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## **PICS, GRUTTER, AND ELITE PUBLIC SECONDARY EDUCATION: USING RACE AS A MEANS IN SELECTIVE ADMISSIONS**

“If [Seattle] students were considered for a whole range of their talents and school needs with race as just one consideration, *Grutter* would have some application.”<sup>1</sup>

“I don’t think someone would want to hire somebody just on the basis of a test score, and we don’t admit them to a great college on the basis of a test score, and we shouldn’t admit them to a great high school on that basis.”<sup>2</sup>

### I. INTRODUCTION

Every year, *Newsweek* publishes a list of the top one hundred public high schools in the country that excludes many prestigious public schools.<sup>3</sup> Instead, *Newsweek* places these schools on a separate list—“The Public Elites.”<sup>4</sup> The reason for this distinction: “Because their students are too good. The best of the best.”<sup>5</sup> These schools, along with other prestigious

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1. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 793 (2007) (Kennedy, J., concurring).

2. Elissa Gootman, *In Elite N.Y. Schools, A Dip in Blacks and Hispanics*, N.Y. TIMES, Aug. 18, 2006, at A1 (quoting Gary Orfield, director of the Civil Rights Project at Harvard University).

3. *The Top of the Class*, NEWSWEEK, June 8, 2009, <http://www.newsweek.com/id/201160?tid=related>. *Newsweek* ranks schools based on an index that divides the number of Advanced Placement, International Baccalaureate, or Cambridge tests given at a school in May by the total number of seniors graduating that year. All schools that achieve at least a 1.000 ratio are put on the *Newsweek* website and the top 1500 schools receive a numerical rank. Jay Mathews, *Behind the Rankings*, NEWSWEEK, June 8, 2009, <http://www.newsweek.com/id/201139>.

4. Jay Mathews, *In a Different Class*, NEWSWEEK, June 8, 2009, <http://www.newsweek.com/id/201138>. *Newsweek* placed these sixteen schools on the “elite” list because their average SAT scores exceed 1950, the maximum score cutoff for the *Newsweek* list that names the best high schools in the country. Mathews, *supra* note 3. This Note, however, does not limit its scope to the schools on this list.

5. Gina Pace, *The Public Elites*, NEWSWEEK, May 18, 2008, <http://www.newsweek.com/id/137421>. When asked why these public high schools were not listed with the rest of the nation’s public schools, Mathews responded, “it would be deceptive for us to put them on this list . . . [It] is designed to honor schools that have done the best job in persuading average students to take college-level courses and tests. It does not work with schools that have no, or almost no, average students.” Mathews, *supra* note 3. Stuyvesant High School in New York City, a school considered more closely in Parts II and III of this Note, serves as an example to highlight Mathew’s point: 86% and 99% of Stuyvesant High School students scored a level 4 in English and mathematics, respectively, while only 40% and 46% of students at similar schools in the district scored a level 4 in English and mathematics, respectively. THE NEW YORK STATE SCHOOL REPORT CARD: ACCOUNTABILITY AND OVERVIEW REPORT FOR STUYVESANT HIGH SCHOOL 12–14 (2007–2008), <https://www.nystart.gov/publicweb-rc/2008/ca/AOR-2008-310200011475.pdf> (defining “level 4” as “Meeting Learning Standards with Distinction” and “similar schools” as schools that have similar resources and serve a student body with similar rates of poverty and limited English proficiency).

public high schools across the country, provide their students with an education unparalleled to that which the vast majority of American teenagers receive.<sup>6</sup> Elite public high schools, however, are not typically open to all students in the district, but rather these schools selectively admit students based on stringent admission requirements. To decide which students merit these remarkable educational opportunities, many school districts utilize admission policies that rely heavily on standardized test scores. The students admitted to these elite public high schools are considered the most intelligent, talented students that will attend the best colleges and universities and become the country's future leaders. However, the representation of black and Latino students at each of these elite public high schools is disproportionately low.<sup>7</sup>

Standardized test scores have been traditionally considered an objective measure of "merit." If this is true, however, then what can explain why the use of test scores in admissions by elite public high schools has resulted in the admission of so few black and Latino students? Said otherwise, why do black and Latino students score lower on standardized testing than white students? Some academics proffer that black and Latino students do not genetically have the same intelligence or ability to meet the rigorous admissions test score criteria,<sup>8</sup> an unpopular proposition. Other scholars have focused on social structure factors to explain the gap between white and black and Latino standardized test scores: "parent and teacher expectations, differences in attitude and attributional styles, family structure, motivation, culture and history, values, and genetics."<sup>9</sup> Additionally, social psychology has shown that even when socioeconomic status and other social structure factors are held equal, black and Latino

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6. Part II of this Note will feature the incredible opportunities at three of these elite public high schools: Stuyvesant High School, Boston Latin School, and Thomas Jefferson School of Technology and Science. However, other selective admissions schools are not discussed in this Note.

7. Several selective admission public high schools that consider only test scores in admissions highlight these disparities. In 2006, black students accounted for 34.7% of the total student population in New York City but only 2.2% and 4.8% of the student bodies at Stuyvesant High School and Bronx High School of Science, respectively. Gootman, *supra* note 2. Latino and black students represent only 14% and 1%, respectively, of Oxford Academy in Cypress, California, Oxford Academy, *School Profile 2008–2009*, available at [http://www.oxfordacademy.us/pdf/Profile\\_08.pdf?m=5263801](http://www.oxfordacademy.us/pdf/Profile_08.pdf?m=5263801), while accounting for approximately 62% and 3%, respectively, of the students enrolled in Anaheim Union High School District where Oxford sits. Anaheim Union High School District, *Demographic Change 1998–2008*, [http://www.auhsd.k12.ca.us/demographics/demographic\\_change.jsp?m=2559937](http://www.auhsd.k12.ca.us/demographics/demographic_change.jsp?m=2559937).

8. See RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* (1994) (advancing a theory that racial differences in intelligence stem from innate genetics).

9. Ambady et al., *Stereotype Susceptibility in Children: Effects of Identity Activation on Quantitative Performance*, 12 *PSYCHOL. SCI.* 385, 385 (2001) (internal citations omitted).

students still score lower than similarly situated white students on standardized tests because of a psychological phenomenon called stereotype threat.<sup>10</sup> Research has demonstrated that negative group stereotypes about the inferior intelligence of blacks and Latinos triggers severe anxiety for black and Latino students during the administration of standardized tests, resulting in lower individual test scores.<sup>11</sup> Furthermore, “model minority” or “positive” stereotypes relating to the superior intelligence of Asians as a group has the opposite affect: Asian students outperform white students on standardized tests.<sup>12</sup> Therefore, social structure and psychological factors contribute to the continuing low numbers of black and Latino students at elite public high schools where admission is heavily based on standardized testing.

The next question then is, what can elite public high schools do to increase the number of black and Latino students if standardized testing leads to racially imbalanced student bodies? In 2003, the Supreme Court, in *Grutter v. Bollinger*,<sup>13</sup> held a diverse student body to be a compelling governmental interest in the context of higher education “that could justify the use of race in university admissions.”<sup>14</sup> After *Grutter*, lower courts<sup>15</sup>

10. Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Test Performance of Academically Successful African Americans*, in *THE BLACK-WHITE TEST SCORE GAP 401* (Christopher Jencks & Meredith Phillips eds., 1998).

11. In the context of academics, stereotype threat is the anxiety created from “the risk of being judged or treated stereotypically, or of doing something that would inadvertently confirm the stereotype” that black and Latino students have inferior intelligence and abilities. *Id.* at 403. Researchers have demonstrated that when black and Latino students believe a test is intended to measure their academic ability, the anxiety created from stereotype threat causes these students to score lower than white students. *Id.* Furthermore, stereotype threat more heavily impacts academically successful students because for them, “[c]onfirming negative [group] stereotype about academic ability threatens something that they care about: their attachment to a domain in which they have invested.” *Id.* at 402. Unfortunately, this means that the black and Latino students who can compete academically with white and Asian counterparts at elite public high schools are often the ones whose test scores are most affected by stereotype threat. With heavy competition in admission to these schools, one or two points can be the difference in being admitted. For an opposing view of the impact of stereotype threat in admissions, see Amy L. Wax, *The Threat in the Air*, *WALL ST. J.*, Apr. 13, 2004, at A20 and Amy L. Wax, *Stereotype Threat: A Case of Overclaim Syndrome?*, in *THE SCIENCE OF WOMEN AND SCIENCE 134* (Christina Hoff Sommers ed., 2009).

12. Ambady et al., *supra* note 9, at 385. Stereotype threat can actually *boost* performance on standardized testing. In a study of Asian females, researchers found that when the students thought a math test was to reflect their ability as *women*, their performance worsened but if they thought the test was to reflect their ability as *Asians* then their performance increased. Margaret Shih et al., *Stereotype Susceptibility: Identity Salience and Shifts in Quantitative Performance*, 10 *PSYCHOL. SCI.* 80, 80 (1999).

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

14. *Id.* at 325.

15. See *Comfort v. Lynn Sch. Comm.*, 418 F.3d 1, 13–16 (1st Cir. 2005); *McFarland v. Jefferson County Pub. Sch.*, 330 F. Supp. 2d 834, 852–53 (W.D. Ky. 2004), *aff'd*, 416 F.3d 513 (6th Cir. 2005);

and school districts considered this holding applicable in the context of primary and secondary education.<sup>16</sup> The Supreme Court in *Parents Involved in Community Schools v. Seattle School District No. 1 (PICS)*<sup>17</sup> indeed confirmed this interpretation of *Grutter* and held diversity to be a compelling interest in primary and secondary education.<sup>18</sup> While *PICS* is often cited as a decision that limits the use of race as a means to increase black and Latino enrollment in public high schools,<sup>19</sup> admission policies administered by colleges and universities are still constitutionally viable, and as Justice Kennedy noted, *Grutter* would have “some application” to primary and secondary education if “students were considered for a whole range of their talents and school needs with race as just one consideration.”<sup>20</sup>

Therefore, *Grutter* can serve as a constitutional framework for admission policies that elite public high schools should adopt to increase the number of black and Latino students attending their schools. Thus far, school districts with admissions policies based on standardized test scores have considered race alone as a decisive factor in final decision making.<sup>21</sup> There are two problems with this approach: first, under the popular view that standardized tests fairly assess merit, any deviation from test scores that involves a consideration of race creates a sense of injustice in many parents, often white and with the most political clout and the resources to challenge admission policies;<sup>22</sup> second, Supreme Court precedent has long

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Parents Involved in Comm. Schs. v. Seattle Sch. Dist., No. 1, 426 F.3d 1162, 1174–77 (9th Cir. 2005) (en banc).

16. Lia B. Epperson, *True Integration: Advancing Brown's Goal of Educational Equality in the Wake of Grutter*, 67 U. PITT. L. REV. 175, 219 (2005) (noting that prior to *PICS* “[t]he Court’s narrow tailoring analysis in *Grutter* suggest[ed] that most voluntary race-conscious plans should survive such an analysis” in the context of primary and secondary education).

17. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

18. *Id.* at 788.

19. After the *PICS* decision, voluntary integration plans will likely involve nonracial means, such as drawing school attendance boundaries, citing of new schools, multi-district consolidation, and inter-district transfer programs. See ANURIMA BHARGAVA ET AL., STILL LOOKING TO THE FUTURE: VOLUNTARY K-12 SCHOOL INTEGRATION 34–39 (2008), [http://www.naacpldf.org/content/pdf/voluntary/Still\\_Looking\\_to\\_the\\_Future\\_Voluntary\\_K-12\\_School\\_Integration;\\_A\\_Manual\\_for\\_Parents,\\_Educators\\_and\\_Advocates.pdf](http://www.naacpldf.org/content/pdf/voluntary/Still_Looking_to_the_Future_Voluntary_K-12_School_Integration;_A_Manual_for_Parents,_Educators_and_Advocates.pdf).

20. *Parents Involved*, 551 U.S. at 793 (Kennedy, J., concurring). Kennedy’s concurring opinion in *PICS* is the controlling opinion. *Marks v. United States*, 430 U.S. 188, 193 (1977) (“When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .’” (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, & Stevens, JJ.)).

21. See *infra* Part III and Part V.A.

22. For a discussion of egalitarian theories applied to gifted education, see Steven V. Mazie, *Equality, Race and Gifted Education: An Egalitarian Critique of Admission to New York City’s*

held that using race as the sole means in making decisions constitutes unconstitutional “racial balancing” or quota systems.<sup>23</sup> For this reason, many attempts by school districts to utilize race as a means in admissions have been limited, deterred, or dismantled by state statutes and lower court decisions.<sup>24</sup>

This Note argues that *PICS* does not prevent elite public high schools from utilizing race as a means to increase diversity; indeed, schools with selective admissions may remain the only primary and secondary entities that can potentially utilize race as a means for integration. By examining the selective admissions processes of three elite public high schools, this Note proposes first, that *Grutter* applies to these high schools and second, that these public schools have the capacity to consider race through a narrowly tailored selection process that would pass constitutional review. Part II introduces three public high schools that have received nationwide acclaim: Stuyvesant High School (Stuyvesant) in New York, Boston Latin School (Boston Latin) in Massachusetts, and Thomas Jefferson High School for Science and Technology (Thomas Jefferson) in Virginia.<sup>25</sup> This part describes each high school’s “elite” (1) academic and extracurricular offerings, (2) college support and counseling, and (3) physical facilities and resources. Next, Part III discusses each school’s admission policies

*Specialized High Schools*, 7 THEORY & RES. EDUC. 5 (2009).

23. See, e.g., *Regents of University of California v. Bakke*, 438 U.S. 265, 306 (1978) (“If petitioner’s purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial but as facially invalid. . . . This the Constitution forbids.”).

24. See *infra* Part III.

25. Stuyvesant and Thomas Jefferson appear on *Newsweek*’s list, “The Public Elites.” See Pace, *supra* note 5. Although Boston Latin did not make that list, the school is well known as one of the country’s premiere examination schools and *Business Week* ranked Boston Latin as the school with the “Best Overall Academic Performance” in Massachusetts. *America’s Best High Schools*, BUS. WK., Jan. 15, 2009, available at [http://images.businessweek.com/ss/09/01/0115\\_best\\_schools/23.htm](http://images.businessweek.com/ss/09/01/0115_best_schools/23.htm). Furthermore, all three schools appear highly ranked on *U.S. News & World Report*’s list of “Gold Metal Schools.” *Gold Metal Schools*, U.S. NEWS & WORLD REP., Dec. 9, 2009, available at <http://www.usnews.com/articles/education/high-schools/2009/12/09/americas-best-high-schools-gold-medal-list.html>. Stuyvesant High School ranked thirty-first on the list; Boston Latin High School ranked thirty-eighth; and Thomas Jefferson High School ranked first on the Gold Metal School list. *Id.* Thomas Jefferson took the top spot on the Gold Metal list for the third year in a row. Kenneth Terrell, *Virginia High School is Best in the Nation*, U.S. NEWS & WORLD REP., Dec. 9, 2009, <http://www.usnews.com/articles/education/high-schools/2009/12/09/virginia-high-school-is-best-in-the-nation.html>. A number of other schools have similar selective admission policies and national reputations like Stuyvesant, Boston Latin, and Thomas Jefferson, and this paper’s argument applies equally to these schools not discussed. Some of these other schools are Bronx High School of Science in New York, New York; Lowell High School in San Francisco, California; Oxford Academy, Cypress, California; University High School in Tucson, Arizona; Bergen Academies in Hackensack, New Jersey; and University Laboratory High School in Urbana, Illinois.

and reviews failed attempts to modify such policies to increase the black and Latino representation at each of these schools.

Part IV.A examines the *Grutter* decision in the context of higher education and identifies the components of the University Michigan Law School's admission policy that the Supreme Court upheld as constitutional. Part IV.B then examines how the principles of *Grutter* can apply in the context of primary and secondary education per Justice Kennedy's opinion in *PICS*. Finally, Part V analyzes the faults in the school plans held unconstitutional by the *PICS* Court and outlines what school districts must take into consideration when crafting admission policies for elite public high schools. Selective admissions schools have the capacity to create admission policies that utilize race as a means to create a diverse student body without violating the Constitution. School districts where these elite public high schools sit must first recognize the negative impact on black and Latino students produced by the heavy dependence on standardized test scores in admissions and then avail themselves of all constitutionally permissible avenues to provide black and Latino students with these incredible educational opportunities.

## II. ELITE EDUCATION, RESOURCES, AND OPPORTUNITIES

This part provides a thorough description of Stuyvesant, Boston Latin, and Thomas Jefferson, including information on each school's: (1) academic and extracurricular offerings, (2) college support and counseling, and (3) physical facilities and resources, in order to highlight the disparity between the resources and opportunities at elite public high schools and other high schools in the country and the need to change standardized-test-heavy admission policies to afford black and Latino students an equal opportunity to attend these elite public high schools.

### A. *Stuyvesant High School: New York City's Premiere High School*

Stuyvesant<sup>26</sup> was founded in 1904<sup>27</sup> and is now one of eight specialized

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26. Stuyvesant High School was named after "Peter Stuyvesant, the Dutch last governor of New Amsterdam." Robert D. McFadden, *Finally, a Facade to Fit Stuyvesant: A High School of High Achievers Get a High-Priced Home*, N.Y. TIMES, Sept. 8, 1992, at B1.

27. Stuyvesant High School, <http://www.stuy.edu/about/history.php> [hereinafter *Stuyvesant History*] (last visited Sept. 12, 2009). Stuyvesant did not admit girls into the high school until pressured by the New York City Board of Education and a legal suit against the school. In 1969, Alice De Rivera filed suit in Manhattan Supreme Court claiming that Stuyvesant's "all-boy" entrance policy violated the Equal Protection Clause of the Fourteenth Amendment. Stuyvesant had denied De Rivera's request to take the entrance exam and rejected her application to the school. *Girl Challenges*

high schools in New York City, which base admissions on standardized test scores. As the most well-known elite public high school,<sup>28</sup> Stuyvesant prides itself on the success of its students—one out of four seniors receives acceptance to an Ivy League college or university<sup>29</sup>—and its star-studded list of notable alumni.<sup>30</sup>

Stuyvesant has ten different academic departments, each with its own chairperson,<sup>31</sup> and a Program Office run by seven staff members to help students select classes<sup>32</sup> from an online course guide that describes in detail each course offered by the school.<sup>33</sup> Students have the opportunity to learn eleven different languages<sup>34</sup> and take classes ranging from

*Stuyvesant High's All-Boy Policy*, N.Y. TIMES, Jan. 21, 1969, at 37. In the face of this lawsuit, the New York City Board of Education admitted De Rivera based on her performance on an equivalent examination. Rudy Johnson, *Stuyvesant Admits First Girl; She Had Sued to Attend School*, N.Y. TIMES, May 3, 1969, at 40.

28. Stuyvesant is “often cited among school advocates as proof that public education can work.” Cotton Delo, *Best and Worst Schools: Ed Department's Controversial Grades*, N.Y. RESIDENT, Dec. 4, 2007, <http://74.54.115.114/node/1035>. One Stuyvesant student claimed that the school’s “reputation was known as far away as Leningrad”—his mother heard about Stuyvesant in Russia and his family decided to immigrate to the United States instead of Australia so he could attend the school. Andrew Maykuth, *A Public High School Where Scholars are the Real Stars*, SEATTLE TIMES, Mar. 29, 1992, at A14.

29. CLARA HEMPHILL ET AL., *NEW YORK CITY'S BEST PUBLIC HIGH SCHOOLS: A PARENT'S GUIDE* 35, 37 (2d ed. 2003) (noting roughly one-quarter of students from Stuyvesant High School in New York City go to an Ivy League college or university).

30. THE CAMPAIGN FOR STUYVESANT, *STUYVESANT HIGH SCHOOL: THE FIRST 100 YEARS* (2004), excerpt available at [http://www.ourstrongband.org/pdfs/notables\\_preview.pdf](http://www.ourstrongband.org/pdfs/notables_preview.pdf) (including a legend to designate which alumni are Oscar and Emmy Award winners, Nobel Prize winners, and Olympic medalists). Eric Holder, once co-captain of Stuyvesant’s basketball team, has become the latest notable Stuyvesant alumnus as President Obama’s Attorney General. Javier C. Hernandez, *A High Achiever Poised to Scale New Heights*, N.Y. TIMES, Dec. 1, 2008, at A23.

31. Stuyvesant High School, [http://register.stuy.edu/program\\_office/course\\_descriptions.html](http://register.stuy.edu/program_office/course_descriptions.html) (last visited Sept. 12, 2009). The departments are: Biology, Psychology, and Geo-Science; Chemistry and Physics; Computer Science; English; World Languages, Health and Physical Education; Mathematics; Music and Fine Arts; Social Studies; and Technology Education. *Id.*

32. Stuyvesant High School, [http://register.stuy.edu/program\\_office/about\\_us.html](http://register.stuy.edu/program_office/about_us.html) (last visited Oct. 6, 2009).

33. “This curriculum guide will allow you to dream about what you might do and plan for what you will do. Hopefully, you will browse through it thoroughly, more than once. Lurking amidst the hundreds of descriptions, you might find a course to capture your imagination.” Stuyvesant High School, [http://register.stuy.edu/program\\_office/course\\_descriptions.html](http://register.stuy.edu/program_office/course_descriptions.html) (last visited Sept. 12, 2009) (message to students about the Course Guide from the Program Office Chairperson). In addition to the online course guide, Stuyvesant students register for classes online. Stuyvesant High School, [http://register.stuy.edu/program\\_office/programming\\_information/online\\_registration.html](http://register.stuy.edu/program_office/programming_information/online_registration.html) (last visited Sept. 12, 2009).

34. Stuyvesant High School, [http://register.stuy.edu/program\\_office/all\\_%20courses/language\\_courses.htm](http://register.stuy.edu/program_office/all_%20courses/language_courses.htm) (last visited Sept. 12, 2009) (listing languages offered including Classical Greek, Mandarin Chinese, French, Spanish, Italian, Arabic, Korean, German, Japanese, Hebrew, and Latin). In 2004, Stuyvesant ran a dozen Chinese classes, seven Japanese classes and two Korean classes. David M. Herszenhorn, *Hebrew Classes Off, Then On In Switch at Stuyvesant High*, N.Y. TIMES, Feb. 1, 2004, at N32.



“Existentialism”<sup>35</sup> to “Geopolitics.”<sup>36</sup> In addition to hundreds of classes, including thirty-seven Advanced Placement (AP) courses in 2009,<sup>37</sup> Stuyvesant students have the opportunity to do independent research and take courses at local universities and colleges.<sup>38</sup> Furthermore, extracurricular activities supplement the academics: Stuyvesant is known for its “active and elaborate system of student government”<sup>39</sup> and has over a hundred different student clubs and publications<sup>40</sup> and thirty different sports teams.<sup>41</sup>

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35. Stuyvesant High School, [http://register.stuy.edu/program\\_office/all\\_%20courses/english\\_courses.htm](http://register.stuy.edu/program_office/all_%20courses/english_courses.htm) (last visited Sept. 12, 2009) (listing English Department courses, including African-American Literature, Forensics, Russian Literature Since 1850, Women’s Voices, and Acting Workshop).

36. Stuyvesant High School, [http://register.stuy.edu/program\\_office/all\\_%20courses/socst\\_courses.htm](http://register.stuy.edu/program_office/all_%20courses/socst_courses.htm) (last visited Sept. 12, 2009) (listing Social Studies Department courses). The Social Studies Department offers an elective, “Wall Street with Merrill Lynch,” in which “regular class instruction will be supplemented by approximately 14 prominent guest speakers from Merrill Lynch, trips to the Merrill Lynch trading floors, the actual floor of the New York Stock Exchange, and the COMEX,” and observations of “corporate CEOs’ presentations during underwriting meetings at Merrill Lynch.” Stuyvesant High School, [http://register.stuy.edu/program\\_office/all\\_%20courses/socst\\_descriptions/hfws.html](http://register.stuy.edu/program_office/all_%20courses/socst_descriptions/hfws.html) (last visited Sept. 12, 2009).

37. Stuyvesant High School, [http://register.stuy.edu/program\\_office/course\\_descriptions.html](http://register.stuy.edu/program_office/course_descriptions.html) (last visited Sept. 12, 2009) (determined from browsing each academic department’s course listings). Stuyvesant has the highest number of students taking A.P. tests in the world as well as the highest number achieving a mastery score. Susan Saulny, *New York Tops Advanced Placement Tests*, N.Y. TIMES, Jan. 26, 2005, at A14.

38. NYC DEPARTMENT OF EDUCATION, SPECIALIZED HIGH SCHOOLS STUDENT HANDBOOK: ADMISSIONS INFORMATION AND SAMPLE TESTS 6 (2008–2009), available at [http://schools.nyc.gov/NR/rdonlyres/D6C3C010-DD6B-4B04-BFFB-3A9C240F27C9/0/SHSAT\\_Hndbk\\_0809\\_toDOE.pdf](http://schools.nyc.gov/NR/rdonlyres/D6C3C010-DD6B-4B04-BFFB-3A9C240F27C9/0/SHSAT_Hndbk_0809_toDOE.pdf) [hereinafter SPECIALIZED HS HANDBOOK] (noting Stuyvesant offers courses at New York University, Hunter College, and City College of New York). Jonathan Kozol has noted that “New York City’s civic and political leaders have rewarded [Stuyvesant students] with academic opportunities unknown to children in the schools I visit in the Bronx.” JONATHAN KOZOL, *THE SHAME OF THE NATION: THE RESTORATION OF APARTHEID SCHOOLING IN AMERICA* 139 (2005). Students at another New York City elite public high school had a chance to meet privately with Supreme Court Justices. HEMPHILL, *supra* note 29 (stating that students met privately with Supreme Court Justices O’Connor and Scalia as part of a special law program at Bronx High School of Science).

39. SPECIALIZED HS HANDBOOK, *supra* note 38, at 6; *see also* The Stuyvesant Student Union, <http://su.stuysu.org/> (last visited Sept. 12, 2009) (displaying election results). A documentary, *FRONTRUNNERS*, directed by Caroline Suh and released in October 2008, follows four Stuyvesant students’ campaigns for student body president. Stephen Holden, *Running for Office, With Class*, N.Y. TIMES, Oct. 15, 2008, at C4. The production notes of the documentary quote Dick Morris, a Stuyvesant graduate and political consultant, saying, “[i]t was at Stuyvesant that I learned how to be a politician, and it was in their elections that I developed my abilities.” *Id.*

40. Stuyvesant History, *supra* note 27 (Stuyvesant has thirty different student-run publications). Examples of Stuyvesant clubs: Artistic Beads Club, The Diplomacy Club, Stuyvesant Red Cross Club, Math Tutoring Squad, and iDesign. The Stuyvesant Student Union, [http://su.stuysu.org/?page\\_id=10](http://su.stuysu.org/?page_id=10) (last visited Nov. 11, 2009).

41. *See* Stuyvesant History, *supra* note 27.

Additionally, Stuyvesant's College Office supports its students throughout the college application process.<sup>42</sup> The College Office posts bi-monthly bulletins to share "announcements of college visits to Stuyvesant, open houses throughout the city, and financial aid and scholarship information."<sup>43</sup> Almost daily during the fall, college admission representatives from one of dozens of universities visit Stuyvesant and meet with groups of students.<sup>44</sup> Additionally, Stuyvesant students can contact alumni to seek advice on college and other future decisions.<sup>45</sup>

Stuyvesant students attend school in a \$150 million<sup>46</sup> state-of-the-art building that has been described as a "lavishly appointed, 10-story futureschool."<sup>47</sup> This facility features twelve science labs, twelve shops (for, among other things, investigating robotics, ceramics, and photography), two gyms, lecture halls, seven escalators,<sup>48</sup> an "auditorium worthy of Broadway,"<sup>49</sup> racquetball courts, a six-lane swimming pool, 450 computers on thirteen networks, a sixteen-inch digital satellite television monitor in every classroom,<sup>50</sup> and a library with a capacity of 40,000 volumes.<sup>51</sup>

42. See Stuyvesant High School, *Bulletin #1: September 2008*, available at <http://www.stuy.edu/college/bulletins/2008-2009/Bulletin12008.pdf> (last visited Oct. 10, 2009). A director and two full-time college counselors staff Stuyvesant's College Office. *Id.*

43. *Id.* Each bulletin includes information about the SAT, important college application deadlines, scholarship information, and any college open house or diversity event opportunities. See, e.g., *id.*

44. See, e.g., Stuyvesant High School, *College Rep Visits 2009*, <http://www.stuy.edu/college/bulletins/2009-2010/CollegeRep32009.pdf> (last visited Oct. 10, 2009).

45. Stuyvesant High School, <http://www.stuy.edu/college/> (last visited Sept. 22, 2009) (the section of the website, "Contact Stuy Grads," is currently under reconstruction).

46. New York City funded this \$150 million project out of a \$7 billion budget intended to serve over one million students in 991 schools. McFadden, *supra* note 26 ("The expenditure of millions on an opulent new school for a relatively few students has renewed a cry of elitism against this highly selective, world-class high school, which flourished for generations by admitting only the brightest young scholars."). The Stuyvesant school building is "the most expensive high school ever built in New York City" during the early 1990s recession when the city faced a billion dollar tax cut. KOZOL, *supra* note 38, at 140. "Not a single high school had been built for students in the Bronx since 1973." *Id.*

47. McFadden, *supra* note 26. One reporter notes that the "opulent, \$150-million, granite-paneled building, with its light-filled rooms—so different from the worn facilities many students are used to—only seemed to confirm Stuyvesant's rewards." Adam Nossiter, *Anxiety 101: Taking Test to Attend Stuyvesant*, N.Y. TIMES, Dec. 3, 1995, at 51.

48. In 2004, Stuyvesant used close to a million dollars of a special Department of Education fund for school repairs to overhaul and fix its escalators. Stuyvesant High School Alumni Association, [http://www.shsaa.org/index.php?option=com\\_content&task=view&id=25&Itemid=54](http://www.shsaa.org/index.php?option=com_content&task=view&id=25&Itemid=54) (last visited Sept. 12, 2009).

49. McFadden, *supra* note 26.

50. Maykuth, *supra* note 28.

51. Stuyvesant High School Alumni Association, *supra* note 48.

*B. Boston Latin School: The Oldest School in America*

Boston Latin, founded by the citizens of Boston in 1635,<sup>52</sup> is a public six-year college preparatory school<sup>53</sup> whose alumni include five signees of the Declaration of Independence.<sup>54</sup> Academically, like Stuyvesant, Boston Latin has eight academic departments, each with its own program director.<sup>55</sup> Twenty-three different A.P. courses are available to students, not including numerous honors classes and electives,<sup>56</sup> as well as academic support programs.<sup>57</sup> Boston Latin students must study Latin for four years, a school tradition, and take four years of one of six other “modern languages.”<sup>58</sup> In addition to academics, the school runs just shy of one hundred clubs,<sup>59</sup> fifteen different sports programs,<sup>60</sup> and seventeen different musical programs.<sup>61</sup>

Moreover, students receive tremendous support in preparing for and applying to college. Each student is assigned to one of nine guidance counselors<sup>62</sup> who organize an annual college fair with representatives from

52. Boston Latin was established one year before Harvard College. “Legend has it that Harvard College was founded so that Latin School’s graduates would have a suitable place to continue their studies.” Bebe Nixon, *Race to the Top*, MOTHER JONES, Sept./Oct. 1997, at 44, 46.

53. BOSTON LATIN SCHOOL, BOSTON LATIN SCHOOL STUDENT HANDBOOK [hereinafter BOSTON LATIN HANDBOOK] 4 (2009), available at [http://www.bls.org/ftpimages/314/download/BLS\\_Handbook\\_09-10\\_online.pdf](http://www.bls.org/ftpimages/314/download/BLS_Handbook_09-10_online.pdf).

54. Benjamin Franklin, John Hancock, Samuel Adams, William Hooper, and Robert Treat Paine all signed the Declaration of Independence and all attended Boston Latin. Boston Latin School, <http://www.bls.org/podium/default.aspx?t=113646&rc=0> (last visited Sept. 12, 2009). In answering the question “What is Boston Latin School?” Boston Latin’s website tells prospective students that, “[s]ome adults who studied at Boston Latin are now multi-millionaires, government officials, and even Hollywood actors!” Boston Latin School, <http://www.bls.org/podium/default.aspx?t=113645> (last visited Sept. 12, 2009).

55. Boston Latin School, <http://www.bls.org/podium/default.aspx?t=113833> (last visited Sept. 12, 2009) (listing Classics, English, History, Mathematics, Modern Languages, Physical Education, Science, and Visual and Performing Arts as the eight academic programs).

56. Boston Latin School, <http://www.bls.org/podium/default.aspx?t=113964&did=15810,D> (last visited Sept. 12, 2009) (determined from browsing each academic department’s course listings).

57. The McCarthy Institute for Transition & Support provides five support programs: College Resource Center, After-School Tutoring Program, Saturday Success School, Mentoring Program, and Strategies for Success. Boston Latin School, <http://www.bls.org/podium/default.aspx?t=114702> (last visited Sept. 12, 2009).

58. Tracy Jan, *Growing a Boston Latin in Brooklyn*, BOSTON GLOBE, Mar. 4, 2006, at B1. Boston Latin offers students language courses in German, Chinese, French, Italian, Spanish, and American Sign Language. Boston Latin School, <http://www.bls.org/podium/default.aspx?t=113964&did=15802,D> (last visited Sept. 12, 2009).

59. BOSTON LATIN HANDBOOK, *supra* note 53, at 23–24 (listing clubs such as the Anime Culture Club, Cooks Who Care, Business Society, and Mahjong Club).

60. *Id.* at 25 (listing sports teams: wrestling, baseball, softball, tennis, track, sailing, crew, basketball, cheerleading, golf, hockey, swimming, volleyball, football, and soccer).

61. *Id.* (listing music programs such as Football Band, Show Choir, and Jazz Combo).

62. Boston Latin School, <http://www.bls.org/podium/default.aspx?t=114622> (last visited Sept.

over 100 colleges to meet with students and parents.<sup>63</sup> Boston Latin's College Resource Center assists students with writing college essays and offers interviewing skills workshops and a nine-week college preparatory course.<sup>64</sup> Not surprisingly, colleges and universities across the country accepted 99% of the school's Class of 2009.<sup>65</sup>

The Boston Latin school building underwent a complete \$20 million renovation between 1988 and 1991<sup>66</sup> that included the addition of a new gym.<sup>67</sup> The building was again updated several years later to include the newest technology, a new dining hall, and a new building for art and music rooms.<sup>68</sup> In addition to this renovation, the school constructed the Harry V. Keefe Library-Media Center, "the most advanced school library in the world,"<sup>69</sup> to afford Boston Latin students a state-of-the-art facility, which includes fourteen electronic databases, a TV studio, editing rooms, a narrator's booth, and a digital audio studio.<sup>70</sup>

12, 2009).

63. The 2009 Annual College Fair will have 168 college representatives visit the school. Boston Latin School, <http://www.bls.org/podium/default.aspx?t=115637> (last visited Sept. 12, 2009). Each student is also provided a personal registration code for Family Connection from Naviance, a web-based program that assists students and parents to research colleges, create resumes, find scholarship opportunities, and communicate with the Boston Latin Guidance Office. *Id.*

64. Boston Latin School, <http://www.bls.org/podium/default.aspx?t=114702> (last visited Sept. 12, 2009).

65. Boston Latin School, <http://www.bls.org/podium/default.aspx?t=115637> (follow "2009-10 BLS Profile" hyperlink) (last visited Sept. 12, 2009). Between 2005 and 2009, Boston Latin students have applied to over 500 colleges across the country with an approximately 60% rate of acceptance. Boston Latin School, <http://www.bls.org/podium/default.aspx?t=115637> (follow "More Downloads" hyperlink then "College Admission Decisions 2005-09" hyperlink) (last visited Sept. 12, 2009).

66. Ironically, because the Boston School Committee represented the renovations to the State Board of Education as "one intended to reduce or eliminate racial imbalance," the State of Massachusetts paid 90% of the cost. *McLaughlin v. Boston Sch. Comm.*, 938 F. Supp. 1001, 1004 (D. Mass. 1996). Without a previous desegregation order in *Morgan v. Kerrigan*, 509 F.2d 580, 598 (1975), that stemmed from "the initiative and support of the black and Hispanic plaintiff classes . . . [Boston Latin] would not be what it is today." *McLaughlin*, 938 F. Supp. at 1004.

67. Boston Latin School, <http://www.bls.org/podium/default.aspx?t=113646> (last visited Sept. 12, 2009).

68. *Id.*

69. *Id.*

70. The library is named after successful Boston Latin alumnus, Harry V. Keefe, Jr. who donated \$3 million to endow the library in 2000. Naomi R. Kooker, *Schawbel's Passion Paid Off for Boston Latin Campaign*, BOSTON BUS. J., May 19, 2006, available at <http://boston.bizjournals.com/boston/stories/2006/05/22/newscolumn4.html> (describing the fundraising campaign for Boston Latin that raised almost \$37 million over five years, with over 50% coming from Boston Latin alumni).

C. *Thomas Jefferson High School for Science and Technology: The Country's #1*

While both Stuyvesant and Boston Latin have educated students for over one hundred years, Thomas Jefferson was established less than thirty years ago in 1985<sup>71</sup> as a Governor's School in Virginia.<sup>72</sup> Thomas Jefferson's popularity rose quickly; in 1986 only 814 students applied for 400 seats, in 1989, 1615 students applied for those 400 seats,<sup>73</sup> and in 2008, 2500 students applied for 485 seats.<sup>74</sup> Today, Thomas Jefferson has been hailed as the number one public high school in the United States by *U.S. News & World Report* for three years in a row.<sup>75</sup>

Thomas Jefferson students take courses from six different academic departments,<sup>76</sup> each of which offers a wide array of courses and numerous A.P. classes.<sup>77</sup> However, unlike other elite public high schools, Thomas Jefferson also offers *post-A.P.* courses<sup>78</sup> and three unique academic programs, two of which allow students to complete a technology laboratory project that the school requires for graduation.<sup>79</sup> Furthermore,

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71. Michael Alison Chandler, *Building a Foundation for Students*, WASH. POST, Jan. 8, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/01/06/AR2009010603663.html> ("More than two decades ago, a group of business leaders decided that Fairfax County needed a school that would prepare students for jobs in high-tech industries. That vision, stocked with state-of-the-art labs and equipment, became embodied in the Thomas Jefferson High School for Science and Technology."); see also Thomas Jefferson High School of Science and Technology [hereinafter Thomas Jefferson], <http://www.tjhsst.edu/abouttj/> (last visited Oct. 6, 2009).

72. The Virginia Governor's School Program was established by Governor Holton in 1973 and provides "gifted students academic and visual and performing arts opportunities beyond those normally available in the students' home schools." Virginia Department of Education, [http://www.doe.virginia.gov/instruction/governors\\_school\\_programs/index.shtml](http://www.doe.virginia.gov/instruction/governors_school_programs/index.shtml) (last visited Feb. 6, 2010). Seven Governor's Schools serve grades 9–12 and three schools, including Thomas Jefferson, have their own independent site. VA. DEP'T OF EDUC., ACADEMIC-YEAR GOVERNOR'S SCHOOLS (2009–2010), [http://www.doe.virginia.gov/instruction/governors\\_school\\_programs/academic\\_year/academic\\_year\\_chart.pdf](http://www.doe.virginia.gov/instruction/governors_school_programs/academic_year/academic_year_chart.pdf).

73. *Competition Heavy to Get in Fairfax Magnet School*, RICHMOND TIMES DISPATCH, Aug. 10, 1990, at B4 (noting that in 1990 Thomas Jefferson sent all but one student to college).

74. Michael Alison Chandler, *At Magnet School, An Asian Plurality, Group Forms 45% of Freshmen at Thomas Jefferson*, WASH. POST, July 7, 2008, at A1.

75. See Terrell, *supra* note 25.

76. Thomas Jefferson, <http://www.tjhsst.edu/curriculum/> (last visited Sept. 13, 2009) (listing the departments as Science and Technology, Math and Science, Humanities, World Languages, Fine Arts and Physical Education).

77. Laura Pappano, *The Incredibles*, N.Y. TIMES, Jan. 7, 2007, at A4.

78. One post-A.P. course, Complex Analysis, covers upper-level college material and is taught by a math professor at George Mason University. The professor noted, "If you ask me, 'Is [my class] like the honors curriculum at M.I.T.?' we're probably real close." *Id.* Other post-A.P. courses include Computer Architecture, Artificial Intelligence, and Supercomputer Applications. Thomas Jefferson, <http://academics.tjhsst.edu/mathcs/index.htm> (last visited Sept. 13, 2009).

79. Thomas Jefferson, <http://www.tjhsst.edu/curriculum/> (last visited Sept. 13, 2009). The two

Thomas Jefferson offers students more than eighty-five student clubs,<sup>80</sup> twenty-five sports teams,<sup>81</sup> and five publications, including the award-winning *Teknos Journal of Science, Mathematics and Technology*.<sup>82</sup>

Thomas Jefferson also has a Department of Social Services, composed of a team of fifteen support staff members, including eight full-time counselors to serve students<sup>83</sup> and its own College/Career Center where students can meet with a career specialist and access or borrow college resources from the Career Center Library.<sup>84</sup> More than 100 colleges and universities send representatives to Thomas Jefferson to speak with students and parents.<sup>85</sup> As for facilities, Thomas Jefferson houses “[s]pecialized technical laboratories, including a technological computational center . . . and provide[s] students with experience in state-

programs are the Technical Research Laboratories Program and the TJ Mentorship Program. Thomas Jefferson, <http://www.tjhsst.edu/discovery/index.php> (last visited Sept. 13, 2009). For the Technical Research Laboratories Program, Thomas Jefferson maintains fourteen laboratories where students can research in areas such as astronomy and astrophysics, microelectronics, and oceanography and geophysical systems. Thomas Jefferson, <http://www.tjhsst.edu/discovery/labs/index.php> (last visited Sept. 13, 2009). The initial funding for the laboratories came from the sponsorship of fifteen different corporations. Thomas Jefferson, <http://www.tjhsst.edu/discovery/labs/origsponsors.php> (last visited Sept. 13, 2009). The TJ Mentorship Program allows students to perform research for fifteen hours a week at an off-campus laboratory under the supervision and mentorship of an accomplished professional. Thomas Jefferson, <http://academics.tjhsst.edu/mentorship.html> (last visited Sept. 13, 2009). The supporting institutions include “the National Institutes of Health, The U.S. Army Topographic Engineering Center, UUNET Technologies, Inc., The Naval Surface Warfare Center-Carver Division, George Mason University, Lombardi Cancer Center, Smithsonian Institution and Orbital Sciences Corporation.” *Id.*

80. Thomas Jefferson, <http://activities.tjhsst.edu/> (last visited Sept. 12, 2009) (listing clubs such as the Chemistry Society, the Hispanic Alliance, Fellowship of Christian Athletes, Relay for Life, and the Juggling and Flying Apparatus Club). Thomas Jefferson is also renowned for its “Eighth Period,” a forty-minute block on Wednesdays where students can “choose from sundry offerings,” such as swing dancing, rock climbing or being inspired by a Nobel laureate. Ken Adelman, *What I’ve Learned: Go See the Principal*, WASHINGTONIAN, Sept. 1, 2006, at 39–42.

81. Thomas Jefferson High School Colonial Athletes, <http://www.tjhsst.edu/~mrmmodell/sports/page/Simple.html> (last visited Sept. 12, 2009) (listing fall, winter, and spring sports such as gymnastics, swim/dive, golf, football, indoor track and lacrosse).

82. Thomas Jefferson, <http://www.tjhsst.edu/studentlife/publications/index.php> (last visited Sept. 13, 2009). In addition to *Teknos*, Thomas Jefferson students publish *Threshold* annually, “an anthology of poetry, fiction, drawings and other writings by students and staff at TJ,” and a monthly newspaper, *tjTODAY*. *Id.*

83. Thomas Jefferson, <http://www.tjhsst.edu/curriculum/dss/staff.php> (last visited Feb. 6, 2010).

84. Thomas Jefferson, <http://www.tjhsst.edu/supportingtj/careercenter/index.html> (last visited Sept. 13, 2009). The Library “contains books, CDs, DVDs, and other resources regarding colleges, financial aid, scholarships, AP/SAT/ACT materials and additional topics related to colleges and careers.” In addition to support in applying to college, the College/Career Center website provides links to leadership opportunities, summer job opportunities and organizations looking for student volunteers. *Id.*

85. Thomas Jefferson, <http://www.tjhsst.edu/supportingtj/careercenter/colalpha.htm> (last visited Sept. 13, 2009).

of-the-art technology . . . .”<sup>86</sup> Furthermore, Thomas Jefferson’s Geoffrey A. Jones Library runs a “student-centered program” that trains students in research and presentation skills.<sup>87</sup> In addition to print sources, the library offers students access, both at school and through proxy off-campus, to eighteen online databases, ranging from Annals of American History to JSTOR.<sup>88</sup>

### III. CURRENT ADMISSION POLICIES AND THE LAWS THAT SHAPED THEM

These three elite public high schools provide students with academic opportunities, resources and facilities that many public school students across the country do not enjoy. As each school has limited space, these schools each have selective admissions processes to determine which students will attend each academic year. Different authorities have played a role in shaping each school’s admission policy—the legislature in New York, the courts in Boston, and the school board in Fairfax County. Thus far, all three schools have relied heavily on standardized test scores to determine a student’s merit and as a result educate only small numbers of black and Latino students.

#### A. *Stuyvesant: Exam-Only Admissions Mandated by Statute*

Stuyvesant’s admission policy can easily be described: students take a standardized test and those with the highest scores will be accepted.<sup>89</sup> This

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86. Fairfax County Public Schools, *FCPS’ Thomas Jefferson High School for Science and Technology Offers Admissions to 485 Students*, Apr. 21, 2008, <http://commweb.fcps.edu/newsreleases/newsrelease.cfm?newsid=836>. Each year, the Thomas Jefferson Partnership Fund places a “wish list” online for alumni, individuals, and corporations to purchase new resources for the school. Thomas Jefferson Partnership Fund, <http://www.tjpartnershipfund.org/currentNeedsList.html> (follow “needs list” hyperlink) (listing \$2,238,626 of equipment needed for the 2009–10 school year, including a \$15,000 gas chromatography system, a \$24,000 grand piano, and a \$10,000 TJ Monument, with over one million dollars already donated). The Partnership Fund raised over \$500,000 in 2008–2009, \$250,000 coming from parent donations alone. *New School Year Brings Great Excitement, Pressing Needs TJ PARTNERS*, (Thomas Jefferson Partnership Fund), Aug. 2009, at 1, <http://tjpartnershipfund.org/docs/TJPF%20Back%20to%20School%20Newsletter%202009.pdf>.

87. Thomas Jefferson, <http://academics.tjhsst.edu/library/> (last visited Sept. 13, 2009).

88. Thomas Jefferson, <http://academics.tjhsst.edu/library/database.htm> (last visited Sept. 13, 2009).

89. An article in the *New York Observer* described the process:

Every fall, 20,000-plus eighth graders with cowlicks or ponytails and an abnormal share of pocket protectors take the most important test of their lives—the Stuyvesant exam. Nothing else matters in competition for the toughest high school ticket in New York. Not grades, not essays, not legacy. You hit the cutoff, you’re in; one point below, forget it. Compared to this test, the stakes involved in the SAT’s that the students will take three years later seem penny ante. For those with financial resources, admission to Stuyvesant is merely a \$120,000

test, the Specialized High School Admissions Test (SHSAT),<sup>90</sup> is offered annually to all eighth and ninth graders in the five boroughs of New York City for admission into Stuyvesant and the city's seven other specialized high schools.<sup>91</sup> Each year, more than 20,000 students take the SHSAT and only "roughly the top-scoring 3% are admitted to Stuyvesant—making it, statistically, harder to get into Stuyvesant than Harvard."<sup>92</sup> The scores of all students are then arranged from the highest to the lowest—the highest score receives the first acceptance and so forth until all the seats available that year are filled.<sup>93</sup> Of the approximately 800 spots at Stuyvesant, black and Latino students comprise less than 5% of the student body.<sup>94</sup>

The eight specialized high schools, including Stuyvesant, have resisted any attempt to include other criteria to their admission policies since the 1960s and have remained examination-only admissions schools. In 1968, during the Ocean Hill-Brownsville disturbances,<sup>95</sup> black activists

savings over the cost of a private school. But for the majority, for whom private school is not an option, it's the difference between the best education in the world and being thrown into the maw of the [New York City] Board of Education.

Melvin Jules Burkiet, *Stuyvesant High School, the Ultimate Meritocracy*, N.Y. OBSERVER, Aug. 21, 2007, available at <http://www.observer.com/2007/stuyvesant-high-school-ultimate-meritocracy>.

90. The co-founder of Princeton Review, Adam Robinson, "considers [the SHSAT] more difficult than the Scholastic Assessment Test taken in 11th grade. The average college-educated adult, he said, could not be admitted to Stuyvesant without preparation." Elisabeth Bumiller, *Putting Dreams to the Test: Elite High School Is a Grueling Exam Away*, N.Y. TIMES, Apr. 2, 1998, at A1.

91. SPECIALIZED HS HANDBOOK, *supra* note 38, at 12 (describing the SHSAT test as comprising of verbal and math sections that students have two and half hours to complete). New York City has eight other specialized high schools, most notably Bronx High School of Science, and all these schools decide admissions based on SHSAT test score cutoffs and student preferences, except LaGuardia High School, which bases admission on an audition process. *Id.* at 10.

92. Kate Taylor, *Stuyvesant High School's Status Burnished by New Book*, N.Y. SUN, Sept. 17, 2007, at 3. Students hoping to get into Stuyvesant have expressed beliefs about the rewards of going to Stuyvesant: "It makes a difference in your life," "[Colleges will] think twice about rejecting me," and "[my brother can get] out from Washington Heights, and into a good neighborhood." Nossiter, *supra* note 47.

93. SPECIALIZED HS HANDBOOK, *supra* note 38; *see also* Stuyvesant High School, <http://www.stuy.edu/about/admissions.php> (last visited Sept. 13, 2009). For a more detailed description of the examination process, see JOSHUA FEINMAN, HIGH STAKES, BUT LOW VALIDITY? A CASE STUDY OF STANDARDIZED TESTS AND ADMISSIONS INTO NEW YORK CITY SPECIALIZED HIGH SCHOOLS 7–18 (2008), [http://epicpolicy.org/files/PB-Feinman-NYC-TEST\\_FINAL.pdf](http://epicpolicy.org/files/PB-Feinman-NYC-TEST_FINAL.pdf).

94. *See* Mazie, *supra* note 22, at 6. More than half of students admitted to Stuyvesant in 1997 had previously attended private school or a middle school in three out of thirty-one city districts. Lawrence Goodman, *HS Admissions Biased—Study Sez Many Denied Key Prep Course*, N.Y. DAILY NEWS, May 8, 1997, at 7. The five districts that sent the highest number of students to Stuyvesant were 45% black and Latino; the five districts that sent the lowest number of students were 97% black and Latino. *Id.*

95. The disturbances arose from a struggle for control between the Ocean Hill-Brownsville local administrator Rhody McCoy and the United Federation of Teachers president Albert Shanker, inciting racial unrest and one of the longest teacher strikes in New York City history. Jay Maeder, *Absolute Control: Ocean Hill-Brownsville, November–December 1968 Chapter 365 Part Three of Three*, N.Y.



demanded these schools open their doors to the public as community schools without selective admissions.<sup>96</sup> The school district would not heed that demand and instead agreed to an expansion of the Discovery Program, an affirmative-action program for disadvantaged students.<sup>97</sup> Then in January 1971, a local superintendent alleged that the admissions test was “culturally biased” and “screen[ed] out” black and Latino students.<sup>98</sup> He asked that the test be abolished and that the schools admit students based on recommendation.<sup>99</sup> In response to this demand, New York City school system’s Chancellor Harvey B. Scribner appointed a commission to study the admissions test, which spurred fears from specialized school supporters that the commission would “destroy the schools’ standards.”<sup>100</sup> For years, many had already feared that the city would close the schools altogether.<sup>101</sup>

In response to Scribner’s commission, a group of supporters of the specialized high schools formed a council and attracted the attention of two New York state legislators from the Bronx, Senator John Calandra

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DAILY NEWS, June 3, 2001, at 41 (quoting Mayor John Lindsay: “We have heard ugly words these past weeks. We have heard race against race, religion against religion. I hope this sorry hour will be over now. I hope we can return to a city where people believe in each other and trust each other.”).

96. Heather MacDonald, *How Gotham’s Elite High Schools Escaped the Leveller’s Ax*, CITY J., Spring 1999, at 68, 71. Joshua N. Feinman, a Stuyvesant graduate and an economist, engaged in a study in 2008 that challenged the validity of the Stuyvesant test (other elite schools maintain their tests are similar to New York City’s). The results “revive[] complaints from the 1960s, when civil rights groups charged that the tests were unfair to black and Puerto Rican children and should not be the only criterion determining access to the schools.” Javier C. Hernandez, *Racial Imbalance Persists at Elite Schools*, N.Y. TIMES, Nov. 8, 2008, at A23 (noting that Feinman’s daughter attends Bronx High School for Science, one of New York City’s elite public high schools). For the results of study, see FEINMAN, *supra* note 93.

97. ALEC KLEIN, *A CLASS APART: PRODIGIES, PRESSURE, AND PASSION INSIDE ONE OF AMERICA’S BEST HIGH SCHOOLS* 68 (2007). The Discovery Program was designed to grant admission to “disadvantaged” students who just missed the test score cutoff if they performed well in special summer classes. *Id.*

98. MacDonald, *supra* note 96, at 71.

99. *Id.*

100. Fred M. Hechinger, *High School: Challenge to the Concept of the Elite*, N.Y. TIMES, May 23, 1971, at E12. Many already felt that the Discovery Program had lowered expectations and therefore the quality of the schools. In 1971, the specialized schools admitted 3,484 students, with 352 Discovery students, producing an overall 25% nonwhite enrollment at a time when 51% of the city’s students were nonwhite. *Id.*

101. See, e.g., Martin Tolchin, *Call for Abolishing New York’s Four Specialized Elite Schools Stirs Dispute*, N.Y. TIMES, Jan. 16, 1964, at 91; *Students Urge Retention of Special High Schools*, N.Y. TIMES, Dec. 28, 1965, at 17; Leonard Buder, *Donovan Favors Special Schools*, N.Y. TIMES, Jan. 21, 1966, at 27; *Mayor Defends 4 Elite High Schools*, N.Y. TIMES, June 29, 1966, at 49. A 1974 Stuyvesant alumnus said the possibility of the school closing “loomed over” the students. For him, “losing Stuyvesant would have meant going to Brandeis High School . . . known variously as ‘the Drugstore’ and ‘the Gauntlet.’” He recalls, “I would’ve dropped out of high school rather than go [to Brandeis].” MacDonald, *supra* note 96, at 73.

and Assemblyman Burton Hecht.<sup>102</sup> In order to “protect the status and quality of the specialized schools,” these legislators introduced and passed the Hecht-Calandra Act (Act),<sup>103</sup> a piece of controversial legislation that created a rift in the New York State Assembly.<sup>104</sup> The Act mandated the use of competitive examinations as the only form of admission to the specialized schools and disavowed any sort of affirmative-action program for blacks and Latinos that interfered “with the academic level of [the] schools.”<sup>105</sup> To this day, the Hecht-Calandra Act insulates the exam-only admission policy that Stuyvesant currently uses and must be repealed by the New York State legislature before New York City can alter the way the school admits students.<sup>106</sup>

Although the underrepresentation of black and Latino students has been called “unacceptable,”<sup>107</sup> no New York City official has challenged the law since its enactment in 1971.<sup>108</sup> The New York City Department of

102. MacDonald, *supra* note 96, at 73. The bill was also co-sponsored by thirteen Senators and forty-one Assemblymen from New York City.

103. N.Y. EDUC. LAW § 2950(f) (1971) (originally passed under Chapter 1212 of the Laws of New York as an Act to amend the education law, in relation to the establishment and maintenance of special high schools in the city of New York). The Hecht-Calandra Bill said in pertinent part, “[a]dmissions to [the specialized high schools] and in such similar further special high schools which may established shall be solely and exclusively by taking a competitive, objective and scholastic achievement examination. . . .” *Id.*

104. See Francis X. Clines, *Assembly Votes High School Curb*, N.Y. TIMES, May 20, 1971, at 1.

105. William E. Farrell, *Legislature Retains Admission Tests for City’s Four Specialized High Schools*, N.Y. TIMES, May 26, 1971, at 52. The bill, as originally passed by the Assembly, established a 14% quota of disadvantaged student permitted to enter through the Discovery program. However, the Senate removed the quota before passing the Act into law. *Id.*

106. Telephone Interview with Robin Singer, Assoc. Counsel of the Gen. Practice Unit of the N.Y. Dep’t of Educ. (Jan. 5, 2009). In 1997, after a study presented research that black and Latino students did not have an equal opportunity to score well on the Stuyvesant admissions test, Chancellor Rudy Crew announced that “he had no plan to scrap the exam, mandated by state law.” Goodman, *supra* note 94. The current Stuyvesant principal, Stanley Teitel, who was at the time chairman of Stuyvesant’s Physics and Chemistry Department, expressed his support for exam-only admissions in 1971: “You can take us to court, you can yell and scream—given the bill, you can’t do anything! . . . I don’t care if your mommy or daddy knows the superintendent of the borough . . . I don’t want to know anything else—no portfolios, not any of the other crap. . . .” MacDonald, *supra* note 96, at 75.

107. Posting of Javier C. Hernandez to N.Y. Times City Room, <http://cityroom.blogs.nytimes.com/2009/02/06/gap-persists-in-test-for-specialized-high-schools> (Feb. 6, 2009, 15:20 EST). Also, New York City’s deputy mayor recently said, “I’m not ever happy when I see a low percentage of [black and Latino] students participating in schools that are high rigor. . . . It’s important for the halls of Stuyvesant, the halls of the Bronx High School of Science, to be reflective of the city itself.” Eddy Ramirez, *Elite Public High Schools in New York City Drawing Few Minorities*, U.S. NEWS & WORLD REP., Nov. 10, 2008, <http://www.usnews.com/blogs/on-education/2008/11/10/elite-public-high-schools-in-new-york-city-drawing-few-minorities.html>.

108. Recently, a spokesman of the NYC Department of Education Andrew Jacob stated, “[w]e absolutely want to see increases in the number of black and Hispanic students at the specialized high schools. But we don’t think the test is responsible for those groups being underrepresented.” Helen Zelon, *What Will It Take to Alter Makeup of Top Schools?*, CITY LIMITS WEEKLY, Apr. 6, 2009,

Education has attempted to bolster these numbers by supporting the Discovery Program and creating the Math and Science Institute, now called the Specialized High Schools Institute, to prepare black and Latino students to take the SHSAT.<sup>109</sup> However, these programs have achieved little success in increasing black and Latino enrollment, and the Department of Education discontinued the Discovery Program in the 1990s at Stuyvesant.<sup>110</sup> Additionally, the Institute's policy of granting preference to black and Latino students has been modified in response to a suit filed against the Department premised on the *PICS* decision.<sup>111</sup>

*B. Boston Latin: Quotas and Racial Balancing Not a Constitutional Means*

Admission to Boston Latin is “open primarily to students who intend to go to college and wish to prepare in the liberal arts tradition.”<sup>112</sup> New students may enter Boston Latin in seventh or ninth grade, and all prospective students must take the Independent School Entrance Exam (ISEE) administered by the Educational Records Bureau.<sup>113</sup> This exam is

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[http://www.citylimits.org/content/articles/viewarticle.cfm?article\\_id=3723](http://www.citylimits.org/content/articles/viewarticle.cfm?article_id=3723). This position that the SHSAT does not play a role in the disproportionately low numbers of black and Latino students has never been confirmed through a predictive validity study. See FEINMAN, *supra* note 96, at 2 (noting that “[t]he thousands of students who apply to these select high schools deserve a properly tested system of determining who gets access to these prestigious and potentially life-changing educational experiences”).

109. Maria Newman, *Cortines Has Plan to Coach Minorities Into Top Schools*, N.Y. TIMES, Mar. 18, 1995, at 1.

110. As academic quotas came “under fire” in the early part of the decade, the Discovery Program “quietly [took] a hiatus at Stuyvesant.” KLEIN, *supra* note 97, at 68.

111. With the help of the Center for Individual Rights, a conservative organization, three Chinese parents filed a complaint in 2007 against the Department of Education in light of the *PICS* decision, claiming that their children were unconstitutionally excluded from the Specialized High Schools Institute because the program gave preference to black and Latino students. Catherine Gewertz, *N.Y.C. Parents Allege Test Prep Excludes Students by Race*, EDUC. WK., Nov. 28, 2007, at 4; see generally *Ctr. for Individual Rights, Ng, et al. v. New York City Dept. of Education*, [http://www.cir-usa.org/cases/ng\\_v\\_nyc.html](http://www.cir-usa.org/cases/ng_v_nyc.html) (last visited Dec. 22, 2009). Although the Institute was “designed to boost enrollment of underrepresented groups,” Gewertz, *supra*, at 4, and Asian students are overrepresented at the specialized high schools, the Department of Education changed its policy without opposing the suit and no longer considers race in enrollment. Hernandez, *supra* note 96. For the terms of the settlement, see *Ng, et al. v. NYC Dept. of Educ., Stipulation of Settlement and Discontinuance*, 07-CV-4805 (Nov. 6, 2008), available at [http://www.cir-usa.org/legal\\_docs/ng\\_settle.pdf](http://www.cir-usa.org/legal_docs/ng_settle.pdf).

112. BOSTON LATIN HANDBOOK, *supra* note 53, at 4.

113. Boston Public Schools, <http://www.bostonpublicschools.org/node/19> (last visited on Sept. 16, 2009) (listing Boston's other two examination schools, Boston Latin Academy and John D. O'Bryant School of Mathematics and Science). Boston Latin's admission policy did not include an entrance exam until 1963. From 1963 until 1969, the school used a test created by the school department; in 1969, the school began administering the Secondary School Aptitude Test until 1994 when the

three hours long and tests verbal reasoning, quantitative reasoning, reading comprehension, mathematics achievement, and essay writing.<sup>114</sup> Admission to Boston Latin is then based on a composite score that combines a student's score on the ISEE and his or her grade point average.<sup>115</sup> Like at Stuyvesant, these composite scores are ranked and students from the top of the list are admitted according to the number of seats available. Through the use of this admission policy, black and Latino students represented only 16% of the student body in 2006, while at the same time these students represented 77% of the Boston school system's student population.<sup>116</sup> However, the percentage of black and Latino students at Boston Latin was not always so low.

In 1976, a court entered a remedial order that mandated Boston Latin to set aside 35% of its seats for black and Latino students.<sup>117</sup> The judge relinquished control over school assignments in 1987, but the Boston School Committee (BSC) chose to preserve the set-aside policy in 1989, "converting it into a voluntary affirmative action program."<sup>118</sup> Then in 1995, Michael McLaughlin, the father of a twelve-year-old white student who had been denied admission to Boston Latin, challenged the quota on behalf of his daughter in federal court as a violation of the Fourteenth Amendment.<sup>119</sup> The district court held that McLaughlin would likely succeed on the merits of the equal protection claim<sup>120</sup> and granted a

Independent School Entrance Exam took its place as the official admissions exam. *McLaughlin v. Boston Sch. Comm.*, 938 F. Supp. 1001, 1004 n.2 (D. Mass. 1996).

114. EDUCATIONAL RECORDS BUREAU, INDEPENDENT SCHOOL ENTRANCE EXAM 2009–2010 STUDENT GUIDE 2 (2009), <http://docs.erbtest.org/pdfs/ISEEStudentGuide2009-10.pdf>.

115. Grade point average is based on final grades in English and math from the previous school year (either fifth or seventh) and from the first two marking periods of the applicable application year (either sixth or eighth). Boston Latin School, <http://www.bls.org/podium/default.aspx?t=113645&rc=0> (follow "Is entrance based solely on test scores?" hyperlink) (last visited Sept. 16, 2009).

116. Jan, *supra* note 58.

117. Sara Rimer, *Challenge to Quota Roils School in Boston*, N.Y. TIMES, Sept. 25, 1995, at A8. In 1972, black Boston public school children and their parents filed a suit against BSC and others alleging that the city's school system violated the Thirteenth and Fourteenth Amendments. *Morgan v. Hennigan*, 379 F. Supp. 410, 414–15 (D. Mass. 1974). The district court concluded that local authorities "knowingly carried out a systematic program of segregation affecting all of the city's students, teachers and school facilities and have intentionally brought about and maintained a dual school system" and held that the Boston school system was unconstitutionally segregated. *Id.* at 482. The First Circuit affirmed the district court's findings in *Morgan v. Kerrigan*, 509 F.2d 580, 582 (1st Cir. 1974); see *McLaughlin*, 938 F. Supp. at 1003 (considering the constitutional challenge to Boston Latin's admission policy as an "offshoot" of the *Morgan* class action); *Wessmann v. Boston Sch. Comm.*, 996 F. Supp. 120, 122 (D. Mass. 1998) (describing the suit as "the latest chapter in a longer history of prior litigation" with the 1974 *Morgan* case as the "seminal case").

118. *McLaughlin*, 938 F. Supp. at 1003.

119. *Id.*

120. *Id.* at 1017.

preliminary injunction ordering Boston Latin to admit the girl to its upcoming eighth-grade class.<sup>121</sup> However, the lawsuit did not resolve the constitutionality of the Boston Latin quota; the court later dismissed the claim as moot because BSC had decided to permit McLaughlin's daughter to remain at Boston Latin and to adopt a new admission policy.<sup>122</sup>

BSC decided to revise the 35% set-aside policy<sup>123</sup> in "hopes of finding [an admission policy] that might prevent [the drop in minority enrollment] without offending the Constitution."<sup>124</sup> The new policy, instituted in the 1997–98 school year, reserved half of Boston Latin's seats for applicants with the highest combined standardized test score and grade point

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121. *Id.* at 1018.

122. *McLaughlin v. Boston Sch. Comm.*, 952 F. Supp. 33, 35 (D. Mass. 1996). Similarly, federal courts did not decide the constitutionality of a 1983 desegregation consent decree, which mandated a 40% ceiling on any racial or ethnic group at any San Francisco magnet school, because the school district agreed to modify its policies. See Bob Egelko, *Tentative Settlement on Racial Admissions Parent Protest: School Limits on Ethnic Groups Likely to Be Repealed*, SAN JOSE MERCURY NEWS, Feb. 17, 1999, at 3B. Chinese-American parents whose children had been denied admissions to Lowell High School, another elite public high school, challenged the constitutionality of the desegregation order in federal district court, an order that "curb[ed] Lowell's Chinese-American enrollment." *Id.* In the end, the suit settled, and accordingly, San Francisco no longer could assign students based on race or ethnicity but could only consider socioeconomic status. See *Ho v. San Francisco Unified Sch. Dist.*, 965 F. Supp. 1316, 1327 (N.D. Cal. 1997) (denying plaintiffs' motion for summary judgment); *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, 59 F. Supp. 2d 1021, 1039 (N.D. Cal. 1999) (approving settlement). In 2008, Lowell High School's student body was approximately 55% Asian, 14% White, 3% African American, and 7% Latino. *LOWELL HIGH SCHOOL, PROFILE 2007–2008 1* (2008), <http://www.sfusd.edu/schwww/sch697/about/profile/08Profile.pdf>. San Francisco Unified School District, where Lowell is located, serves a population of students that are approximately 33% Asian, 10% White, 13% African-American, and 23% Latino. San Francisco Unified School District, *Student Enrollment—1967–68 to 2008–09*, Jan. 31, 2009, [http://sfportal.sfusd.edu/sites/research\\_public/rpa\\_docs/Student%20Enrollment/SFUSD%20Enrollment%201967-2008F%20%2801-31-2009%29.pdf](http://sfportal.sfusd.edu/sites/research_public/rpa_docs/Student%20Enrollment/SFUSD%20Enrollment%201967-2008F%20%2801-31-2009%29.pdf).

123. In deciding to grant the preliminary injunction, however, the court noted that the quota was unlikely to pass constitutional muster. *McLaughlin*, 938 F. Supp. at 1016. The court also seemed to suggest that BSC revisit the admission policy by noting how it could do so: "In carrying out such a project [of developing less racially preferential means], broad community participation will be important and national school associations can furnish expert assistance . . . members of the Boston Compact and the Boston Plan will doubtless cooperate [and also work with the] resourceful BLS alumni association." *Id.* at 1018.

124. *Wessmann v. Gittens*, 160 F.3d 790, 793 (1st Cir. 1998). In crafting this new policy, BSC had its superintendent direct an internal study and it appointed a Task Force, which included civil rights leader and Harvard Law professor Charles Ogletree. *Wessmann v. Boston Sch. Comm.*, 996 F. Supp. 120, 123–24. The superintendent worked on the internal study with Bain & Company, who proposed that admissions could be based on one of five alternatives: composite score ranking, socioeconomic status, neighborhood residence, prior Boston public school attendance, and lottery. *Id.* at 123. However, the Task Force requested that Bain & Company create an option that combined composite score ranking and flexible racial/ethnic guidelines. *Id.* at 124. After deliberation by the BSC, a policy was adopted with the philosophy that admission to Boston Latin "be based on standards of academic excellence, access, fairness and a respect for diversity and difference." *Id.* at 125.

average.<sup>125</sup> BSC awarded the other half of the seats according to a combination of performance scores and “flexible racial/ethnic guidelines” that required the seats be allocated in proportion to the racial and ethnic composition of the remaining applicant pool,<sup>126</sup> with the percentage of black and Latinos admitted varying from year to year. By the next year, Sarah Wessmann, another white student who had been denied admission to Boston Latin, filed suit against BSC challenging its constitutionality.<sup>127</sup> The district court upheld the policy, finding that BSC’s interest in promoting a diverse student body was compelling and that the means were narrowly tailored to that interest.<sup>128</sup> On appeal, however, in *Wessmann v. Gittens*, the First Circuit Court of Appeals found that the “concept of ‘diversity’ implemented by [Boston Latin did] not justify a race-based classification” and held the admission policy to be unconstitutional.<sup>129</sup>

The court noted that in order for diversity to serve as a compelling interest, the Supreme Court’s decision in *Regents of the University of California v. Bakke*<sup>130</sup> required diversity to “encompass[] a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.”<sup>131</sup> Because the plan focused

125. Mark Walsh, *Court Blocks Race-Based School Policy*, EDUC. WK., Nov. 25, 1998, at 1.

126. *Wessmann*, 996 F. Supp. at 126. With this admission policy, Boston Latin did not maintain 35% minority enrollment and by the 1998–1999 school year, black and Latino students represented 27% of the student body. Maria Sacchetti, *Minority Numbers Plunge at Latin, Concerns Raised About Recruiting*, BOSTON GLOBE, Aug. 23, 2005, at A1.

127. *Wessmann*, 996 F. Supp. at 121. Boston Latin had only ninety seats for the 1997–98 school year; Sarah Wessmann ranked ninety-first and was denied admission even though she scored higher on the entrance exam than eight minority students who received admission to Boston Latin. Walsh, *supra* note 125. Michael McLaughlin, who had represented his daughter in the 1995 suit against the BSC, also represented Sarah Wessmann in the 1998 suit. *Id.*

128. *Wessmann*, 996 F. Supp. at 128 (“[D]iversity in the classroom is the most effective of all weapons in challenging stereotypical preconceptions. When studying side by side . . . students grow to understand and respect the differences among them as they share life in a complex, pluralistic society.”). As the admission policy racially classified students, the court engaged in strict scrutiny review of the policy; to survive strict scrutiny a classification must serve a compelling governmental interest and be narrowly tailored to achieve that interest. *Id.* at 127 (citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224–25 (1995)).

129. *Gittens*, 160 F.3d at 800. During the trial, BSC had attempted to “give substance to the word [diversity]” by providing testimony of the benefits of diversity in a society that is “racially and ethnically heterogeneous” where “the modern learning experience” requires diversity to teach students to “converse with and persuade those who do not share their outlook” because modern technology “forces heretofore estranged nations and cultures to communicate and cooperate.” *Id.* at 797. However, the First Circuit described this justification for diversity as an “abstraction.” *Id.* (“If one is to limit consideration to generalities, any proponent of any notion of diversity could recite a similar litany of virtues. Hence, an inquiring court cannot content itself with abstractions.”). Thus, the court stated it had to look beyond the theoretical benefits of diversity to decide whether the plan bore relation to the “noble ends it espouses.” *Id.* at 798.

130. 438 U.S. 265 (1978).

131. *Gittens*, 160 F.3d at 798 (quoting *Bakke*, 438 U.S. at 315). The *Bakke* Court held that

exclusively on racial and ethnic diversity, the court viewed the purpose of the plan to be racial balancing that considered individuals as part of a larger racial group, “a practice that the Court consistently has denounced as impermissible stereotyping.”<sup>132</sup> Thus, the First Circuit concluded that the plan was unconstitutional because, “at a certain point, it effectively foreclose[d] some candidates from all consideration for a seat at an examination school simply because of the racial or ethnic category in which they fall.”<sup>133</sup>

Since the *Gittens* decision in 1998,<sup>134</sup> Boston Latin has not again attempted to utilize race as a factor in its admission policy and, as described above, today the school considers only standardized test scores and grade point average in admitting students. The current admission

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admission policies could not benefit certain minority groups because the school viewed them as “victims of societal discrimination”; according to the Court, such policies impose “disadvantages upon [white] persons . . . who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered.” *Bakke*, 438 U.S. at 310. The First Circuit had an opportunity in *Gittens* to follow its sister circuit’s decision in *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), in which the Fifth Circuit had “pronounced [*Bakke*] dead,” *Gittens*, 160 F.3d at 796, and held the University of Texas School of Law’s admission policy unconstitutional because “the use of race to achieve a diverse student body . . . cannot be a state interest compelling enough to meet the steep standard of strict scrutiny.” *Hopwood*, 78 F.3d at 948, *abrogated by* *Grutter v. Bollinger*, 539 U.S. 306. However, the First Circuit stated it was “not prepared to make such a declaration in the absence of a clear signal [from the Supreme Court] that [it] should,” and asserted that “some iterations of ‘diversity’ might be sufficiently compelling, in specific circumstances, to justify race-conscious actions.” *Gittens*, 160 F.3d at 796.

132. *Gittens*, 160 F.3d at 799.

133. *Id.* at 800. Furthermore, the court found that Boston Latin’s admission policy was not narrowly tailored as it failed to demonstrate that racially neutral alternatives would not similarly promote an exchange of ideas or a significant increase in the percentages of minority representation. *Id.* at 799–800. After this blow:

[t]he [BSC] voted unanimously on February 3, 1999, to not ask the U.S. Supreme Court to decide on its Latin School assignment procedure in an appeal from the First Circuit decision . . . [in order to avoid] the making of bad law by a court known to be hostile toward affirmative action policies in general.

Robert A. Dentler, *Special Report: A Critical Review of Wessmann v. Gittens*, *The U.S. First Circuit Court of Appeals Decision in the Boston Latin School Admissions Case*, 32 EQUITY & EXCELLENCE EDUC. 5, 16–17 (1999).

134. Although the *Gittens* court held that diversity articulated by BSC was not a compelling interest, seven years later the First Circuit found a racial assignment plan similar to Boston Latin’s to be constitutional; the court interpreted *Grutter* as a change in legal jurisprudence and held racial diversity to be a compelling governmental interest in primary and secondary education. *Comfort v. Lynn Sch. Comm.*, 418 F.3d 1, 13 (1st Cir. 2005) (upholding a school assignment plan that utilized race as a means for assigning students because the Supreme Court in *Grutter* had “answered [whether diversity could constitute a compelling interest in the educational context] in the affirmative”). That case has since been abrogated by the Supreme Court in *PICS*, but BSC had four years in between *Grutter* and *PICS* in which to reenergize its effort to utilize race as a means to increase its student body and did not do so.

policy has produced a severe drop in black and Latino student enrollment,<sup>135</sup> once at 35% and now only at 16%.<sup>136</sup>

*C. Thomas Jefferson: Limited Attempts Reap Limited Gains*

Since Thomas Jefferson opened in 1985, Fairfax County Public Schools (FCPS) has advocated for an admission policy that includes “considerations relative to achieving an appropriate representative student population in regard to racial/ethnic and sex distributions.”<sup>137</sup> Like other elite public high schools, applicants must take a standardized test, the Thomas Jefferson Admissions Test, which includes a two-hour multiple-choice portion and an hour of essay writing.<sup>138</sup> Unlike the other schools, however, Thomas Jefferson has a two-tiered admission policy. First, a pool of semifinalists is determined by considering exam scores and grade point average on a sliding scale.<sup>139</sup> Semifinalists then complete a packet, similar to that of a college application,<sup>140</sup> that a selection committee evaluates “holistically,” as “no one component of the application packet carries any greater weight than any other.”<sup>141</sup> The admissions committee

135. Sacchetti, *supra* note 126 (reporting that between 1999 and 2005 the black enrollment dropped by more than 42% and Latino enrollment by 32% at Boston Latin).

136. Jan, *supra* note 58. Interestingly, the data in 1996 had accurately predicted the decline in black and Latino student representation at Boston Latin without the 35% quota; the data showed the representation would fall to approximately 12–17% in any given year. *McLaughlin v. Boston Sch. Comm.*, 938 F. Supp. 1001, 1008 (D. Mass. 1996) (showing a table representing the percentage of blacks and Hispanics in Boston Public Schools and the percentage of blacks and Hispanics in Boston Latin without the quota for school years from 1987 until 1996).

137. PAMELA VARLEY, *VALUES IN CONFLICT: THE FUROR OVER ADMISSION POLICY AT A POPULAR VIRGINIA MAGNET SCHOOL 8* (2006) (John F. Kennedy School of Government Case Program).

138. Thomas Jefferson, <http://www.tjhsst.edu/abouttj/admissions/testing-freshman.php> (last visited Sept. 16, 2009). Analysis of the exam by FCPS indicated that the “[test] is similar in format . . . and content . . . to admissions tests used by other selective high schools such as . . . Stuyvesant High School.” FCPS OFFICE OF PROGRAM EVALUATION, *REPORT ON SUPPLY AND DEMAND AT TJHSST: RESPONSES TO THE BLUE RIBBON COMMISSION RECOMMENDATIONS* (2006), [http://www.boarddocs.com/vsba/fairfax/archive.nsf/ecabb7e97b0992ab85256e56000c1bea/e3098a5ed1610e4b852570900069d2d1/\\$FILE/TJHSST%20Supply-Demand--Respons%20to%20BRC%20Recomm--2-13-06.pdf](http://www.boarddocs.com/vsba/fairfax/archive.nsf/ecabb7e97b0992ab85256e56000c1bea/e3098a5ed1610e4b852570900069d2d1/$FILE/TJHSST%20Supply-Demand--Respons%20to%20BRC%20Recomm--2-13-06.pdf) [hereinafter FCPS REPORT].

139. TJHSST, *REGULATION 3355.9* (2007), [http://www.boarddocs.com/vsba/fairfax/Board.nsf/0/97ecc9782e4eaa9185256fd30058e5c9/\\$FILE/R3355.pdf](http://www.boarddocs.com/vsba/fairfax/Board.nsf/0/97ecc9782e4eaa9185256fd30058e5c9/$FILE/R3355.pdf) [hereinafter *REGULATION 3355.9*]. The combination of an applicant’s exam score and grade point average must reach a minimum standard. For example, an applicant with a GPA of 2.67 must score 90% or higher on the exam to be considered as a semifinalist while another applicant with an exam score of 60% must have a GPA of at least 3.67. *Id.*

140. The semifinalist packet includes the application form, a student information and data sheet, three letters of recommendation, and two essay questions administered at the time of the standardized test. *Id.* at 4.

141. TJHSST ADMISSIONS OFFICE, *CLASS OF 2012 ADMISSIONS SUGGESTIONS AND HELPFUL*



considers all the materials in the semifinalist's packet "as part of an individualized and holistic review, designed to identify a talented, committed, and diverse student body consistent with the school's mission."<sup>142</sup> This admission policy, however, has produced an incoming class in 2009 of 485 students, comprised of 54% Asian students but only eight black and six Latino students.<sup>143</sup>

Before Thomas Jefferson opened its doors in 1985, a debate over how to select the brightest students ensued. Some called for "the time-honored" and "objective" system of grades and standardized test scores and others opposed the use of standardized test scores on the grounds that minority students would "be excluded by this approach."<sup>144</sup> The final decision was to utilize a two-tiered admissions process similar to the current policy: first, the district would select the top 800 students based on a combination of standardized test score and grades, providing that the weight of the decision be 80% test scores and 20% grades; second, a committee would consider these top 800 students through individualized review.<sup>145</sup> By 1989, however, the admission process failed to admit a representative student body—95.3% of the incoming class was white or Asian while the percentage of black and Latino students in Fairfax County was 15%.<sup>146</sup>

In 1989, to deal with this failure, FCPS implemented a "quiet" affirmative-action plan at Thomas Jefferson.<sup>147</sup> Black and Latino students that did not qualify as one of the top 800 students in the first tier of the admissions process would get a "second look" from the admissions committee in an effort to find "indications of academic promise not captured by the applicant's grades or test scores."<sup>148</sup> The new admission policy garnered an increase of black and Latino students from a range of

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HINTS FOR SEMIFINALISTS 12 (2008), [http://information.tjhsst.edu/admissions/DOCS/SugN\\_hnt.pdf](http://information.tjhsst.edu/admissions/DOCS/SugN_hnt.pdf) (document given to students who become semifinalists). Admissions is based on four criteria: (a) "aptitude for successful study of science, mathematics, computer science, and related technological fields;" (b) "record of prior academic achievement;" (c) "interest and motivation in the study of science, mathematics, computer science, and related technological fields;" and (d) "background, skills, or experiences that promote the School Board's goal of providing diversity in the student body to enhance a unique learning experience and to develop future leaders." *Id.*

142. REGULATION 3355.9, *supra* note 139, at 4.

143. Leah Fabel, *Black, Hispanic Students Disappearing From TJ*, WASH. EXAMINER, Sept. 14, 2009, [http://www.washingtonexaminer.com/local/Black\\_-Hispanic-students-disappearing-from-TJ-8237726-59176222.html](http://www.washingtonexaminer.com/local/Black_-Hispanic-students-disappearing-from-TJ-8237726-59176222.html).

144. VARLEY, *supra* note 137, at 9.

145. *Id.*

146. *Id.* at 10.

147. *Id.*

148. *Id.* At the same time, Fairfax County started a two-year enrichment program for black and Latino students called "Visions" that included test preparation for the Thomas Jefferson Admissions Test. *Id.*

3.9% to 4.7% between 1985 and 1989 to a range of 8.5% to 12.3% between 1991 and 1998. Despite the increase, these numbers were still disproportionately low, as black and Latino students represented 21% of the county's population in 1998.<sup>149</sup>

However, as Thomas Jefferson became more popular and spots at the school more coveted,<sup>150</sup> parents of several white students who had applied to Thomas Jefferson and had been rejected threatened to file suit to challenge the affirmative-action program in 1997.<sup>151</sup> In the face of the threat and “the court challenges of affirmative action in California and Texas, lawyers [for FCPS] got cold feet. They told the school to stop it. So the affirmative action that had started quietly stopped quietly.”<sup>152</sup> To replace the admission policy, now sans the affirmative action component, the superintendent proposed a geographic diversity plan to increase the number of black and Latino students at Thomas Jefferson; however, that plan was “pronounced dead” by the school board due to passionate opposition,<sup>153</sup> controversial exchanges,<sup>154</sup> and a lack of support.<sup>155</sup>

149. *Id.* at 11.

150. *See supra* notes 73–74 and accompanying text.

151. VARLEY, *supra* note 137, at 12. In addition, shortly before this threat, a federal district judge had struck down as unconstitutional a program in a neighboring county that gave more weight to low-income students and racial minorities. *Id.*

152. Adelman, *supra* note 80. The Visions program for black and Latino students was canceled simultaneously with the affirmative action program. VARLEY, *supra* note 137, at 13.

153. Those parents who opposed the plan felt that the use of standardized test scores as the primary consideration in the first tier of the admissions process was the “fairest to individual students” and, if Thomas Jefferson accepted “less gifted students” the school would “be forced to water down its offerings so as not to leave these students behind.” VARLEY, *supra* note 137, at 18. The Fairfax County School Board confronted similar opposition in 2002 when it implemented a three-week test preparation program designed for eighth graders from middle schools who sent disproportionately low numbers of students to Thomas Jefferson. *Id.* at 19. However, parents with children at middle schools that did not qualify for the program protested and Board, again in the heat of political pressure, opened up the program to all eighth graders. *Id.* The result—more than half of the students that participated in the program came from higher-income middle schools. *Id.* Students complained that the test preparation program was “too easy.” One parent responded to that comment by saying, “Well, of course it was ‘too easy!’ . . . It wasn’t designed for you. You are already prepared for the test. But God forbid that we level the playing field.” *Id.*

154. Law school professor Lloyd Cohen, whose son had been rejected by Thomas Jefferson, asserted that the admission policy discriminated against white students by “admitting the largest number of black students available.” S. Mitra Kalita, *Charge of Biased Admissions Stirs School*, WASH. POST, Apr. 2, 2003, at B2. Cohen collected data on applicants’ test scores through the Freedom of Information Act and conducted a statistical analysis to support his assertion. *Id.* For the full exchange between Lloyd Cohen and former superintendent of Fairfax County Public Schools, Daniel Domenech, see Lloyd Cohen, *A Study of Invidious Racial Discrimination in Admissions at Thomas Jefferson High School for Science and Technology: Monty Python and Franz Kafka Meet a Probit Regression*, 66 ALB. L. REV. 447 (2003); Lloyd Cohen, Commentary, *Straw Men, Fibs, and Other Academic Sins*, 67 ALB. L. REV. 285 (2003). Daniel A. Domenech, Commentary, *Metamorphosis: From Statistics into Cockroaches, A Response to Professor Cohen’s A Study of Invidious Racial*

Concerned with the dropping numbers of black and Latino students,<sup>156</sup> FCPS created a Blue Ribbon Commission in 2004, comprised of educators from across the country with expertise in selective admissions at the high school and high educational levels.<sup>157</sup> The Commission reported some critical findings<sup>158</sup> and recommended that Thomas Jefferson eliminate the first tier of its admissions process that utilized test score cutoffs and, instead, consider every applicant holistically on the basis of the entire student admissions packet.<sup>159</sup> The Commission also requested a total budget of \$186,500 to implement its recommendations for the selection process, to conduct public relations and outreach, and to continue its evaluation of the admissions process.<sup>160</sup> The school board dismissed the recommendation as “cost prohibitive”<sup>161</sup> and instead implemented the admission policy that Thomas Jefferson currently uses today.<sup>162</sup> Regrettably, even with the holistic review in the second tier of the process, the Sliding Scale process selects semifinalist pools that weighed test scores as 80% in the first tier, “quite similar” to the admissions process

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Discrimination in Admissions at Thomas Jefferson High School for Science and Technology: Monty Python and Franz Kafka Meet a Probit Regression, 67 ALB. L. REV. 279 (2003).

155. VARLEY, *supra* note 137, at 17. Varley notes that the lack of support for the plan might have been that minority parents had more pressing concerns, such as the improvement of neighborhood schools, and that groups that normally support such initiatives for black and Latino students believed that the students affected—the brightest black and Latino students—would be fine whichever school they attended. *Id.*

156. Thomas Jefferson admitted only nine black and Latino students in 2001; it had admitted close to fifty in 1994. Chandler, *supra* note 74. One student recounts that on his first day of school he “attended his first six classes without seeing another black face. It wasn’t until the last period of the day that he discovered another black freshman. The only other black freshman.” Catherine Gewertz, *Affirmative ReAction*, EDUC. WK., Feb. 6, 2002, at 26.

157. Fairfax County School Board, *Minutes, Regular Meeting No. 10*, at 13 (Dec. 18, 2003), <http://www.fcps.edu/schlbld/minutes/20031218R.pdf> (resolving to review Thomas Jefferson’s admission policy and appoint a Blue Ribbon Commission).

158. PAMELA VARLEY, *VALUES IN CONFLICT: THE FUROR OVER ADMISSION POLICY AT A POPULAR VIRGINIA MAGNET SCHOOL SEQUEL 2* (2006) [hereinafter VARLEY, SEQUEL] (John F. Kennedy School of Government Case Program). The Commission stated that the Thomas Jefferson admission policy was “significantly inferior to that of most highly selective high schools and post-secondary institutions that have maintained high academic standards while achieving substantially more inclusive student populations.” *Id.* The Commission also noted that the admissions process relied “too heavily on standardized exam results.” Fairfax County School Board, *Minutes, Regulation Meeting No. 3*, at 4 (Sept. 9, 2004), <http://www.fcps.edu/schlbld/minutes/20040909R.pdf>.

159. VARLEY, SEQUEL, *supra* note 158, at 3.

160. Memorandum from Brad Draeger on Staff Action Plans for Recommendations of the Blue Ribbon Commission on Admissions at TJHSST to Fairfax County School Board 4 (June 30, 2004), [http://www.boarddocs.com/vsba/fairfax/archive.nsf/ecabb7e97b0992ab85256e56000c1bea/930ab8fc2711a40485256ec90057d635/\\$FILE/TJHSST.pdf](http://www.boarddocs.com/vsba/fairfax/archive.nsf/ecabb7e97b0992ab85256e56000c1bea/930ab8fc2711a40485256ec90057d635/$FILE/TJHSST.pdf).

161. VARLEY, SEQUEL, *supra* note 158, at 3.

162. See *supra* notes 138–42 and accompanying text.

used in 1985.<sup>163</sup> By relying so heavily on standardized test scores in the first tier, Thomas Jefferson's admission policy has not surprisingly failed to achieve a racially "appropriate representative student population."<sup>164</sup>

Thus, because of legislative and court decisions, political pressure or the action or inaction of local officials, the admission policies at each of these elite public high schools now rely heavily on standardized test scores, and the number of black and Latino students has dropped significantly over the past twenty years. Boston Latin and Thomas Jefferson's histories indicate that using race as a means for admission can lead to the threat of or actual legal challenges, but these potential liabilities should not outweigh the responsibility of local officials to design admission policies that serve to increase the number of black and Latino students at their elite public high schools. Although numerous school plans have been struck down as impermissibly using race to assign students, two Supreme Court decisions, *Grutter* and *PICS*, have left the door open for elite public high schools to craft constitutional admission policies that retain the use of exam scores and consider race as a means for admission.

#### IV. CONSTITUTIONALLY USING RACE AS A MEANS IN ADMISSIONS

In 2003, the Supreme Court upheld the constitutionality of the University of Michigan Law School's admission policy. School districts across the country believed that this decision would support broad efforts at integration, including the use of race-conscious student assignment plans.<sup>165</sup> Then, in 2007, the *PICS* Court limited how school districts can utilize race as a means in achieving a diverse student body in the context of primary and secondary education. Importantly, Justice Kennedy's opinion did not foreclose using race as a direct means in student admissions, suggesting that *Grutter* may "have some application" to school plans that engaged in individualized review.<sup>166</sup> For elite public high

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163. FCPS REPORT, *supra* note 138, at 7 (noting, however, a slight increase in Hispanic and Asian students). The first year the new policy was implemented nineteen Latino students were admitted out of 495 spots compared to ten the year before out of 450 spots; twelve black students were admitted compared to eleven the year before. One school board member expressed, "[t]he board did not expect to see a great shift." Maria Glod, *Update: After Policy Change, Thomas Jefferson High Makes Small Gains in Student Diversity*, WASH. POST, Feb. 26, 2006, at C2.

164. VARLEY, *supra* note 137 and accompanying text; *see also* Fabel, *supra* note 143 and accompanying text.

165. *See supra* notes 17–18.

166. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 793 (2007). A federal court has already held that *Grutter* should apply to gifted public schools. *Hart v. Cmty. Sch. Bd. of Brooklyn*, 536 F. Supp. 2d 274, 283 (E.D.N.Y. 2008) ("The same considerations that permit race as one factor among many that may be considered in college and graduate schools under *Grutter*

schools with selective admissions, *Grutter* serves as a guide for crafting constitutional admission policies.

### A. *Grutter in the Context of Higher Education*

In 1992, a faculty committee at University of Michigan Law School created a written admission policy to achieve “a mix of students with varying backgrounds and experiences who will respect and learn from each other.”<sup>167</sup> Although the school affirmed a commitment to racial and ethnic diversity, the policy did not define diversity “solely in terms of racial and ethnic status,”<sup>168</sup> but it did use race as a consideration in admitting students. The school implemented this admission policy for five years before a white woman, Barbara Grutter, sued University of Michigan Law School, alleging that her Fourteenth Amendment rights were violated because the policy used race as a “‘predominant’ factor.”<sup>169</sup> In addressing this challenge, the Supreme Court upheld the policy as a narrowly tailored means to serve a compelling governmental interest.<sup>170</sup>

The Court first affirmed its decision twenty-five years earlier in *Bakke*<sup>171</sup>—that “the attainment of a diverse student body” could serve as a compelling interest because the “‘nation’s future depends upon leaders trained through wide exposure’ to the ideas and mores of students as diverse as this Nation of many peoples.”<sup>172</sup> In its rationale for holding diversity to be a compelling interest, the Court recognized the academic freedom of a university to select its students, a right grounded in the First Amendment, and noted that this freedom required the Court to grant a degree of deference to the school’s decisions.<sup>173</sup> The Court also accepted the benefits of diversity presented by both the law school and its amici.<sup>174</sup>

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and *Bakke* should be applied to grade schools where characteristics for future success or failure are imprinted on students.”). The school at issue was a talented and gifted elementary school in Brooklyn, New York that produced high academic results.

167. *Grutter v. Bollinger*, 539 U.S. 306, 314 (2003).

168. *Id.* at 316.

169. *Id.* at 317.

170. *Id.* at 329.

171. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 311 (1978).

172. *Grutter*, 539 U.S. at 324.

173. *Id.*

174. *Id.* at 330–33. The district court emphasized that with diversity, “classroom discussion is livelier, more spirited, and simply more enlightening and interesting.” *Id.* at 330. Educational experts testified that diversity “promotes learning outcomes, and better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.” *Id.* Businesses weighed in and stressed that skills needed in the workplace can “only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.” *Id.*

In addition to the benefits of diversity, the Court recognized access to educational opportunity as essential to “the dream of one Nation, indivisible.”<sup>175</sup> It noted that “education . . . is the very foundation of good citizenship<sup>176</sup> . . . [and] [f]or this reason, the diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity.”<sup>177</sup>

To satisfy narrow tailoring,<sup>178</sup> the Court instructed that race could be considered in admissions only as a “‘plus’ in a particular applicant’s file,”<sup>179</sup> but could not be used to establish quotas<sup>180</sup> or different standards for applicants of different races.<sup>181</sup> The Court emphasized that giving race greater weight than other factors did not constitute a quota.<sup>182</sup> However, an admission policy must provide for individual review of each individual applicant; the Court noted that the “importance of this individualized consideration in the context of a race-conscious admissions program is paramount.”<sup>183</sup> Furthermore, narrow tailoring did not require an

175. *Id.* at 332.

176. *Id.* at 331 (quoting *Brown v. Board of Education*, 347 U.S. 483, 493 (1954)).

177. *Grutter*, 539 U.S. at 331. The Court continued by stating that universities, specifically law schools, exist as “the training ground for a large number of our Nation’s leaders,” observing that individuals with law degrees earn a resounding number of seats as governors, senators, representatives, and judges. *Id.* at 332.

178. *Id.* at 333 (defining “narrow tailoring” as requiring “[t]he means chosen to accomplish the [government’s] asserted purpose . . . be specifically and narrowly framed to accomplish that purpose”) (quoting *Shaw v. Hunt*, 517 U.S. 899, 908 (1996)).

179. *Grutter*, 539 U.S. at 334 (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 317 (1978)). The Court in *Bakke* established the reason why race could be used as a “plus” but not as the sole factor:

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 the seat simply because he was not the right color or had the wrong surname. It would mean only that his combined qualifications . . . 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.

*Bakke*, 438 U.S. at 318.

180. *Grutter*, 539 U.S. at 334; see *Bakke*, 438 U.S. at 307 (“If petitioner’s purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial but as facially invalid.”).

181. *Grutter*, 539 U.S. at 334; see *Gratz v. Bollinger*, 539 U.S. 244 (2003) (striking down an undergraduate admission policy for granting a twenty-point bonus to African-American, Hispanic, and Native American students); see also *Bakke*, 438 U.S. at 274–75 (holding unconstitutional a graduate school admission policy that employed a “special admissions committee” for self-identified members of a “minority group” to admit a prescribed number of “special applicants”).

182. *Grutter*, 539 U.S. at 335. The Court in *Bakke* noted that admission policies must be flexible enough to consider all “pertinent elements of diversity,” and to “place them on the same footing for consideration,” but not need to accord them the same weight. *Bakke*, 438 U.S. at 317. “Indeed, the weight attributed to a particular quality may vary from year to year depending on the ‘mix’ both of the student body and the applicants for the incoming class.” *Id.* at 317–18.

183. *Grutter*, 539 U.S. at 337.

exhaustion of all race-neutral alternatives, but rather required a “serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks”<sup>184</sup> and a durational limit to the use of race in admissions.<sup>185</sup> Thus, in upholding the Michigan Law School’s policy, the Court detailed the framework for an admission policy that would satisfy the Fourteenth Amendment in the context of higher education.

### *B. Grutter in the Context of Primary and Secondary Education*

On June 28, 2007, the Supreme Court, in a 4–1–4 decision,<sup>186</sup> struck down student assignment plans in Washington, Kentucky, and Massachusetts as violations of the Fourteenth Amendment.<sup>187</sup> The plurality<sup>188</sup> held that the plans failed both requirements of strict scrutiny: diversity did not serve as a compelling governmental interest in primary and secondary education, and the plans were not narrowly tailored.<sup>189</sup> The dissent,<sup>190</sup> on the other hand, argued that diversity was a compelling governmental interest and that the schools’ student assignment plans were constitutionally utilizing race as a means to achieve integration.<sup>191</sup> Justice Kennedy, however, authored the controlling opinion<sup>192</sup> and while he joined the plurality in striking down the plans for failing to be narrowly tailored,

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184. *Id.* at 339 (noting that alternatives for the law school—a lottery system, decreasing the emphasis on test scores and grades, or a percentage plan—would sacrifice diversity and academic quality and prevent individualized review).

185. *Id.* The Court set a twenty-five-year limit, set to expire in 2028.

186. The legal community was surprised that the Court granted certiorari because the First, Sixth, and Ninth Circuit Courts of Appeals had all upheld race-conscious assignment plans for similar reasons and therefore no circuit split existed. Furthermore, six months prior to the grant of certiorari in *PICS*, the Court had denied certiorari in the Massachusetts case, *Comfort v. Lynn Schools*, 418 F.3d 1 (1st Cir. 2005). A potential reason for this change of heart: Justice O’Connor, the deciding vote in *Grutter*, stepped down from the Court and was replaced by Justice Alito. As Berkeley Professor Goodwin Liu predicted after the Court granted certiorari, “[i]t’s bad news for desegregation advocates . . . It looks like the more conservative justices see they have a fifth vote to reverse these cases.” Charles Lane, *Justices to Hear Cases of Race-Conscious School Placements*, WASH. POST, June 6, 2006, at A3.

187. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007). *PICS* was the first time the Court addressed diversity as a compelling governmental interest since *Grutter*. Lane, *supra* note 186.

188. The plurality consisted of Chief Justice Roberts, who delivered the opinion of the Court, Justice Scalia, Justice Thomas, and Justice Alito.

189. *Parents Involved*, 551 U.S. at 747.

190. Justice Breyer, Justice Stevens, Justice Ginsberg, and Justice Souter dissented.

191. *Parents Involved*, 551 U.S. at 803 (Breyer, J., dissenting).

192. *See supra* note 20. One author states that Justice Kennedy’s opinion is “now pored over like an arcane treasure map.” Martha Minow, *After Brown: What Would Martin Luther King Say?*, 12 LEWIS & CLARK L. REV. 599, 643 (2008).

he came down on the side of the dissent that diversity was a compelling governmental interest in the context of primary and secondary education.<sup>193</sup>

The plurality and Kennedy not only diverged on whether diversity served as a compelling governmental interest in primary and secondary education, but also disagreed on the applicability of *Grutter* outside the context of higher education. The plurality shallowly distinguished *Grutter* from *PICS* by stating that the *Grutter* Court had “relied upon considerations unique to institutions of higher education, [and] explained that ‘[c]ontext matters’ in applying strict scrutiny, and repeatedly noted that it was addressing the use of race ‘in the context of higher education.’”<sup>194</sup> Because of “context” and without any further discussion, the plurality declared, “[t]he present cases are not governed by *Grutter*.”<sup>195</sup> However, although the *Grutter* court had indeed considered the special context of higher education as one factor in its rationale for upholding the Michigan Law School admission policy,<sup>196</sup> Justice Kennedy saw a direct relationship between *Grutter* and the context of primary and secondary education.<sup>197</sup> He reasoned that, had the Seattle and Louisville plans considered students “for a whole range of their talents and school needs with race as just one consideration, *Grutter* would have some application.”<sup>198</sup> Therefore, unlike the plurality, Justice Kennedy did not foreclose secondary schools’ use of race as a means to assign and admit students to a particular school. Rather, his opinion suggests that a school admission policy meeting *Grutter*’s strict scrutiny standards on school policies or plans would withstand

193. *Parents Involved*, 551 U.S. at 787–88 (Kennedy, J., concurring in part). Justice Kennedy responded strongly to the plurality’s dismissal of the government interest in diversity, stating, “The plurality’s postulate that ‘[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race is not sufficient to decide these cases. Fifty years of experience since *Brown v. Board of Education*, should teach us that the problem before us defies so easy a solution.” *Id.* at 788 (internal citations omitted). He went further to voice his disagreement, “[t]o the extent the plurality opinion suggests the Constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools, it is, in my view, profoundly mistaken.” *Id.*

194. *Parents Involved*, 551 U.S. at 724–25.

195. *Id.* at 725.

196. *Grutter*, 539 U.S. at 324.

197. Besides the academic freedom afforded to institutions of higher education, *see supra* note 173 and accompanying text, the Court’s rationale in *Grutter* for upholding a diverse student body as a compelling governmental interest in higher education, *see supra* notes 172, 174–77 and accompanying text, apply equally to primary and secondary education. “If schools no longer are expected to pursue racial integration, other institutions will need to carry the task of achieving civil equality. But it is hard to imagine any other institutions as well situated for this task.” Minow, *supra* note 192, at 642.

198. *Parents Involved*, 551 U.S. at 793 (Kennedy, J., concurring in part).



constitutional review. Thus, elite public high schools should consider the mandates outlined in *Grutter* when crafting admission policies.<sup>199</sup>

#### V. MAKING SELECTIVE ELITE PUBLIC HIGH SCHOOLS' ADMISSION POLICIES EFFECTIVE AND CONSTITUTIONAL

Schools with selective admissions may remain the only primary and secondary entities that can directly utilize race as a means for integration. Standardized testing cannot remain the main criteria in admissions to elite public high schools when this approach has proven to be an inadequate measure of merit and admits black and Latino students at disproportionately low rates. School districts must modify their admission policies or continue to send an unfortunate negative message to black and Latino students that they are not the best, brightest, or deserving of the best educational opportunities in their districts.<sup>200</sup>

Stuyvesant and Thomas Jefferson's histories demonstrate that proposals for admission policies that do not include standardized tests are met with heavy political opposition. However, Justice Kennedy's opinion in *PICS* has provided an opportunity for school districts to craft individualized admission policies for their elite public high schools that would retain the use of test scores, unlike the geographic plan proposed by FCPS, but only as one factor of many and not the chief consideration. The threat of potential litigation cannot paralyze school districts as it has in the past,<sup>201</sup> the current state of the law provides school districts with tools to make a constitutional attempt to afford black and Latino students a more

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199. See Justin P. Walsh, *Swept Under the Rug: Integrating Critical Race Theory into the Legal Debate on the Use of Race*, 6 SEATTLE J. SOC. JUST. 673, 700 (2008) (noting that Justice Kennedy "refused to provide any aggressive means of curtailing the problem and instead allowed school districts only facially neutral means—such as redistricting—and those means outlined in *Grutter*").

200. In 2004, a Stuyvesant student waited for his friend to finish the Stuyvesant exam, wanting his friend to be admitted to the school. "It would be nice to see more Latin kids there . . . They say the smart kids go to Stuyvesant, but if there aren't Hispanic kids, they'll say minorities aren't smart." Patrick Healy & Johanna Jainchill, *For 3,000 Slots at 6 Schools, 23,000 Pencils at Work*, N.Y. TIMES, Oct. 25, 2004, at B3. Furthermore, the composition of elite public high schools serves to deter black and Latino students from applying at all: "Why would I want to go there?" said Josue Mendez, a seventh-grader, referring to Stuyvesant. "It's a white school." Newman, *supra* note 109.

201. After the *PICS* decision came down, the executive director of the Council of Great City Schools in Washington stated, "[f]or all intents and purposes, the court said you can use race, but we dare you to come up with a solution that passes muster. For that reason . . . I worry that a lot of school districts will simply give up in the face of repeated challenges." Mark Walsh, *Use of Race Uncertain for Schools*, EDUC. WK., July 18, 2007, at 1. A veteran education lawyer with Hogan & Hartson shared a more optimistic outlook on the decision at a seminar—"I said, 'How many of you think you can't use race as a factor?' and almost everybody raised their hands . . . I said, 'You must not have read the opinion.'" *Id.*

equitable opportunity to attend these elite public high schools. School districts can create a roadmap for constitutional admission policies by analyzing the unconstitutional school assignment plans in *PICS* against the Court's directives in *Grutter*.

#### A. *What Worked in Grutter and What Did Not in PICS*

In *Grutter*, the Michigan Law School's admission policy required an evaluation of each applicant based on "a personal statement, letters of recommendation, and an essay describing the ways in which the applicant will contribute to the life and diversity of the Law School."<sup>202</sup> The policy also considered Law School Admission Test scores and undergraduate grade point averages, and stressed that no applicant would be admitted unless the school "expect[ed] that applicant to do well enough to graduate with no serious academic problems."<sup>203</sup> The Court found that the law school demonstrated such individualized consideration by: (1) not automatically accepting or denying applicants based on a single factor, (2) not awarding predetermined "bonuses" based on race, (3) considering all factors that may contribute to diversity, and (4) requiring essays that allowed applicants to highlight their contributions to the diversity of the school.<sup>204</sup> Additionally, the law school presented evidence that the percentages of minority students enrolled fluctuated year to year, unlike a quota,<sup>205</sup> and accepted non-minority students with lower test scores and grades than rejected minority applicants.<sup>206</sup>

The three plans from school districts in Washington, Kentucky, and Massachusetts all failed to meet these *Grutter* requirements and in turn the Court struck them down in *PICS*. None of the plans engaged in holistic, individual review: the Seattle plan utilized a race-based tie-breaker to determine enrollment in oversubscribed schools;<sup>207</sup> Louisville's plan required "each school to seek a Black student enrollment of at least 15% and no more than 50%,"<sup>208</sup> and Lynn Public Schools in Massachusetts

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202. *Grutter*, 539 U.S. at 315.

203. *Id.*

204. *Id.* at 337–38.

205. *Id.* at 336.

206. *Id.* at 338.

207. *Parents Involved in Comm. Schs. v. Seattle Sch. Dist., No. 1*, 426 F.3d 1162, 1169–70 (9th Cir. 2005) (en banc) (defining oversubscribed as a school where "more students wish to attend those schools than capacity allows"). While the plan utilized other tie-breakers, the *PICS* Court focused on the "race-based" tie-breaker.

208. *McFarland v. Jefferson County Pub. Sch.*, 330 F. Supp. 2d 834, 842 (2004), *aff'd*, 416 F.3d 513 (6th Cir. 2005), *rev'd*, *Parents Involved in Comm. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701

adopted a plan that classified students by race when accepting or denying transfer requests to a school outside of a student's neighborhood school.<sup>209</sup> The plurality in *PICS* struck down the plans as "patently unconstitutional" racial balancing<sup>210</sup> as the plans failed to consider "all factors that may contribute to student body diversity."<sup>211</sup> The plans considered students "simply as a member of a particular racial group" and failed to engage in an individualized review that "focused on each applicant as an individual."<sup>212</sup> Particularly, Justice Kennedy found the plans deficient because they relied upon a mechanical formula that included race as the main criterion and did not take into account "all pertinent elements of diversity."<sup>213</sup>

Therefore, elite public high school admission policies must avoid using race as *the* consideration, as Boston Latin did prior to 1998, and insure that race is only a "plus-factor" in diversity as it was in the Michigan Law School's policy.

### *B. Considerations to Craft a Constitutional Admission Policy*

With these legal implications in mind, elite public high schools can craft holistic, individualized admission policies. Thomas Jefferson already engages in a holistic review of its applicants but only does so during the second tier review, after creating a pool of semifinalists based heavily on test scores.<sup>214</sup> This process has proven ineffective and therefore elite public high schools should not utilize test score cutoffs or a minimum combination of test scores and grades. Admission policies for these

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(2007).

209. *Comfort v. Lynn Sch. Comm.*, 418 F.3d 1, 7 (1st Cir. 2005). The Lynn School Committee placed its schools into three categories: racially balanced, racially imbalanced, or racially isolated. *Id.* at 7–8. Lynn defined "racially balanced" as a school in which the percentage of nonwhite students fell within a 15% range for elementary schools and a 10% range for high schools of "the overall proportion of minorities in Lynn's student population." *Id.* A school would be "racially isolated" if the nonwhite population fell below the balance range used to define balance and "racially imbalanced" if the nonwhite population rose above that range. *Id.* Students were freely allowed to transfer between schools that were racially balanced but were otherwise only allowed to make "desegregative" transfers. For example, a white student could transfer from a racially balanced school to a school with a lower percentage of white students (a racially imbalanced) but not to a school with too many white students (a racially isolated school). *Id.* at 8.

210. *Parents Involved*, 551 U.S. at 740.

211. *Id.* at 722.

212. *Id.* The Court in *Grutter* characterized this consideration as a "highly individualized, holistic review." *Grutter*, 539 U.S. at 337.

213. *Parents Involved*, 551 U.S. at 793 (Kennedy, J., concurring in part) (quoting *Grutter*, 539 U.S. at 341).

214. *See supra* notes 140–42 and accompanying text.

schools should mirror those utilized by institutions of higher education. The *Grutter* Court set forth specific requirements for admission policies, namely that the policy: (1) seeks diversity in a broad sense, beyond simple racial and ethnic diversity, (2) calls for individualized consideration using race only as a “plus factor,” and (3) is narrow-tailored, including a serious “good faith” effort to consider race-neutral alternatives and a durational limit. Therefore, officials crafting holistic, individualized admission policies must consider these issues.

### 1. Diversity

School officials must articulate what qualities will be considered in defining diversity for the school. The plurality in *PICS* was correct in stating that “context matters.” Justice Kennedy stated that “the criteria relevant to student placement could differ based on the age of the students, the needs of the parents, and the role of the schools.”<sup>215</sup> Race and ethnicity must be only one of many diversity considerations, although it may be weighed more heavily.<sup>216</sup> For Thomas Jefferson, FCPS broadly defines diversity to include “a wide variety of factors, such as race, ethnicity, gender, English for speakers of other languages (ESOL), geography, poverty, prior school and cultural experiences, and other unique skills and experiences”<sup>217</sup> and has other school-specific criteria relating to science and technology.<sup>218</sup>

### 2. Individualized Consideration

Once a school defines diversity, the next step must be to craft a mechanism for holistic, individualized review. A school must decide upon the structure of a selection committee, the training of selection members, guidelines for considering an application, and the process of admitting applicants. Further, a school must determine how it will gather information from its applicants to consider each applicant’s contributions to broad diversity.<sup>219</sup> Potential instruments include letters of

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215. *Parents Involved*, 551 U.S. at 790 (Kennedy, J., concurring in part).

216. *See supra* note 179.

217. Fairfax County School Board, *Minutes, Regulation Meeting No. 3*, at 11 (Sept. 9, 2004), <http://www.fcps.edu/schlbd/minutes/20040909R.pdf>.

218. *See supra* note 141.

219. *See* TJHSST ADMISSIONS OFFICE, CLASS OF 2012 ADMISSIONS SUGGESTIONS AND HELPFUL HINTS FOR SEMIFINALISTS, *supra* note 141, at 7–8 (listing brainstorming tips for students about their potential contribution to the school, including questions that elicit many aspects of a student that can contribute to broad diversity).

recommendation, essays on diversity or disadvantage, student information sheets, and interviews. In determining admissions, race should not be given any predetermined weight in the process, no set number of seats should be set aside for black and Latino students, and special bonus points should not be awarded for race or ethnicity.<sup>220</sup> The method of review in the second-tier of Thomas Jefferson's admission policy can serve as a good example of how to engage in individualized consideration in the context of elite public secondary education.

### 3. *Narrow-Tailoring: Race-Neutral Alternatives and Sunset Provisions*

The Court has been less clear on how schools can prove "good faith" in considering race-neutral alternatives. The *Grutter* Court held, without any evidence besides the word of Michigan Law School, that race-neutral alternatives would not achieve the compelling interest of a diverse student body.<sup>221</sup> For guidance, in addition to holistic, individualized admission policies, Justice Kennedy also suggested that schools could foster integration through race-neutral means: "strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race."<sup>222</sup> By collecting data to demonstrate that these means have failed elite public high schools, in their unique context, schools can prepare themselves for potential legal challenges. Elite public high schools that draw from an entire region, often in large urban areas, cannot increase diversity by drawing attendance zones, and the creation of new schools does not

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220. Schools should also track all aspects of diversity admitted into incoming classes and not only keep records of racial composition. Kennedy in *Grutter* did not agree that Michigan Law School had proven its admission policy considered race as a only one consideration of many, in large part because the school considered the student body's racial breakdown daily. *Grutter*, 539 U.S. at 391. He expressed, "[t]here is no constitutional objection to the goal of considering race as one modest factor among many others to achieve diversity, but an educational institution must ensure, through sufficient procedures, that each applicant receives individual consideration and that race does not become a predominant factor in the admissions decisionmaking." *Id.* at 392-93. Therefore, Kennedy suggested that the law school could have provided "guidelines to its admissions personnel on how to reconcile individual assessment with the directive to admit a critical mass of minority students." *Id.* at 392.

221. *See supra* note 184.

222. *Parents Involved*, 551 U.S. at 789 (Kennedy, J., concurring in part). School districts may be restricted to these race-neutral options, as implementing holistic, individualized assignment plans is not likely feasible with thousands of students across dozens of schools. However, elite public high schools with selective admissions have the capacity, as Thomas Jefferson has already demonstrated, to use means that are most effective in providing opportunity for black and Latino students.

provide black and Latino students the same educational opportunities as provided at well-established, elite public high schools.<sup>223</sup> Furthermore, Stuyvesant, Boston Latin, and Thomas Jefferson have all engaged in pouring money into special institutes for minority students and doing targeted outreach; these efforts have not increased black and Latino admissions.<sup>224</sup> Schools must document the results of these race-neutral attempts and have tangible proof of their ineffectiveness. As for the sunset provision, schools should adopt *Grutter*'s twenty-five year period and claim the admission policy to be unnecessary sometime before 2028,<sup>225</sup> although Justice Kennedy seemed to wonder how any Court could determine when race will no longer need to be considered in admissions.<sup>226</sup>

## VI. CONCLUSION

Promoting, crafting, and implementing holistic, individualized admission policies at elite public high schools will not be easy work. Local school officials will face opposition by members of the community that believe that standardized tests alone measure true merit.<sup>227</sup> However, school districts must accept the limited value of standardized testing and, without having to discard test scores altogether, should work to educate its constituents that standardized testing does not result in "equity" and "fairness." Local organizations, community centers, and churches can encourage those less vocal groups of the community to speak up for

223. *Cf.* *United States v. Virginia*, 518 U.S. 515, 553–54 (1996) (holding that Virginia's VWIL as an inadequate remedy to blocking the admission of women to VMU because it was not a "comparable single-gender women's institution" in terms of resources or "those qualities which are incapable of objective measurement but which make for greatness" in a school, including "reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige") (quoting *Sweatt v. Painter*, 339 U.S. 629, 634 (1950)).

224. While holistic, individualized review of applicants may be more challenging and costly, it is the most effective means of fostering a diverse student body and the only way to also preserve standardized testing as a consideration. *See, e.g.*, Sarah Sloan Wilson, Note *Readin', 'Ritin', 'Rithmetic, and Responsibility: Advocating for the Development of Controlled-Choice Student-Assignment Plans After Parents Involved*, 97 KY. L.J. 199, 224 (2009) ("Race-neutral guidelines will fail to create a diverse student body. Thus, although such guidelines are arguably a safer option after *Parents Involved*, guidelines that eschew race entirely do not achieve the same effects as districts that opt for race-conscious ones.").

225. *See supra* note 185 and accompanying text.

226. "It is difficult to assess the Court's pronouncement that race-conscious admissions programs will be unnecessary 25 years from now." *Grutter*, 539 U.S. at 394 (Kennedy, J., dissenting).

227. "[T]here is an underlying sense . . . that the students who get into schools like Stuyvesant must genuinely deserve to be there; and it is commonly believed that most of the kids who don't get in could probably not handle the demands they would be facing if they did." KOZOL, *supra* note 38, at 140.

integration and provide strategies for invested groups to pressure local authorities.<sup>228</sup> And of course, the cost of selecting students will increase. In trying economic times, as school districts face substantial budget cuts, the money may not be readily available; however, elite public schools also have access to private funding that most schools do not have. If Thomas Jefferson can acquire \$2 million in resources<sup>229</sup> and the Stuyvesant Parents Association can raise \$400,000 in a given year,<sup>230</sup> then businesses, organizations, and parents who value integration can provide the funding for the increased cost of a holistic, individualized review. As Professor Goodwin Liu emphasized shortly after the *PICS* decision, “[d]istricts that are very committed to integration will continue to try to achieve it. It is fundamentally an issue of political will.”<sup>231</sup>

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228. As a sixth grade teacher in the Bronx, New York, I witnessed the disenfranchisement of black and Latino parents within the New York City education system. However, when supported and guided through the bureaucratic system, parents had the ability to effectively advocate on behalf of their children.

229. Thomas Jefferson Partnership Fund, *supra* note 86.

230. Mazie, *supra* note 22, at 17.

231. Walsh, *supra* note 199.

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