</sup> Id.

<sup>49</sup> Id.

<sup>50</sup> Id. at 8.

as adults.<sup>51</sup> Racial integration has also been connected to increased interaction with other racial groups later in life and an impact on the success of interracial friendships.<sup>52</sup>

The final category is improved attitudes.<sup>53</sup> Kurlaender claims that students of all racial or ethnic groups who attend racially diverse schools are more comfortable with members of other racial and ethnic groups, have an increased sense of civic engagement and a larger drive to live and work in diverse settings.<sup>54</sup>

In contrast, Stephan Thernstrom, professor of history at Harvard University and senior fellow at the Manhattan institute, brings up the harm of assigning students to schools based on race.<sup>55</sup> He argues that such disbursement should only take place where there has been a clear constitutional violation or a court ordered remedy.<sup>56</sup>

In 2007, the importance of racial diversity in lower education came up in a big way in Parents Involved in Community Schools v. Seattle School Dist. No. 1. In separate cases, Seattle school district and Jefferson County, petitioners, parents involved in community schools, a parents association of the parents of children who have been or may be denied assignment to their chosen high school in the district because of their race, and the parents of a student, brought actions against respondent, public school districts, challenging the districts' plans, which relied upon racial classifications in making school assignments.<sup>57</sup>

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<sup>51</sup> Id.

<sup>52</sup> Id.

<sup>53</sup> Id.

<sup>54</sup> Id.

<sup>55</sup> Id.

<sup>56</sup> Id.

<sup>57</sup> Parents Involved, 127 S. Ct. 2738.

The Seattle school district No. 1 operates ten regular public high schools.<sup>58</sup> In 1998, it adopted a plan that allowed incoming ninth graders to choose among the district’s high schools, ranking them in order of preference.<sup>59</sup> Because some of the schools were more popular than others, the district created “tie breakers.”<sup>60</sup> The first of these gave priority to students who had a sibling currently enrolled in their chosen school.<sup>61</sup> The second “tie-breaker” looked at the racial composition of the particular school and the race of the individual students.<sup>62</sup> Students were characterized as “white” or “non-white” in order to “racially balance” the schools.<sup>63</sup> Seattle school district had never operated legally segregated schools or had been subject to court ordered desegregation.<sup>64</sup> The third “tie-breaker” was the geographic proximity of the school to the student’s residence.<sup>65</sup>

Jill Kurfirst sought to enroll her ninth grade son, Andy Meeks in one of the school’s biotechnology career academies.<sup>66</sup> Jill and Andy’s teachers thought that this program held the most promise for Andy’s success.<sup>67</sup> Andy was accepted into the program but because of the racial tie-breaker, was denied admission.<sup>68</sup>

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<sup>58</sup> Id.

<sup>59</sup> Id.

<sup>60</sup> Id.

<sup>61</sup> Id.

<sup>62</sup> Id.

<sup>63</sup> Id.

<sup>64</sup> Id.

<sup>65</sup> Id.

<sup>66</sup> Id.

<sup>67</sup> Id.

<sup>68</sup> Id.

Jefferson County on the other hand, had previously had Court interaction schools because of segregation.<sup>69</sup> In 1973, a federal court found that Jefferson County had maintained a segregated school system, however, by 2000, the Court found that the district had achieved unitary status.<sup>70</sup> In 2001, Jefferson County adopted a voluntary student assignment plan, which required all non-magnet schools to maintain a minimum black enrollment of fifteen percent and a maximum black enrollment of fifty percent.<sup>71</sup> At the elementary school level, based on his or her address, each student was designed a “resides” school where students within a specific geographic area were assigned.<sup>72</sup> Elementary schools were grouped into clusters to ease integration. Assignment decisions were based on available space and racial guidelines.<sup>73</sup> If a school had reached the “extremes of the racial guidelines,” a student whose race would contribute to the school’s racial imbalance will not be assigned there.<sup>74</sup> After the assignment students could transfer, however, transfers could be denied based on space or racial guidelines.<sup>75</sup>

Crystal Meredith sought to enroll her son Joshua McDonald in kindergarten. His resides school was only one mile from his home but it had no available space.<sup>76</sup> Jefferson County assigned Joshua to another school in the cluster that was ten miles from his home and Meredith sought to transfer him to a closer cluster school. Space was available, but

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<sup>69</sup> Id.

<sup>70</sup> Id.

<sup>71</sup> Id.

<sup>72</sup> Id.

<sup>73</sup> Id.

<sup>74</sup> Id.

<sup>75</sup> Id.

<sup>76</sup> Id.

the transfer was denied because “it would have had an adverse effect on the desegregation compliance.”<sup>77</sup>

Led by Justice Roberts, the Supreme Court held that the student assignment plans of Seattle Public Schools and Jefferson County did not meet the narrowly tailored and compelling governmental interest requirements of strict scrutiny for a race-based assignment plan because it was used only to achieve “racial balance.”<sup>78</sup> Public schools may not use race as the sole determining factor for assigning students to schools.<sup>79</sup> The judgments of the lower courts were reversed and the cases were remanded.

The Court reasoned that in prior cases involving the use of racial classifications in the school context, the Court has only recognized two interests that qualify as compelling: (1) remedying the effects of past intentional discrimination, and (2) the interest in diversity in higher education in Grutter.<sup>80</sup> Here, the Court stated that this case did not satisfy either of these two interests. First, in Seattle, the public schools had not shown that they were ever segregated by law, nor were they subject to Court ordered desegregation decrees.<sup>81</sup> The Jefferson County public schools were previously segregated by law but they had achieved unitary status.<sup>82</sup> Second, the Court distinguishes this case from Grutter because in that case, the diversity interest was not solely focused on race, but rather focused on each applicant as an individual.<sup>83</sup> Justice Thomas’ concurrence also pointed out that that there is no evidence that coerced racial mixing has any education

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<sup>77</sup> Id.

<sup>78</sup> Id.

<sup>79</sup> Id.

<sup>80</sup> Id.

<sup>81</sup> Id.

<sup>82</sup> Id.

<sup>83</sup> Id.

benefits to African American achievement.<sup>84</sup> The Grutter case focused on the educational benefits of a law school, whereas there does not appear to have been conclusive evidence of educational benefits of racial diversity in lower education.<sup>85</sup>

Additionally, the Court stated that the plans employed by these two districts were not narrowly tailored to achieve the educational and social benefits of racial diversity.<sup>86</sup> The plans were tied to each district's specific demographics, rather than pedagogic concept of the level of diversity needed to obtain the asserted educational benefits.<sup>87</sup> The Court also stated that there could have been racial divisions without the use of racial tie-breakers. There was evidence that the student body would have been substantially diverse without it and that these tie-breakers, therefore had a minimal effect on the schools' diversity. The school districts also failed to show that they attempted to employ other means to achieve diversity.<sup>88</sup>

Justice Kennedy concurred in part of the judgment. He differed from the majority because he found that the goal of obtaining a diverse student body is a compelling state interest.<sup>89</sup> He also argued that methods that took race into could be used by school districts to further the goal of diversity.<sup>90</sup> Although in his view having a diverse student body is a compelling governmental interest, he stated that the school districts in this case

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<sup>84</sup> Id.

<sup>85</sup> Id.

<sup>86</sup> Id.

<sup>87</sup> Id.

<sup>88</sup> Id.

<sup>89</sup> Id.

<sup>90</sup> Id.

did not narrowly tailor the use of race to achieve compelling interests and they could have achieved diversity through less racially charged means.<sup>91</sup>

Justice Breyer wrote the main dissent. Breyer pointed out that “education is perhaps the most important function of state and local governments.”<sup>92</sup> In his opinion, Seattle and Jefferson County’s plans represent local efforts to bring about the kind of desegregated education that Brown v. Board of Education promised in 1954.<sup>93</sup> He reminds us that post Brown, the Court told schools what they must do to achieve desegregation at a minimum but that beyond that, the Court left the determination of how to achieve integration up to the individual school districts.<sup>94</sup> He argued that the school district’s plans served a compelling interest of student body diversity and the plans were narrowly tailored.<sup>95</sup> Because of recent trends in re-segregation, many school districts, including Seattle and Jefferson County have found it necessary to make efforts to desegregate.<sup>96</sup>

Breyer characterizes the compelling state interest here as the “interest in eliminating school-by-school racial isolation and increasing the degree to which racial mixture characterizes each of the district’s schools and each individual student’s public school experience.”<sup>97</sup> In showing how important this interest is, he argues that it comprises three elements.<sup>98</sup> The first is a historical element of fixing previous segregation

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<sup>91</sup> Id.

<sup>92</sup> Id.

<sup>93</sup> Id.

<sup>94</sup> Id.

<sup>95</sup> Id.

<sup>96</sup> Id.

<sup>97</sup> Id.

<sup>98</sup> Id.

and continuing to fight the remnants of school segregation, which affects not only schools, but also future employment, social attitudes, and housing patterns.<sup>99</sup>

The second element is an interest in overcoming the negative educational effects of segregated schools. Breyer points out that studies have in fact shown that children taken out of segregated schools and placed in racially diverse schools show positive academic growth.<sup>100</sup> He argues that while other studies have reached different conclusions, the evidence supporting a positive educational interest from racially diverse schools is well- established and strong enough.<sup>101</sup> Breyer points to an example of research suggesting that black children from segregated educational environments significantly increased their educational achievement once they were placed in a racially diverse environment.<sup>102</sup> He gives further research support that states that African American student's educational achievement has been consistently improved from integrated school environments as opposed to a segregated ones and the earlier that African American students are removed the segregated environment, the better their results.<sup>103</sup> He also discussed the results of multiple studies, which have indicated that African American alumni of racially diverse schools are more likely to obtain jobs traditionally unavailable to African Americans and to have greater earning potential.<sup>104</sup>

The third element that Breyer discusses is an interest in creating an environment at school that mirrors the “pluralistic” society, which these children will one day live and

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<sup>99</sup> Id.  
<sup>100</sup> Id.  
<sup>101</sup> Id.  
<sup>102</sup> Id.  
<sup>103</sup> Id.  
<sup>104</sup> Id.

work in.<sup>105</sup> He points to evidence that supports theories that this will help interracial children work and play together and teach children to participate in cooperation among all races, which is necessary to continue the American value of unity.<sup>106</sup>

To support his idea that racial diversity in primary and secondary education is a compelling governmental interest, Breyer points out that primary and secondary schools are “where the education of this Nation’s children begins, where each of us begins to absorb those values we carry with us to the end of our days.”<sup>107</sup> Breyer then repeats a quote from Justice Marshall that “unless our children begin learning together, there is little hope that our people will ever learn to live together.”<sup>108</sup> He also notes that that Brown focused on primary and secondary schools.<sup>109</sup> He concludes then that the compelling interest at issue in this case is not to eliminate societal discrimination in general, but primary and secondary school segregation.<sup>110</sup> Additionally, Breyer states that there is no precedent that suggests that once a school district is “unitary,” the interests of desegregation disappear.<sup>111</sup>

#### *IV. Conclusion*

Based on the scholarly research that has been done over the last four decades as well as the very convincing words of both Kennedy and Breyer in their opinions in Parents Involved, I believe that racial diversity in elementary and secondary schools is a compelling governmental interest and state and local school districts should have

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<sup>105</sup> Id.

<sup>106</sup> Id.

<sup>107</sup> Id.

<sup>108</sup> Id.

<sup>109</sup> Id.

<sup>110</sup> Id.

<sup>111</sup> Id.

discretion to decide the most successful means of achieving racial diversity in their schools. There has been so much research that has shown the benefits on children of attending a racially diverse school and it is clear that the earlier children are exposed to racial diversity, the more they are positively impacted. Even at a minimum, if it is established that there are no negative effects from racial integration in lower education, this should be something that schools should strive for. With the current economic recession it is particularly difficult to not only obtain jobs, but to keep them. Hundreds of Americans are being laid off every day right now and are losing everything. Professional success clearly stems from having a quality education, and therefore the importance of racial diversity in elementary and secondary education cannot be stressed enough.

I do, however agree, that as stated in Gratz, race should not be the sole determining factor for enrollment in a school. There is much merit in Kennedy's decision in Parents Involved, where he believed that racial integration in primary and secondary education was a compelling state interest, however the means chosen by Seattle and Jefferson County were not narrowly tailored to achieve their goal. Therefore, schools should be able to use race as a classification among many others, such as socioeconomic status, geographic proximity to the school, academic achievement level, and student's interests and abilities. One way to do this is not to characterize students simply as "white" or "non-white." Each nationality should be recognized individually. In addition, if certain schools are not integrated enough and schools need to move students around, it is imperative that they not simply take race into account. For example, if there is a student like Joshua McDonald and his parents and teachers feel that a certain school would benefit his learning and growth much more than any other school, he should not be

denied admission there solely based on his race. Race should, however, be one classification that schools can take into account in looking at enrollment.