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The Implications of the Equal Protection Clause for the Mandatory Integration of Public School Students

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Since 1954 America has been involved in efforts to desegregate her public schools. These efforts were primarily the result of United States Supreme Court opinions interpreting the Equal Protection Clause of the Fourteenth Amendment. Cases in the 1950s, 1960s and 1970s, like *Brown v. Board of Education*,[1] *Green v New Kent County School Board*,[2] and *Swann v Charlotte-Mecklenburg Board of Education*,[3] placed a remedial obligation on public school districts that had engaged in intentional de jure segregation to racially balance their school populations. At one point, over 500 school districts across the country were under some form of federal court supervision.[4]

Despite these efforts, recent reports suggest that desegregation of public schools peaked in the late 1980s. Public schools actually be-

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1. 347 U.S. 483 (1954).
2. 391 U.S. 430 (1968).
3. 402 U.S. 1 (1971).
4. *See* James S. Liebman, *Desegregating Politics: All-Out School Desegregation Explained*, 90 COLUM. L. REV. 1463, 1465-66 (1990).

came more segregated in the 1990s.[5] As the public schools were becoming more segregated, the Supreme Court's school desegregation jurisprudence entered into its final phase. With its 1990 opinion—*Board of Education of Oklahoma City v. Dowell*[6]—the Supreme Court began to define what a public school system must accomplish in order to satisfy the equal protection mandate of eradicating the vestiges of segregation. The *Dowell* opinion has been followed by two other school desegregation termination opinions, *Freeman v Pitts*[7] and *Missouri v Jenkins*.[8] Pursuant to these cases, federal courts are increasingly withdrawing from their involvement in the desegregation of public schools and thereby closing an epic chapter in American legal history.

If efforts to desegregate public schools are not destined to reach a dead end on the federal highway, it is clear that new roads must be forged through the territory of the laws of state and local governments. Only state and local action will be able to provide an alternative avenue. The recent opinion by the Supreme Court of Connecticut in *Sheff v O'Neill*[9] may spark the most far reaching state endeavor aimed at desegregating public schools. In *Sheff*, Connecticut's highest court placed an affirmative obligation on the state to dismantle racial and ethnic isolation in Hartford, Connecticut. Unlike school desegregation cases under the Equal Protection Clause, the affirmative obligation being imposed on the state in *Sheff* does not remedy any prior intentional segregative conduct by state officials. The obligation requires that Hartford maintain a racially and ethnically integrated student body.

The *Sheff* opinion could provide the blueprint for the construction of a new superhighway for the desegregation of public schools. The decision, however, also raises the troubling question of whether the Supreme Court of the United States has already constructed a road block to state and local efforts to desegregate public schools. The

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5. On December 13, 1993, the Harvard Project on School Desegregation released the results of a study which shows that 66 percent of all Black students and 74.3 percent of all Hispanic students attended predominantly minority schools in 1991-92. For African-Americans, these figures represents the highest level of racial segregation since 1968. *See* William Celis, III, *Study Finds Rising Concentration of Black and Hispanic Students*, N.Y. TIMES, Dec. 14, 1993, at A1. In 1986 only 63 percent of African-American students were attending predominately minority schools and in 1968 only 54 percent of Latino students were attending majority-minority schools. *See* William Eaton, *Segregation Creeping Back in U.S. Schools*, CHRONICLE, Dec. 14, 1993, at A1.

6. 498 U.S. 237 (1991).

7. 503 U.S. 467 (1992).

8. 115 S. Ct. 2038 (1995).

9. 238 Conn. 1, 678 A.2d 1267 (1996).

Supreme Court's current interpretation of the Equal Protection Clause is considerably different from that which accompanied the revival of the Equal Protection Clause in the 1950s after "decades of relative desuetude."[10] No issue reflects this dramatic shift more than the recognition that current interpretations of the Equal Protection Clause *may* proscribe efforts by state and local governments to engage in mandatory school desegregation Outside of the public educational context, recent Supreme Court opinions express a hostility to the use of racial and ethnic classifications by governmental units when used to advance even "benign" purposes. Supreme Court opinions like *City of Richmond v. Croson*,[11] *Adarand Contractors, Inc v. Pena*,[12] and *Miller v. Johnson*[13] have subjected all governmental decision making using racial classifications to strict scrutiny.

This article will examine the question of whether the Equal Protection Clause—as currently interpreted by the Supreme Court—proscribes the mandatory desegregation of public school students in Hartford, Connecticut. It will conclude by arguing that, despite initial appearances, the recent Supreme Court cases do not preclude the State of Connecticut from discharging its affirmative obligation to dismantle racial isolation.

Section I reviews the Supreme Court of Connecticut's opinion in *Sheff v O'Neill*.[14] Section II examines the United States Supreme Court's recent cases applying strict scrutiny to governmental decisions involving racial classifications. This section will focus particular attention on *Miller v Johnson*.[15] In *Miller*, the Court struck down a congressional redistricting plan passed by the Georgia General Assembly that was intended to produce a third majority-minority legislative district. The Court stated any time government uses racial classifications,

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10. Regents of the University of California v. Bakke, 438 U.S. 265, 290 (1978). According to Powell's opinion, "The Court's initial view of the Fourteenth Amendment was that its 'one pervading purpose' was the 'freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised dominion over him.'" Slaughterhouse Cases, 16 Wall. 36, 71 (1873). *But see* City of Richmond v. Croson, 488 U.S. at 490-91 (O'Connor, J.) (claiming that the intention of the framers of the Fourteenth Amendment was to place clear limits on the State's use of race as a criterion for legislative action, and to have the federal courts enforce those limits).

11. 488 U.S. 469 (1989).

12. 115 S. Ct. 2097 (1995).

13. 115 S. Ct. 2475 (1995).

14. 238 Conn. 1, 678 A.2d 1267 (1996).

15. 115 S. Ct. 2475 (1995).

strict scrutiny is triggered. In discharging the affirmative obligation to dismantle racial isolation of Hartford public school students, Connecticut will almost certainly have to rely on some form of mandatory school desegregation. Any form of mandatory desegregation—including school redistricting, busing, redrawing individual school boundary lines, or freedom of choice plans which impose limitations on the percentage of students from racial and ethnic groups that can attend a given school—requires the State of Connecticut to treat its students as members of racial and ethnic groups. This section will also examine Connecticut's attempt to use racial classifications in order to desegregate Hartford public schools in light of strict scrutiny jurisprudence articulated by prior United States Supreme Court cases.

None of the prior Supreme Court cases provides an adequate justification for the use of racial classifications in order to desegregate public schools. If prior Supreme Court cases are not to stand as precedent for prohibiting mandatory desegregation, there must be something about public education that is unique in terms of governmental service. Section III will first point to the conceptual structure that provides the hidden assumptions which animate the Supreme Court's recent equal protection jurisprudence. It will then demonstrate why that structure is inappropriate when addressing the rights of children in public schools. The unique features of public education justify a different analysis for the use of race and ethnic classification in public schools than it does outside of that context. Public schools are socializing institutions that inculcate fundamental values necessary to the transmission of our democratic society to the next generation of adults. Mandatory desegregation for public schools should be viewed in light of this socializing function. Thus, whether Connecticut, in discharging its affirmative obligation to dismantle racial isolation, violates the Equal Protection Clause should be a question of the message conveyed—i.e., the values being inculcated—by mandatory desegregation.

Examining the constitutionality of mandatory desegregation by focusing on the message being conveyed does not determine whether it is consistent with the Equal Protection Clause. Section IV will apply strict scrutiny to racial classification of students for purposes of mandatory desegregation by focusing on the values being inculcated. It will argue that Connecticut has a compelling state interest in inculcating fundamental values in its public schools. The role of public education is to convert learners into choosers. Education must both foster individual self-determination, but at the same time attempt to constrain the choices individuals make in order to allow others the same ability for

self-determination. Depending on where the emphasis is placed, mandatory desegregation can both further, as well as inhibit, the values related to self-determination. But mandatory desegregation clearly furthers the values of tolerance of racial and ethnic diversity. Since Connecticut's interest in socialization relates to all individual public students in Hartford, mandatory desegregation is narrowly tailored to effect only the individuals that the interest involves. Thus, mandatory desegregation should survive a strict scrutiny analysis when examined from a value inculcating perspective.

I. *SHEFF V. O'NEILL*

The plaintiffs were eighteen African-American, Latino, and Caucasian school children. They alleged that the defendants—all of whom were state officials[16]—had a constitutional obligation under Article Eighth, § 1 and Article First, § 20 to remedy the denial of equal educational opportunity in the Hartford public schools.[17] The plaintiffs' argument included an assertion that this obligation prohibited both de facto and de jure racial and ethnic segregation of public schools.[18] The percentage of minority students in Hartford actually increased to 94.5% in the 1994-95 school year.[19]

Except for a brief period in 1868, Connecticut did not intentionally segregate racial and ethnic minorities in the Hartford public school system.[20] The General Assembly did not enact any legislation that was intended to cause either de jure or de facto segregation. The State also

16. For example, the governor, the state board of education and various state officials were named as defendants. *See* 238 Conn. at 4, note 4, 678 A.2d at 1269, note 4.

17. The Connecticut Constitution provides: "All men when they form a social compact, are equal in rights; and no man or set of men are entitled to exclusive public emoluments or privileges from the community." CONN. CONST. art. I, § 1. The Connecticut Constitution further provides: "No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his or her civil or political rights because of religion, race, color, ancestry, national origin, sex or physical or mental disability." CONN. CONST. art. I, § 20 (as amended by articles V and XXI of the amendments).

18. In the 1991-92 school year, 25.7% of the Connecticut student population were members of minority groups. The public schools in the capital city of Hartford enrolled the largest percentage of minority students in the state—92.4% of the student body. *See* Sheff v. O'Neill, 238 Conn. 1, 38, 678 A.2d 1267, 1287 (1996).

19. *See* 238 Conn. at 43 n.43, 678 A.2d at 1289 n.43. In contrast, only 7 of the 21 surrounding suburban school systems, had a minority student enrollment in excess of 10 percent. *See id.* at 42, 678 A.2d at 1289.

20. *See* 238 Conn. at 10 n.11, 678 A.2d at 1274 n.11.

took various civil rights initiatives between 1905 and 1961 to combat racial discrimination.[21] Since 1970, the State supported and encouraged voluntary plans for increasing interdistrict diversity, including providing financial support to interdistrict magnet programs.[22] Furthermore, in recognition of a "moral obligation to address the adverse consequences of racial and ethnic discrimination", the State reorganized the Board of Education during the 1980s in order to concentrate on the needs of urban school children and to promote diversity in public schools.[23]

The trial court concluded that racial and ethnic segregation in Hartford public schools is harmful and that integration would likely have positive benefits for all children and for society as a whole.[24] Relying, however, on principles drawn from federal equal protection law, the trial court determined that the plaintiffs could not prevail because they did not establish that it was state action that caused the conditions alleged in their complaint. Due to "the importance of the novel and controversial questions" raised by this case and the fact that it had languished in the trial court for over six years, the Connecticut Supreme Court took the case.[25]

Despite the lack of intentional segregation, the Supreme Court of Connecticut found that the State played a significant role in the present concentration of minorities in Hartford's schools. The State always controlled public elementary and secondary education. The legislature directs many aspects of the local school programs including courses of study, standardized testing, school attendance and graduation requirements. The state legislature also provides considerable financial resources to local schools. In 1909, the State enacted a statute which fixed the school district boundaries with those of its corresponding town.[26] The statute was enacted for the purpose of improving the quality of education by fostering local control. Nevertheless, it "is the single most important factor contributing to the present concentration of racial and ethnic minorities in the Hartford public school[s]."[27]

Under the Connecticut Constitution, the State has an obligation to provide both a right to a free public elementary and secondary educa-

21. *See id.* at 10, 678 A.2d at 1224.
22. *See id.* at 10, 41; 678 A.2d at 1274, 1288.
23. *Id.* at 41, 678 A.2d at 1288.
24. *See id.* at 33, 678 A.2d at 1285.
25. *Id.* at 7, 678 A.2d at 1272 (citing CONN. GEN. STAT. §51-199(c) (1996)).
26. *See id.* at 11, 678 A. 2d at 1274 (discussing CONN. GEN. STAT. § 10-240 (1996)).
27. *Id.* at 11, 678 A.2d at 1274.

tion and protection from segregation. According to the majority opinion, these two provisions, working in tandem, place on the State an affirmative obligation to provide a substantially equal educational opportunity to all of Connecticut's school children. "A significant component of that substantially equal educational opportunity is access to a public school education that is not substantially impaired by racial and ethnic isolation."[28]

According to the Connecticut Supreme Court:

> for the purposes of the present litigation, we decide only that the scope of the constitutional obligation expressly imposed on the state by article eighth, §1, is informed by the constitutional prohibition against segregation contained in article first, §20. Reading these constitutional provisions conjointly, we conclude that the existence of extreme racial and ethnic isolation in the public school system deprives school children of a substantially equal educational opportunity and requires the state to take further remedial measures.[29]

Thus the court held that Connecticut's constitutional requirement of equal educational opportunity mandates that the legislature "take affirmative responsibility to remedy segregation in our public schools, regardless of whether that segregation has occurred de jure or de facto."[30]

The Supreme Court of Connecticut noted that it was the racial and ethnic composition of the public schools that triggered the affirmative obligation to remedy the condition.[31] It is significant to note that the majority opinion did not rest upon the impact of racial isolation on

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28. *Id.* at 24, 678 A.2d at 1280.

29. *Id.* at 25-26, 678 A.2d at 1281.

30. *Id.* at 30, 678 A.2d at 1283. The Court noted:

> the fact that Hartford's schoolchildren labor under a dual burden: their poverty *and* their racial and ethnic isolation. These findings regarding the causal relationship between the poverty suffered by Hartford schoolchildren and their poor academic performance cannot be read in isolation. They do not diminish the significance of the stipulations and undisputed findings that the Hartford public school system suffers from severe and increasing racial and ethnic isolation, that such isolation is harmful to students of all races, and that the districting statute codified at § 10-240 is the single most important factor contributing to the concentration of racial and ethnic minorities in the Hartford public school system. The fact that, as pleaded, the plaintiffs' complaint does not provide them a constitutional remedy for one of their afflictions, namely, their poverty, is not a ground for depriving them of a remedy for the other.

Id. at 39, 678 A.2d at 1287-88.

31. *See id.* at 25-26, 39-40; 678 A.2d at 1281, 1288.

academic achievement.[32] The Supreme Court expressly emphasized the importance of the socializing aspect of integrated schools as the basis of its decision.

> Schools are an important socializing institution, imparting those shared values through which social order and stability are maintained. Schools bear central responsibility for inculcating the fundamental values necessary to the maintenance of a democratic political system. When children attend racially and ethnically isolated schools, these shared values are jeopardized: If children of different races and economic and social groups have no opportunity to know each other and to live together in school, they cannot be expected to gain the understanding and mutual respect necessary for the cohesion of our society. The elimination of racial isolation in the schools promotes the attainment of equal educational opportunity and is beneficial to all students both black and white.[33]

Justice Berdon in his separate concurring opinion also noted the socializing implications of integrated schools:

> If the mission of education is to prepare our children to survive and succeed in today's world, then they must be taught how to live together as one people. Anything less will surely result in a segregated society with one racial and ethnic community pitted against another. Instead of fostering social division, we must build an integrated society, commencing with educating our children in a nonsegregated environment.[34]

The Supreme Court of Connecticut concluded that the current school districting scheme was unconstitutional. The court, however, decided that the constitutional imperative of separation of powers required that it afford the state legislature an opportunity to fashion a remedy that

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32. This constitutes one of the major distinctions between the majority opinion and the separate opinion filed by Justice Berdon. Berdon noted that poor academic achievement of Hartford's students is one aspect of the devastating effects of racial isolation. *See id.* at 51-53, 678 A.2d at 1291-94. He noted the results of a study commissioned by the State Department of Education in 1989 that concluded that desegregation has had some positive effects on the reading skills of black youngsters. *See id.* at 52, 678 A.2d at 1293. But Berdon also noted that racial and ethnic isolation also inhibits the development of social understanding and racial tolerance. *See id.* at 53, 678 A.2d at 1294.

33. *Id.* at 34, 678 A.2d at 1285 (internal quotation marks and citations omitted).

34. *Id.* at 53, 678 A.2d at 1294.

will most appropriately respond to the constitutional violation.[35]

II. APPLICATION OF STRICT SCRUTINY

Connecticut has already tried a number of voluntary measures aimed at decreasing racial isolation in Hartford schools. In order for the General Assembly to comply with its affirmative obligation to dismantle racial isolation, some form of mandatory desegregation will probably be employed. The trial court in *Sheff* noted this point when it indicated that in order to effectively remedy the severe racial, ethnic, and socioeconomic isolation that exists in the Hartford public school system, school district lines would have to be redrawn.[36] Other possible desegregation measures include mandatory busing of students, redrawing individual school attendance boundaries, and freedom of choice plans which impose limitations on the percentage of students from racial and ethnic groups that can attend a given school. The above measures share one feature in common—each requires Connecticut to racially and ethnically classify its public school students and thereby treat them as members of racial and ethnic groups.

In the summer of 1995, the United States Supreme Court rendered its most recent affirmative action opinion, *Adarand Contractors, Inc v. Pena*.[37] This case rescinds the Supreme Court's 1990 holding in *Metro Broadcasting, Inc. v. FCC*.[38] *Adarand* essentially extends the standard of review articulated by the Court in its landmark case of *City of Richmond v. J.A. Croson Co.*[39] to the federal government. In *Croson*, a majority of the justices on the Supreme Court agreed that affirmative action programs should be subjected to strict scrutiny regardless of the presumed beneficiaries. When government attempts to use a suspect classification, it can only do so when there is a compelling governmental interest and it employs means that are narrowly tailored to advance that interest.[40]

Affirmative action programs not only involve racially motivated

35. *See id.* at 45-46, 678 A.2d at 1290.
36. Sheff v. O'Neill, 1995 Conn. LEXIS 249 at *46 (Conn.Super.Ct. June 27, 1995).
37. 115 S. Ct. 2097 (1995).
38. 497 U.S. 547 (1990). The Court's opinion also appears to overrule Fullilove v. Klutznick, 448 U.S. 448 (1980).
39. 488 U.S. 469 (1989).
40. *See* Miller v. Johnson, 115 S. Ct. 2475, 2490 (1995).

decision making and racial classification, but they also generate racial winners and losers. Thus, affirmative action programs can be said to inflict two different types of harms. Not only does government disrespect its citizens' individuality by treating them as members of racial and ethnic groups, but it also denies members of the dominant group opportunities to be considered for some tangible benefit.[41]

The Court's opinion in *Miller v. Johnson*[42] poses a significant hurdle to Connecticut's efforts to discharge its affirmative obligation to dismantle racial isolation in Hartford public schools. It articulates a more restrictive scenario for when strict scrutiny applies than that imposed by affirmative action cases. In *Miller,* the Court concluded that strict scrutiny is triggered by government's treatment of its citizens as members of racial and ethnic groups. Thus only one harm, the denial of individuality, is a sufficient constitutional predicate for requiring strict scrutiny. Before *Miller,* it could be argued that strict scrutiny should not apply to the mandatory desegregation of public schools. Mandatory desegregation does require government to treat students as members of racial and ethnic groups. It does not, however, generate the secondary harm of racial winners and losers. All students maintain their individual right to a free public education. Thus, the additional harm imposed on members of the disfavored groups by affirmative action programs does not exist; therefore, strict scrutiny should not be triggered. *Miller v. Johnson* prevents the State of Connecticut from asserting this argument.

This section will first discuss *Miller v. Johnson.* It will then analyze mandatory desegregation in light of what existing Supreme Court cases have said about strict scrutiny.

A. Miller v. Johnson

From 1980 to 1990, only one of Georgia's ten congressional dis-

41. Affirmative action is also seen by many to be in conflict with societal values of efficiency and meritocracy. *See, e.g.,* NATHAN GLAZER, AFFIRMATIVE DISCRIMINATION (1975); Lee Nisbet, *Affirmative Action: A Liberal Program? in* RACIAL PREFERENCE AND RACIAL JUSTICE: THE NEW AFFIRMATIVE ACTION CONTROVERSY 111-16 (Russell Nieli ed., 1991); Burt Neuborne, *Observations on* Weber, 54 N.Y.U. L. REV. 547 (1979); George Schatzki, United Steelworkers of America v. Weber: *An Exercise in Understandable Indecision,* 56 WASH. L. REV. 51, 59 (1980); Walter Williams, *False Civil Rights Vision and Contempt for Rule of Law,* 79 GEO. L.J. 1777 (1991).

42. 115 S. Ct. 2475 (1995).

tricts was a majority-black district.[43] The 1990 Decennial Census revealed that 27% of Georgia's residents were African-American.[44] The census also disclosed that the state's increase in population entitled Georgia to an extra congressional seat.[45] This increase prompted the Georgia General Assembly to redraw the State's congressional districts.

The General Assembly's redistricting plan had to be submitted for preclearance to the Bush Administration's Attorney General. The Attorney General rejected the first two plans submitted because they created only two, instead of three, majority black districts.[46]

Since the General Assembly's third plan created three majority-black districts, it gained preclearance from the Department of Justice.[47] Elections under the new redistricting plan were held on November 4, 1992.[48] Black candidates were elected to Congress from all three majority-black districts. The action was filed on January 13, 1994 by five white voters from the Eleventh District.[49]

The Supreme Court faced a situation where, in order to create a third majority black district, it was clear that the Georgia General Assembly classified and treated its citizens as members of racial groups. Unlike affirmative action plans, however, there was no discriminatory treatment or effect. The white plaintiffs were not denied the right to register, vote, or be represented by an elected official from the district in which they resided. Thus, the plaintiffs as individuals were not subject to invidious discriminatory treatment. Nor did the redistricting program discriminate against whites by making blacks a favored group. African-Americans were the majority in three of the eleven congressional districts in Georgia. While constituting 27% of the Georgia population, blacks were also a majority in 27% of the Georgia congressional districts. As a result there was no vote dilution, because the redistricting plan did not produce any discriminatory effect against whites as a

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43. *See id.* 115 S. Ct. at 2483.

44. *See id.*

45. *See id.*

46. *See id.* Prior to Congressional redistricting that resulted from the 1990 census, African-Americans who constituted 11.1% of the voting population were only 4.9% of the members of Congress. Latinos who constituted 7.3% of the voting population were even more under represented. Only 2.5% of the members of Congress were Latinos. Congressional redistricting plans that resulted after the 1990 census doubled the number of majority black and Latino districts from 26 to 52. *See* Frank R. Parker, *The Constitutionality of Racial Redistricting: A Critique of* Shaw v. Reno, 3 DET. C.L. REV. 1, 2 (1995).

47. *See Miller*, 115 S. Ct. at 2483.

48. *See id.* at 2485.

49. *See id.*

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Justice Kennedy's opinion for the Court invoked strict scrutiny. He made it clear that the failure by government to treat its citizens as individuals justifies invoking strict scrutiny. Kennedy noted that the claim recognized by the Court in *Shaw v. Reno*[50] was "analytically distinct" from a vote dilution claim.[51] Vote dilution alleges that the State has enacted a particular voting scheme as a purposeful device to minimize or cancel out the voting potential of racial or ethnic minorities.[52] Vote dilution involves both racial classification of voters and discriminatory effect. The equal protection violation recognized in *Shaw*, however, was based on the State using race to separate voters into districts. Thus, the claim recognized in *Shaw*—and applied by the Court in *Miller*—involved racial classification of individuals, but not discriminatory effect.

According to Kennedy, the problem with assigning citizens to voting districts based on race is that race-based assignments "embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred by Government . . . ."[53] At the "heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens 'as individuals, not as simply components of a racial, religious, sexual or national class' . . . ."[54] Kennedy compared the racial classification of voters into different voting districts to prior Supreme Court cases involving segregation of public parks,[55] buses,[56] golf courses,[57] beaches,[58] and schools.[59]

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50. 113 S. Ct. 2816 (1993).

51. *Miller*, 115 S. Ct. at 2485.

52. In United Jewish Organization v. Carey, 430 U.S. 144 (1977), the Supreme Court held that state legislative action which created majority-minority districts to comply with the Voting Rights Act did not violate the constitution as long as they did not dilute white voting strength.

53. *Miller*, 115 S. Ct. at 2486 (quoting *Shaw*, 113 S. Ct. at 2827).

54. *Miller*, 115 S.Ct. at 2486 (quoting Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting)).

55. *See* New Orleans City Park Improvement Ass'n. v. Detiege, 358 U.S. 54 (1958) (per curiam).

56. *See* Gayle v. Browder, 352 U.S. 903 (1956) (per curiam).

57. *See* Holmes v. Atlanta, 350 U.S. 879 (1955) (per curiam).

58. *See* Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955) (per curiam).

59. *See* Brown v. Board of Educ., 347 U.S. 483 (1954). Kennedy's opinion citing to earlier cases as justification for the Court's decision in *Miller* suggests that the Court may also be revisiting the harm of segregation in those prior cases. The segregation cases Kennedy cited have generally been understood as cases involving harm to minority citizens beyond the simple use of racial classifications. Thus, the plaintiffs in school desegregation cases, for example,

B. *Strict Scrutiny Test*

Given the Supreme Court's opinion in *Miller v. Johnson*, Connecticut's attempts to dismantle racial isolation in Hartford's public schools will trigger strict scrutiny. Under strict scrutiny, for the government to justify the use of racial classifications, it must establish a compelling governmental interest and employ a scheme that is narrowly tailored to the achievement of that interest.[60] Distinctions based on race are considered by their very nature to be odious to a free people.[61] Preferring members of any one group for no reason other than race or ethnic origin is discrimination in its own sake.[62] The purpose of the strict scrutiny test is to smoke out illegitimate uses of race by ensuring that the legislative body is pursuing a goal important enough to warrant the use of a highly suspect tool.[63]

The strict scrutiny test ensures that the means chosen fit this compelling goal so closely that there is little or no possibility that the motive for the classification is illegitimate racial prejudice or stereotype. Other reasons that strict scrutiny is applied to racial classifications are preventing stigmatic harms, promotion of notions of racial inferiority, and politics of racial hostility.[64]

1. *Compelling State Interest*

When evaluating proffered governmental interest for justifying racial classifications courts recognize that the rights created by the Equal Protection Clause are by their terms guaranteed to the individual.[65] The

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have always been minority school children and not white school children. As a result, the segregation cases are normally understood as embodying the same harms that affirmative action embody—denial of individuality as a result of racial classification and denial of some other opportunity or benefit. By citing to these cases, Kennedy suggests that the primary constitutional harm of segregation is the denial of individuality. It would therefore follow that since whites were also being racially classified in determining which public parks, buses, golf courses, beaches, and schools they could visit or attend, they too were being harmed by segregation. Thus under the interpretation of the harm discussed by Kennedy, those earlier cases—as well as his opinion in *Miller*—can be viewed as discrimination against both whites and blacks, because individuals of both races were treated as members of racial groups.

60. *See* Adarand Constructors, Inc. v. Pena, 115 S.Ct. 2097, 2117 (1995); Miller v. Johnson, 115 S. Ct. 2475, 2482 (1995).

61. *See* Hirabayashi v. United States 320 U.S. 81, 100 (1943).

62. *See* Regents of Univ. Cal. v. Bakke, 438 U.S. 265, 307 (1978); *See also* Brown v Board of Educ., 347 U.S. 483, 493-94 (1954); Loving v. Virginia, 388 U.S. 1, 11 (1967).

63. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989).

64. *See id.*

65. *See* Hopwood v. Texas, 78 F.3d 932, 941 (5th Cir. 1996) (citing Shelly v Kraemer, 334

United States Supreme Court has addressed the issue of what constitutes a compelling state interest in a number of equal protection cases. These discussions are relevant in determining whether Connecticut has such an interest in its use of racial classifications so as to discharge the affirmative obligation to dismantle racial isolation. These cases also reveal an underlying structure that defines the nature of what constitutes a compelling interests. This subsection will focus on the Supreme Court's consideration of the compelling nature of various state interest. It will also point to the focus on government respecting the individuality of its citizens. Finally, it will demonstrate the need for the State of Connecticut to articulate an as yet accepted interest that will be compelling enough to justify the use of racial classifications of its public school students. The central focus in accepting or rejecting the compelling nature of various governmental interests is whether they advance or retard the notion of treating citizens as individuals.

a. Remedy for Past Discrimination

The only compelling interest recognized by a majority of the justices on the Supreme Court is a remedy for past discrimination.[66] In order to remedy the effects of prior discrimination, racial classifications can be justified.[67] The state has a legitimate interest in ameliorating or, whereever feasible, eliminating the effects of identified discrimination. The conclusion that such remedial measures are necessary requires government to do more than make a mere assertion. To justify the use of racial classifications for remedial purposes requires a judicial, legislative, or administrative finding of discrimination with a strong basis in evidence.[68]

U.S. 1, 22 (1948)); *see also* Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2111 (1995) ("[A]ny person, of whatever race, has the right to demand that any government actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny.").

66. Justice O'Connor in her dissent, joined by Justices Rehnquist, Scalia and Kennedy in *Metro Broadcasting, Inc. v. FCC*, stated: "Modern equal protection has recognized only one [compelling state] interest: remedying the effects of racial discrimination." 497 U.S. 547, 612 (1990).

67. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 280-81 (1986).

68. *See* Miller v. Johnson, 115 S. Ct. at 2491. In *City of Richmond v. J.A. Croson*, 488 U.S. 489 (1989), the Supreme Court stated that the City of Richmond had not satisfied the factual predicate for demonstrating past discrimination. The Court noted that the five predicate facts relied upon by the District Court to establish identified discrimination singly or together did not provide the City of Richmond with a strong basis in evidence for its conclusion that remedial action was necessary. Those facts were:

(1) the ordinance declared itself to be remedial; (2) several proponents of the mea-

Past discrimination is the result of the denial of individuality to its victims. Allowing a remedy for past discrimination to be a compelling interest is an effort to move towards the furtherance of a society based on a collection of individuals. The remedy is needed to eradicate the effects—the denial of individuality—of the prior discriminatory conduct.

The use of racial classifications to redress the effects of de jure segregation of public schools is an example of this compelling interest.[69] After the Supreme Court's opinion in *Green v New Kent County*,[70] public school districts that engaged in de jure segregation were under a mandatory obligation to achieve racial balancing. School districts could not simply use racially neutral student assignment methods to remedy the effects of de jure segregation if those methods did not produce real desegregation.[71]

Court-ordered desegregation was justified as a means by which to dismantle the prior effects of government treating citizens as members of racial and ethnic groups rather than as individuals. In other words, the desegregation of public school students was the result of the failure of government to treat citizens as individuals. Thus a distinction was

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sure stated their views that there had been past discrimination in t he construction industry; (3) minority businesses received 0.67% of prime contracts from the city while minorities constituted 50% of the city's population; (4) there were very few minority contractors in local and state contractors' associations; and (5) in 1977 Congress made a determination that the effects of past discrimination had stifled minority participation in the construction industry nationally.

Id. at 499. If the City could identify past discrimination in the local construction industry with the particularity required by the Equal Protection Clause, it would have the power to adopt race-based legislation designed to eradicate the effects of discrimination. *See id.* at 509.

In Podberesky v. Kirwan, 38 F.3d 147 (4th Cir. 1994), the court addressed a scholarship program of the University of Maryland that was limited to African-American students. *See id.* at 151. The University of Maryland attempted to justify the program as necessary to remedy the present effects of past discrimination. It argued that the plan was necessary to address four present effects: (1) the University had a poor reputation within the African-American community; (2) African-Americans were underrepresented in the student population; (3) African-American students who enrolled at the University had low retention and graduation rates; and (4) the atmosphere on campus was perceived as being hostile to African-American students. *See id.* at 152. The court rejected the University's argument that the first and fourth effects represented the type of discrimination that constitutes a compelling state interest. *See id.* at 154-55. The court went on to conclude that the second and third effects were not the type that were narrowly tailored. *See id.* at 157-162.

69. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978).

70. 391 U.S. 430 (1968).

71. For an articulation of the theory examining de jure segregation as a constitutional violation from the perspective of the value inculcating function of public schools, see Kevin Brown, *Termination of Public School Desegregation: Determination of Unitary Status Based on the Elimination of Invidious Value Inculcation*, 58 GEO. WASH. L. REV. 1105 (1990).

drawn between de jure segregation, which violated the Equal Protection Clause and triggered the remedial burden and de facto segregation which did not.[72]

Connecticut cannot use the compelling state interest that justified prior federal court efforts to desegregate public schools. Unlike the desegregation ordered by the Supreme Court of Connecticut in *Sheff*, federal court desegregation was remedial and not an affirmative obligation. It was taking account of race for the purpose of counteracting prior discriminatory state action proven to have been a product of discriminatory intent.[73]

b. Diversity in Education

In *Regents of University of California v Bakke*, the Supreme Court addressed the case of Allan Bakke, a white male who was denied admission to the medical school of the University of California at Davis. He argued that the State had discriminated against him because it operated a separate admissions program for members of minority groups. Four justices in *Bakke* declined to reach the constitutional issue. For them, the separate admissions program violated Title VI of the 1964 Civil Rights Act. On this ground, they upheld Bakke's admission. The opinion authored by Justice Brennan—and joined by Justices White, Marshall and Blackmun—opined that racial classifications designed to serve remedial purposes should receive only intermediate scrutiny. These justices would have upheld the admissions program under intermediate scrutiny because it served the substantial and benign purpose of remedying past societal discrimination.

Justice Powell's opinion was the decisive swing vote. While applying strict scrutiny to an affirmative action program in higher education, Justice Powell's opinion in *Bakke* accepted the argument that diversity was a compelling state interest that justified racial classification. He noted that diversity of points of view furthered academic freedom which was an interest embodied in the First Amendment that colleges and universities possessed under the Constitution.[74] Powell went on to note that the interest in diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics, of which racial or ethnic origin is but a single though important element.[75]

72. *See* Keyes v. School Dist. No. 1, 413 U.S. 189, 205-06 (1973).
73. *See Bakke*, 438 U.S. at 406-07 (Blackmun, J., concurring).
74. *See id.* at 312.
75. *See id.* at 315.

Thus, the right of colleges and universities to select those students who will contribute the most to the robust exchange of ideas is a countervailing constitutional interest. Powell stressed, however, the importance of viewing each student's application individually in order to determine its quality and quantity of diversity.

Using the argument for diversity in education to justify mandatory desegregation by the State of Connecticut is fraught with difficulty. To begin with, public elementary and secondary schools do not have the same right of academic freedom that exists for colleges and universities. One of the principal justifications for academic freedom is that colleges and universities are there to criticize received wisdom. This critical function requires protection from the vagaries of society. Criticizing received wisdom is a far less significant feature of elementary and secondary education than it is of colleges and universities. Secondly, the Connecticut Supreme Court's opinion focuses only on racial and ethnic diversity. Thus, it rejects the broader concept of diversity in education found by Justice Powell to justify considering race as a factor in admissions decisions. Finally, *if* the Fifth Circuit opinion is correct, in light of Supreme Court cases after *Bakke*, diversity in education may not be a compelling state interest under any circumstances.[76]

Question has recently been raised regarding whether the Supreme Court continues to recognize diversity in education as a compelling state interest.[77] In *Hopwood v Texas*[78] the Fifth Circuit struck down any use of race in determining admissions to the University of Texas Law School. The Fifth Circuit concluded that Powell's views in *Bakke* are not binding precedent on the issue. Powell has been the only Justice to conclude that diversity constitutes a compelling justification for the use by government of racial classifications.[79] In order to come to the conclusion in *Bakke* that a college or university could use race as a factor in the admission's procedure, Powell's opinion had to be combined with that of Brennan's. Brennan's opinion did not apply strict scrutiny and therefore judged the affirmative action program under a

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76. I do not wish to in any way condone the Fifth Circuit's opinion in *Hopwood* by citing to it in this article. Judge Wiener in his concurring opinion struck down the University of Texas Law School's admissions program employed for 1992 by concluding that it violated Powell's opinion in *Bakke*. Wiener specifically rejected the majority opinion's decision to declare *Bakke* overruled. *See Hopwood*, 78 F.3d at 963 (Weiner, J., concurring). I, too, would argue that *Bakke* is still the governing law for admissions in higher education.

77. *See* Hopwood v. Texas, 78 F.3d 932 (5th Cir.), *cert. denied*,116 S. Ct. 2581 (1996).

78. *See id.*

more relaxed standard. According to the Fifth Circuit, Brennan implicitly rejected Powell's opinion, including the notion that diversity in education was a compelling state interest.[80]

The *Hopwood* opinion also noted that the only other case in which the Supreme Court accepted the diversity rationale was *Metro Broadcasting, Inc. v. FCC*.[81] In that case, the five-Justice majority relied upon an intermediate standard of review to uphold a federal program seeking diversity in ownership of broadcasting facilities. In *Adarand*, a majority of the Supreme Court, however, rejected the intermediate scrutiny as the standard of review for racial classifications by the federal government. According to the Fifth Circuit, *Adarand* vindicated Justice O'Connor's dissent in *Metro Broadcasting* which was joined by three other current members of the Supreme Court: Rehnquist, Kennedy, and Scalia.

> Modern equal protection has recognized only one [compelling state] interest: remedying the effects of racial discrimination. The interest in increasing the diversity of broadcast viewpoints is clearly not a compelling interest. It is simply too amorphous, too insubstantial, and too unrelated to any legitimate basis for employing racial classifications.[82]

Given Justice Clarence Thomas's condemnation of the use of "benign" discrimination in his concurring opinion in *Adarand*, the Fifth Circuit suggested that the majority of the current members of the Supreme Court would uphold its decision.[83]

The Fifth Circuit also opined that, given the general principles of the equal protection clause, the use of race in admissions for diversity in higher education contradicts, rather than furthers, the aims of the Equal Protection Clause.[84] Since diversity treats students as members of racial and ethnic groups, it could foster the use of race, rather than minimize its importance.

c. Compliance with Legislative Enactments

In *Miller v. Johnson*, it was clear that the State of Georgia created

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80. *See id.* at 944.

81. 497 U.S. 547 (1990).

82. *Id.* at 612 (O'Connor, J., dissenting).

83. It should be noted that the Supreme Court denied cert. on Hopwood v. Texas, 116 S. Ct. 2580 (1996).

84. *See Hopwood*, 78 F.3d at 945.

the third majority-minority district to comply with the Justice Department's preclearance requirements. The Court addressed an argument from Georgia that such compliance was a compelling state interest. Kennedy's opinion rejected the argument that a state has a compelling interest in complying with whatever preclearance mandates the Justice Department issues.[85] To accept the Justice Department's conclusion that the Voting Rights Act required racial districting as a compelling state interest would allow the Justice Department to determine the constitutionality of such a provision—a role retained by the courts. The Court's opinion reserved the issue of whether compliance with the Voting Rights Act, standing alone, could provide a compelling state interest independent of any interest in remedying past discrimination, because such was not presented.[86]

Miller clearly indicates that the State of Connecticut will be unable to justify the use of racial classification simply because its Supreme Court found such efforts necessary in order to comply with a state constitutional obligation. Given the Court's clear directive that the federal judiciary has an independent obligation to determine the constitutionality of a given interpretation, the Supreme Court of Connecticut's affirmative obligation alone will not provide a compelling state interest. This independent obligation is of special importance when the Fourteen Amendment is involved. The purpose of the Fourteenth Amendment was to take from the State the ability to use race as a criterion for government decision making.

d. Societal Discrimination/Role Models

The Supreme Court has recognized the fact that racial discrimination has exerted an effect on the current American society and contributed to a lack of opportunities for disadvantaged minorities.[87] Nevertheless, the Court has consistently rejected societal discrimination as a sufficient justification for the use of racial classifications.[88] It is considered too amorphous a concept to justify the use of racial classifications.[89] Because of the ubiquity of societal discrimination, to opine that

85. *See* Miller v. Johnson, 115 S. Ct. 2475, 2475-91 (1995).

86. *See id.* at 2490-91.

87. *See* Wygant v Board of Educ., 476 U.S. 267, 276 (1986); City of Richmond v. Croson, 488 U.S. 469, 499 (1988).

88. Justice Powell first noted this in his opinion in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978), which applied strict scrutiny.

89. *See Wygant*, 476 U.S. at 276 (1986). This opinion was a plurality opinion written by Justice Powell and joined by Burger and Rehnquist. Justice O'Connor joined all but Section

it justified the use of racial classification would provide all governmental institutions in the Nation with a ready-made compelling justification for using racial classifications.[90] Thus, government could always provide a compelling interest to advance the pursuit of societally disadvantaged groups at the expense of societally advantaged groups. The recognition of such a broad compelling interest would have undermined the idea that the Equal Protection Clause is there to protect individuals.

In *Wygant v Jackson Board of Education,*[91] the Supreme Court also rejected the argument that providing role models for minority public school students was a compelling state interest. In 1972, because of racial tension in the community, the Jackson Board of Education considered adding a layoff provision to the Collective Bargaining Agreement between it and the Jackson Education Association (Union). The provision would protect certain minority groups of teachers against layoffs. The Board and the Union eventually agreed on a new provision for its collective bargaining agreement which provided that "in the event of layoffs teachers with the most seniority in the district shall be retained, except that at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed as the time of the layoff." When layoffs became necessary in 1974, it was obvious that adherence to this provision meant that some majority teachers with more seniority would be laid off in order to keep minority teachers with less seniority.

The Board's argument for the layoff provision was its interest in providing minority role models for minority students as an attempt to alleviate the effects of societal discrimination. The Court viewed the role model theory as analogous to societal discrimination. The plurality opinion noted that since the role model theory was not intended to be remedial, it did not bear any relationship to the harm caused by prior discriminatory hiring practices.[92]

In order for the Board to use the role model theory to justify the use of racial classifications, the Board would have to treat and view its teachers and students as members of racial and ethnic groups. For the

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IV of the opinion and wrote a separate concurrence. Justice White made the fifth person in the majority. His separate opinion concurring in judgment simply stated that the layoff policy was no different than discharging whites and hiring blacks until the suitable percentage of blacks in the work force was achieved. *See also Croson,* 488 U.S. at 497 (O'Connor, J.).

90. *See Bakke,* 438 U.S. at 311.

91. 476 U.S. at 276.

92. *See id.*

Supreme Court to agree that providing role models for minority students constituted a compelling state interest would require it to back away from viewing the rights created by the Equal Protection Clause in terms of the rights of individuals. Role model theory could be a compelling justification only if one starts by viewing teachers and students as members of racial and ethnic groups—a view that a focus on individuals must reject.

The State of Connecticut will not be able to justify the discharge of its affirmative obligation to dismantle racial isolation in Hartford public schools by asserting societal discrimination. Connecticut must articulate a different interest if its plan to engage in compulsory integration is to survive strict scrutiny.

2. *Narrowly Tailored*

In addition to the difficulty Connecticut will meet in providing a compelling state interest, it must also address the second prong of the strict scrutiny test. The measure employed must be narrowly tailored to further the compelling state interest. In order for a measure to pass this prong of the test, there must be no other means available that is less restrictive than the one employed to further the state's goal.

In advancing the compelling state interest of remedying past discrimination, the Court has indicated that it is necessary to consider the use of race-neutral means to obtain the objective and whether the program is appropriately limited such that it will not last longer than the discriminatory effects it is designed to eliminate.[93] The Court has also suggested that, when possible, the beneficiaries should be limited to those individuals who have suffered the effects of discrimination. In *Croson* the Court noted that municipal contracts were awarded on a case-by-case basis. Given the existence of an individualized procedure, the City's only interest in maintaining a quota system rather than investigating the need for remedial action in a particular case would seem to be simple administrative convenience. The City could investigate the need for remedial action on a case-by-case basis.[94] According to the Court, such a case by case treatment makes the program less problematic from an equal protection standpoint, because it does not make the applicant's skin color the sole relevant consideration.[95]

93. *See* Adarand Constructors, Inc. v Pena, 115 S. Ct. 2097, 2118 (1995); City of Richmond v. Croson, 488 U.S. 469, 508 (1988).

94. *See Croson*, 488 U.S. at 508.

95. *See id.*

Powell's opinion in *Bakke* also addressed the narrowly tailored prong of strict scrutiny. He made it a point of stating that the interest in diversity is not just ethnic diversity for its own sake; rather, the interest is the diversity that the individual student contributes to the student population. Thus, each individual minority student must be compared with other students to determine which student would promote educational pluralism.[96] This kind of comparison treats each student as an individual and not as a member of a racial or ethnic group. The individual's race or ethnicity is viewed as simply one aspect of his or her overall character.

The Court's application of the narrowly tailored aspect also shows a concern for furthering the notion of a society of individuals. Like the determination of compelling state interest, The Court's preference is to advance individuality.

III. ROLE OF PUBLIC EDUCATION AS A GOVERNMENTAL SERVICE

When government treats citizens as members of racial and ethnic groups—no matter what the purpose—strict scrutiny is applied. Just as the Georgia legislature treated its citizens as members of racial groups in order to produce three majority-black legislative districts, the Connecticut legislature would have to treat public school students as members of racial and ethnic groups in order to produce racially and ethnically desegregated schools. In both situations, the legislature would be treating citizens not as individuals, but as members of racial and ethnic groups.

Can the conscious treatment of citizens as members of racial and ethnic groups survive an equal protection challenge in the context of desegregating public schools, when it did not in the context of creating majority-minority districts? To this point, the Supreme Court has not accepted a compelling state interest that would justify the use of racial classifications to achieve mandatory desegregation when pursued outside of the remedial context. If such a compelling justification exists it must rest on a fundamental distinction between public education and other governmental services which justifies the dissimilar treatment. The uniqueness of the function of public education can be found in the confluence of two factors—those who attend public schools are chil-

96. *See Bakke*, 438 U.S. at 317.

dren, and the primary purpose of education. These two factors suggest that when government acts as educator of the young, it is operating in a unique capacity. The use of racial classification in the one institution which by its very nature is a transmitter of societal values to the young may be *sui generis*.

In this section I will first examine the conceptual structure that provides the hidden foundation for the Supreme Court's application of the equal protection clause to racial conflicts. The Court seems to view society as a collection of knowing individuals. It is not individuality for the sake of individuality, however, that animates the Court's recent equal protection opinions. The Court appears to be motivated by a desire to protect the rights of individuals to be self-determining. From the conception of society as a collection of knowing individuals there is an implicit role for government. The role of government, however, when dealing with adults—who are choosers—requires a different focus than when dealing with children in public education—who are learners.

A. *Conceptual Structure and the Knowing Individual*

The Supreme Court's primary method of resolving racial and ethnic issues is by viewing American society as a collection of knowing individuals.[97] Much of the Supreme Court's rhetoric on the harm of governmental racial classifications contained in the controlling opinions in cases like *Bakke*, *Wygant*, *Croson*, *Miller* and *Adarand*, rests upon the idea of furthering the self-determination of knowing individuals. Knowing individuals are viewed as rational, autonomous, self-generating, and free-willed people who are capable of pursuing their self-formulated goals and objectives. To hold this view requires that the individual be seen as the source of its drive.[98] This requires a recognition of an essential and hidden self that is viewed as the generator of the desires and predilections of the individual. The ontological presupposition of this essential self is not only that it is unique for any given individual, but also that it is capable of obtaining a self-reflective position separate from all aims and attachments.[99] This split provides

97. This concept of the social world is one of the fundamental presuppositions of the predominant world view in contemporary Western society. *See* BARBARA SENKOWSKI STENGEL, JUST EDUCATION: THE RIGHT TO EDUCATION IN CONTEXT AND CONVERSATION 101 (1991).

98. *See* ROBERT N. BELLAH ET AL., HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE 143 (1985).

99. *See, e.g.*, Seyla Benhabib, *Critical Theory and Postmodernism: On the Interplay of Eth-*

knowing individuals with the ability to assess and revise their aims and attachments.[100] The capacity for self-reflection means that their attitudes, opinions and beliefs can be understood as products of individual realization.

Americans have a strong belief in the sacredness of individual choice. Violations of the right of individuals to think for themselves, judge for themselves, make their own decisions, or live the lives they see fit, is often viewed as sacrilegious.[101] Contemporary American society, perhaps more so than any other society in human history, believes that the primary goal of life is for individuals to live in harmony with their essential selves. Individuals seek to uncover their essential self, decipher its qualities, separate it from that which might obscure or alienate it, and then structure the remaining aspects of their life so that they are in harmony with it.[102] The presupposition of much of mainstream American culture, and hence the journey of a lifetime that occupies many Americans on an emotional, psychological and psychoanalytic level, is the search embodied in the attempt to comprehend and then to live in harmony with the unique and hidden part of who one believes oneself to truly be.

Treating individuals according to a characteristic which they did not choose denies them their ability to be self determining. But the crux of the problem is not the denial of self-determination, it is the impairment of the ability of individuals to obtain the state of individual harmony. It is for the pursuit of individual harmony that makes respecting self-determination so important. The proper approach to racial and ethnic considerations is to transcend those characteristics and deal directly with the essential self that is presumed to be at a distance from all of the individual's characteristics including race or ethnicity. In this way unchosen characteristics are not viewed as constraining the individual.

Even though knowing individuals should not be compelled to view themselves as members of their racial and ethnic group, they must be allowed the conceptual space by society in which to choose to celebrate

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ics, Aesthetics, and Utopia in Critical Theory, 11 CARDOZO L. REV. 1435 (1990); *see also* Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167, 181 (1990).

100. *See* Michael J. Sandel, *Religious Liberty-Freedom of Conscience or Freedom of Choice?*, 1989 UTAH L. REV. 597, 598 (1989).

101. *See* BELLAH ET AL., *supra* note 98, at 142.

102. *See* HUBERT L. DREYFUS & PAUL RABINOW, MICHEL FOUCAULT: BEYOND STRUCTURALISM AND HERMENEUTICS 245 (2d ed. 1983).

their racial or ethnic heritage. As contradictory as it sounds, unchosen characteristics are not to be eliminated, but placed on a level of voluntariness. In order to achieve this notion, traditions of beliefs embodied by racial and ethnic heritages must be converted for the individual into matters of personal preference.[103]

The historical development of the concept of the knowing individual in Anglo-American societies—that appears to animate the Supreme Court's current application of the equal protection clause—was the result of hundreds of years of intellectual development. The origins of this idea are rooted in Judeo-Christian theology which presupposes that God created us as individual souls. The Judeo-Christian origins of Western Civilization continue to provide the foundation for the fundamental belief in the existence of a unique and hidden essential self (the soul) for every individual.[104]

The roots of American liberalism can be traced to 17th century England.[105] There a new philosophy to justify individual rights that were not based upon biblical or classical sources was developed. John Locke was the key figure in the development of this philosophy. The essence of Locke's philosophy was to view the rights of the individual as prior to society. Judeo-Christian theology grounded the notion of individuality in the design of an omnipotent God. In contrast, Locke's philosophy operates by accepting the reality of individuality, but without basing it in the design of a creator God. Locke's philosophy started with the biological individual in a presumed state of nature. This biological individual in a state of nature corresponds to the essential self of the knowing individual. Both are presumed to proceed the person in society. Therefore, both are the real self that is in control of the individual's actions in society.

Locke developed a social order defined in terms of the relations of these individuals to each other.[106] Society comes into existence through the voluntary contract of individuals trying to maximize their own self-interest.[107] As a result, society and government are there to protect

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103. This involves a disrespect for beliefs that individuals find so fundamental as to constitute a part of who they are because those constitutive beliefs must be understood as matters of personal preference.

104. *See* 1 REINHOLD NIEBUHR, THE NATURE AND DESTINY OF MAN: A CHRISTIAN INTERPRETATION 21-23 (1964).

105. For a discussion of American individualism, see generally BELLAH ET AL., *supra* note 98.

106. *See id.* at 143.

107. *See id.*

those pre-ordained individual rights.

The benefit derived by individuals from this arrangement is the noninterference with their pursuit of their own goals and objectives. This benefit provides a sphere for each person which is immune from interference by others. Making possible this mutual benefit is the assumption by individuals of a burden. The burden requires that each individual exercise self-restraint over their inclinations that would, if satisfied, directly interfere or create a substantial risk of interference with others' ability to pursue their goals and objectives.

B. *Role of Government with Regard to Knowing Individuals*

Government comes into existence in order to protect the rights of knowing individuals. Government should be neutral on the question of the good life or the good society, respecting equally all knowing individuals' pursuit of their various objectives. Government must both respect the individuality of its citizens and mediate their conduct so as to allow them to pursue their own desires and to prevent them from unjustly interfering with the rights of their fellow persons to do likewise. By doing this, government allows individuals to choose their own goals and ends for themselves consistent with a similar liberty for others.[108] Government is therefore charged with assuring that individuals receive the benefit as well as abide by the burdens which the social contract entails.

No matter what the goal, when government classifies and treats knowing individuals according to characteristics they do not choose—such as race or ethnicity—it violates its primary function. Government violates the individuality of knowing individuals when it treats them as members of racial and ethnic groups for even laudable purposes such as furthering an integrated society, countering the effects of societal discrimination, reducing the historic deficits of disfavored minorities in various professions,[109] or providing role models for minority students. To use race or ethnicity as a salient characteristic for rights or duties means that government is treating people as members of groups and not as individuals. While government should not treat individuals as member of racial and ethnic groups, it must, however, provide an environment tolerant of those who do choose to make their

108. *See, e.g.*, Sandel, *supra* note 101, at 598 (1989).

109. *See* Regents of the Univ. of Cal. v Bakke, 438 U.S. 265, 310-14 (1978).

race or ethnicity a significant feature of their personal identity. Some individuals will conclude that their individual harmony can only be obtained by pursuing that lifestyle.

C. *Rights of Children in Public Schools Differ from Those of Adults*

In contrast to adults—who are viewed as choosers—children can be seen as learners. Public education is the one place where government is suppose to be actively involved in the socialization of the next generation of adult citizens. In the institution of public education, government exerts a tremendous influence on learners in order to produce the kind of choosers that possess the values necessary for the maintenance of our democratic society. But public education, like other governmental functions, must maintain the neutrality that flows from the conception of society as a collection of individuals.[110] Many recent Supreme Court opinions addressing conflicts in public education have recognized the socializing function of public schools as its primary function. This general view of education has shifted the emphasis in educational disputes from a rights-based to a values-based ideology.[111] Thus the primary concern of the Court should be to assure that schools are inculcating the type of values that minors need to internalize in order to maintain a society of choosers.

1. *Rights of Children*

The Supreme Court has repeatedly noted that the constitutional rights of children differ from those of adults.[112] The difference between minor and adult—however much we may be baffled by borderline problems, demands for adequate criteria, and administrative difficulties—is fundamental and inescapable.[113] As Professor Tussman has pointed out, no single set of principles can govern both minor and adult; we need principles for both the caterpillar and the butterfly.[114]

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110. The equal protection clause's acceptance of society as a collection of knowing individuals provides an implicit model of public education. This implicit model recognizes the constraint of governmental neutrality. For a discussion of that implicit model of education, see Kevin Brown, *Do African-Americans Need Immersion Schools?: The Paradoxes Created by Legal Conceptualization of Race and Public Education*, 78 IOWA L. REV. 813, 858-67 (1993).

111. *See* Rosemary C. Salomone, *Common Schools, Uncommon Values: Listening to the Voices of Dissent*, 14 YALE L. & POL'Y REV. 169, 186 (1996).

112. *See, e.g.*, Bellotti v. Baird, 443 U.S. 622, 634 (1979).

113. *See* JOSEPH TUSSMAN, GOVERNMENT AND THE MIND 53 (1977).

114. *See id.*

The reasons the rights of children are different from those of adults are obvious.[115] The cognitive development of children makes value-inculcation of them inevitable. Children, like adults, will acquire values through innumerable influences on their lives including parents, friends, church, writers, and television. Children, however, lack experience, maturity, and judgment of adults, and therefore cannot critically evaluate what is being presented to them. Children must go through a maturation process during which they will have experiences and develop perspectives that will inevitably effect their view of themselves, their fellow citizens, their country, and their world.[116] After the end of this maturation process, children will be accorded the rights of adults. No matter how misguided their beliefs turn out, as adults they will be entitled to act on their own ideas.

With respect to children, the question is not whether they will go through a maturation process in which values will be inculcated, but who will be involved in that process and how will it be structured. In order for government to maintain its neutrality with respect to children, their rights should flow from providing an environment where they can become the kind of citizens necessary for our democratic society. Thus they must become choosers, but at the same time need to internalize the values that will limit their choices to those that do not interfere with the rights of their fellow citizens.

2. *Public Schools are Primarily Socializing Institutions*[117]

115. The Supreme Court has recognized "three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing." *Bellotti*, 443 U.S. at 634.

116. Some commentators have challenged the notion that schools have an enduring effect on the attitudes, values, and even intellectual development. *See* RANDALL COLLINS, THE CREDENTIAL SOCIETY 1-21 (2d ed. 1985); CHRISTOPHER JENCKS ET AL., INEQUALITY: A REASSESSMENT OF THE EFFECT OF FAMILY AND SCHOOLING IN AMERICA, 135 (1972). Collins stresses that what is learned in school is rapidly forgotten and makes little contribution to the effectiveness of adult role job performance. The importance of schooling for Collins lies in the general acceptance of the principle that educational credentials are a fair and rational method of allocating occupational positions in American society. *See* COLLINS, *supra*, at 20-21.

This line of research presents a particular challenge to the discourse regarding the inculcation of fundamental values. If the school's inculcation is ineffective, then arguably the exposure to ideas that a child as an adult will be negligible. This conclusion, however, conflicts with the exercise of the state's police power, or *parens patriae*, to compel attendance at school experience does have an impact on how the child will view the world.

117. Public education also performs an important academic function. But the academic func-

Public schools are institutions that acculturate America's youth. They are inculcators of dominant American cultural values.[118] The process of educating youth for citizenship is not confined to books and curricular materials—schools also teach shared values by example.[119] Schools inculcate values, both through the curricular materials, as well as through administrative rules and regulations governing student and teacher conduct, including student assignment policies.

The establishment of public elementary and secondary schools with concomitant compulsory school attendance statutes[120] reflects in part the exercise by a state of its police power to assure the public health, safety, welfare, and morality.[121] Underlying the legitimacy of the establishment of public elementary and secondary schools is the acknowledgement that, with respect to children, governmental power is not limited to physical coercion and persuasion. While government must avoid the indoctrination of competent adults, the fertile mind of the young is a legitimate subject of public concern.[122]

The Supreme Court has addressed the socializing aspect of public education on numerous occasions.[123] Many of the Court's recent opin-

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tion is generally viewed as the distribution to students of a value free commodity thought of as knowledge. Thus the academic function does not implicate the concern of the equal protection clause in the way the socializing function does. For a further discussion of the value neutral presupposition of the academic function of public schools see Brown, *supra* note 110, at 862-65.

118. The term "values" is used in this Article to refer to moral, political, and social values, including ideas, attitudes, opinions and beliefs.

119. *See* Mary Harter Mitchell, *Secularism in Public Education: The Constitutional Issues*, 67 B.U. L. REV. 603, 684 (1987). For example, rules prohibiting fighting on school premises attempt to inculcate a belief that violence is not a legitimate means to resolve a dispute. Rules requiring all students to attend the same classes and to start school at the same time attempt to produce patriotic sentiment. *See, e.g.*, West Virginia v. Barnette, 319 U.S. 624 (1943) (holding that children cannot be compelled to salute the flag or recite the pledge of allegiance in public schools).

120. Virtually every state plus the District of Columbia have adopted a compulsory school attendance statute. *See* 2 WILLIAM D. VALENTE, EDUCATION LAW: PUBLIC AND PRIVATE 466 (1985).

121. *See, e.g.*, State v. Bailey, 61 N.E. 730 (Ind. 1901); State v. Hoyt, 146 A. 170 (N.H. 1929); *see also* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926) (discussing state police power with regard to zoning ordinances); Jacobson v. Massachusetts, 197 U.S. 11, 24-25 (1905) (discussing state police power with regard to medical vaccinations).

122. For a discussion of the rationale of allowing the Government access to the mind, see TUSSMAN, *supra* note 113. Tussman asserts that the public interest in the condition of the mind is the most fundamental part of the public domain.

123. *See, e.g.* Epperson v. Arkansas, 393 U.S. 97 (1968) (invalidating a state statute that proscribed the teaching of the theory of evolution in public schools); Abington v. Schempp, 374 U.S. 203 (1963) (invalidating a state statute requiring Bible reading in public schools);

ions have been extremely forthright about embracing the value-inculcating aspect of public elementary and secondary schools as its primary role.[124] In *Board of Education v. Pico*,[125] the Court was presented with the removal by school officials of controversial books from a public school library. Even though the Court was sharply divided over the outcome of the case, most of the Justices agreed that it was important to examine public schools with an understanding that they are socializing institutions. Justice Brennan, writing for a plurality of three judges, held that students possess a right to receive information and that right is violated whenever school officials remove books from school libraries in order to deny students access to ideas in those books with which the school officials disagree.[126] In his opinion Justice Brennan wrote "[the Court has] acknowledged that public [elementary and secondary] schools are vitally important . . . vehicles for inculcating fundamental values necessary to the maintenance of a democratic political system."[127] In a concurring opinion, Justice Blackmun stated "the Court has acknowledged the importance of the public [elementary and secondary] schools in the preservation of values on which our society rests. Because of the essential socializing function of schools, local school officials . . . awaken the child to cultural values."[128] Justice Rehnquist, in

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Engel v. Vitale, 370 U.S. 421 (1962) (holding that a state may not require the reading of an official state prayer in public schools even if pupils who wish to remain silent or be excused may do so); *see also* Ambach v. Norwick, 441 U.S. 68 (1979) (upholding against an Equal Protection Clause challenge a New York statute forbidding permanent certification as a public school teacher of any person who is not a United States citizen); Board of Educ. v. Pico, *ex. rel.* Pico, 457 U.S. 853 (1982) (limiting school board's discretion to remove books from the school libraries); Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986) (upholding the authority of public school officials to discipline a student for the content of a vulgar speech delivered at a student assembly); Hazlewood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988) (upholding the authority of public school officials to censor a student newspaper).

124. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988) (upholding the authority of public school officials to censor a student newspaper); Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986) (upholding the authority of public school officials to discipline a student for the content of a vulgar speech delivered at a student assembly); Board of Educ. v. Pico *ex. rel.* Pico, 457 U.S. 853 (1982) (limiting school board's discretion to remove books from school libraries); Ambach v. Norwick, 441 U.S. 68 (1979) (upholding against an Equal Protection Clause challenge a state statute forbidding permanent certification as a public school teacher of any person who is not a United States citizen).

125. 457 U.S. 853 (1982).

126. *See id.* at 871-72. Justices Marshall and Stevens joined Brennan's plurality opinion.

127. *Id.* at 864 (citation omitted).

128. *Id.* at 876 (Blackmun J., concurring) (citations omitted). Justice Blackmun rested his concurrence not on the right to receive information, articulated by Justice Brennan, but instead on improper suppression of ideas by the school officials.

his dissenting opinion joined by the Chief Justice Burger and Justice Powell, also placed emphasis on the socializing role of public elementary and secondary schools. In criticizing Justice Brennan's plurality opinion which rested upon a right of students to receive information, Justice Rehnquist wrote:

> The idea that students have a right of access, in the school, to information other than that thought by their educators to be necessary is contrary to the very nature of an inculcative education. Education consists of the selective presentation and explanation of ideas. . . . Thus, Justice Brennan cannot rely upon the nature of school libraries to escape the fact that the First Amendment right to receive information simply has no application to *the one public institution which, by its very nature, is a place for the selective conveyance of ideas.*[129]

In *Bethel School District v. Fraser*,[130] the Court upheld—against a free speech challenge—the authority of school officials to discipline a student for delivering an address at a student assembly which made suggestive use of vulgar and offensive terms. The Court rested its opinion on the importance of the socializing function of public elementary and secondary schools. Citing its opinion in *Ambach v. Norwick*,[131] the Court stated:

> The role and purpose of the American public school system were well described by two historians, who stated: "[P]ublic education must prepare students for citizenship . . . . It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation." In *Ambach v. Norwick, we echoed the essence of this statement of the objectives of public education as the "inculcat[ion of] fundamental values necessary to the maintenance of a democratic political system.*[132]

The recognition of the value-inculcating aspect of public education was also a salient feature in the Supreme Court's opinion in *Hazlewood*

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129. *Id.* at 914-15 (Rehnquist, J., dissenting) (second emphasis added).

130. 478 U.S. 675 (1986).

131. 441 U.S. 68 (1979). For a discussion of *Ambach*, *see infra* notes 138-46 and accompanying text.

132. *Fraser*, 478 U.S. at 681 (citations omitted) (emphasis added) (alterations in original).

School District v. Kuhlmeier.[133] The Court addressed content-based censorship by a school principal of articles that were to appear in a student newspaper.[134] Though this was also a hotly debated case, (just as in *Pico*) almost all of the justices focused on the socializing aspect of public education. Writing for a five person majority, Justice White upheld the principal's decision to censor the articles. White repeatedly noted the importance of public elementary and secondary schools in awakening children to cultural values.[135] In a dissenting opinion joined by Justices Marshall and Blackmun, Brennan noted that "[public elementary and secondary schools] inculcate[] in tomorrow's leaders the fundamental values necessary to the maintenance of a democratic political system. . . . . All the while, the public educator nurtures students' social and moral development by transmitting to them an official dogma of community values."[136]

Pico, *Fraser*, and *Kuhlmeier* all addressed First Amendment issues arising in the context of public elementary and secondary schools. The Court's first explicit articulation of the objectives of public education as inculcating fundamental values, however, was in an equal protection case, *Ambach v. Norwick.*[137] *Ambach* is also an important case in that

133. 484 U.S. 260 (1988).

134. *See id.* at 262-64. Principal Reynolds of Hazelwood East High School objected to two student-written articles. One was an article describing three Hazelwood East students' experiences with pregnancy; the other discussed the impact of divorce on students at the school. Even though the pregnancy story used false names to keep the girls' identities a secret, Reynolds was concerned that the students could still be identified from the text. Reynolds also believed that the article's references to sexual activity and birth control were inappropriate for some of the younger students at the school. Reynolds' concern about the article on divorce related to the fact that one of the students identified by name made defamatory comments about her father. Reynolds felt that the students' parents should have been given an opportunity to respond to her remarks or to consent to publication. *See id.*

135. *See id.* at 272, 274-75.

136. *Id.* at 278 (internal quotation marks omitted) (citations omitted).

137. 441 U.S. 68 (1979). The Court also noted the importance of the value-inculcating function of public schools in another case addressing the application of the Equal Protection Clause in public schools. *See* Plyler v. Doe, 457 U.S. 202, 221, *reh'g denied*, 458 U.S. 1131 (1982). *Plyler*, however, was not decided primarily with reference to the value-inculcating function of public schools. *See also* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 113-14 (1973) (Marshall, J. dissenting) ("'Americans regard the public schools as a most vital civic institution for the preservation of a democratic system of government.' Education serves the essential function of instilling in our young an understanding of and appreciation of the principles and operation for our governmental processes.") (citation omitted).

In Brown v. Board of Educ., 347 U.S. 483 (1954), the Supreme Court noted that public education "is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." *Id.* at 493.

the court articulated in it the need to distinguish public education from most other governmental services.

Ambach involved an equal protection challenge to a New York law that forbade certification as a public school teacher of any person who was not a citizen of the United States unless that person manifested an intention to apply for citizenship. The appellees were two foreign-born individuals who were otherwise qualified to teach in public elementary and secondary schools.[138] They challenged the law on the grounds that it violated the equal protection clause, by employing a classification based on alienage.[139] In upholding the New York law, the five justice majority opinion authored by Justice Powell stated that although classifications based on alienage are normally inherently suspect, there are exceptions.[140] According to Powell, some state functions are intimately bound up with the operation of the state as a governmental entity. Exclusion from those functions of all persons who have not become part of the process of self-government shall not be reviewed under the rigorous constitutional test normally applied to suspect classification.[141] If the classification based on alienage relates to one of those governmental functions, then it is reviewed under the lower rational relationship standard.[142]

In determining whether or not teaching in public elementary and secondary schools constitutes a government function, the Court stated that "we look to the role of public education and to the degree of responsibility and discretion teachers possess in fulfilling that role."[143] According to the Court, "public education, like the police function, fulfills a most fundamental obligation of government to its constituency. The importance of public [elementary and secondary] schools . . . in the preservation of the values on which our society rests, long has been

138. Appellee Norwick was born in Scotland and was a citizen of Great Britain. She had been a resident of the United States since 1965 and was married to an American citizen. Appellee Dachinger was a Finnish citizen who came to the United States in 1966. She was also married to an American citizen. Neither of the Appellees wanted to give up their citizenship in their native countries. *See Ambach*, 441 U.S. at 71.

139. *See id.*

140. *See id.* at 74-75.

141. *See id.* at 73-74.

142. *See id.* at 74. The Court noted that the distinction between citizens and aliens is ordinarily irrelevant to private activity. However, the status of citizenship, whether by birth or by naturalization, denotes an association with the polity. The lack of this association provides government entities with wider latitude in limiting participation of noncitizens. *See id.* at 75.

143. *Id.* at 75.

recognized by our decisions."[144] After finding the value-inculcating function of public elementary and secondary schools fundamental, the Court upheld the New York law under a rational basis review.[145]

IV. APPLICATION OF STRICT SCRUTINY TO MANDATORY DESEGREGATION FROM A VALUES INCULCATION PERSPECTIVE

The Supreme Court of Connecticut's opinion in *Sheff v. O'Neill*[146] rests upon the impact of desegregated schools on the socializing function of education. The Supreme Court of Connecticut indicated that schools are important socializing institutions for imparting shared values. It favored integrated schools in Hartford as a means to inculcate certain values to its public school students.

When government action affects the rights of adults, it is affecting the right of people who are generally presumed to be capable of exercising the capacity for free choice. Racially and ethnically classifying choosers is anathema to their ability to be self-determining, because they are being treated in accordance with a characteristic they did not choose. Children in public schools, however, are learners not choosers. Classification of them in public schools should be understood in the context of its implications for learners. In a value-inculcating institution those implications are related to the values or messages being carried by the use of racial and ethnic classifications.

An important socializing objective of public education is to advance the minor's ability to become a chooser. This requires public education to advance two conflicting objectives that government is to protect. The learner must learn to become a self-determining chooser. But equally important is the need for learners to learn to constrain their choices in order to allow others the same right of self-determination. Thus schools must strive to further the values of self-determination and toleration. They must both advance and constrain individual choices at the same time. When the Court focuses on whether mandatory desegregation advances the objectives of a society of knowing individuals, both objectives must be examined.

A. *Mandatory Desegregation's Impact on Self-Determination*

144. *Id.* at 76 (citation omitted) (internal quotation marks omitted).
145. *See id.* at 80-81.
146. 238 Conn. 1, 678 A.2d 1267 (1996).

Forms of cultural beliefs that require the individual to submit his or her will to some external standard such as the will of God, ethnic traditions, or racial affiliation, all inhibit the ability of knowing individuals to live in a society that provided the necessary freedom for individual self-determination. No concept could be more anathema to the self-determination of knowing individuals than the restriction of their range of options to historically ascribed traditions.

Today, we think of America as a place that has become the home of new immigrants from China, Cuba, El Salvador, Haiti, Honduras, India, Korea, Japan, Mexico, Nicaragua, Nigeria, Philippines, Vietnam, and many other countries. But before that America became the new home of the English, the Scots, the Welsh, the Irish, the German, the Poles, the Italians, the Slavs, the Dutch, the French, the Czechs, the Russians, the Portuguese, and the Spanish. One of the primary motivations for the development of the concept of the knowing individuals was to emancipate the individual from religious and feudal obligations and loyalties that were the result of ascription and historical tradition.[147] To liberate the individual, the dead-hand grip of the past embodied in Europe's religious, ethnic, and feudal traditions had to be overcome. This emancipatory function took on particular importance in a society like the United States, which is a land predominately of immigrants. Immigration to the United States was the largest single voluntary migration in human history. Between 1821 and 1924, total immigration exceeded thirty three million people primarily from Europe.[148] As a result, America was founded as a country of immigrants who came from diverse old countries with different ethnic languages, cultures, and heritages.

Not only did America have to contend with so many different ethnic groups, but these ethnic groups also brought with them different religious traditions. The recent immigrants have brought with them Buddhism, Shintoism, Islam, Hinduism, and Sikhism. These newly arrived religions have added to those of the Anglican, the Baptist, the Puritan, the Calvinist, the Catholic, the Episcopalian, the Lutheran, the Jew, and the Russian Orthodox. The character of American immigration changed drastically around 1880. A principally Protestant nation began to see a large number of Catholic and Jewish immigrants. Between 1900 and 1930 the Catholic population doubled to 24 million.[149]

147. *See* STENGEL, *supra* note 97 at 101.

148. *See* ROGER DANIELS, COMING TO AMERICA, A HISTORY OF IMMIGRATION AND ETHNICITY IN AMERICAN LIFE 23 (1990).

149. *See* Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions* 82

The massive increase in the numbers of Catholics was replicated by the number of Jews. Their population increased from 229,000 in 1887 to over 4,228,000 forty years later.[150]

The emancipatory function of the knowing individual in America served as a means to attenuate the sense of ethnic and religious group identity for European immigrants. By reducing the sense of ethnic and religious identity, large and destructive ethnic and religious conflicts so often seen in Europe and other parts of the world were largely avoided in America.

During the Civil Rights Era the concept of the knowing individual was expanded to include blacks. At this time racial traditions that had constrained the individuality of African-Americans were analogized and treated in the same fashion that religious and ethnic traditions of immigrating Europeans had been previously treated.[151]

There has always been a nascent tradition in American society that recognized blacks as individuals.[152] The origins of this tradition can be traced to its earliest roots in the messages of some religious leaders in colonial America. Over 100 years before the American Revolutionary War, such leaders advocated a conception of society under God where race did not matter. For example, Cotton Mather—the symbol of authoritarian Puritanism—asserted the equality of slaves in the sight of God.[153] Richard Baxter, another English Puritan, told slave holders in 1673 that slaves are as good a kind as you and even though their sins have enslaved them to you, remember that they have immortal souls and are just as capable of salvation as you are.[154]

Despite this rudimentary tradition, prior to the Civil Rights Movement the African-American seldom stood at a distance from their race. For African-Americans, race was not an object of their experience, but a contradictory and irreconcilable part of their subjectivity. There was little, if any, space ("-") between the African and the American (African American) where race did not matter. Race was the trait that drew

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VA. L. REV. 1, 49 (1996). Between 1850 and 1900 the number of Catholics increased from 1.7 million to 12 million. The number doubled again between 1900 and 1930. *See id.*

150. *See id.* This represented an increase from .5% of the nations's population to 3%.

151. For an extensive discussion of this see Brown, *supra* note 110, at 834-37.

152. Individualism was embedded in the civic and religious structures of colonial life. The term, however, was not given a name until Tocqueville used "individualism" to describe the restless American quest for material betterment. *See* BELLAH ET AL. *supra* note 99, at 147.

153. *See* KENNETH L. KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION 45 (1989).

154. *See id.*

blacks together in a collective struggle against racial oppression. Thus race provided the basis for the duties and obligations attendant upon a member of a community that was struggling to overthrow its subjugation. This could be understood as the African side of their nomenclature. Within the American arena in which the dominant understandings about African Americans operated, however, race was the trait that subjected blacks to discrimination and often brutalization. Race functioned to subordinate and oppress black people. It was this suppression that epitomized the American experience of blacks.

This duality of the African American soul was best described by W. E. B. DuBois in his 1903 book *The Souls of Black Folk.* As Du Bois wrote:

> [T]he Negro is a sort of seventh son, born with a veil, and gifted with second-sight in this American world,—a world which yields him no true self-consciousness, but only lets him see himself through the revelation of the other world. It is a peculiar sensation, this double-consciousness, this sense of always looking at one's self through the eyes of others, of measuring one's soul by the tape of a world that looks on in amused contempt and pity. One ever feels his twoness,—an American, a Negro; two souls, two thoughts, two unreconciled strivings; two warring ideals in one dark body, whose dogged strength alone keeps it from being torn asunder.[155]

The major event that inaugurated the Civil Rights Era and sparked the Civil Rights Movement was the Supreme Court opinion of *Brown v. Board of Education.*[156] As an era in American history, this period of time included many historically significant economic, social, legal and political events. These events would include the Montgomery Bus Boycott, the Freedom Rides, the March on Washington in 1963, school desegregation litigation, passage of the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Fair Housing Act of 1968.[157]

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155. W. E. BURGHARDT DU BOIS, THE SOULS OF BLACK FOLK: ESSAYS AND SKETCHES 16-17 (1961). This printing contains the complete text of the original 1903 edition.

156. 347 U.S. 483 (1954).

157. In order to understand the influence that the desegregation era has had on our current racialized thinking, it is necessary to recall its history. The conservative implications of the civil rights agenda, which at the time were progressive, were not the ones that rallied African-Americans to its support. We must recall that for the African-American the civil rights agenda has suffered from an "ideological drift". (The term "ideological drift" is one that I am borrowing from Professor Jack Balkin. He notes that political and legal ideas can change their

The Civil Rights Movement can be thought of as the liberating ideological force that helped to bring about the major political, economic, social, and legal events of the era. Within the confines of a conceptual structure of thought that views the world from the standpoint of a society of knowing individuals, this movement can be viewed as containing two separate and distinct ethoses. One ethos is negative and will be discussed here. The second is positive and I will defer its discussion until the next section.

The negative ethos was a liberating one. It attempted to free individuals that were black from the conceptual imprisonment attached to the color of their skin. Thus the negative ethos of the Civil Rights Movement called upon the emancipatory function that is contained in a society viewed as a collection of knowing individuals. This ethos was a search for *a way out, an exit* from the over-arching objectification and subordination of people of color.[158] This negative ethos sought to problematize the understanding of blacks as permanent members of a subordinated community and thus make an historical break with racial attitudes that had been forged and maintained about blacks in the past.[159]

This liberation applied not only to the subordinating aspect of being black, but also to the duties and obligations imposed on the individual by being a member of the African-American community. It was a way for African-Americans to lose their blackness in the celebration of their individuality. Hence, both the oppressive aspect as well as the unifying

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political valence over time from progressive to conservative and back again. *See* J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 15 DUKE L.J. 375, 383-84 (1990)). The civil rights colorblind agenda of the 1950s has been co-opted by conservative ideology and used as a bar to race-based programs aimed at addressing the current condition of African-Americans. By situating the civil rights agenda within its historical context and accounting for the ideological drift that has occurred since the 1950s, we can begin to see how the civil rights program was never intended to respond to the current situation with regards to African-Americans.

158. African-Americans have long been looked down upon by dominant American culture. This point was discussed by Toqueville in ALEXIS DE TOQUEVILLE, DEMOCRACY IN AMERICA (Phillips Bradley ed., 1945). In a chapter entitled "The Present and Probable Future Condition of the Three Races That Inhabit the Territory of the United States," Toqueville discussed the racial mistreatment of African-Americans. Also, in his 1944 epic, Gunnar Myrdal stated:

> Upper class people in all countries are accustomed to look down upon people of the laboring class as inherently inferior. But in the case of Negroes the deprecation is fortified by the elaborate system of racial beliefs, and the discriminations are organized in the social institution of rigid caste and not only of flexible social class.

GUNNAR MYRDAL, AMERICAN DILEMMA 209 (1962).

159. *See, e.g.*, Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 761 (1990).

aspect of being African-American are to be transcended in favor of allowing individuals to be self-determining. In other words, the African and the American are both to be transcended so that the individual can live within the "-" created between the other two selves. In effect, the dual nature of the African-American soul was now to be divided into three parts. With the third part, a sense of individuality becoming dominant.

When federal courts engaged in remedial school desegregation, they were attempting to remedy prior discriminatory conduct. Connecticut's affirmative obligation must be examined outside of the remedial context. Mandatory desegregation of public school students both conveys and rejects the value of self-determination. On the one hand, bringing students of different racial and ethnic groups together allows them to interact with people of different racial or ethnic groups—on an individual basis. By exposing students to people with different racial and ethnic backgrounds it also allows them to be more informed about their own backgrounds. Awareness of their backgrounds is necessary to allow students to gain the ability to obtain a self-reflective position from which they can accept or reject their received traditions. Thus mandatory desegregation can be viewed as enhancing the ability of learners to become self-determining.

Mandatory desegregation can also be viewed as conveying the wrong message. Whether government is engaged in racial and ethnic classification for the purpose of segregating students or integrating students, both violate the constraint of neutrality because government is not treating students as individuals. Mandatory desegregation sends the message that students should think of themselves and others as members of racial and ethnic groups and not as individuals. As a result, government is not liberating people from racial and ethnic traditions, but sending a message that constrains them to racial and ethnic traditions.

Analyzing mandatory desegregation by focusing on self-determination does not definitively resolve the issue. Depending on how it is understood, mandatory desegregation can inculcate values that further, or constrain self-determination.

B. *Mandatory Desegregation's Impact on Tolerance for Racial and Ethnic Diversity*

Being a citizen entails not just the benefits and privileges that come

from being able to be self-determining, but also the duties and obligations to constrain one's choices. In a system of collective self-government in which every citizen is viewed not only as an agent but also as a subject, the ruler and the ruled affect each other. In order for citizens to be self-determining they must have an interest in their fellow citizens developing the values that will allow them to be self-determining. Toleration—the showing of understanding or leniency for conduct or ideas conflicting with one's own—for those who are different provides as fundamental a core set of values as does the right of self-determination.

There has long been a need for racial and ethnic toleration in American society. Today America is the new home of recent immigrants from many diverse places, as well as the home of ethnic groups with a longer history in this country. The need for toleration of racial and ethnic diversity has always been important to American life. America has always been a country of people with their own different ethnic languages, cultures, and heritages.

The positive ethos of the Civil Rights Movement can be seen in its demand by African-Americans to be accepted for being black. Accompanying the desegregation movement was also the mantra of "Black is Beautiful" and the switch of nomenclatures first from Negro, to Black, and then to African-American. These represented a demand by African-Americans for respect and toleration of their heritage and way of life.

The conception of society that follows from the concern about the rights of knowing individuals does not eliminate the possibility that people will choose to make their race or ethnicity a salient part of their identity. Racial and ethnic differences are in theory to be placed upon a voluntary basis. This means that government must ensure those who wish to make their race or ethnicity an important aspect of their personal identity be given the conceptual space by their fellow citizens to do it.

All students, regardless of race or ethnicity, need to be socialized to be tolerant of these differences. The Supreme Court of Connecticut noted that the fundamental values necessary for a democratic society are jeopardized when students are educated in racially and ethnically isolated schools.[160] Ensuring that public school students internalize the

160. This point has also been made in a number of opinions from the United States Supreme Court, but perhaps no more forcefully than by Justice Clarence Thomas in his opinion in *Holder v. Hall*, 512 U.S. 874 (1994) (Thomas, J. concurring).

values of toleration for racial and ethnic differences is just as important as them internalizing the values for self-determination. Exposing children to those from diverse racial and ethnic backgrounds assimilates them into a pluralist culture and thereby prepares them for participation in our democratic society. The court correctly stated that all students benefit from racially and ethnically diverse schools. This is because without the opportunity to get to know each other individuals of different races and ethnicities can not gain understanding and mutual respect.

While it can be argued that self-determination is both advanced and inhibited by mandatory desegregation, racial and ethnic tolerance is far less equivocal. As a value, it is advanced by a racially and ethnically diverse student body. School desegregation allows students from different backgrounds to interact on an individual basis.

C. *Application of Strict Scrutiny to Mandatory Desegregation*

In order for the mandatory desegregation of Hartford public school students to survive strict scrutiny, Connecticut must supply a compelling state interest and demonstrate how the means chosen to advance that interest are narrowly tailored. The rights created by the equal protection clause are guaranteed to the individual. In order to give itself the best chance to survive strict scrutiny, Connecticut should also demonstrate how mandatory desegregation respects the individuality of its students.

Connecticut can argue that the mandatory desegregation of public students is necessary to further its interests of properly advancing the ability of its students to become self-determining choosers. Mandatory desegregation allows individual students to become more informed about other lifestyles. Becoming more informed about racial and ethnic differences furthers a minor's ability to obtain a self-reliant position from which she can assess her received tradition. Minors as adults will be better able to make informed choices about the lives they will lead. In addition, racially and ethnically diverse student bodies also advance the values of racial and ethnic toleration. Toleration of those who choose to celebrate their racial and ethnic heritage is necessary for them to pursue these lifestyles.

Connecticut can also demonstrate that mandatory desegregation is narrowly tailored. The values that Connecticut seeks to advance are ones that all students regardless of race or ethnicity need to internalize. Mandatory desegregation is narrowly tailored because only those individuals who need to be subjected to the socializing process provided by

desegregated schools are effected. Thus Connecticut is respecting the individuality of its students.

V. CONCLUSION

In *Sheff v. O'Neill*[161] the Supreme Court of Connecticut placed an affirmative obligation on the state to eliminate racial isolation in Hartford public schools. This obligation was placed on the state despite any finding of intentional segregative conduct by state officials. In order to discharge this obligation, Connecticut will have to treat its students as members of racial and ethnic groups.

For Connecticut to discharge its affirmative obligation to dismantle racial isolation in public schools it must overcome the obstacles imposed by recent Supreme Court cases. Despite the laudatory nature of the goal that Connecticut seeks to achieve, given the Supreme Court opinion in *Miller v. Johnson*,[162] strict scrutiny will be triggered. Connecticut will have to justify its use of racial classifications by showing that its scheme is narrowly tailored to advance a compelling state interest. Supreme Court precedent has not yet provided a compelling state interest that would justify the use of racial classification for purpose of desegregating public schools.

In order to comply with strict scrutiny requires that there must be something unique about public education. The role of public education suggests that its unique features may justify a different analysis for the use of race and ethnic classification in public schools than it does outside of that context. Public schools are responsible for inculcating fundamental values necessary for the maintenance of our democratic society to minors. In the context of public education, the use of racial classifications should be viewed in light of public schools' socializing function. Thus, the primary question about using racial classifications of public schools must focus on the message being conveyed by their use.

Connecticut can demonstrate that mandatory desegregation can pass strict scrutiny. Connecticut has a compelling interest in the proper socialization of public school students. The fundamental values that

161. 238 Conn. 1, 678 A.2d 1267 (1996).
162. 115 S. Ct. 2475 (1995).

public schools should advance must foster individual choice. At the same time, however, they must constrain those choices to allow others the ability to choose as well. Mandatory desegregation may be able to advance the ability of students to become self-determining and certainly contributes to toleration of racial and ethnic differences. All students need to internalize the values of liberty and self-determination and tolerance of racial and ethnic diversity. Therefore, mandatory desegregation is narrowly tailored to advance the State's compelling interest.