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Deconstructing Transnationalism: Conceptualizing Metanationalism as a Putative Model of Evolving Jurisprudence

Paul Enriquez

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Deconstructing Transnationalism: Conceptualizing Metanationalism as a Putative Model of Evolving Jurisprudence

*Paul Enríquez**

ABSTRACT

This Article builds upon Philip C. Jessup's revolutionary scholarship to pave new pathways for interdisciplinary research and expand the normative constitutional framework of universal human problems. To that end, this Article ties American constitutional theory to the new era of international globalization and provides context that facilitates the discussion of racial and ethnic diversity in education from a domestic and international perspective. By arguing for compelling treatment of diversity in elementary and secondary learning institutions, this Article introduces a new theory of constitutional interpretation vis-à-vis international law. This theory, called metanationalism, rejects Harold Koh's theory of transnationalism and demonstrates that nationalism and transnationalism are not two mutually exclusive concepts at opposite ends of a linear spectrum of constitutional theory. Contrary to Koh's postulate, metanationalism conceptualizes these two theories as components in a multidimensional paradigm where such theories exist to broaden and enrich legal analysis. Applying metanationalism, this Article argues that existing literature overlooks diversity's role in the global education-rights movement and focuses on India as a case study. Lastly, this Article analyzes a recent trend in U.S. constitutional law to advocate revisiting the current equal protection landscape.

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The doctrine of human equality may be unpopular with besotted ignorants, but, popular or unpopular, I shall stand by it until I am relieved of the unprofitable labors of such.

—Thaddeus Stevens¹

INTRODUCTION

Five and a half decades ago, on May 17, 1954, the Supreme Court rendered one of its most significant and controversial rulings to date when it decided *Brown v. Board of Education*.² After decades of government-sponsored racial segregation, the Court unanimously struck down the doctrine of “separate but equal” in public educational facilities.³ The Court emphasized the importance of education in our society by reminding us that “[i]t is the very foundation of good citizenship” and “a principal instrument in awakening [a] child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.”⁴ *Brown’s* jurisprudence overturned nearly six decades of de jure⁵ segregation and has become a virtuous emblem of the judiciary’s ability to protect the individual rights guaranteed in the Equal Protection Clause of the Fourteenth Amendment.⁶

Despite *Brown’s* powerful mandate against racial discrimination, total desegregation remains an unmet goal.⁷ De jure segregation may have been abolished, but many public schools remain de facto⁸

1. CHESTER JAMES ANTIEAU, *THE INTENDED SIGNIFICANCE OF THE FOURTEENTH AMENDMENT* 238 (1997) (citing JAMES WOODBURN, *THE LIFE OF THADDEUS STEVENS* 428–29 (1913)). Stevens, a Representative from Pennsylvania, uttered these words on September 4, 1866. *Id.*

2. 347 U.S. 483 (1954).

3. *Id.* at 495.

4. *Id.* at 493.

5. “De jure” is Latin for “as a matter of law.” *Black’s Law Dictionary* defines the term as “[e]xisting by right or according to law.” BLACK’S LAW DICTIONARY 490 (9th ed. 2009).

6. Gerald N. Rosenberg, *African-American Rights After Brown*, in BLACK, WHITE, AND BROWN 203, 208 (Clare Cushman & Melvin I. Urofsky eds., 2004).

7. Diane E. Hess, *Brown as a Classroom Icon*, in BLACK, WHITE, AND BROWN, *supra* note 6, at 275, 281.

8. “De facto” is Latin for “in point of fact.” *Black’s Law Dictionary* defines the term as “[a]ctual; existing in fact; having effect even though not formally or legally recognized.” BLACK’S LAW DICTIONARY 479 (9th ed. 2009).

segregated due to pervasive residential segregation and white flight.⁹ To combat de facto segregation, several school districts recently implemented voluntary integration programs, which sparked litigation in the lower courts.¹⁰ The school districts, relying on the Supreme Court's decision in *Grutter v. Bollinger*,¹¹ urged the courts to uphold the constitutionality of their race-conscious plans. However, *Grutter* extends only to higher education,¹² and its application to K–12 admissions generated a stream of organized legal chaos.

Most people familiar with *Brown* and its progeny recognize the aspiration of promoting racial and ethnic diversity,¹³ while

9. Imany Perry, *Holistic Integration: An Anniversary Reflection on the Goals of Brown v. Board of Education*, in LEGACIES OF BROWN 303, 304 (Dorinda J. Carter et al. eds., 2004).

10. See, e.g., *Comfort v. Lynn Sch. Comm.*, 418 F.3d 1, 7–9 (1st Cir. 2005) (en banc) (describing the Lynn School Committee's race-conscious voluntary transfer plan); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162, 1169–72 (9th Cir. 2005) (en banc) (describing the Seattle School District's assignment plan designed to ameliorate the effects of private housing segregation), cert. granted, 547 U.S. 1177 (2006); *McFarland v. Jefferson Cnty. Pub. Sch.*, 330 F. Supp. 2d 834, 841–48 (W.D. Ky. 2004) (describing the Jefferson County Public School District's voluntary student assignment plan for purposes of integration), aff'd per curiam, 416 F.3d 513 (6th Cir. 2005), cert. granted sub. nom. *Meredith v. Jefferson Cnty. Bd. of Educ.*, 547 U.S. 1178 (2006).

11. 539 U.S. 306, 343–44 (2003) (holding that the University of Michigan Law School's race-conscious admissions plan did not violate the Equal Protection Clause because diversity constitutes a compelling government interest that justifies the narrowly tailored use of race in the context of higher education).

12. See discussion *infra* note 424.

13. Diversity, as referred to in this Article, denotes the differences among people. For many decades after independence, the United States' public schools operated on a dual system that served as a barrier for racial diversity and inclusion. Carl A. Grant, *Diversity and Inclusion in the United States: The Dual Structures that Prevent Equality*, in INTERNATIONAL PERSPECTIVES ON EDUCATIONAL DIVERSITY AND INCLUSION: STUDIES FROM AMERICA, EUROPE, AND INDIA 47, 52–53 (Gajendra K. Verma et al. eds., 2007) [hereinafter INTERNATIONAL PERSPECTIVES]. After the Civil War, group distinctions in the United States shifted to focus mainly on race and ethnicity. Today, "racial and ethnic diversity" among individuals is a term that is generally used to depict a mixture of individuals from different racial and ethnic backgrounds. Most of the current diversity literature classifies minority groups as White, Black, Latino, Asian, or Other. However, this system of classification does not adequately portray diversity in the United States. Even within these overinclusive umbrella categories for minorities, each group is diverse in its own way. For example, Latinos are a group comprised of Spanish-speaking peoples from the Caribbean, Spain, and Central and South America. Approximately 62 percent of Latinos in the United States are of Mexican origin (mainly concentrated in California, Texas, Florida, and New York), 13 percent are of Puerto Rican origin (mostly inhabiting the New York City metropolitan area), 5 percent are of Cuban origin (mostly residing in the Miami area), 12 percent are of Central or South American origin, and 8 percent are from Spain or other places. MICHAEL BENJAMIN, CULTURAL DIVERSITY, EDUCATIONAL EQUITY AND THE TRANSFORMATION OF HIGHER EDUCATION 53 (1996). The Asian category is noticeably more diverse. In 2000, 23 percent of Asians in the United States were of Chinese origin, while 19 percent were Filipino, 16 percent South Asian (Indian), 12 percent

simultaneously eliminating segregation, as a distinctively American problem. Yet, contrary to this belief, an examination of law and public policy in nations around the world reveals that diversity in education—as well as in other areas—has become a global predicament. This is precisely the type of dilemma identified by Philip C. Jessup, the late jurist and scholar, when he published a series of lectures contained in his groundbreaking volume *Transnational Law*. Jessup explored the universal nature of human problems to challenge the traditional approach to relationships between nation-states, as well as between states and non-state actors.¹⁴ Jessup's exposition of the complex and interrelated world community in which we live constitutes the genesis of this Article.

In broad terms, this Article examines the constitutional framework of racial and ethnic diversity in K–12 public education from an equal protection standpoint. Namely, it argues for constitutional compelling treatment of diversity and integration in education that survives strict judicial scrutiny. To advocate a normative framework inclusive of diversity, the greater part of this Article ties American constitutional theory to the new era of international globalization. By using diversity as a “universal human problem,” this Article builds upon Jessup's revolutionary scholarship to challenge the current binary construct (nationalism–transnationalism) advanced by Professor Harold Koh and conceptualizes a solution as a putative model of evolving jurisprudence.

This Article makes three distinct contributions to legal scholarship. First, it introduces metanationalism,¹⁵ a novel theory of constitutional interpretation vis-à-vis international law. This term has not appeared in prior literature but borrows from Jessup's own experiment in word coining. When Jessup coined the term “transnational law,”¹⁶ he understood that a particular choice of

Japanese, 11 percent Korean, 8 percent Indo-Chinese, and 16 percent belonged to other subgroups including Polynesians, Indonesians, and Malays. *Id.* at 71. Similarly, Blacks come from the African continent, but also from the Caribbean and South America. *Id.* at 23. As is evident in the generalization of minority classifications, American society appears to be more comfortable categorizing people in broad terms. In reality, the cultural, linguistic, religious, and social distinctions of each subgroup illustrate the abundant diversity found in the United States.

14. PHILIP C. JESSUP, *TRANSNATIONAL LAW* 3 (1956).

15. The prefix “meta” in this context denotes a concept (1) situated beyond or in succession to; (2) “later or more highly organized or specialized”; and (3) “more comprehensive . . . used with the name of a discipline to designate a new but related discipline designed to deal critically with the original one.” *Meta*, MERRIAM–WEBSTER ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/meta> (last visited Oct. 15, 2010). For a detailed discussion of metanationalism, see *infra* Part III.C.

16. “Transnational law” includes “all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as

terminology might appear unsatisfactory to some.¹⁷ Nevertheless, he exercised his scholarly freedom, recognizing that “[t]he more wedded we become to a particular classification or definition, the more our thinking tends to become frozen and thus to have a rigidity which hampers progress toward the ever needed new solutions of problems whether old or new.”¹⁸ Ultimately, however, while articulating a term is necessary from a methodological standpoint, this Article is more concerned with paving new pathways for interdisciplinary research and expanding the normative constitutional framework.

In essence, the metanationalist approach is twofold. First, it rejects Koh’s theory of transnationalism. More specifically, this rejection focuses on transnationalists’ overemphasis on respecting only the laws of “mature” or “developed” societies. Such limitation is problematic because it requires a subjective measuring of jurisprudential maturity, fosters unnecessary debate over the citation of international sources, and creates a veil of international majoritarianism.¹⁹ Second, the metanationalist approach replaces Koh’s linear model with a multidimensional paradigm for interpreting international law. Simply put, instead of thinking of nationalism and transnationalism as two mutually exclusive concepts at opposite ends of a linear spectrum of constitutional interpretation, metanationalism views these concepts as important elements in a multidimensional plane where theories exist to broaden and enrich legal analysis. This concept is similar to the substitution of normative linear models in other disciplinary areas such as human sexuality (adding bisexual, transsexual, pansexual, intersexual, and asexual to the original homosexual and heterosexual linear model) and political theory (replacing the conservative and liberal linear model with a diverse plane that includes classifications such as totalitarian, libertarian, socialist, anarchist, and communist).

The second independent contribution in this Article stems from the application of metanationalist principles in a comparative analysis of the role of diversity in India’s education-rights movement. Until now, the bulk of literature in this field of human rights law has

are other rules which do not wholly fit into such standard categories.” JESSUP, *supra* note 14, at 2. As Jessup acknowledged in his work, he did not invent the term transnational law; scholars before him had used the term repeatedly. *See id.* at 2 n.3. Indeed, the term transnational first appeared in literature during World War I in an essay written by Randolph Bourne. *See* Randolph Bourne, *Trans-National America*, 118 ATLANTIC MONTHLY 86, 97 (1916) (discussing the failure of the melting pot theory while advancing his view of America’s destiny as a cosmopolitan mixture of cultures). Nevertheless, Jessup successfully conceptualized transnational law in its present meaning.

17. JESSUP, *supra* note 14, at 2.

18. *Id.* at 7.

19. *See* discussion *infra* Part III.C.

focused on an international consensus—found in treaties and other international agreements—regarding the importance of education as a basic human right. However, a closer examination of the emergence of education as a fundamental right in India—first through jurisprudence and later by means of a constitutional mandate²⁰—reveals a crucial factor largely absent from the scholarly debate: diversity. This Article argues that diversity played a significant role in securing a constitutional amendment, primarily resulting from the desire to eradicate illiteracy and extend educational opportunities to the poor and socially deprived. With that background, this Article demonstrates some of the ways that India—and other nations—treats diversity as a compelling interest that justifies measures to integrate pupils from different races, castes, and cultures in educational facilities.

The third contribution in this Article focuses on two new developments in American constitutional law. The first development is a trend in equal protection law that has altered the nature of strict scrutiny. For decades, remedial measures against past discrimination constituted the only exception—or compelling interest—to justify the limited use of race under the Fourteenth Amendment.²¹ However, this Article identifies four—and potentially six—new compelling interests that have arisen in recent jurisprudence.²² Similarly, the second development originates from evolving jurisprudence in the Supreme Court's interpretation of international law. This evolution, which inspired metanationalism, substantiates the notion that diversity—under the mantle of globalization—constitutes a “global” compelling interest.

Together, these developments support carving a new integration exception to the Fourteenth Amendment to resolve the quandary begot by the Supreme Court's decision in *Parents Involved in Community Schools v. Seattle School District No. 1 (PICS)*.²³ Indeed, when the Court granted certiorari in *PICS*,²⁴ it set out to answer, once and for all, whether diversity constitutes a compelling interest that justifies the limited preferential use of race in K–12 admissions.

20. India's judiciary established education as a protected right in 1993. In 2002, the legislature passed a constitutional amendment to the same effect. For an overview of case law and the events leading to the constitutional amendment, see *infra* Part III.D.

21. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 749 (2007) (Thomas, J., concurring) (acknowledging that the Court had previously authorized and required race-based remedial measures to address de jure segregation).

22. See discussion *infra* Part IV.

23. *Parents Involved*, 551 U.S. 701.

24. *PICS* consolidated *Parents Involved in Community Schools v. Seattle School District No. 1*, 547 U.S. 1177, and *Meredith v. Jefferson County Board of Education*, 547 U.S. 1178. See 551 U.S. 701.

Unfortunately, instead of bringing much needed guidance and closure to a controversial area of the law, the Court's fragmented decision left the equal protection status of race-based integration programs in a state of disarray. Diversity in early education can teach children to function in a pluralistic society;²⁵ but more importantly, it can provide a path to eradicate the need for controversial and polarizing preferential policies. If everyone starts with the same opportunities, states would find it difficult to justify favorable discrimination on racial grounds. The Court's failure to articulate a majority rationale for the importance of diversity in primary and secondary education is worth revisiting.²⁶ In times of uncertainty, the United States needs a Supreme Court that asserts its authority to render judgment on the most difficult constitutional questions of its time. That was the case in *Brown*, where the Court unanimously veered the country in the right course after decades of having strayed from it.

Part I of this Article provides an overview of the case law that sets the stage for *Grutter* and *PICS*. Part II discusses the educational and social benefits that flow from diversity in education. Part III examines, from an international perspective, the constitutional framework of diversity in education. A section of Part III analyzes recent efforts in social architecture to further diversity in the international community, with particular emphasis on India, the most populous democracy on Earth. Additionally, Part III discusses the globalization phenomenon and introduces the theory of metanationalism. To illustrate metanationalism at work, Part III provides a constitutional analysis and argues that the existing literature overlooks the role of diversity in India's education-rights movement. Finally, Part IV reconciles Parts I, II, and III and suggests a new approach to equal protection jurisprudence that considers the importance of diversity from a domestic and global standpoint, the effects of globalization on diversity in education across the world, *Grutter's* inapplicability to the K-12 context, and two new trends in American constitutional law.

25. See discussion *infra* Part II.

26. Indeed, the plurality opinion avoids the more pressing constitutional question. Instead of addressing the compelling nature of diversity in the K-12 setting, the plurality dodged the question by finding that the integration plans violated the second prong of strict scrutiny. The plurality explained that they did not need to resolve the question of whether racial diversity constitutes a compelling interest under the Fourteenth Amendment because it was "clear that the racial classifications employed by the districts [were] not narrowly tailored . . ." *Parents Involved*, 551 U.S. at 726 (plurality opinion). *But cf.* *Citizens United v. Federal Election Comm'n*, 130 S. Ct. 876, 892 (2010) ("It is not judicial restraint to accept an unsound, narrow argument just so the Court can avoid another argument with broader implications. Indeed, a court would be remiss in performing its duties were it to accept an unsound principle merely to avoid the necessity of making a broader ruling.").

I. TURMOIL IN THE COURTS

Despite *Brown's* landmark constitutional jurisprudence and its effects on the elimination of de jure segregation, the war against racial discrimination remains far from over. Litigation continues to provide a framework for integration, but social reform moves slowly.²⁷ In the American system of separated powers, courts are severely constrained.²⁸ As a result, the judiciary has struggled to distinguish desegregation from integration.²⁹ Desegregation concentrates exclusively on student reassignment to ensure that a school district has a balanced racial mix.³⁰ Integration goes a step further and uses changed racial composition as a mere starting point to restructure the basis of an educational system.³¹ Integration of a desegregated school system requires not only a good administrative structure, but also positive attitudes among people of different racial and ethnic groups.³² *Brown* led to the successful desegregation of American schools, but turned a blind eye on the issue of integration.

A. *The Path to Grutter*

1. *Brown* Triumphs Over Segregation

From the late nineteenth century until the mid-twentieth century, *Plessy v. Ferguson*³³ and the doctrine of separate but equal dominated equal protection jurisprudence. By the 1950s, as the United States sought to increase its influence in the international community at the beginning of the Cold War, it encountered criticism for its racially discriminatory policies.³⁴ News organizations around the world—especially in Asia and Africa—condemned the United States for its segregation policies and highlighted the irony that a country advocating for democracy around the world could not even support democracy on its own soil.³⁵ International pressure, coupled with efforts led by Thurgood Marshall and the National Association

27. Rosenberg, *supra* note 6, at 232–33.

28. *Id.* at 232.

29. David L. Kirp, *Race, Politics, and the Courts*, in LEGACIES OF BROWN, *supra* note 9, at 41, 59.

30. *Id.*

31. *Id.*

32. *Id.*

33. 163 U.S. 537 (1896).

34. Catherine Prendergast, *The Economy of Literacy*, in LEGACIES OF BROWN, *supra* note 9, at 181, 187.

35. *Id.*

for Advancement of Colored People (NAACP) to eliminate segregation in higher education, set the stage for *Brown*.³⁶

Brown arrived at the Supreme Court as one of four consolidated state cases involving racial segregation in K–12 public schools.³⁷ The Court unanimously concluded “that in the field of public education the doctrine of ‘separate but equal’ has no place.³⁸ Separate educational facilities are inherently unequal.”³⁹ The ruling affirmed that racial distinctions under the law are morally suspect and lack any constitutional legitimacy.⁴⁰ The historical impact of the Court’s decision transcended international barriers and attracted worldwide attention.⁴¹ However, despite *Brown*’s cogency and moral transparency, the ruling did little or nothing to address integration, racial inequities, and poverty in public schools.⁴² Desegregation in the school systems became compulsory, but the judiciary’s solution to the segregation crisis proved inadequate to ameliorate the problems of poor and minority school systems.⁴³

2. *Freeman Cripples Brown*

The Supreme Court’s mandate to desegregate schools with “all deliberate speed”⁴⁴ generated pervasive resistance that changed the country’s demographic landscape.⁴⁵ Residential segregation advanced hastily and “white flight” created areas where the population was almost entirely composed of minorities.⁴⁶ The Court

36. See Thurgood Marshall, *An Evaluation of Recent Efforts to Achieve Racial Integration in Education Through Resort to the Courts*, 21 J. NEGRO EDUC. 316, 318 (1952) (advocating for desegregation in American higher education).

37. *Brown* originated in Kansas. The three other cases were *Briggs v. Elliot*, 342 U.S. 350 (1952), from South Carolina; *Davis v. Cnty Sch. Bd.*, 103 F. Supp. 337 (E.D. Va. 1952), from Virginia; and *Gebhart v. Belton*, 91 A.2d 137 (Del. 1952), from Delaware. In addition, a fifth companion case to *Brown* involving public school segregation in the District of Columbia was decided the same day. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

38. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

39. *Brown*, 347 U.S. at 495.

40. JOHN R. HOWARD, *THE SHIFTING WIND* 329 (1999).

41. *Id.* at 328.

42. MARY F. EHRLANDER, *EQUAL EDUCATIONAL OPPORTUNITY: BROWN’S ELUSIVE MANDATE* 271 (Eric Rise ed., 2002).

43. *Id.*

44. *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 301 (1955).

45. EHRLANDER, *supra* note 42, at 275.

46. *Id.* at 275–76. “White flight” refers to the exodus of whites from inner cities to suburbia. “White exodus had occurred at vastly different rates, but research showed that as blacks and other minorities moved into neighborhoods, especially after the percentage surpassed the ‘comfort zone’ for whites (10–20 percent minority), whites began to leave, seeking homes in suburbs, where they were surrounded by other whites.” *Id.*

addressed this racial imbalance in *Swann v. Charlotte-Mecklenburg Board of Education*.⁴⁷ In that case, the Court unanimously held that school districts have “an affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.”⁴⁸ *Swann* vested courts with broad power to prescribe desegregation plans in educational policy, but it conditioned its scope on proof of a constitutional violation and failure of school officials to comply with the Fourteenth Amendment.⁴⁹

The Supreme Court entered a new chapter in school desegregation when it began releasing school districts from court supervision.⁵⁰ In 1992, *Freeman v. Pitts* considered whether a district court could withdraw judicial supervision over a school district—the Dekalb County School System (DCSS)—that had complied with a desegregation decree and implemented a comprehensive integration plan.⁵¹ *Freeman* examined DCSS’s efforts to combat massive demographic changes that resulted in de facto segregation.⁵² Once again, a unanimous Court held that “[r]acial balance is not to be achieved for its own sake,” unless the imbalance is the direct result of a constitutional violation.⁵³ The Court further declared that:

Once the racial imbalance due to the *de jure* violation has been remedied, the school district is under no duty to remedy imbalance that is caused by demographic factors. . . . It is beyond the authority and beyond the practical ability of the federal courts to try to counteract these kinds of continuous and massive demographic shifts.⁵⁴

47. 402 U.S. 1 (1971).

48. *Id.* at 15 (quoting *Green v. Cnty. Sch. Bd.*, 391 U.S. 430, 437–38 (1968)).

49. *Id.* at 16. The Court in *Swann* explicitly stated,

in order to prepare students to live in a pluralistic society each school [could] have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court.

Id.

50. *See Bd. of Educ. v. Dowell*, 498 U.S. 237, 249 (1991) (deciding to release a school district from supervision if it has, in good faith, complied with a court’s desegregation decree); *see also Freeman v. Pitts*, 503 U.S. 467, 490 (1992) (holding that courts have the authority to relinquish supervision and control over a school district that has complied with a court’s order).

51. 503 U.S. 467, 471 (1992).

52. KEVIN BROWN, RACE, LAW AND EDUCATION IN THE POST-DESEGREGATION ERA 217 (2005). By 1986, “[o]ver 50% of African-American [DCSS] students attended schools that were over 90% black, and 62% of them attended schools that were at least 67% black.” *Id.*

53. *Freeman*, 503 U.S. at 494.

54. *Id.* at 494–95.

School districts should not be subject to perpetual supervision “simply because they were once *de jure* segregated.”⁵⁵

Freeman made it clear that the purpose of *Brown* and its progeny was to eradicate *de jure* segregation and its vestiges.⁵⁶ Residential segregation caused by private housing demographics would not be remedied by racial balancing, unless it could be traced to state action.⁵⁷ *Freeman*’s effect on desegregation rendered a legal blow to *Brown*’s legacy by implicitly permitting a reversal of desegregation initiatives in unlawfully segregated school systems, provided that the reversal did not originate with the intent to discriminate.⁵⁸ In essence, *Freeman* held that “[*d*]e *facto* segregation of school districts after they have been declared unitary lies outside the scope of judicial remedy.”⁵⁹

3. Diversity Ignites Hullabaloo in *Bakke*’s Oven

The 1990s brought an end to the era of court-ordered desegregation.⁶⁰ The release of school districts from judicial custody made it increasingly difficult to define or predict the type of integration policies, if any, that would withstand constitutional scrutiny.⁶¹ The end of *de jure* segregation in the post-*Brown* era gave birth to the question of whether diversity constitutes a compelling governmental interest in public education that would justify preferential treatment on the basis of race.⁶² The Supreme Court considered this exact question in *Grutter*,⁶³ although this case arose in the narrow context of higher education. *Grutter* sent shockwaves through the equal protection landscape when it upheld, by a 5–4 majority, the constitutionality of race-based affirmative action programs.⁶⁴

55. *Id.* at 495; see also *Dowell*, 498 U.S. at 248 (holding that desegregation decrees “are not intended to operate in perpetuity”).

56. *Freeman*, 503 U.S. at 485.

57. *BROWN*, *supra* note 52, at 219.

58. Bradley W. Joondeph, Note, *Killing Brown Softly: The Subtle Undermining of Effective Desegregation in Freeman v. Pitts*, 46 STAN. L. REV. 147, 161 (1993).

59. *Id.* at 164 (citing 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, 1107 n.7 (1990)).

60. EHRLANDER, *supra* note 42, at 284–85.

61. *Id.*

62. *Id.*

63. See *Grutter v. Bollinger*, 359 U.S. 306 (2003). For a more detailed discussion of *Grutter*, see *infra* Part IV.A.

64. Paul J. Beard II, *The Legacy of Grutter: How the Meredith and PICS Courts Wrongly Extended the “Educational Benefits” Exception to the Equal Protection Clause in Public Higher Education*, 11 TEX. REV. L. & POL. 1, 3 (2006).

The origins of *Grutter*, however, trace back almost a quarter century earlier. Litigation flourished as many institutions of higher education began to experiment with granting minority students preferential treatment to achieve racial equality.⁶⁵ In *Regents of the University of California v. Bakke*, the Supreme Court first addressed the issue of affirmative action in education.⁶⁶ The case involved a constitutional challenge to the University of California at Davis Medical School's race-conscious admissions program.⁶⁷ The University implemented a dual-admissions policy under which sixteen out of a total one hundred seats were reserved exclusively for individuals from minority groups.⁶⁸ White individuals competed for the remaining eighty-four seats.⁶⁹ The Court held, by a narrow 5–4 majority, that the race-based program operated as a quota and violated the Equal Protection Clause.⁷⁰

Bakke's ruling failed to clarify the constitutionality of affirmative action programs in higher education, but it placed diversity at the summit of the constitutional scale.⁷¹ Writing alone, Justice Powell declared that the attainment of diversity in higher education constitutes a compelling governmental interest that justifies the use of race as one factor among many.⁷² Powell based his reasoning on the relationship between diversity and academic freedom under the First Amendment.⁷³ This innovative approach reflected the notion that “[a]ny award generated by the operation of diversity . . . is not meant to restore a loss to anyone . . . but to recognize and pursue a value that is highly prized in our society—free speech, with all its recognized aims.”⁷⁴

65. JAMES A. BECKMAN, AFFIRMATIVE ACTION NOW 15 (2006).

66. 438 U.S. 265, 269–70 (1978).

67. *Id.* at 269.

68. *Id.* at 275–76.

69. *Id.*

70. *Id.* at 316–17.

71. *Bakke* generated six separate opinions encompassing three major coalitions on the viability of affirmative action plans. One bloc of four Justices believed using race as a preferential factor in any admissions decision was unconstitutional. BECKMAN, *supra* note 65, at 17–18. A second bloc of four Justices deemed race-based admissions plans constitutional if used to improve diversity or further any other important government interest. *Id.* at 18. Justice Powell was the crucial swing vote and joined both blocs on different points. *Id.* He joined the first bloc to strike down the plans as violative of the Fourteenth Amendment. He also joined the second bloc to hold that better drafted, more narrowly tailored, and less exclusionary plans might be permissible under different circumstances. *Id.* Powell's plurality opinion did not speak for the majority of the Court, but it articulated what has become *Bakke's* diversity rationale. *Id.*

72. *Bakke*, 438 U.S. at 316–17.

73. *Id.* at 312.

74. W. ROBERT GRAY, THE FOUR FACES OF AFFIRMATIVE ACTION: FUNDAMENTAL ANSWERS AND ACTIONS 40 (2001) (footnote omitted).

Justice Powell's diversity rationale was the product of his own legal reasoning and did not create binding precedent.⁷⁵ However, his lone opinion "served as the touchstone for constitutional analysis of race-conscious admissions policies."⁷⁶ Twenty-five years after *Bakke*, a majority of the Court endorsed, for the first time in history, Powell's view that student-body diversity is a compelling state interest that warrants the narrowly tailored use of race in higher-education admissions.⁷⁷

B. Lower Courts Struggle with Diversity

As courts struggled to keep *Brown's* spirit of racial equality alive, new legal battles were fought in the context of voluntary school assignment plans designed to encourage integration and avoid de facto segregation. A handful of courts examined the constitutionality of race-based K–12 plans prior to *Grutter* and found a compelling governmental interest to further diversity.⁷⁸ *Grutter* finally provided lower courts some guidance regarding the constitutional analysis for race-conscious plans. However, that guidance was narrow because *Grutter* applied explicitly to higher education.⁷⁹ As a result, lower courts undertook the intricate task of applying *Grutter's* jurisprudence to the K–12 setting.⁸⁰ The outcomes of these decisions

75. BECKMAN, *supra* note 65, at 18.

76. *Grutter v. Bollinger*, 539 U.S. 306, 323 (2003).

77. *Id.* at 325.

78. See *Brewer v. W. Irondequoit Cent. Sch. Dist.*, 212 F.3d 738, 752 (2d Cir. 2000) (upholding the constitutionality of a race-based transfer program intended to reduce racial isolation in participating schools); *Tuttle v. Arlington Cnty. Sch. Bd.*, 195 F.3d 698, 705 (4th Cir. 1999) (striking down a race-weighted lottery admissions policy implemented by the Arlington County School Board and designed to promote racial diversity); *Hunter ex rel. Brandt v. Regents of the Univ. of Cal.*, 190 F.3d 1061, 1063 (9th Cir. 1999) (ruling that a laboratory elementary school's admissions policy, which considered race and ethnicity to obtain a desired student population, met the demands of strict scrutiny); *Wessman v. Gittens*, 160 F.3d 790, 799–800 (1st Cir. 1998) (holding that the use of composite scores and race to determine admissions to the Boston Latin School was an act of racial balancing that violated the Constitution, but recognizing that, in some instances, diversity could justify using race-based policies). All these cases accepted the compelling nature of diversity. *Hunter* and *Brewer* explicitly found a compelling interest, while *Wessman* and *Tuttle* assumed, without deciding, that diversity constitutes a compelling interest.

79. See discussion *infra* note 424.

80. See *Comfort v. Lynn Sch. Comm.*, 418 F.3d 1, 5–6 (1st Cir. 2005) (en banc) (relying on *Grutter* to find a compelling interest in promoting diversity by upholding the constitutionality of a voluntary plan adopted to combat demographic changes in the housing market); *Cavalier v. Caddo Parish Sch. Bd.*, 403 F.3d 246, 260 (5th Cir. 2005) (rejecting a magnet school's use of racial classifications designed to achieve a racial balance because it amounted to an impermissible quota under *Grutter*); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162, 1192–93 (9th Cir. 2005) (en banc), *cert. granted*, 547 U.S. 1177 (2006) (holding that a race-conscious

reflected a perplexing array of organized legal chaos, which ultimately compelled the Supreme Court to step in to decide the fate of diversity in K–12 education in the post-*Grutter* era of affirmative action.

C. *Everyone's Chasing Brown—PICS and the Illusory Promise of a Resolution*

The Supreme Court announced in June 2006 that it would consolidate *PICS* and *McFarland* for review.⁸¹ For the first time since *Grutter* and *Gratz*,⁸² the Court considered the constitutionality of affirmative action. This time, however, the case concerned elementary and secondary public education. Publicity and contention surrounded the case, and the country waited anxiously for a clear statement from the Court.⁸³ As the Justices lingered, the debate over race-based preferences augmented.⁸⁴ By the time—seven months after hearing oral arguments—that the Court rendered a decision, the case was the oldest on the docket.⁸⁵ Unfortunately, the length of time that the Court considered the case appears inversely proportional to the clarity of the Court's various opinions.⁸⁶ Despite sharp disagreement on the constitutionality of the schools plans, the Justices were unanimous in one respect: every single one of them—in their own minds—faithfully adhered to *Brown's* spirit.⁸⁷

tiebreaker assignment plan was constitutionally permissible because there is a compelling interest to achieve diversity in K–12 education); *McFarland v. Jefferson Cnty. Pub. Sch.*, 330 F. Supp. 2d 834, 855 (W.D. Ky. 2004), *aff'd per curiam*, 416 F.3d 513 (6th Cir. 2005), *cert. granted sub. nom. Meredith v. Jefferson Cnty. Bd. Of Educ.*, 547 U.S. 1178 (2006) (finding a compelling interest in maintaining racially integrated schools in a district that pursued a voluntary plan after judicial supervision ended in 2000).

81. *McFarland*, 416 F.3d 513, *cert. granted sub. nom. Meredith*, 547 U.S. 1178, *rev'd sub nom. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701.

82. *Gratz v. Bollinger*, 539 U.S. 244, 257 (2003).

83. See Linda Greenhouse, *Justices Limit the Use of Race in School Plans for Integration*, N.Y. TIMES, June 29, 2007, at A1 (discussing the turmoil in the Court prior to rendering the decision).

84. *Id.*

85. *Id.*

86. Chief Justice Roberts wrote the plurality opinion; Justices Kennedy and Thomas each filed concurring opinions; and Justices Stevens and Breyer filed dissenting opinions. *Parents Involved*, 551 U.S. at 708.

87. Justice Roberts invokes the Equal Protection Clause's protection of persons, not groups, as a fundamental principle "going back to *Brown* itself." See *id.* at 743 (plurality opinion). Justice Thomas points to *Brown's* invocation of the Equal Protection Clause of the Fourteenth Amendment. See *id.* at 749 (Thomas, J., concurring). Justice Stevens argues that a rigid adherence to tiers of scrutiny obscures *Brown's* clear message. See *id.* 800–01 (Stevens, J., dissenting).

The plurality opinion, authored by Justice Roberts, began by affirming the strict scrutiny standard of review traditionally applied to racial classifications.⁸⁸ The opinion then proceeded to recite the two accepted compelling interests for racial categorizations in the school context: remedying the effects of past discrimination and *Grutter's* higher education diversity.⁸⁹ As to the former interest, the plurality wrote that, because the plans were voluntary (Seattle was never subject to a desegregation judicial decree and Louisville achieved unitary status in 2000), there was no compelling interest to use race in K–12 student assignments.⁹⁰ As to the latter interest, the opinion correctly noted *Grutter's* compelling interest applies only to institutions of higher education.⁹¹ The plurality skipped the question of whether some new compelling interest might exist and proceeded to examine the plans' failure to use narrowly tailored means to achieve their goals.⁹² Invoking *Brown's* spirit to strike down the student assignment plans, the plurality averred that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”⁹³

The main dissenting opinion, authored by Justice Breyer, austere-ly accused the plurality of distorting and misapplying established constitutional precedent, creating rules that obfuscate state and local governments confronted by growing resegregation of public schools, and undermining *Brown's* spirit.⁹⁴ The dissent also accused the plurality of playing a game of semantics by labeling the interest sought by the districts as an interest in racial balancing.⁹⁵ Instead, the dissent referred to the interest as the elimination of racial isolation from public schools.⁹⁶ The dissent concluded that the assignment plans met both prongs of strict scrutiny⁹⁷ and “pass[ed] even the strictest tailoring test.”⁹⁸

88. *Parents Involved*, 551 U.S. at 720 (plurality opinion). The Court's reaffirmation of the standard of review specifically contradicted Judge Kozinski's concurring opinion in the Ninth Circuit's en banc decision, where he opined that the Seattle plan warranted an evaluation under a “robust and realistic rational basis review.” *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162, 1194 (9th Cir. 2005) (Kozinski, J., concurring).

89. *Parents Involved*, 551 U.S. at 720, 722 (plurality opinion).

90. *Id.* at 720–21.

91. *Id.* at 722.

92. *Id.* at 723–35.

93. *Id.* at 748.

94. *Id.* at 803 (Breyer, J., dissenting).

95. *Id.* at 838.

96. *Id.*

97. *Id.* at 837.

98. *Id.* at 846.

Although the dissent warned that *PICS* is “a decision that the Court and the Nation will come to regret,”⁹⁹ Justice Kennedy’s concurrence brings the prospect of hope. Prior to the decision, it was easy to conceive that *Grutter* stood on precarious ground. After all, Justice Kennedy joined the dissent in *Grutter*,¹⁰⁰ and Justice Alito, an opponent of affirmative action,¹⁰¹ replaced Justice O’Connor in 2006.

99. *Id.* at 868.

100. *Grutter v. Bollinger*, 539 U.S. 306, 378 (2003).

101. In *Taxman v. Board of Education of Piscataway*, 91 F.3d 1547, 1550 (3d Cir. 1996) (en banc), Circuit Judge—now Associate Justice—Alito joined the majority in rejecting a diversity rationale to rule against a school board’s decision to lay off a white teacher instead of an equally qualified black teacher. It is far-fetched, on the sole basis of *Taxman*, to peg Justice Alito as an anti-affirmative action jurist. That characterization would be grossly unfair. Although Alito rejected the diversity rationale in *Taxman*, the facts of that case were overwhelmingly tilted against the school district’s race-conscious employment policy, which used race as the decisive factor despite the lack of evidence of a prior constitutional violation that warranted remedial measures. *See id.* at 1550–51. Both the district and circuit court rulings rejected the type of discrimination examined under *Taxman*. Even a number of dissenters on the en banc panel acknowledged the merits of certain parts of the majority opinion. *See id.* at 1576 (Scirica, J., dissenting) (“While I find much with which I agree in the majority’s opinion, I am constrained to express my disagreement because I believe education presents unique concerns.”); *see also id.* at 1579 (McKee, J., dissenting) (“I can understand the majority’s concern over allowing race to be a factor in any decision.”). But compare Judge Sloviter’s opinion,

In the law, as in other professions, it is often how the question is framed that determines the answer that is received. . . . I do not see this appeal as raising a broad legal referendum on affirmative action The posture in which the legal issue in this case is presented is so stripped of extraneous factors that it could well serve as the question for a law school moot court.

Id. at 1567 (Sloviter, J., dissenting).

Alito’s involvement as Assistant Solicitor General in three cases prior to his tenure as a jurist may reveal further insights into his views on affirmative action. *See* Brief for the United States as Amicus Curiae Supporting Petitioner, Local No. 93, Int’l Ass’n of Firefighters v. City of Cleveland, 478 U.S. 501 (1986) (No. 84–1999) (arguing that only the victims of discrimination are eligible for relief under Title XII); Brief for the United States as Amicus Curiae Supporting Petitioners at 30, *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (No. 84–1340) (“[E]ven a finding that there had been past discrimination against some individuals would not support a categorical racial and ethnic preference such as that contained in the Jackson agreement.”); Brief for the Equal Employment Opportunity Commission, Local 28 of the Sheet Metal Workers Int’l Ass’n v. EEOC, 478 U.S. 421 (1986) (No. 84–1656) (arguing that government preferential policies based on race are not lawful in various contexts).

Furthermore, during his confirmation hearings as Supreme Court nominee, controversy arose when written memos surfaced in which Alito wrote he was “particularly proud” of opposing affirmative action programs. Charles Babington, *Alito Distances Himself from 1985 Memos*, WASH. POST, Dec. 3, 2005, at A01. It should be noted that a correction to Babington’s article appeared in *The Washington Post* emphasizing that Alito specifically opposed “racial and ethnic quotas,” which did not include all affirmative action plans. Additionally, during Alito’s confirmation hearings, some members of the Senate Judiciary Committee voiced concerns over Alito’s membership in the Concerned Alumni of Princeton (CAP), a group Alito joined as an

In a surprising move, however, Justice Kennedy disagreed with the plurality and argued that diversity in education is a compelling interest that warrants the limited use of race.¹⁰² He correctly noted that the school plans failed to meet the second prong of strict scrutiny,¹⁰³ but he dismissed the plurality's rigid insistence that school districts "must accept the status quo of racial isolation in schools."¹⁰⁴

undergraduate at Princeton that advocated quotas designed to limit the number of women and minorities in admissions and opposed affirmative action plans. *See, e.g.*, Eyal Press, *Alito's CAP Connection*, THE NATION, Dec. 12, 2005, available at <http://www.thenation.com/article/alitos-cap-connection> (describing CAP's agenda to include "preventing women and minorities from entering an institution that had long been a bastion of white male privilege"); Chanakya Sethi, *Alito '72 Joined Conservative Alumni Group*, THE DAILY PRINCETONIAN, Nov. 18, 2005, available at <http://www.dailyprincetonian.com/2005/11/18/13876/> (discussing CAP's disapproval of coeducation and affirmative action at Princeton and Alito's involvement with the group). However, the extent of Alito's affiliation and specific role at CAP could not be substantiated because there was no proof to indicate he was a major donor, and a CAP founding member appeared on the record stating he did not remember Alito playing a role in the organization. *See, e.g.*, Kathryn Jean Lopez, *Don't Rush to Judgment*, NAT'L REVIEW ONLINE, Jan. 11, 2006, <http://old.nationalreview.com/interrogatory/qa200601111508.asp> (interviewing a CAP founding member, William Rusher, on Alito's involvement); Byron York, *Alito: A Last-Gasp Democratic Gambit Fails*, NAT'L REVIEW ONLINE, Jan. 12, 2006, <http://old.nationalreview.com/york/york200601120909> (describing Alito's confirmation hearing where Democrats could not present proof of Alito's involvement in CAP).

It is fair to state that viewing individual parts of Alito's record, in context, is not sufficient to categorize him as anti-affirmative action. Similarly, the fact that a jurist holds a certain view of preferential policies does not indicate he or she will depart from principles of *stare decisis* when performing judicial duties. However, at a bare minimum, an examination of the totality of Alito's record on positive discrimination signals that he would likely join a bloc of Justices who oppose benign government measures in future cases.

102. *Parents Involved*, 551 U.S. at 783 (Kennedy, J., concurring in part and concurring in the judgment).

103. *Id.* at 787. Kennedy wrote that school districts can use alternative means to pursue integration "including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race." *Id.* at 789. The available alternatives to racial balancing are not mere strategies based on impracticable utopian ideologies. Rather, as the evidence shows, the alternatives are tangible, easy to adopt, and far less burdensome than the implementation of race-based discriminatory policies. For example, the U.S. Department of Education has published an extensive report identifying admissions-oriented, race-neutral approaches. Among the alternatives listed are assignments based on socioeconomic status, creation of new skill-development programs, formation of partnerships between low-performing schools and universities, and assignments based on random lottery systems. U.S. DEPT OF EDUC., OFFICE FOR CIVIL RIGHTS, ACHIEVING DIVERSITY: RACE-NEUTRAL ALTERNATIVES IN AMERICAN EDUCATION (2004), available at <http://www.ed.gov/about/offices/list/ocr/edlite-raceneutralreport2.html>.

104. *Parents Involved*, 551 U.S. at 788. Coincidentally, Justice Kennedy's lone opinion came out exactly twenty-nine years—to the day—after Justice Powell, the

Notwithstanding the Court's vacillation regarding diversity and the decision's blow to *Brown*, *PICS* did not overrule *Grutter*. Nor did it result in a binding majority opinion foreclosing any future use of race in K–12 admissions.¹⁰⁵ There is good reason to believe that if the Court were to revisit the issue of diversity in a suit brought by litigants with a slightly different set of facts, a different result might ensue.¹⁰⁶

previous holder of Justice Kennedy's seat, announced his lone opinion in *Bakke. Id.* (decided June 28, 2007); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 265 (1978) (decided June 28, 1978).

105. To the contrary, *PICS* suggests that there are now five votes in favor of declaring a compelling interest for racial diversity in K–12 education.

106. At the time *PICS* was decided, there were five votes in favor of finding a compelling governmental interest to integrate pupils in K–12 institutions. However, a majority to uphold the constitutionality of the assignment plans did not form because of problems with the tailoring of the school districts' measures. Notably, the assignment plans were problematic because they relied on a rigid mechanical formula that was inconsistent with the districts' purported goal. *See Parents Involved*, 551 U.S. at 724 (plurality opinion) (indicating that "a school with 50 percent Asian-American students and 50 percent white students but no African-American, Native-American, or Latino students would qualify as balanced, while a school with 30 percent Asian-American, 25 percent African-American, 25 percent Latino, and 20 percent white students would not."); *id.* at 727–28; *id.* at 787 (Kennedy, J., concurring in part and concurring in the judgment).

A case with a slightly different fact pattern addressing the tailoring concerns articulated by Justice Kennedy would likely result in a majority asserting a new compelling governmental interest. The Court's composition today is the same as it was in 2007, with the exception that Justice Sotomayor replaced Justice Souter in 2009, and Justice Kagan replaced Justice Stevens in 2010. Both Justices were nominated to their lifetime posts by a Democratic President. Although it is too soon to predict Sotomayor's views, there are early signs in two major recent 5–4 decisions that hint she will fall into the so-called "liberal" bloc of Justices. *See Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010) (striking down a provision of a federal law that banned independent expenditures by corporations and unions on behalf of a political candidate); *Hollingsworth v. Perry*, 130 S. Ct. 705 (2010) (prohibiting a district court from broadcasting the trial relating to Proposition 8, a California ballot initiative that defines marriage as a union between a man and a woman). Justice Kagan began her tenure in the Supreme Court a mere two months ago. Because of her previous post as Solicitor General, she has recused herself from twenty-five of the fifty-one cases on the current 2010 Supreme Court docket. Robert Barnes, *Kagan's Recusals Take Her Out of Action in Many of the Supreme Court's Cases*, WASH. POST, Oct. 4, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/10/03/AR2010100303890.html>. Accordingly, it may be a short while before her judicial philosophy becomes apparent.

II. DIVERSITY AND ITS PIVOTAL SIGNIFICANCE

A. *Diversity Increases Racial Tolerance and Promotes Citizenship*

Exposure to a diverse environment is crucial to ensure integration in our multi-plural society. Today, corporations and other organizations realize the value of employees who are adept in dealing with people from all walks of life. It should follow that children stand to benefit even more from living in a society that encourages integration and desegregation.

Due to the efforts of local governments, public schools are an essential socializing institution charged with the duty to impart “shared values through which social order and stability are maintained.”¹⁰⁷ Because children spend most of their waking hours in school, diversity in educational facilities can be critical in promoting tolerance and principles of mutual respect for all.¹⁰⁸ The Supreme Court “has long recognized that education . . . is the very foundation of good citizenship”¹⁰⁹ but, by the same token, it has never indicated that education in an institution of higher learning is more important than elementary education.

To the contrary, diversity and access to a quality education in earlier years have a potentially greater impact on a person’s life because discrimination in education is a major factor in the incidence of poverty.¹¹⁰ What children learn early in their academic and social life transcends public education and affects professional and personal aspects of their adult lives.¹¹¹ Students who experience “a racially integrated learning environment . . . learn tolerance towards others from different races, develop relationships across racial lines and relinquish racial stereotypes.”¹¹² The tremendous impact and influence of early education in a person’s life supports the proposition

107. Plyler v. Doe, 457 U.S. 202, 223 (1982).

108. See Rajagopalan Sampatkumar, *Global Citizenship and the Role of Human Values*, in RESEARCH IN INTERNATIONAL EDUCATION 70, at 77 (Mary Hayden et al. eds., 2007) (emphasizing the importance of values-based education).

109. Grutter v. Bollinger, 539 U.S. 306, 331 (2003) (quoting Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954)) (internal quotation marks omitted).

110. BRADLEY R. SCHILLER, THE ECONOMICS OF POVERTY AND DISCRIMINATION 187–88 (10th ed. 2008).

111. See Sampatkumar, *supra* note 108, at 77.

112. McFarland v. Jefferson Cnty. Pub. Sch., 330 F. Supp. 2d 834, 853 (W.D. Ky. 2004), *aff’d per curiam*, 416 F.3d 513 (6th Cir. 2005), *cert. granted sub. nom.* Meredith v. Jefferson Cnty. Bd. Of Educ., 547 U.S. 1178 (2006).

that diversity in the K–12 context could be even more important than diversity in higher education.

Moreover, children who are exposed to diversity are more likely to exhibit tolerance toward others: “Under certain conditions, interaction between students of different races promotes empathy, understanding, positive racial attitudes, and the disarming of stereotypes.”¹¹³ The goal of cultivating positive attitudes toward others with different upbringings is easier to achieve if it is nurtured in childhood and adolescence, because the human mind is highly malleable early in life.¹¹⁴ Diversity in early education is essential to stop discrimination by preventing prejudice from setting in children’s minds.¹¹⁵ It is important to distinguish prejudice and discrimination. Discrimination entails action, whereas prejudice refers to attitudes harbored against others. Accordingly, prejudiced individuals may or may not discriminate, but they continue to harbor hostile feelings for members of other groups.¹¹⁶ Exposing children to diversity creates positive outcomes, but as the Supreme Court correctly noted, diversity “cannot [be] accomplish[ed] with only token numbers of minority students.”¹¹⁷

B. *Diversity and Its Broad Impact*

Elementary and secondary education in the United States is compulsory.¹¹⁸ As a result, the majority of children in this country develop under the joint custody of parents and the K–12 public school system. For most of the population, a public high school education is perhaps the last opportunity for any meaningful exposure to racial diversity in their lives.¹¹⁹ Indeed, where private housing markets cause segregation in our public schools, it is possible that children may never get a chance to enjoy the benefits that derive from diversity.¹²⁰

Learning is not limited to academics. An indispensable portion of what a human learns occurs through informal interactions with people of other races, sexes, religions, and backgrounds, because “[p]eople do not learn very much when they are surrounded only by

113. *Comfort v. Lynn Sch. Comm.*, 418 F.3d 1, 14 (1st Cir. 2005) (en banc).

114. Sampatkumar, *supra* note 108, at 77.

115. *See id.*

116. *Id.*

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

118. U.S. DEPT OF EDUC., NAT’L CTR. FOR EDUC. STATISTICS, *THE CONDITION OF EDUCATION 2010*, at 23 (2010), <http://nces.ed.gov/pubs2010/2010028.pdf>.

119. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162, 1176 (9th Cir. 2005), *cert. granted*, 547 U.S. 1177.

120. *See* SCHILLER, *supra* note 110, at 195.

the likes of themselves.”¹²¹ Consequently, given the likelihood of success in learning racial tolerance in childhood and adolescence and the vast number of individuals affected by it, public school districts have a compelling interest in promoting integration and diversity through a narrowly tailored use of race.¹²² Achieving integration in public schools can prove problematic at first because the invasiveness of the majority can appear to threaten the distinct culture of the minority.¹²³ However, the benefits that integration, racial diversity, and multiculturalism bring outweigh this potential setback at the early stages of integration.

Diversity in K–12 schools is broader in scope than diversity in universities. *Grutter*’s viewpoint on diversity, for instance, depends greatly on the “robust exchange of ideas” among students to develop “critical thinking skills,”¹²⁴ but the development of critical thinking skills does not begin in colleges and universities. Although abstract or substantially robust exchange of ideas is minimal among students in the K–12 setting—particularly in early grades, children do learn the basic skills that form the framework for critical thought later in life.¹²⁵ The minds of pupils in primary school are not developed enough to participate in the type of debates and discussions of pupils in higher education, but they learn to develop respect for human dignity and interdependence,¹²⁶ which eventually gives them the tools necessary to articulate a viewpoint.¹²⁷ More importantly, critical thought is not limited to academia. For example, kids who play sports and engage in extracurricular activities learn critical social and thinking skills that serve them in life.¹²⁸ Ensuring diversity in the K–12 system constitutes a compelling governmental interest because the range of potential impact is even greater than in higher education.

121. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 n.48 (1978) (citing William G. Bowen, *Admissions and the Relevance of Race*, PRINCETON ALUMNI WKLY, Sept. 26, 1977, at 9).

122. *See Grutter*, 539 U.S. at 313–14 (applying the same rationale to institutions of higher education).

123. NEVILLE HARRIS, *EDUCATION, LAW AND DIVERSITY* 362–63 (2007).

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

125. Judith Graham, *Brain Development*, U. OF ME. COOPERATIVE EXTENSION PUBLICATIONS (2001), <http://umaine.edu/publications/4356e/>.

126. Sampat Kumar, *supra* note 108, at 177.

127. *Id.*

128. Extracurricular activities are among the factors considered in university admissions. *Extracurricular Activities*, C. BD., <http://www.collegeboard.com/student/plan/high-school/113.html> (last visited Oct. 15, 2010).

C. Diversity Prepares Students to Interact in a Global Society and Increases Academic Achievement

Grutter held that diversity constitutes a compelling governmental interest that meets the requirements of strict scrutiny because it “better prepares students for an increasingly diverse workforce and society.”¹²⁹ The Court firmly stated that the benefits of diversity “are not theoretical but real, as major American businesses have made clear that the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.”¹³⁰ This reasoning applies more forcefully to K–12 schools because most high school graduates never attend an institution of higher learning.¹³¹

Furthermore, the diversity rationale points to research as evidence that “a desegregated educational experience opens opportunity networks in areas of higher education and employment.”¹³² Integration and cross-racial interaction studies indicate that “graduates of desegregated high schools are more likely to live in integrated communities than those who do not, and are more likely to have cross-race friendships later in life.”¹³³ Diversity in education plays an essential role in eradicating poverty, increasing average testing scores, and increasing academic achievement.¹³⁴ More importantly, modern societies in this new era of globalization realize that segregation and discrimination in education are detrimental to prosperity because nations need more than a small, educated elite to remain competitive in the global economy.¹³⁵

Part II of this Article has restrained its discussion to the use of contemporary research and sociological science to support the concept of diversity in K–12 institutions. The use of scientific research to

129. *Grutter*, 539 U.S. at 330.

130. *Id.*

131. Only one out of five Blacks and even fewer Hispanics attend college. SCHILLER, *supra* note 110, at 193. In fact, millions of children today do not even graduate from high school, which makes diversity in the K–12 setting even more compelling. A staggering 26 percent of Hispanics and 11 percent of Blacks do not complete secondary instruction. *Id.*

132. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162, 1175 (9th Cir. 2005), *cert. granted*, 547 U.S. 1177.

133. *Id.*

134. *Id.* at 1177 (citing ERICA FRANKENBERG ET AL., A MULTIRACIAL SOCIETY WITH SEGREGATED SCHOOLS: ARE WE LOSING THE DREAM? 11 (2002) (cited in *Grutter*, 539 U.S. at 345 (Ginsburg, J., concurring))).

135. Derek Woodrow, *The Impact of Culture in Creating Learning Styles, in INTERNATIONAL PERSPECTIVES*, *supra* note 13, at 87, 87.

support case law is highly controversial.¹³⁶ One downside is that scientific evidence as a rhetorical device lends itself to potential ideological use by courts.¹³⁷ However, the last half-century indicates that social science evidence, regardless of how influential it proves to be on a case-by-case basis, will most likely continue to be important in race-based government policies.¹³⁸ Social science is not perfect, but “[i]f we are to insist upon unanimity in the social science literature before finding a compelling interest, we might never find one.”¹³⁹ The controversy over the use of psychological and sociological research in the legal arena is likely to dissipate once scientific research becomes developed enough “to help demonstrate operational needs in areas of policing and employment as well as to show the benefits of racial diversity in sectors outside of higher education.”¹⁴⁰

III. WAIT, THE NEIGHBORS TOO?—AN INTERNATIONAL AFFAIR

Before embarking on this next Part, it is imperative to outline the reasons for shining the spotlight of international law upon the subject matter of this Article. Why is it worth discussing—from an international perspective—the constitutional framework of diversity in education under American jurisprudence? After all, the U.S. educational system is unique and fundamentally different from the rest of the world. Unlike most nations, where education and national curricula are highly centralized, the U.S. educational system depends on local control and decentralization of schools.¹⁴¹ Moreover, American constitutional law differs starkly from foreign law¹⁴² and

136. ANGELO N. ANCHETA, SCIENTIFIC EVIDENCE AND EQUAL PROTECTION OF THE LAW 2–4 (2006).

137. *Id.* at 7.

138. *Id.* at 111.

139. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 845 (2007) (Breyer, J., dissenting). Both *Grutter* and *PICS* relied heavily on multiple sociological studies to support the diversity rationale. *See id.* at 840–41; *Grutter*, 539 U.S. at 330; *see also* Justin Pidot, Note, *Intuition or Proof: The Social Science of Justification for the Diversity Rationale in Grutter v. Bollinger and Gratz v. Bollinger*, 59 STAN. L. REV. 761, 770–96 (2006) (analyzing data from diversity studies cited in *Grutter* and identifying their virtues and flaws).

140. ANCHETA, *supra* note 136, at 113.

141. Tom Oden, *The Role of Standards in K–12 International Education*, in RESEARCH IN INTERNATIONAL EDUCATION, *supra* note 108, at 176, 176. It should be noted that although there is currently no official national educational system in the United States, many scholars believe that national curricula and certain basic expectations across all school districts demonstrate, in practice, a highly normalized system. *Id.*

142. *See, e.g.*, JESSUP, *supra* note 14, at 58 (contemplating that differences in social customs and standards around the world prevent jurisprudential uniformity

their differences tend to exacerbate the divergence of legal analysis and interpretation.

Although American educational and constitutional systems differ from other systems around the world, the American struggle with measures intended to further diversity in education is not unique.¹⁴³ To the contrary, the controversy surrounding preferential treatment of certain groups plagues many nations just as much as it plagues the United States.¹⁴⁴ As Jessup would say, diversity in schools is a universal human problem.¹⁴⁵ Many countries have struggled with diversity—in education, employment, and other aspects of government—and have employed varying methods and policies to embrace integration.¹⁴⁶ The pursuit of diversity is considerably complex and bereft of simple solution. Nevertheless, it is inconceivable to think that the United States cannot profit from the experiences—and mistakes—of others in a world that is increasingly integrated through global economies, trade, and political agreements.

This Part examines efforts to further diversity in the international community during the last few decades. It begins by discussing globalization and its effect on diversity and education. Next, it surveys the current status of international law in American constitutional jurisprudence and provides the approach and context necessary to understand the rationale behind using international or foreign law¹⁴⁷ to highlight the importance of diversity. Special

among nations); discussion *infra* notes 229–30 and accompanying text (comparing foreign jurisprudence to American laws).

143. See generally Gajendra K. Verma, *Diversity and Multicultural Education: Cross-Cutting Issues and Concepts*, in INTERNATIONAL PERSPECTIVES, *supra* note 13, at 21, 28 (arguing that diversity and multicultural education confront challenges that vary in intensity across regions of the world, but nevertheless create a global impact that transcends political and cultural barriers).

144. THOMAS SOWELL, AFFIRMATIVE ACTION AROUND THE WORLD: AN EMPIRICAL STUDY 1–2 (2004).

145. See JESSUP, *supra* note 14, at 1 (describing the “universality of the human problems”).

146. See, e.g., SOWELL, *supra* note 144, at 3–6 (discussing such efforts in India, the United States, Singapore, New Zealand, and Pakistan).

147. From a technical standpoint, it is worthwhile to note that sometimes the terms “international law,” “law of nations,” “customary international law,” and “foreign law” are not used interchangeably. See, e.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102.2 (1987) (“Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.”); *id.* § 111, introd. note.

The term ‘law of nations’ was used to describe the customary rules and obligations that regulated conduct between states and certain aspects of state conduct towards individuals . . . From the beginning, the law of nations, later referred to as international law, was considered to be incorporated into the law of the United States.

emphasis is placed on recent Supreme Court landmark decisions that suggest two main schools of thought vis-à-vis interpretation of global law: nationalism and transnationalism. In addition, this Part introduces metanationalism, a new approach to the interpretation of global law. Lastly, this Part discusses the international community's efforts to tackle the issue of diversity in education. Particular attention is applied to India, the most populous and culturally diverse democracy on Earth.¹⁴⁸

A. Globalization

A new world phenomenon with far-reaching implications has emerged. Like capitalism, socialism, communism, and other economic and social theories at their respective times, globalization has become the most recent and momentum-driven political order.¹⁴⁹

Id. § 111; see also John O. McGinnis, *Foreign to Our Constitution*, 100 NW. U. L. REV. 303, 311 (2006) (explaining that foreign law—decisions from foreign courts—is different from international law and “should not be used to cast doubt on the constitutionality of our own law because it emerged from a structure designed to generate norms for another nation, not our own”); *id.* at 312 (explaining that principles “of international law are a product of a universal consensus either as realized through customary international law or treaty”). *But see, e.g.,* *Hilton v. Guyot*, 159 U.S. 113, 163 (1895) (explaining that international law includes “not only questions of right between nations, governed by what has been appropriately called the law of nations; but also questions arising under what is usually called private international law, or the conflict of laws”); David T. Hutt & Lisa K. Parshall, *Divergent Views on the Use of International and Foreign Law: Congress and the Executive Versus the Court*, 33 OHIO N.U. L. REV. 113, 113–14 (2007) (giving interchangeable treatment to foreign and international law). However, for purposes of this Article, the word “international” is treated as an umbrella term to identify law that comes from outside the United States. Thus, a discussion from an international perspective will encompass treaties, international customs, international agreements, and the domestic law of foreign countries.

148. *Country Profile: India*, INDIAN HIGH COMM'N, BOTSWANA, <http://www.highcommissionofindia.org/bw/The/Html/indianprofile.htm> (last visited Oct. 15, 2010).

149. Pepi Leistyna, *Horton Hears a Who: Lessons from the Highlander Folk School in the Era of Globalization*, in *GRAPPLING WITH DIVERSITY: READINGS ON CIVIL RIGHTS PEDAGOGY AND CRITICAL MULTICULTURALISM* 57 (Susan Schramm-Pate & Rhonda B. Jeffries eds., 2008). As a reference to the reader, to whom the title of Leistyna's paper may not be recognizable, Myles Horton founded the Highlander Folk School (HFS) in the Appalachian Mountains of Tennessee in 1932. *Id.* at 59. HFS instituted an integration and civil rights program in its curriculum and established integrated classrooms even before the Supreme Court decided *Brown*. *Id.* at 65. As a result of its integration and desegregation policies, HFS became the educational center of the civil rights movement of the 1950s and early 1960s. At a time when political controversy and even claims of student indoctrination in communist ideals surrounded the school, HFS created literacy programs and workshops where renowned civil rights leaders and influential figures participated. *Id.* Among the prominent civil rights activists who visited HFS were Martin Luther King, Jr., Stokeley Carmichael, Rosa Parks, Septima Clark, Andrew Young, and Fanny Lou Hammer. *Id.* In her paper,

Long gone are the days of isolated civilizations and blood-spattered conquests. Today, thanks to technological advances in information and communication, humans live in a world that is interconnected and interdependent like never before.¹⁵⁰ Over the span of the last half-century alone, the Earth's population doubled and the global economy increased sevenfold.¹⁵¹ This new era of global interaction between sovereign nations, people, and institutions is slowly, but gradually, reshaping aged social, political, economical, and cultural structures.¹⁵²

It is widely accepted that globalization, in its contemporary form, originated in Western civilization.¹⁵³ After World War II, globalization became associated with the free-market economy, international trade, technological innovations, and greater interstate flow of commodities, money, information, and people.¹⁵⁴ However, the core cultural and technological prerequisites for globalization did not appear until the late 1970s and early 1980s, at the dawn of the information age.¹⁵⁵ Attempts of Western developed countries to universalize ideas and values (including concepts of capitalism, free trade, democracy, and human rights) encountered opposition from countries that viewed globalization as an imposition on non-Western culture.¹⁵⁶ Notwithstanding the enduring opposition from some in

Leistyna links the innovative and revolutionary curricula and pedagogical techniques at HFS with the recent globalization movement to argue that participatory action-based research—the notion of doing research with others rather than on them—can propel global justice and help globalization simultaneously. *Id.* at 69–71.

150. Fazal Rizvi et al., *Equality and the Politics of Globalization in Education*, in INTERNATIONAL PERSPECTIVES, *supra* note 13, at 3, 4.

151. Jasleen Kewlani, *Directive Principles of State Policies v. Contemporary Development: A Socio-Legal Development*, in HUMAN RIGHTS IN THE 21ST CENTURY 370, 371 (2008).

152. Leistyna, *supra* note 149, at 57.

153. Sampatkumar, *supra* note 108, at 72.

154. *Id.*

155. Nada Dabbagh & Angela D. Benson, *Technology, Globalization, and Distance Education: Pedagogical Models and Constructs*, in RESEARCH IN INTERNATIONAL EDUCATION, *supra* note 108, at 188, 190.

156. Sampatkumar, *supra* note 108, at 72. Interestingly enough, the same cannot be said of Western civilizations, which have eagerly embraced non-Western religions, medicine, art, literature, music, and cuisine. As a result of globalization, the availability of alternative and “exotic” choices has been fully accepted, admired, and revered in mainstream Western culture. *Id.* For instance, it is common for Westerners, many of whom lead hectic lives and have demanding schedules, to turn to meditation and yoga imported from Eastern civilizations to cope with stress. Martial arts with Eastern origins are extremely popular in America and other Western societies. Western Christians and celebrities often turn to Eastern religions, such as Islam, Buddhism, Confucianism, Hinduism, or Kabbalism, in their quest to find spiritual guidance. Mainstream Western musicians evince a strong influence of African, Eastern, and Latino music in their work. Acupuncture is widely recognized as an

non-Western societies, several decades of adjustments to cultural and social practices across various regions of the world have led non-Western countries to more or less accept—and in some cases embrace—globalization.¹⁵⁷

In its broader sense, the term “globalization” encompasses a myriad of definitions.¹⁵⁸ Indeed, the widely used term may denote slightly different meanings according to the context in which it is used. However, a consensus has formed that globalization is a multidimensional phenomenon that is gradually integrating our world socially, politically, economically, and culturally.¹⁵⁹ Thanks to globalization and its effects, no nation can afford to be isolated from the rest of the world.¹⁶⁰ To the contrary, globalization has chipped away at old-rooted notions of sovereignty, territory, and political supremacy.¹⁶¹ Although the contemporary state continues to play an authoritative role in society, the need to negotiate and interact with

alternative treatment for certain conditions. These and many more examples of cross-cultural enrichment are possible because of globalization.

157. *Id.*

158. Definitions for the term “globalization” are numerous and vary according to the milieu upon which the concept is discussed. The following is a nonexhaustive list of definitions for “globalization.” Globalization, in the economic context, “refers to the reduction and removal of barriers between national borders in order to facilitate the flow of goods, capital, services and labour.” U.N. Econ. & Soc. Comm’n for W. Asia [ESCWA], *Annual Review of Developments in Globalization and Regional Integration in the Countries of the ESCWA Region*, at 1, U.N. Doc. E/ESCWA/GRID/2002/2 (Dec. 10, 2002). It is the “inexorable integration of markets, nation-states and technologies to a degree never witnessed before—in a way that is enabling individuals, corporations and nation-states to reach around the world farther, faster and deeper.” KAMBHAMPATI S. SASTRY, *CONSTITUTION FOR 21ST CENTURY INDIA* 150 (2004) (footnote omitted). It is an emerging and imminent reality based on “the increasing interdependence of human and nonhuman systems across the planet.” WILLIAM GAUDELLI, *WORLD CLASS: TEACHING AND LEARNING IN GLOBAL TIMES* 157 (2003) (citation omitted). “[A]n overarching international system shaping the domestic politics and foreign relations of virtually every country . . .” THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE: UNDERSTANDING GLOBALIZATION* 7 (2000). Globalization is the “widening, intensifying, speeding up and growing impact of world-wide interconnectedness.” Nada Dabbagh & Angela D. Benson, *supra* note 155, at 190. From a purist perspective, “true globalization is characterized by the elimination of nation-states and the erasing of national borders.” Sampatkumar, *supra* note 108, at 71. Globalization comes “from the abolition of borders for all kinds of economic, financial and cultural activities. It affects not only the economic and financial sphere but also national cultures and services . . .” Françoise Caillods, *The Changing Role of the State: New Competencies for Planners*, INT’L INST. FOR EDUC. PLAN. NEWSL. (U.N. Educ., Sci., & Cultural Org.), Apr.–June 2003, at 1. Globalization refers “to the diminution or elimination of state-enforced restrictions on exchanges across borders and the increasingly integrated and complex global system of production and exchange that has emerged as a result.” Tom G. Palmer, *Globalization is Grrreat!*, 1 CATO’S LETTER 1 (2002), <http://www.cato.org/pubs/letters/palmer-catoletters.pdf>.

159. *See supra* note 158 and accompanying text.

160. SASTRY, *supra* note 158, at 150.

161. Rizvi, *supra* note 150, at 4–5.

transnational networks, international organizations, and intergovernmental regimes has fragmented the state's political and economic prowess.¹⁶² Whether the world likes it or not, globalization is omnipresent, inevitable, and unstoppable.¹⁶³ Pretending that globalization does not exist, or that it can be subdued, is akin to professing that the world is flat, the sun will not rise, or death is reversible.

1. Two Sides of the Coin

The rapid expansion of globalization across the world is a double-edged sword, which provides opportunity for advancement on one side and poses challenges that exacerbate inequalities on the other. Advocates of globalization are quick to point out the benefits of free trade and world interconnection, which include, *inter alia*, openness, accountability, spread of democracy and the rule of law, elimination of child labor, the creation of wealth, and incentives for conflict resolution among nation-states.¹⁶⁴ When countries have open access to large markets, globalization leads to greater efficiency, more direct investment, healthy competition, higher quality outputs, technological progress, and better standards of living.¹⁶⁵ Indeed, foreign direct investment—one of the central pillars of economic globalization—has helped to integrate many developing countries into the global economy over the last few decades.¹⁶⁶ Undoubtedly, globalization has a positive impact on societies around the world.¹⁶⁷ Sufficient empirical evidence demonstrates the benefits of globalization, but not all advocates of the global movement confine themselves to statistical data to advance their point of view: some advocates claim that free trade is a fundamental and inalienable human right that forms the basis for every human civilization.¹⁶⁸

162. *Id.* at 5.

163. Sampatkumar, *supra* note 108, at 73.

164. See Palmer, *supra* note 158, at 5–6 (outlining the benefits of reducing protectionism and increasing globalization).

165. ESCWA, *supra* note 158, at 1.

166. *Id.* at 2.

167. Free trade and open markets can play a major role in the worldwide reduction of poverty. See generally SECRETARIAT OF THE U.N. CONFERENCE ON TRADE & DEV., LEAST DEVELOPED COUNTRIES REPORT 2004, at 106, U.N. Doc. UNCTAD/LDC/2004, U.N. Sales No. E.04.II.D.27 (2004) (providing a discussion of the effects of globalization in developing countries and the relationship between international trade and poverty among least-developed countries in the global arena).

168. See Palmer, *supra* note 158, at 6 (arguing that globalization is based on the idea that free trade is not merely a privilege, but rather a fundamental human right recognized as the foundation of every human civilization since the dawn of time). Tom Palmer, a Senior Fellow at Cato Institute and Director of Cato University, further argues that anti-globalization measures are immoral and uncivilized. *Id.*

Despite its benefits, globalization is not without shortcomings. Open markets designed to increase the flow of goods and services can create dangerously large trade deficits in high-import nations.¹⁶⁹ Globalization limits local fiscal autonomy to use taxation as a revenue source because it hinders capital investment.¹⁷⁰ Constant technological advances generally lead to inequalities between the rich, whose discretionary income permits access to the new technology, and the poor in both developed and less-developed nations.¹⁷¹ Economic liberalization policies expose nations and individuals to more intense market pressures, which can lead to economic instability.¹⁷² Globalization also makes developing countries vulnerable to fluctuations in banking and monetary policies,¹⁷³ as well as foreign governance and management of their economic systems.¹⁷⁴ In the global economy, the International Monetary Fund, the World Bank, and other transnational financial institutions exert power and influence over all the governments with which they interact.¹⁷⁵

Criticism of globalization varies. At one end of the spectrum, anti-globalists denounce globalization as a ploy multinational corporations use to increase profits at the cost of individual freedoms.¹⁷⁶ Under this view, conglomerates with little regard for religious, cultural, and social sensitivities infiltrate foreign political and economical systems.¹⁷⁷ With maximum capital accumulation as the main goal, corporations exploit and manipulate labor, natural resources, indigenous populations, and the environment.¹⁷⁸ Conversely, critics at the other end of the spectrum condemn globalization for what they perceive to be its harmful effects on national self-determination and sovereignty.¹⁷⁹ According to this view, globalization interferes with efforts to preserve Western civilization and diminishes the power and military superiority of the West.¹⁸⁰ Thus, these critics argue that the global system should

169. ESCWA, *supra* note 158, at 1.

170. *Id.*

171. MARIA A. PACINO, REFLECTIONS ON EQUITY, DIVERSITY, AND SCHOOLING 44 (2008). Although inequities between rich and poor are visible in developed countries, generally speaking, the poorer populations of developed nations have greater access to technological advances. *See id.*

172. Rizvi, *supra* note 150, at 6.

173. ESCWA, *supra* note 158, at 1.

174. SASTRY, *supra* note 158, at 150.

175. *Id.*

176. Sampatkumar, *supra* note 108, at 73.

177. *Id.*

178. GAUDELLI, *supra* note 158, at 157 (citation omitted).

179. *Id.* at 158.

180. SAMUEL P. HUNTINGTON, THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER 311–12 (1996).

include mechanisms that promote the spread of Western interests across the globe.¹⁸¹

Despite the good, the bad, and the ugly that comes with globalization, one thing is certain: globalization is both incipient and ubiquitous. More importantly for this discussion, globalization implicates educational policy just as much as economic policy.

2. Education and Diversity

Increasing cross-cultural interaction in our globalized world is affecting demographics in a way never before seen. As a result of globalization, immigration to, and diversification of, once-homogeneous societies is occurring with astounding speed.¹⁸² The cultural diversity of virtually all modern societies is rapidly replacing societal homogeneity.¹⁸³ Consequently, globalization is a vehicle for the creation and transformation of multicultural nation-states.¹⁸⁴

Thanks to the global economy, developing countries are now able to compete and cooperate with developed nations in education and the job market.¹⁸⁵ The exchange between developed and developing nations has a symbiotic effect. The developed world profits from the deregulation and low-wage opportunities offered by less developed countries.¹⁸⁶ In turn, developed nations provide employment opportunities to foreign individuals with the necessary technological expertise.¹⁸⁷ This exchange, however, is only possible if the developing country's labor force is adequately educated in a particular field.

The current global economy features a knowledge-based foundation that requires greater levels of education and training.¹⁸⁸ Social and economic development is virtually impossible without educational policies that ensure access, equality, and participation for all.¹⁸⁹ Formal governmental and transnational policies to deal with issues of diversity and global population in the educational context

181. SASTRY, *supra* note 158, at 151.

182. This is precisely the case in Europe, Canada, the United States, and other developed countries that are becoming increasingly diverse with people from different cultures, languages, and religions. PACINO, *supra* note 171, at 15.

183. S. CASTLES & A. DAVIDSON, *CITIZENSHIP AND MIGRATION: GLOBALIZATION AND THE POLITICS OF BELONGING* 127 (2000).

184. Audrey Osler, *Looking to the Future: Democracy, Diversity and Citizenship Education*, in *TEACHERS, HUMAN RIGHTS AND DIVERSITY: EDUCATING CITIZENS IN MULTICULTURAL SOCIETIES* 3, 3 (Audrey Osler ed., 2005).

185. PACINO, *supra* note 171, at 15.

186. *Id.*

187. *Id.*

188. Rizvi, *supra* note 150, at 3.

189. *Id.*

are common among nations all over the world,¹⁹⁰ mainly because rapid and constant fluctuations in technology and demographics provide incentives to improve and renovate an educational system.¹⁹¹

Even the U.S. Supreme Court has acknowledged the importance of diversity in education within a globalized world.¹⁹² As noted in the previous Part, exposure to diversity in education prepares students to interact in an interconnected world where geographical and ethnic boundaries are constantly being blurred.¹⁹³ Education on a diverse and multicultural platform can be useful to confront stereotypes, prejudices, and ethnocentric propensities in groups and individuals.¹⁹⁴ All pupils must be granted the opportunity to learn regardless of ethnic, social, and cultural identity, but, at the same time, they must learn to respect diversity in a multiracial and multicultural world.¹⁹⁵ Global economic integration can be successful only with a multi-skilled, innovative, and flexible labor force capable of functioning in culturally diverse environments.¹⁹⁶ Governments, transnational organizations, and nongovernmental organizations are cognizant that universal access to education, especially in information and communication technology, is the only effective way to meet the challenges posed by globalization.¹⁹⁷ Hence, investment in multicultural education and curricula in recent years aims to nurture diversity and promote cohesion to improve social relations between students.¹⁹⁸

190. See GAUDELLI, *supra* note 158, at 18 (discussing the results of a study suggesting that elementary students can “simultaneously develop positive global and national attitudes’ when they engage in dialogue in an open climate” (citation omitted)).

191. PACINO, *supra* note 171, at 25.

192. See *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) (concluding that diversity in educational facilities is important because “the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints”).

193. *Id.*

194. Verma, *supra* note 143, at 21.

195. See generally GR. BRIT. DEPT. OF EDUC. AND SCI., EDUCATION FOR ALL: REPORT OF THE COMMITTEE OF INQUIRY INTO EDUCATION OF CHILDREN FROM ETHNIC MINORITY GROUPS 363–64 (1985). This government-sponsored report, more commonly known as the Swann Report, advocated a system of multicultural education for all learning institutions in Great Britain without regard to race, age range, ethnicity, or geographical location. *Id.* The report published data that correlated ethnicity and educational achievement and discovered that racism had a negative impact on the education of children from minority groups. *Id.*

196. Rizvi, *supra* note 150, at 7–8.

197. *Id.* at 3.

198. *E.g.*, U.N. EDUC., SCI. & CULTURAL ORG., WORLD REPORT EXECUTIVE SUMMARY: INVESTING IN CULTURAL DIVERSITY AND INTERCULTURAL DIALOGUE 15–17, 28–9, 31, <http://unesdoc.unesco.org/images/0018/001847/184755e.pdf>.

Unmistakably, globalization has an enormous impact on policies designed to grapple with diversity in education. A more connected world calls for more connected educational policies that emphasize pluralism among nations. However, this view implies, at least on a basic level, that nations also view law and policy in a globalized context, which is seldom the case.¹⁹⁹ For this reason, it is important to examine the relevance of globalization within our constitutional framework to American and international law.

B. *Square Pegs and Round Holes? International Law in American Constitutional Jurisprudence*

The globalization phenomenon is starting to exert a new kind of pressure upon our legal system. In recent decades, the world has witnessed an internationalization of legal affairs and institutions. In the United States, a growing body of foreign and international public and private law presents a dilemma for the judiciary.²⁰⁰ International law “is no longer confined in relevance to a few treaties and business agreements. Rather, it has taken on the character of transnational law.”²⁰¹ Many academics and policy makers believe that the integration of domestic and international law is a foregone conclusion that will make it impossible to classify issues as local or global.²⁰² Whether domestic and foreign law will become unrecognizable in the future is beyond the scope of this Article. Nevertheless, prior to an examination of diversity in education from an international perspective, it is necessary to discuss the role that international law plays in the American legal system and its place in evolving constitutional jurisprudence.

1. The New Archenemies: Nationalism Versus Transnationalism

The dichotomy between international and American law has permeated the American legal system since the beginning, as shown by the text of the Declaration of Independence. The Founding

199. With the exception of few areas such as the globalization of trade and technological advances, most sovereign nations are extremely reluctant to relinquish authority and jurisdiction to international organizations or tribunals. NICHOLAS A. ASHFORD & CHARLES C. CALDART, *TECHNOLOGY, LAW, AND THE WORKING ENVIRONMENT* 535 (1996).

200. Sandra Day O'Connor, Assoc. Justice, U.S. Supreme Court, Keynote Address at the Ninety-Sixth Annual Meeting of the American Society of International Law (Mar. 16, 2002), *in* 96 AM. SOC'Y INT'L L. PROC. 348, 350.

201. *Id.*

202. Harold Hongju Koh, *The Globalization of Freedom*, 26 YALE J. INT'L L. 305, 306 (2001) (arguing that domestic and global law have melded together, thereby preventing classification).

Fathers attempted to create an independent sovereign nation with a new system of governance and laws.²⁰³ At the same time, the Framers also understood that the legitimacy of the United States would be measured by the “opinions of mankind”²⁰⁴ and the ability of the country to avail itself of the same powers and duties that other independent nations enjoyed worldwide.²⁰⁵ As the United States developed its own jurisprudence, international law became incorporated into domestic law, at least where a treaty or action by one of the branches of government did not forestall it.²⁰⁶ However, the extent to which international law applies in American constitutional interpretation remains unclear. In the most recent iteration of this debate, two distinct theories of constitutional interpretation vis-à-vis international law emerged: nationalism and transnationalism.²⁰⁷

Nationalism is a theory “characterized by commitments to territoriality, national politics, deference to executive power, and resistance to comity or international law as meaningful constraints on national prerogative.”²⁰⁸ This theory of constitutional interpretation dates back to the nineteenth century²⁰⁹ and has lost

203. See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“[W]henver any form of government becomes destructive . . . it is the right of the people to alter or to abolish it, and to institute new government, laying its foundation on such principles and organizing its powers . . . to effect their safety and happiness.”).

204. *Id.* para. 1 (“When in the course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another . . . a decent respect to the *opinions of mankind* requires that they should declare the causes which impel them to the separation.” (emphasis added)). The term “opinions of mankind” suggests a reference to international law—the worldwide opinions of nations. See *Paquete Habana*, 175 U.S. 677, 700 (1900) (“Wheaton places among the principal sources of international law ‘Text-writers of authority showing what is the approved usage of nations, or the general opinion respecting their mutual conduct, with the definitions and modifications introduced by general consent.’” (quoting HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW § 18 (8th ed. 1866))).

205. THE DECLARATION OF INDEPENDENCE para. 4 (U.S. 1776) (“[A]s free and independent states, [the colonies] have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent states may of right do.”); see also Harold Hongju Koh, *International Law as Part of our Law*, 98 AM. J. INT’L L. 43, 44 n.3 (2004) (citing Letter from Thomas Jefferson, Sec’y of State, to M. Genet, French Minister (June 5, 1793)) (noting that Thomas Jefferson, as Secretary of State, believed that the law of nations constituted an important element of the laws of the land).

206. *Paquete Habana*, 175 U.S. at 700 (“International law is part of our law, and must be ascertained and administered by the courts. . . . [W]here there is no treaty and no controlling executive or legislative act or jurical [sic] decision, resort must be had to the customs and usages of evilized [sic] nations.”).

207. Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1513 (2003).

208. *Id.*

209. See, e.g., *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 426 (1857).

some of its momentum in recent years.²¹⁰ In essence, nationalist jurisprudence disapproves of surrendering American sovereignty to the international regime.²¹¹

Transnationalism, on the other hand, “looks forward toward political and economic interdependence and outward toward rules of international law and comity as necessary means to coordinate international system interests and to promote the development of a well-functioning international judicial system.”²¹² Transnationalism has been part of American jurisprudence—at least in concept—since the early days of our republic.²¹³

For a while, both nationalism and transnationalism remained at the periphery of constitutional debate. Modern trends of globalization, however, have made it impossible to ignore them. As the debate over American constitutional interpretation of

No one, we presume, supposes that any change in public opinion or feeling . . . in the civilized nations of Europe . . . should induce the court to give . . . the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted. . . . [The Constitution] must be construed now as it was understood at the time of its adoption . . . as long as it continues to exist in its present form.

Id.

210. See *infra* notes 215–26 and accompanying text. The most ardent supporters of a nationalist approach to constitutional jurisprudence in today’s Supreme Court are Justices Scalia and Thomas. See, e.g., *Thompson v. Oklahoma*, 487 U.S. 815, 868 n.4 (1987) (Scalia, J., dissenting) (“[W]here there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution.”); Koh, *supra* note 207, at 1513.

211. See Koh, *supra* note 207, at 1490 (discussing “whether and when the enforcement of international treaties against the United States affronts U.S. sovereignty”).

212. *Id.* at 1514.

213. During the early years of the United States, Justices John Jay and John Marshall championed a transnationalist approach to judicial interpretation. See *id.* at 1513 (“The . . . venerable strand of ‘transnationalist jurisprudence’ began with John Jay and John Marshall”); see also *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.) (holding that “an act of Congress ought never to be construed to violate the law of nations”); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 474 (1793) (opinion of Jay, C.J.) (“[T]he United States had, by taking a place among the nations of the earth, become amenable to the law of nations.”). The approach continued to garner support from other jurists. For example, supporters of transnational views include Justice Gray (early twentieth century); Justices Douglas and White (mid-twentieth century); Justice Blackmun (1980s and early 1990s); and Justices Breyer and Ginsburg (1990s until present time). Koh, *supra* note 207, at 1513; see also, e.g., Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 YALE L.J. 39, 49 (1994) (expressing that he, now retired from the Court, “look[s] forward to the day when the majority of the Supreme Court will inform almost all of its decisions almost all of the time with a decent respect to the opinions of mankind”).

international law intensified during the last decade, the Supreme Court began to favor, for the time being, the transnationalist view.²¹⁴

In *Atkins v. Virginia*,²¹⁵ for instance, the transnationalist view prevailed when the majority held that the death penalty for mentally challenged individuals should be condemned in America, just as it had been within the world community.²¹⁶ A year later, in 2003, Justice Ginsburg wrote a concurring opinion in *Grutter* that praised the majority for its reasoning and cited to international human rights documents.²¹⁷ A more definitive victory for the transnationalist approach came three days later, when the Court decided *Lawrence v. Texas*.²¹⁸

In *Lawrence*, the majority struck down an antisodomy law as unconstitutional.²¹⁹ In the process, it noted that the right to engage in intimate homosexual conduct “ha[d] been accepted as an integral part of human freedom in many other countries.”²²⁰ To support its holding, the majority cited decisions of the European Court of Human Rights, which pointed to an international consensus indicating that intrusion by the government upon a person’s right to choose a sexual partner—male or female—cannot withstand any judicial scrutiny.²²¹

Two years later the Court decided *Roper v. Simmons*, and the transnationalist approach prevailed once more.²²² The majority in

214. The debate is not constricted to the opinion of the judiciary. In fact, Congress has also considered the issue in recent years and rejected the concept of strict nationalism. Attempts to prohibit the use of international legal materials failed under a Congress with a Republican majority, which is generally perceived to reject a transnationalist approach. See Constitution Restoration Act of 2005, H.R. 1070, 109th Cong. § 201 (2005); S. 520, 109th Cong. § 201 (2005) (“In interpreting and applying the Constitution of the United States, a court of the United States may not rely upon any constitution, law, administrative rule, Executive order, directive, policy, judicial decision, or any other action of any foreign state or international organization or agency.”). Representative Robert Aderholt (R–Ala.) and Senator Richard Shelby (R–Ala.) introduced mirror images of the bill in the House and Senate on February 11 and February 12, respectively, of 2004, and again on March 3, 2005. The bills were referred to the Committee on the Judiciary, but failed to garner enough support. See H.R. 1070; S. 520; Constitution Restoration Act of 2004, H.R. 3799, 108th Cong. § 201 (2004); S. 2082, 108th Cong. § 201 (2004).

215. 536 U.S. 304 (2002).

216. *Id.* at 316 n.21.

217. See *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring) (“The Court’s observation that race-conscious programs must have a logical end point, accords with the international understanding of the office of affirmative action.” (internal quotation marks and citation omitted)).

218. 539 U.S. 558 (2003).

219. *Id.* at 579.

220. *Id.* at 577.

221. *Id.* at 573–76 (citing *Modinos v. Cyprus*, 259 Eur. Ct. H.R. (1993); *Norris v. Ireland*, 142 Eur. Ct. H.R. (1988); *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (1981)).

222. 543 U.S. 551 (2005).

Roper held that the Eighth and Fourteenth Amendments proscribe the death penalty for minors who commit capital crimes.²²³ Crucially, the Court found “confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty.”²²⁴ In the majority’s view, citing the treatment other nations afford certain fundamental rights “does not lessen [] fidelity to the Constitution or [] pride in its origins.”²²⁵ Although *Roper* embraced the use of international law to interpret certain parts of our Constitution, it explicitly warned that “[t]he opinion of the world community, [does] not control[] [the] outcome.”²²⁶

Despite the recent legal victories for transnationalism, it can hardly be said that this area of the law is settled. A trend toward transnationalism is clearly visible in recent jurisprudence, but nationalists have strong arguments against the use of international law to interpret domestic law.²²⁷ In addition, two of the four most recent additions to the Court support a nationalist approach, making it increasingly possible that the ground gained by supporters of transnationalism will be lost.²²⁸

Justice Scalia’s caustic dissent in *Roper* and other writings showcase three arguments in support of the nationalist view.²²⁹ First, nationalists argue that the uniqueness of America’s culture and legal system renders international law incongruous with the Constitution.²³⁰ Many explicit constitutional provisions—right to

223. *Id.* at 560.

224. *Id.* at 575.

225. *Id.* at 578.

226. *Id.*

227. *See supra* note 210 and accompanying text.

228. The four most recent additions to the Court are Chief Justice Roberts (2005) and Justices Alito (2006), Sotomayor (2009), and Kagan (2010). Justices Roberts and Alito have expressed a preference for a nationalist approach to international law. *See, e.g., Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Supreme Court: Hearing Before S. Comm. On the Judiciary, 109th Cong. 200–01 (2005)* (statement of Judge John G. Roberts, Jr.) (“In foreign law you can find anything you want. . . . Looking at foreign law for support is like looking out over a crowd and picking out your friends. You can find them. They’re there.”); Harold Hongju Koh, *Why Transnational Law Matters*, 24 PENN ST. INT’L L. REV. 745, 749–50 (2006) (“Chief Justice John Roberts, and Justices Scalia, Thomas, and Alito seem[] committed to a more nationalist course.”).

229. *Roper*, 543 U.S. at 622 (Scalia, J., dissenting).

230. *See* Antonin Scalia, Assoc. Justice, U.S. Supreme Court & Stephen Breyer, Assoc. Justice, U.S. Supreme Court, Debate on Foreign Law at American University, Washington College of Law (Jan. 13, 2005) [hereinafter Scalia–Breyer Debate Transcript] (statement of Justice Antonin Scalia), *available at* <http://www.freerepublic.com/focus/news/1352357/posts> (“We don’t have the same moral and legal framework as the rest of the world, and never have. . . . [T]he framers of the Constitution . . . didn’t have a whole lot of respect for many of the rules in European countries.”).

trial by jury and grand jury indictment—as well as many interpretations—in evidence, capital punishment, the Establishment Clause, and abortion jurisprudence—are “distinctively American.”²³¹ The U.S. “belief that all power has to flow from the people” can be difficult to understand in foreign nations where liberty flows from a central power.²³² Second, nationalists contend that the use of international law inevitably results in subjective selectivity.²³³ Cherry picking the best and most desirable argument from a basket of international materials “invites manipulation.”²³⁴ Under this reasoning, a jurist may, for example, follow the international community’s lead in some cases and choose to ignore it in others.²³⁵ Third, most nationalists believe that strict adherence to the text of the Constitution is the only legitimate approach to constitutional theory.²³⁶ Departure from the Constitution’s text “would abrogate the [] character of [the judiciary], and make it the mere reflex of the popular opinion or passion of the day.”²³⁷ Under a nationalist view, international law should be considered only during legislative and constitutional drafting.²³⁸ Therefore, under the nationalist viewpoint, the Founding Fathers appropriately looked to the law of nations, but a jurist today would be wrong to do so.²³⁹

231. *Roper*, 543 U.S. at 623–25 (Scalia, J., dissenting).

232. Scalia–Breyer Debate Transcript, *supra* note 230 (statement of Justice Stephen Breyer).

233. See, e.g., *Roper*, 543 U.S. at 627 (“To invoke alien law when it agrees with one’s own thinking, and ignore it otherwise, is not reasoned decisionmaking, but sophistry.” (footnote omitted)).

234. Scalia–Breyer Debate Transcript, *supra* note 230 (statement of Justice Antonin Scalia).

235. *Roper*, 543 U.S. at 625–26 (Scalia, J., dissenting); see also Scalia–Breyer Debate Transcript, *supra* note 230 (statement of moderator, Norman Dorsen, Founder and President, U.S. Ass’n of Constitutional Law) (noting the Court’s lack of citations to East Asian, South American, and Islamic law).

236. See Scalia–Breyer Debate Transcript, *supra* note 230 (statement of Justice Antonin Scalia) (“[A]s an originalist, I would look at the text of the Constitution. . . . That’s the end of the [search] for me. What good would reading [foreign] opinions do, unless it was my job to be the moral arbiter, which I don’t regard it as?”).

237. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 426 (1856).

238. Koh, *supra* note 205, at 54 (citation omitted).

239. See Scalia–Breyer Debate Transcript, *supra* note 230 (statement of Justice Antonin Scalia) (“[I]n writing [a constitution], of course you consult foreign sources, see how it’s worked, see what they’ve done, use their examples and so forth. But that has nothing to do with interpreting it.”). *But see* Koh, *supra* note 205, at 54 (arguing that to interpret the U.S. Constitution by looking at the drafters—but not the interpreters—of other constitutions around the world would be as preposterous as “to operat[e] a building by examining the blueprints of others on which it was modeled, while ignoring all subsequent progress reports on how well those other buildings actually functioned over time”).

C. *Metanationalism*

Given the effects of globalization on diversity and education and the recent trend in American jurisprudence toward a more transnational approach to constitutional interpretation, it is now appropriate to set the context for the discussion that follows. The purpose of this section is not to argue on behalf of a particular theory of constitutional interpretation vis-à-vis international law or even to endorse alternative conjectures.²⁴⁰ Instead, the goal is to highlight what our neighbor societies are doing to confront a global problem. Regardless of whether the need to follow or cite international law exists—as nationalists and transnationalists debate,²⁴¹ there is real value in awareness of the successes and failures from experiments taking place in “laboratories” around the world.²⁴²

Critics might claim that the suggested approach is a mere watered-down version of the transnationalist view, but they would be mistaken. There are fundamental weaknesses in transnationalism that vitiate its persuasiveness. One of the strongest arguments

240. For instance, Justice O'Connor sponsored a modified version of transnationalism during her tenure on the Court. She believed that “conclusions reached by other countries and by the international community should at times constitute persuasive authority in American courts,” and that there is much we can learn from foreign jurists. O'Connor, *supra* note 200, at 350. However, she also believed that international law should not be given a confirmatory role in interpreting American laws unless “the existence of an international consensus . . . confirm[s] the reasonableness of a consonant and genuine American consensus.” *Roper*, 543 U.S. at 605 (O'Connor, J., dissenting). O'Connor's dissent in *Roper* suggests that if there had been a national consensus among the states against the death penalty for minors at the time, she would have assigned a confirmatory role to the international consensus and thereby treated it as persuasive authority worthy of citation. Applying the same reasoning, O'Connor's approach would, for instance, result in the adoption of a federal right to an education because of the presence of both a national—forty-eight states explicitly recognize education as a right in their constitutions—and international consensus. See generally Angela Avis Holland, Note, *Resolving the Dissonance of Rodriguez and the Right to Education: International Human Rights Instruments as a Source of Repose for the United States*, 41 VAND. J. TRANSNAT'L L. 229 (2008) (advocating for the adoption of international law and legal commitments embodied in international treaties when there is an international consensus to support them).

241. See Scalia–Breyer Debate Transcript, *supra* note 230 (statement of Justice Stephen Breyer) (arguing that citation to international sources is appropriate as a form of intellectual honesty); *id.* (statement of Justice Antonin Scalia) (elaborating that citation to international materials grants them improper precedential value).

242. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, *serve as a laboratory*; and *try novel social and economic experiments* without risk to the rest of the country.” (emphasis added)). The same rationale can be applied in the international context. The United States can, without social or economical risk to itself, observe the experiments of other nations and, thereafter, decide whether or not a similar or different approach could benefit the nation.

transnationalists make, for example, suggests that selectivity serves a purpose; namely, that the practices and societal standards of other *mature* societies—as opposed to those that are underdeveloped—should be construed with respect because of their relevance to our jurisprudence and “the evolving standards of decency that mark the progress of a maturing society.”²⁴³ In other words, transnationalists, as Professor Koh clarifies it, afford a “decent respect” only to the laws of *developed* societies and ignore the laws of whatever legal system they deem to be lagging behind.²⁴⁴

A standard that requires jurists to look at *mature* or *developed* societies for constitutional guidance elicits legal predicaments because it requires a subjective definition of “maturity.”²⁴⁵ If maturity means that a jurist must look at societies with long-established legal systems, why then—as it logically follows—must a jurist not look at other mature systems that differ greatly from our own? Conversely, if maturity is measured by compliance with Western standards, why would it be appropriate to look to decisions of constitutional democracies that have been established for a relatively short period of time, but have not attained complete and thorough development?²⁴⁶

243. Koh, *supra* note 205, at 56 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

244. *Id.*

245. The *Oxford English Dictionary* defines the term “mature” as (1) fully-grown or developed; (2) carefully or thoroughly planned; or (3) timely or ripe. *Mature*, COMPACT OXFORD ENGLISH DICTIONARY, http://www.askoxford.com:80/concise_oed/mature?view=uk (last visited Oct. 15, 2010). *Merriam-Webster Dictionary* defines “mature” as (1) “having completed natural growth and development”; (2) “having attained a final or desired state”; (3) “having achieved a low but stable growth rate”; or (4) having older or elderly characteristics. *Mature*, MERRIAM-WEBSTER ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/mature> (last visited Oct. 15, 2010).

246. In recent times, many legal scholars have noted that the constitutional courts in India, South Africa, and Canada are becoming increasingly influential. Adam Liptak, *U.S. Court is Now Guiding Fewer Nations*, N.Y. TIMES, Sept. 18, 2008, at A1; cf. Stephen Breyer, *Keynote Address*, 97 AM. SOC’Y INT’L L. PROC. 265, 266 (2003) (noting that India’s high court has developed extensive jurisprudence on affirmative action). Transnationalists would willingly consider decisions from South Africa’s Constitutional Court because it was modeled, to a great extent, under the American Bill of Rights—including subsequent rights interpreted under the American Constitution—and, thus, exhibits the core characteristics of a mature society. See S. AFR. CONST., 1996 §§ 7–39 (enumerating the rights enshrined in Chapter 2 of the South African Constitution, which include the rights to life, liberty, freedom of speech, freedom of religion, property, eminent domain, freedom of assembly, petition, access to courts, due process, fair trial, access to counsel, equal protection under the law, protection against unreasonable search and seizure, privacy, adequate conditions of detention, protection against self-incrimination and double jeopardy, remain silent, not be subjected to slavery and forced labor, be informed of the cause and nature of detention, vote, and travel). However, the Court has only been in place since 1996. While South Africa’s Constitutional Court has made impressive developments in human rights and other areas, one can hardly call it “mature.”

The argument Professor Koh and other transnationalists make is counterintuitive because we can learn just as much from the mistakes of others as from their successes without trying to subjectively measure jurisprudential maturity.²⁴⁷ As Justice Scalia has articulated, “societies don’t always mature. Sometimes they rot. . . . [H]uman progress is [not always] one upwardly inclined plane.”²⁴⁸ Even advanced civilizations, with a strong record of respect for human rights and civil liberties, experience setbacks. For a recent example of a setback in a *mature* society, we must look no further than the recent ban of minarets approved overwhelmingly by Swiss voters.²⁴⁹

Flaws in transnationalism are not limited to buzzworthy terms like “maturity.” Koh’s theory of transnationalism is also self-contradictory. Koh explains that advocates of transnationalism are not “international majoritarians who believe that American constitutional liberties should be determined by a worldwide vote”; instead, they assert that the Constitution should be construed with respect for mature legal systems.²⁵⁰ Without a doubt, Professor Koh is one of the most respected, influential, and articulate transnationalists. But his opinion implies that he has either carved a new subset of transnationalism or turned a blind eye at the reasoning of the transnationalists that he frequently cites.²⁵¹

In reality, transnationalists themselves do not commit to opposing international majoritarianism, contrary to Koh’s assertion. If they were committed to doing so, there would be no need to haphazardly mention that the United States is the only country in the entire *galaxy* that dissents from the wise opinions of the rest of

247. See *supra* text accompanying note 246 (noting Koh’s suggestion that interpretation of the U.S. Constitution can be illuminated by the practices of mature foreign legal systems); see also *infra* text accompanying note 260.

248. Scalia–Breyer Debate Transcript, *supra* note 230 (statement of Justice Antonin Scalia).

249. On November 2009, 57 percent of voters in twenty-two out of twenty-six cantons in Switzerland supported a referendum proposal to amend the Swiss Constitution to prohibit the construction of a distinctive architectural feature of Muslim mosques called minarets. Voters feared that Muslim ideology would lead to Islamization, despite the fact that only 400,000 Muslims reside in Switzerland and only four minarets have been built. *Swiss Voters Back Ban on Minarets*, BBC NEWS, Nov. 29, 2009, <http://news.bbc.co.uk/2/hi/8385069.stm>.

250. Koh, *supra* note 205, at 56 (internal quotation marks omitted).

251. Koh has often applauded the transnationalist views of Justices Breyer, Ginsburg, Kennedy, and O’Connor in recent years. *E.g.*, Koh, *supra* note 205, at 48; see also *id.* at 50–51 (citing *Lawrence v. Texas*, 539 U.S. 558 (2003) (Kennedy, J.)) (adding an exclamation point to convey importance to the fact that the European Court of Human Rights struck down homosexual sodomy laws that affected 800 million people in forty-five member countries of the developed Council of Europe); *id.* at 49 (citing *Grutter v. Bollinger*, 539 U.S. 306 (2003) (Ginsburg, J., concurring)); *infra* note 254 and accompanying text.

humankind,²⁵² whenever the international community forms a consensus contrary to U.S. law.²⁵³ Supporters of construing domestic law to the image of international law are quick to point out the few instances where the United States chooses not to follow the rest of the world, as if to implicitly denounce the United States for lagging behind a number of underdeveloped countries.²⁵⁴

In the field of education, as in other areas, transnationalists who advocate for U.S. ratification of international and humanitarian treaties fail to see things from a pragmatist, rather than theoretical, perspective. The United States may sometimes be the lone objector in the international community, but that does not mean that mere ratification of a politically expedient document automatically results in strict—or even moderate—adherence to the provisions of the agreement. In fact, supporters of ratification seem oblivious to the political and economical benefits that developing nations stand to enjoy by virtue of joining an international agreement. Subscribing to widely accepted international treaties offers a boost of legitimacy to a state that oppresses its people and violates their human rights. The mere appearance of respecting international legal standards, even without a true commitment to a treaty's objectives, can persuade a state to sign and ratify.²⁵⁵ For proponents of immediate ratification, it would simply suffice that the United States endorse an international agreement—or subscribe to an international

252. See sources cited *supra* notes 204–05 (referring to the “opinions of [hu]mankind”).

253. See *infra* note 254 and accompanying text; see also MARK DAVID AGRAST ET AL., THE WORLD JUSTICE PROJECT RULE OF LAW INDEX (2010) (using polling data from local population and “qualified, expert” respondent questionnaires in the three most populous cities of thirty-five indexed countries—in the case of the United States, the cities polled were New York, Los Angeles, and Chicago—to formulate a global ranking that places the United States outside the top 20 percent of nations in terms of open access to government, respect for fundamental rights, access to civil justice, absence of corruption, adequate regulatory enforcement, etc.).

254. Of course, the transnationalists that Koh cites do not renounce international majoritarianism, which suggests that Koh is either turning a blind eye to their writings or advocating a different type of transnationalism that is not fully subscribed by those transnationalists he cites. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 576 (2005) (Kennedy, J.) (noting that the majority of the international community disagreed with U.S. law at the time of *Roper* and that “every country in the world has ratified *save for the United States and Somalia*,” the UN Convention on the Rights of the Child (emphasis added)); see also *id.* at 577 (highlighting that “only seven countries other than the [United States] have executed juvenile offenders since 1990: Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China” (emphasis added)).

255. Cf. Mike Moore, *China's WTO Deal: A Defining Moment for Global Cooperation*, N.Y. TIMES, Sept. 19, 2001, http://www.nytimes.com/2001/09/19/opinion/19iht-edmoore_ed2.html (discussing the political and economical benefits China stood to gain by accession to the WTO despite its record of human rights violations).

consensus—without previously analyzing or demonstrating whether the agreement is capable of bringing about the intended change.²⁵⁶

Nationalism's outdated and narrow outlook in an increasingly globalized world and transnationalism's flaws and contradictions should not restrict the potential benefits of examining international law in constitutional inquiries. Instead of thinking of nationalism and transnationalism as two mutually exclusive concepts at opposite ends of a linear spectrum of constitutional interpretation and international law, these two concepts should be viewed as important elements in a multidimensional plane where theories exist to broaden and enrich legal analysis. For this reason, this Article introduces a new theory called metanationalism. Metanationalism rejects the notion that international sources—whether originating from *established* or *emerging* societies that share most, or none, of American cultural values and traditions—are bereft of legal value.²⁵⁷ Under metanationalism, the debate over citation to international materials is irrelevant because the focus of metanationalism is not to look to the decisions of foreign constitutional courts and import them as persuasive legal authority. Instead, metanationalism advocates inspection, observation, and analysis of the successes and failures that other nations experience when they try to implement measures to mitigate the effects of common problems affecting all societies. Certain provisions of the Constitution should not be construed with respect—or deference—for mature international law,²⁵⁸ as Professor Koh posits. Rather, the Constitution should be interpreted with respect for American values enriched by the *awareness* of international law.²⁵⁹ Under the metanationalist approach,

256. For instance, despite ratification of international treaties aiming to secure free and compulsory education to all children, many ratifying nations do not demonstrate a full commitment to the provisions of the treaties. See Eric Lerum et al., *Strengthening America's Foundation: Why Securing the Right to an Education at Home Is Fundamental to the United States' Efforts to Spread Democracy Abroad*, 12 HUM. RTS. BRIEF 13, 13 (2005) (noting that the UN Committee on Economic, Social and Cultural Rights reported that of the nations that ratified the international education treaties, not a single one submitted a detailed plan outlining how the nation hoped to improve educational opportunities).

257. See *Roper*, 543 U.S. at 627 (Scalia, J., dissenting) (arguing that the Supreme Court should "reconsider [its rulings] in light of the views of foreigners, or else it should cease putting forth foreigners' views as part of the *reasoned basis* of its decisions").

258. See Koh, *supra* note 205, at 56 ("When phrases like 'due process of law,' 'equal protection,' and 'cruel and unusual punishments' are illuminated by parallel rules, empirical evidence, or community standards found in other mature legal systems, that evidence should not simply be ignored.")

259. Cf. *Roper*, 543 U.S. at 627 n.9 (Scalia, J., dissenting) ("Either America's principles are its own, or they follow the world; one cannot have it both ways."). Justice Scalia fails to recognize that it is plausible to interpret the U.S. Constitution from a

international law can be used to *inform* the law, rather than to *construe* the law.

Metanationalism does not require the United States to surrender its legal sovereignty to foreign jurists. For example, a jurist may discover that other nations have not tried a solution to a particular problem, but she may find, through research of international sources, instances where policies and legal constructs have gone awry. Examining other nations' mistakes can inform and enrich the jurist's perspective to assist her own legal reasoning. The United States may not have the same moral and legal framework as other nations, but that has not prevented this country from learning from others, as the Founding Fathers did best. When determining policy, the United States does not look only to the practices of other *mature democracies*. America has learned valuable lessons from across the globe.²⁶⁰ Jurists should emulate this reasoning in a way that is consistent with American constitutional principles.

In essence, metanationalism adapts transnationalist principles with special consideration for nationalism. International law under metanationalism has a similar role to that of a linesman in soccer.²⁶¹ Decisions by the linesman are advisory and never binding on the referee. A linesman merely informs, clarifies, and draws attention to

national perspective with a healthy awareness of international norms, without following or surrendering autonomy to the rest of the world.

260. See, e.g., *The European Experience with Cap and Trade: Testimony Before S. Comm. on Foreign Relations*, 111th Cong. (2009) (testimony of Ben Lieberman, Senior Policy Analyst for Energy and Env't, Thomas A. Roe Inst. for Econ. Policy Studies), available at [http://www.heritage.org/research/Energyand Environment/tst071009a.cfm#_ftn3](http://www.heritage.org/research/Energyand%20Environment/tst071009a.cfm#_ftn3) (providing information about Europe's strange experience with cap and trade measures to reduce greenhouse gases to combat global warming). See generally GEORGE CRILE, CHARLIE WILSON'S WAR: THE EXTRAORDINARY STORY OF THE LARGEST COVERT OPERATION IN HISTORY (2003) (narrating the story of the CIA's secret war in Afghanistan during the late 1980s, and how U.S. funding of the only successful jihad in recent history, and subsequent neglect in post-war times, caused Afghanistan to fall into the hands of the Taliban and other rogue groups); GRZEGORZ W. KOLODKO, TEN YEARS OF POST-SOCIALIST TRANSITION LESSONS FOR POLICY REFORM (1999) (outlining lessons for developing policy reorientation in Eastern Europe and the former Soviet Union after economic policies of the so-called Washington consensus failed to introduce post-socialist nations to the world market economy); Robin Hindery, *UCSF Faculty Get Insiders' Look at Cuban Healthcare System*, UCSF TODAY (Jan. 7, 2009), <http://today.ucsf.edu/stories/ucsf-faculty-get-insiders-look-at-cuban-health-care-system/> (discussing a visit to Cuba by a group of faculty members at the University of California, San Francisco Medical School to observe the healthcare system; the system provides free healthcare for all, nourishes a thriving biotech industry, and attracts students from dozens of countries despite poverty and the U.S. economic embargo of the last half century).

261. Metaphors relating jurisprudence and sports are common in the United States. See, e.g., Bruce Weber, *Umpires v. Judges*, N.Y. TIMES, July 12, 2009, at WK1 ("Judges are like umpires. . . . They make sure everybody plays by the rules. But it is a limited role." (quoting Chief Justice Roberts)).

incidents occurring at the periphery of the referee's sight.²⁶² The linesman's perspective benefits the game and enriches the referee's decision making in key areas of the field. Nevertheless, the referee remains the only authoritative figure with the power to settle controversial matters.²⁶³

Admittedly, the nature of American constitutional jurisprudence is unique. Nationalists are right to characterize an attempt to construe domestic law according to international standards as an attempt to fit a square peg into a round hole. For instance, the three-tiered model of judicial scrutiny applied to equal protection cases is distinctively American.²⁶⁴ This means that it is nearly impossible to find cases where other nations have deemed diversity in education to be a compelling governmental interest that justifies the narrowly tailored use of race or ethnicity in benign discrimination. In the field of comparative law, Europe's principles of proportionality and necessity might be the closest relatives to our three-tiered scheme, but these principles are very distant cousins of American equal protection jurisprudence.²⁶⁵ Consequently, the most logical way to observe whether a nation treats diversity in education as a compelling interest is to examine and analyze the level of importance that foreign governments and constitutions afford to diversity measures.²⁶⁶ This approach fits smoothly within the contours of

262. Press Release, Union of European Football Ass'ns, UEFA Europa League to Provide Testing Ground for IFAB Additional Assistant Referees Experiment (Aug. 28, 2009), http://www.uefa.com/multimediafiles/download/pressrelease/uefa/uefamedia/87/94/10/879410_download.pdf.

263. *Id.*

264. See, e.g., Aaron Baker, *Proportional, Not Strict, Scrutiny: Against a U.S. "Suspect Classifications" Model Under Article 14 ECHR in the U.K.*, 56 AM. J. COMP. L. 847, 868 (2008) (noting the uniqueness of American equal protection jurisprudence).

265. See SASTRY, *supra* note 158, at 78–79 (recognizing that principles of proportionality and necessity prevent the European Union from taking action—unless it is more efficacious—at national, regional, or local levels of governance that goes beyond the required steps to achieve the goals of the treaty that created the Union).

266. To illustrate this point, consider societies that exhibit a willingness to place education among the highest goals to be pursued on their national agenda (e.g., European Union, South Africa, Canada, India). Increases in government funding of education, groundbreaking legislation, judicial intervention, or a combination thereof are some methods societies use to increase diversity in education. See, e.g., S. AFR. CONST., 1996 § 29 (right to a basic education); Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, c.23, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.) (right to receive primary and secondary school instruction); EUROPEAN COMM'N EURYDICE EUROPEAN UNIT, HIGHER EDUCATION GOVERNANCE IN EUROPE: POLICIES, STRUCTURES, FUNDING AND ACADEMIC STAFF 17 (2008), http://eacea.ec.europa.eu/education/eurydice/documents/thematic_reports/091EN.pdf; discussion *infra* Part III.D.4. India has applied all these methods in recent years to grant fundamental right status to education under the veil of constitutional reforms. See discussion *infra* Part III.D. The United States does not currently recognize a fundamental right to education. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411

metanationalism because the goal is not to mimic international norms, but to observe and learn how other countries promote diversity. With this frame of reference in mind, this Article demonstrates that India—the most populous, diverse, and pluralistic nation on Earth—is an exemplary case study of diversity and constitutional jurisprudence.

D. India

India holds a particularly important place in this Article's discussion of diversity, education, and the international community. After a period of economic reforms in the late 1980s and early 1990s, India has become one the world's fastest growing nations in terms of economic development.²⁶⁷ India, a democratic nation, is the second

U.S. 1, 35 (1973) (holding that education is neither an explicit nor implicit right under the Constitution that warrants the Court's departure from tradition against creation of "substantive constitutional rights in the name of guaranteeing equal protection of the laws"). *But cf. id.* at 100–01 (Marshall, J., dissenting) (attacking the majority for willfully ignoring the creation of substantive rights to vote in state elections, procreate, appeal criminal convictions, have an abortion, enjoy privacy, etc.).

Rodriguez hampered the progress of *Brown* and laid the groundwork for the subsequent resegregation of school districts. See Jeffery S. Sutton, San Antonio Independent School District v. Rodriguez and its Aftermath, 94 VA. L. REV. 1963 (2008) (discussing the case and its effects on educational reform). Although *Rodriguez* has survived for over three decades and education is an area mostly left to the discretion of states, there is a recent shift toward a more uniform, quasi-federal system of education. This is evidenced by the federal enactment of the No Child Left Behind Act (NCLB) of 2001, 20 U.S.C. § 6301 (2006). NCLB's primary objectives are to provide equal opportunity and access to a quality education, close the achievement gap between high- and low-performing children across all socioeconomic levels, and hold state and local governments accountable for improving academic achievement for all students. *Id.* To retain its status as the world's superpower, the United States must ensure that it continues to lead world innovation, which is impossible without an adequately educated citizenry and an emphasis on math and sciences. See, e.g., *id.* at § 6311(b)(3) (aiming to make math and science integral parts of children's curricula). Though NCLB is in its infancy and its implementation has proven controversial, there is clear overwhelming bipartisan support for the Act. Stephen E. Spaulding, *Legislating Beyond an Educated Guess: The Growing Consensus Toward a Right to Education*, 28 B.C. THIRD WORLD L.J. 539, 556 (2008) (reviewing DANIEL A. FARBER, RETAINED BY THE PEOPLE: THE "SILENT" NINTH AMENDMENT AND THE CONSTITUTIONAL RIGHTS AMERICANS DON'T KNOW THEY HAVE (2007)). Hence, NCLB's strong bipartisan support suggests the genesis of a federal right to education.

Of course, whether education should constitute a fundamental right is beyond the scope of this Article. Elevating education to the highest constitutional rank would certainly promote equal access and qualitatively fungible educational facilities across the United States, and these improvements are an important piece of the diversity puzzle. However, this Article argues that part of the reason other nations have adopted the right is because they see it as the means to the ultimate goal—promoting diversity. See discussion *infra* Part III.D.

267. Econ. Research Serv., *India*, U.S. DEPT OF AGRIC. (Dec. 17, 2009), <http://www.ers.usda.gov/Briefing/India/>.

most populous country in the world.²⁶⁸ In fact, projected population estimates indicate that the population of India will grow at a faster pace than that of China, and by the year 2050, India will become the most populous country in the world.²⁶⁹

India is a complex plural society like no other. It is the world's most ethnically diverse and socially fragmented state.²⁷⁰ No other state matches the unique cultural, linguistic, and genetic diversity of India; scholars believe that the diversity of India is exceeded only by the entire African continent.²⁷¹ India's population can be divided into three ethnic categories: Indo-Aryan (72 percent of the population), Dravidian (25 percent of the population), and Mongoloid and other (3 percent of the population).²⁷² These three main categories can be further dissected into subgroups along religious, linguistic, regional, and caste lines.²⁷³

Hindi, the official and most commonly spoken language in the nation, is spoken by less than one-third of Indians.²⁷⁴ The Indian government estimates that there are 850 languages and over 1,600 dialects spoken in daily life.²⁷⁵ A staggering twenty-two languages are constitutionally recognized for educational and political purposes.²⁷⁶ The same patterns of diversity dominate religion, although there is a clear religious majority: nearly 80 percent of the population is Hindu, while only 13.4 percent is Muslim, 2.3 percent is Christian, 1.9 percent is Sikh, and less than 1 percent is Buddhist.²⁷⁷

268. The latest Census of India reports that as of March 2001, the population in India was 1,028,737,436 persons, of which 532,223,090 are male and 496,514,346 are female. See *Population of India*, OFFICE OF THE REGISTRAR GEN. & CENSUS COMM'R, http://www.censusindia.gov.in/Census_Data_2001/India_at_glance/popul.aspx. Currently, India makes up nearly 17 percent of the world population. The United Nations estimates that as of 2009, India's actual population was 1,198,003,000 persons while China's population was 1,345,751,000 persons. POPULATION DIV., DEPT OF ECON. AND SOCIAL AFFAIRS OF THE UN SECRETARIAT, WORLD POPULATION PROSPECTS: THE 2008 REVISION tbl. A.1 (2008), http://www.un.org/esa/population/publications/wpp2008/wpp2008_text_tables.pdf.

269. By the year 2025, the populations of India and China will nearly mirror each other, but by 2050 India's population is projected to be 1,613,800,000 persons, which is approximately 200 million more than the 1,417,045,000 persons estimated to inhabit China. POPULATION DIV., *supra* note 268, tbl. A.2.

270. SOWELL, *supra* note 144, at 23.

271. LIBRARY OF CONGRESS, FED. RESEARCH DIV., COUNTRY PROFILE: INDIA 7 (2004).

272. *Id.*

273. *Id.*

274. SOWELL, *supra* note 144, at 23.

275. LIBRARY OF CONGRESS, *supra* note 271, at 7.

276. These languages include: Assamese, Bengali, Bodo, Dogri, Gujarati, Hindi, Kannada, Kashmiri, Konkani, Maithali, Malayalam, Manipuri, Marathi, Nepali, Oriya, Punjabi, Sanskrit, Santhali, Sindhi, Tamil, Telugu, and Urdu. *Id.*

277. Another 0.6 percent of the population belongs to other unspecified faiths, which include religions associated with the Scheduled Tribes. *Id.* at 8.

Although caste divisions have been abolished in the Indian Constitution, the caste system remains a pervasive feature in daily life, especially in rural areas.²⁷⁸ This is particularly true for the Scheduled Castes (SC), or Dalits,²⁷⁹ a group that ranks below the four major categories within the caste system.²⁸⁰ Another group, which also ranks below the caste system and is composed of members from any of 461 recognized indigenous tribes, is called the Scheduled Tribes (ST).²⁸¹ Dalits and the Scheduled Tribes constitute approximately 16 percent and 8 percent of the total population respectively.²⁸² These two groups are among the most neglected, poverty-ridden, and economically deprived people in India.²⁸³

1. Constitutional Framework

Modern Indian constitutional law dates back nearly sixty years. In 1947, British rule came to an end and India gained its independence.²⁸⁴ British authorities helped the Indian people to create a Constituent Assembly to draft a constitution.²⁸⁵ After the adoption of its Constitution, India became a democratic republic in 1950.²⁸⁶

As is evident from the document itself, the framing of the new government was a daunting task. India's Constitution is the most

278. Christopher R. Bagley, *Dalit Children in India: Challenges for Education and Inclusiveness*, in INTERNATIONAL PERSPECTIVES, *supra* note 13, at 181, 181.

279. Several terms such as "untouchables" or "Scheduled Castes" are used interchangeably to identify this group of people. "Scheduled Castes" is a legal term used more formally, while "untouchables" was used often in the past. Today, the preferred term this group uses for itself is "Dalits," which roughly translates to downtrodden. LIBRARY OF CONGRESS, *supra* note 271, at 7.

280. The four major categories of the caste system are (1) Priests and Scholars, (2) Soldiers and Leaders, (3) Craftsmen, and (4) General Workers. See Bagley, *supra* note 278, at 181.

281. The term "Scheduled Tribes" is often used formally in legal matters in the same manner as Scheduled Castes. However, a more commonly used term for the Scheduled Tribes is "adivasi." LIBRARY OF CONGRESS, *supra* note 271, at 7.

282. The latest Census of India reports that as of March 2001, the SC population in India was 166,635,700 and the ST population was 84,326,240. See CENSUS OF INDIA 2001, SCHEDULED CASTES AND SCHEDULED TRIBES POPULATION (2001), http://www.censusindia.gov.in/Census_Data_2001/Census_data_finder/A_Series/SC_ST.htm.

283. See *infra* notes 382–404 and accompanying text (discussing the Dalits' hardships).

284. Vijayashri Sripati & Arun K. Thiruvengadam, *India: Constitutional Amendment Making the Right to Education a Fundamental Right*, 2 INT'L J. CONST. L. 148, 149 (2004).

285. C. Raj Kumar, *International Human Rights Perspectives on the Fundamental Right to Education: Integration of Human Rights and Human Development in the Indian Constitution*, 12 TUL. J. INT'L & COMP. L. 237, 262 (2004).

286. Sripati & Thiruvengadam, *supra* note 284, at 149.

extensive and detailed constitution in the world.²⁸⁷ It consists of 22 parts containing 395 articles and has been amended—as of 2008—93 times since its inception.²⁸⁸ Such detail has contributed to criticism that the document is too elaborate and filled with trivial administrative details.²⁸⁹ However, the attention to detail evinces the framers' commitment to bring about fundamental changes to create a social revolution throughout their homeland.²⁹⁰

The Preamble establishes the basic structure of the government. The powers vested in the Constitution originate from the highest source of authority—the Indian people.²⁹¹ The Indian Constitution follows a federalist model under which the Constitution is superior to all other laws; the Union and state governments have divided powers; and the judiciary functions independently from other branches of government.²⁹² Although the Constitution is modeled after federalist principles, there are clear distinctions between the Indian federation and the federal model of the U.S. Constitution.²⁹³ The most notable distinctions are dual citizenship, which does not exist in India; the power of U.S. states to enact their own constitutions; and the Indian Union's ability to exercise powers otherwise reserved for the states.²⁹⁴

The core provisions of the Indian Constitution rest in Parts III (Fundamental Rights) and IV (Directive Principles of State Policy).²⁹⁵ The chapter on fundamental rights is a near replica of the UN Declaration on Human Rights, which was enacted in the aftermath of the Holocaust.²⁹⁶ Among the fundamental rights enumerated in India's Constitution are the rights to equality,²⁹⁷ freedom,²⁹⁸ religious

287. GOKULESH SHARMA, CONSTITUTIONS OF SAARC NATIONS 949 (2008).

288. See INDIA CONST. art. 15, *amended* by The Constitution (Ninety-third Amendment) Act, 2005; *id.* art. 395 (the last Article of the Constitution).

289. GOUKELESH, *supra* note 287, at 949.

290. Kumar, *supra* note 285, at 262–63.

291. See INDIA CONST. pmb. (stating the people of India are giving this Constitution to themselves).

292. P.M. BAKSHI, THE CONSTITUTION OF INDIA 2 (8th ed. 2007).

293. *Id.*

294. *Id.*

295. Kumar, *supra* note 285, at 263.

296. Madan Mohan Jha, *The Right to Education: Developing the Common School System in India*, in INTERNATIONAL PERSPECTIVES, *supra* note 13, at 125, 125. On December 10, 1948, the UN General Assembly proclaimed a Universal Declaration on Human Rights that included “the right to life, liberty and security of person, freedom of movement, nationality, freedom of thought, conscience and religion, freedom of peaceful association and assembly, and freedom to take part in the government.” *Id.* (internal quotation marks omitted).

297. See INDIA CONST. arts. 14–18. The right to equality encompasses equal protection of laws, equal opportunity, and the prohibition of discrimination on grounds of religion, race, caste, sex, or place of birth. *Id.*

autonomy;²⁹⁹ cultural and educational rights;³⁰⁰ constitutional remedies;³⁰¹ and the right against exploitation.³⁰²

The chapter on directive principles, which includes Articles 36 to 51, aims to establish and promote social welfare in the Union.³⁰³ The Directive Principles are a unique feature of India's constitutional structure³⁰⁴ and emphasize the framers' commitment to the advancement of social, economic, and cultural rights.³⁰⁵ However, under Article 37, the provisions of the Directive Principles are judicially unenforceable.³⁰⁶ Unlike the justiciable and constitutionally guaranteed fundamental rights recognized in Part III and under international human rights law, the directive principles merely propose social reforms.³⁰⁷

Although the Indian Supreme Court has refused to place the Directive Principles in equal stature with the Fundamental Rights, it has construed Parts III and IV of the Constitution consistently with one another.³⁰⁸ During its short tenure, the Court has far exceeded the role envisioned by the framers and has become a self-appointed guardian of individual liberties and an enemy of political aggression.³⁰⁹ Its decisions reflect a broad interpretation of fundamental rights, with supplementation from the directive

298. See *id.* arts. 19–22. The freedoms protected include freedom of speech, assembly, and travel; a right against self-incrimination; a right to counsel; and freedom from deprivation of life and personal liberty. *Id.*

299. See *id.* arts. 25–28. Freedom of religion under these Articles includes freedom of religious conscience and exercise, and the establishment of secular instruction in educational institutions maintained by the state. *Id.*

300. See *id.* arts. 29–30. The cultural and educational rights target educational institutions in order to protect minorities' right to establish and administer their own schools and be free of discrimination in them. *Id.*

301. See *id.* art. 32. Individuals have the right to move the Supreme Court to enforce these rights. *Id.*

302. See *id.* arts. 23–24. Exploitation includes human traffic, slavery, and child labor. *Id.*

303. Kewlani, *supra* note 151, at 371.

304. Subhash C. Kashyap, *The Constitution of India and International Law*, in *INDIA AND INTERNATIONAL LAW* 16 (Bimal N. Patel ed., 2005).

305. Kumar, *supra* note 285, at 264.

306. INDIA CONST. art. 37 (“The provisions contained in this Part [IV] shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.”).

307. *But cf.* Kashyap, *supra* note 304, at 16 (arguing that the directives were meant to be treated as positive mandates included in Part III of the Constitution and not mere moral precepts).

308. See *e.g.*, Kumar, *supra* note 285, at 270 (construing the right to education in Part IV in terms of the right to life and personal liberty in Part III).

309. *Id.* at 266. Kumar draws an analogy between India's Supreme Court and the U.S. Supreme Court in its early years by arguing that India's Court has bestowed upon itself a role similar to that exhibited in *Marbury v. Madison*. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (establishing the principle of judicial review).

principles to achieve a welfare state.³¹⁰ As the Court has stated, “[t]he directive principles cannot ignore or override the fundamental rights but must . . . subserve [them].”³¹¹ In essence, the directives in Part IV are subsidiary to the rights found in Part III of the Constitution.³¹²

Having explored India’s constitutional framework, the next section analyzes the application of constitutional norms to issues of diversity, minorities, education, and the state.

2. Diversity, Minorities, and State Preferential Treatment Policies

The framers of India’s Constitution envisioned India as an egalitarian society.³¹³ As a result, the Indian Constitution provides ample protections to minority groups in social, political, and economical spheres.³¹⁴ The framers were conscious of the importance of liberty, equality, fraternity, and justice for all to create a successful democracy that could withstand the pressures of time.³¹⁵ Considering the framers’ familiarity with the issues faced by other modern democracies, it is no coincidence that the Constitution included special provisions for minorities.³¹⁶

India’s highest court shares the framers’ sentiment regarding disadvantaged groups, and it has asserted that “pluralism is the keynote of Indian culture and religious tolerance.”³¹⁷ The rationale behind Parts III and IV of the Constitution is to “make the quality of the life of the poor, disadvantaged and disabled citizens of the society, meaningful.”³¹⁸ The framers and subsequent members of the government branches in India tried to eradicate poverty and build an egalitarian socialist democracy.³¹⁹ However, it is not possible, by

310. Kashyap, *supra* note 304, at 17.

311. *In re Kerala Educ. Bill*, A.I.R. 1958 S.C. 956, 982–83 (India).

312. *Madras v. Champakam Dorairajan*, A.I.R. 1951 S.C. 226, 228.

313. Mohammad Shabbir, *Constitutional Jurisprudence Affirms Reservation for Indian Backward Muslims: Advocacy for the Motion*, in HUMAN RIGHTS IN THE 21ST CENTURY, *supra* note 151, at 3, 3.

314. ARUN KUMAR, CULTURAL AND EDUCATIONAL RIGHTS OF THE MINORITIES UNDER INDIAN CONSTITUTION 234 (1985).

315. *Id.* at 9.

316. *Id.*

317. *Valsamma Paul v. Cochin Univ.*, A.I.R. 1996 S.C. 1011, para. 25.

318. *Id.* para. 6.

319. *See, e.g.*, INDIA CONST. arts. 21, 43, 45 (providing for the protection of life and personal liberty, living wages for workers, and free and compulsory education for workers); *Valsamma Paul*, A.I.R. 1996 S.C. para. 6 (discussing making protections of quality of the life of the poor meaningful); SARBANI SEN, THE CONSTITUTION OF INDIA: POPULAR SOVEREIGNTY AND DEMOCRATIC TRANSFORMATIONS 104–05 (2007) (discussing the debate regarding the treatment of minorities during which many members argued for protection based on “backwardness” rather than minority designations); Shabbir, *supra* note 313, at 3 (stating that the framers envisioned an egalitarian society).

mere adoption of doctrines and principles in a constitution, to quickly eliminate age-old inequalities.³²⁰

During the Constituent Assembly, the question of how to ensure equal civil and political rights in line with the Constitution emerged.³²¹ During the debates, the use of positive discrimination to benefit certain segments of the population became a major source of controversy.³²² Opponents of enacting policies distinguishing Indians along cultural lines argued that such distinctions would harm the Union.³²³ As resistance to positive discrimination increased, some did not want the Constitution to even mention backward classes and argued that the directive principles already provided that every man, woman, and child should be literate within ten years of the enactment of the Constitution.³²⁴

In the midst of pervasive political contention, one man—Dr. B. R. Ambedkar—made it his mission to advocate for the inclusion of positive discrimination measures to benefit disadvantaged groups.³²⁵ He argued that the rights of people are not protected by law, but rather by a social and moral sense of right and wrong.³²⁶ Through discourse and speeches at the Constituent Assembly debates, he quickly became one of the most influential characters of the Assembly.³²⁷

Dr. Ambedkar and those in favor of state affirmative measures were ultimately successful.³²⁸ The pro-affirmative action coalition reasoned that only social reconstruction would ensure the success of

320. Shabbir, *supra* note 313, at 3.

321. SEN, *supra*, note 319, at 103.

322. *See id.* at 103–08 (describing debates contrasting concerns for fair involvement with encouraging state unity and discouraging a sense of otherness). The terms “affirmative action,” “positive discrimination,” “preferential treatment,” and “government reservations” are used interchangeably to describe programs instituted by the government to advance or benefit minority groups with little or no representation in society. *See, e.g., id.* at 108–09 (using “affirmative action,” “positive discrimination,” and “special treatment” interchangeably, all in the same brief discussion).

323. *Id.* at 104–05. One Assembly member summarized a popular sentiment when he exclaimed “it has been our desire and it has been the very soul of the birth of our freedom and our resurgence that *we must go towards unity inspite of all the diversity* that has divided us.” *Id.* at 104 (emphasis added).

324. *Id.* at 105.

325. *See id.* at 103–04 (describing Ambedkar’s contention that the Assembly did not represent a united political community, claiming it effectively excluded minorities). Ambedkar was a Dalit and civil rights pioneer who, upon obtaining his degree from Columbia University, returned to India to initiate a movement towards Dalit emancipation. Bagley, *supra* note 278, at 182.

326. Bagley, *supra* note 278, at 190. For his work to advance Dalit rights, Ambedkar is called the Indian equivalent of Martin Luther King, Jr. *Id.*

327. Kumar, *supra* note 285, at 267.

328. *See id.* at 267–68 (discussing the inclusion of Article 32 providing for judicial enforcement of the fundamental rights).

political democracy.³²⁹ In their view, state intervention was necessary to redistribute wealth and entitlements because certain classes of people had developed serious disabilities or handicaps, which could only be addressed if the Constitution authorized positive discrimination.³³⁰

At its core, the issue of preferential treatment for minorities became a matter of bringing equilibrium to the Union.³³¹ In a system of adult franchise, majorities need little or no institutional protection because they can impose their will through elected representatives.³³² However, to ensure equality for all in a democracy, it is imperative that minorities are able to avail themselves of constitutional protections. As a result, India's Constitution affords special rights to the socially deprived and disadvantaged.³³³

When the framers drafted the Constitution, Ambedkar's imprint was clearly visible. The drafting committee produced a formula that guaranteed equality and opportunity to the members of historically deprived groups.³³⁴ To improve the socioeconomic standing of the SC and ST, the Constitution made provisions for positive discrimination in educational institutions, representation in Parliament, and employment.³³⁵ In addition, the Constitution provided for successive five-year plans to review the development of policies ranging from building a scientific and technological infrastructure to improving conditions of the poor and raising industrial capacity.³³⁶ Interestingly, affirmative measures to benefit the underprivileged classes concentrated on education.³³⁷ This focus laid the groundwork for a constitutional amendment aimed at eradicating social segregation through the advancement of educational opportunities, as discussed in the next subpart.

329. SEN, *supra* note 319, at 108.

330. *Id.* at 108–09.

331. KUMAR, *supra* note 314, at 9.

332. *Id.* at 9–10.

333. *Id.*

334. SEN, *supra* note 319, at 110.

335. SOWELL, *supra* note 144, at 24.

336. SHARMA, *supra* note 287, at 952.

337. See, e.g., SEN, *supra* note 319, at 109 (reiterating that the socially and economically disadvantaged need special treatment in education to aid the development of India). Many in the Constituent Assembly believed that “the case of the [SC] is not pleaded on a matter of communalism . . . [it is] due to their lack of social, economic and educational advancement for years . . . [that] it is necessary.” *Id.*

3. Diversity and the Emergence of a Right to Education

The origin of a right to education dates back more than a century, when India was still under British rule.³³⁸ In 1909, the first attempt to make primary education mandatory reached Indian legislators by means of a bill under the Indian Council Act of 1909.³³⁹ At the time, an overwhelming majority defeated the bill, but this defeat did not stop G. K. Gokhale, the bill's sponsor, from denouncing the opposition.³⁴⁰ While addressing the legislature, Gokhale foretold that the issue would persist until all children obtained access to a free education as a matter of right.³⁴¹

In British India, the provinces controlled education.³⁴² That control resembled the current practice in the United States, where education is traditionally left to the control of individual states.³⁴³ This approach to education, however, came under scrutiny at the Constituent Assembly, where some debated whether control over education should shift from the states to the Union.³⁴⁴ By the time of enactment, the Constitution included a right to free and compulsory education, but only as a Directive Principle in Part IV.³⁴⁵ Article 45, which originated from Article 13(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), prescribed that “[t]he State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, free and compulsory education for all children until they complete the age of fourteen years.”³⁴⁶

The inclusion of a right to education was a significant step, despite its relegation to the Directive Principles. Although the inclusion of the right to education under the Directive Principles precluded Indians from invoking the power of Article 32 to remedy a violation of that right,³⁴⁷ the courts would still play a major role in defining the status of education in society.

338. See Jha, *supra* note 296, at 126 (describing the first attempt to provide free and compulsory education in 1909).

339. *Id.*

340. *Id.*

341. *Id.*

342. Sripati & Thiruvengadam, *supra* note 284, at 150.

343. Oden, *supra* note 141, at 176.

344. Sripati & Thiruvengadam, *supra* note 284, at 150.

345. Jha, *supra* note 296, at 126.

346. INDIA CONST. art. 45, *amended by* The Constitution (Eighty-Sixth Amendment) Act, 2002; see Unni Krishnan J.P. v. State of Andhra Pradesh, (1993) 1 S.C.R. 594 (describing ICESCR Article 13 and relating it to Article 45).

347. Article 32 of the Indian Constitution is the gatekeeper of constitutional remedies. It provides judicial remedies to violations of fundamental rights. INDIA

Beginning in the 1980s, the Supreme Court of India began to interpret Article 21, which protects life and personal liberty, in a broad manner.³⁴⁸ In *Francis Coralie Mullin v. The Administrator, Union Territory of Delhi*,³⁴⁹ the Court stated that “[t]he right to life includes the right to live with human dignity [including] the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms.”³⁵⁰ This focus on literacy developed throughout the 1980s and 1990s.³⁵¹ In 1992 and 1993, the Court rendered judgments in two landmark cases adjudicating the status of the right to education: *Mohini Jain v. State of Karnataka*³⁵² and *Unni Krishnan J. P. v. State of Andhra Pradesh*.³⁵³ Both cases dealt with issues of higher education but, in the end, the decisions had a greater impact on the status of primary education.³⁵⁴

In *Unni Krishnan*, the Court voiced its discontent over decades of neglect of Article 45.³⁵⁵ It pointed out that, among all the articles in the Directive Principles, only Article 45 had a time limit.³⁵⁶ The Court reasoned that the government’s failure to fulfill its obligation to provide education, after more than four decades, converted that obligation into a judicially enforceable right.³⁵⁷ The Court interpreted Article 21 broadly by finding an implicit right to education flowing from the right to life and personal liberty.³⁵⁸ Thus, Articles 21 and 45 of the Constitution had to be read in harmony because the deprivation of elementary education rendered the right to life and personal liberty meaningless.³⁵⁹

Unni Krishnan motivated civil society groups and nongovernmental organizations to demand the incorporation of the right to education under Part III of the Constitution.³⁶⁰ As a result,

CONST. art. 32 (“The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part [III] is guaranteed.”).

348. Jha, *supra* note 296, at 126.

349. *Francis Coralie Mullin v. Adm’r, Union Territory of Delhi*, (1981) 2 S.C.R. 516.

350. *Id.* at 518.

351. *See, e.g.*, *Unni Krishnan J.P. v. State of Andhra Pradesh*, (1993) 1 S.C.R. 594, 656 (holding that the delay in adhering to Article 45 has made education an enforceable right).

352. *Mohini Jain v. State of Karnataka*, (1992) 3 S.C.R. 658.

353. *Unni Krishnan*, 1 S.C.R. at 594.

354. *Sripati & Thiruvengadam, supra* note 284, at 152.

355. *Id.* at 153.

356. *Unni Krishnan*, 1 S.C.R. at 656.

357. *Id.*

358. *Id.* at 652 (“[W]e hold . . . that [the] right to education is implicit in and flows from the right to life guaranteed by Article 21.”).

359. Jha, *supra* note 296, at 126.

360. *Id.*

the central government introduced the 83rd Amendment Act in 1997, which granted fundamental right status to education.³⁶¹ Due to a change of government, the bill was reintroduced as the 93rd Amendment Act of 2001.³⁶² The Lok Sabha³⁶³ passed the bill unanimously on November 28, 2001.³⁶⁴ Six months later, on May 2002, the Rajya Sabha³⁶⁵ also approved the bill.³⁶⁶ With the approval of both houses of the Legislature, the President signed the bill on December 2002, and it formally became the 86th Amendment to the Constitution.³⁶⁷

The Amendment added a new Article 21(A) to the Constitution, which states that “[t]he State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine.”³⁶⁸ Furthermore, it reworded Article 45 by omitting the time limit and instead requiring that “[t]he State shall endeavour to provide early childhood care and education for all children until they complete the age of six years.”³⁶⁹ At the time, some wondered why it was necessary to pass a constitutional amendment when the Court had declared the right to education to be judicially enforceable ten years before.³⁷⁰ However, the constitutional status of the right to education insulates it from political acts by the Legislature and evinces the government’s compelling treatment of education as a matter of utmost importance.³⁷¹

At first glance, education might not seem as important as the rights to life, freedom, and personal liberty. After all, one may continue to breathe, say what one thinks, practice any religion of choice, and be free from government intervention without having received an education. However, education affords human beings the

361. Sripati & Thiruvengadam, *supra* note 284, at 154.

362. *Id.*

363. The Lok Sabha, or the House of People, is the name given to the lower house of the Indian Parliament. Kumar, *supra* note 285, at 271 n.226.

364. Sripati & Thiruvengadam, *supra* note 284, at 156.

365. The Rajya Sabha is the name given to the upper house of the Indian Parliament. *Id.*

366. *Id.*

367. *Id.*

368. INDIA CONST. art. 21(A), *amended* by The Constitution (Eighty-Sixth Amendment) Act, 2002.

369. INDIA CONST. art. 45, *amended* by The Constitution (Eighty-Sixth Amendment) Act, 2002.

370. See Prachi Srivastava, *Low-Fee Private Schooling: Challenging an Era of Education for All and Quality Provision?*, in INTERNATIONAL PERSPECTIVES, *supra* note 13, at 138, 140–41 (explaining that “the insistence of including the term ‘by law’ [in Article 21(A)] was to mark India’s outward compliance in the international politics of education agenda-setting”).

371. BAKSHI, *supra* note 292, at 55.

opportunity to exercise the other rights. “Education is enlightenment. It is the one [right] that lends dignity to a man.”³⁷² A person cannot truly be free to pursue happiness if she is unable to communicate, to learn to think for herself, to make meaningful and informed choices, to secure a job to provide for her sustenance, and to escape the evils of social segregation, profound poverty, and institutionalized ignorance. The right to education plays a crucial role in support of other fundamental and constitutionally protected rights.

An examination of the emergence of education as a fundamental right in India—first through jurisprudence and later by means of a constitutional mandate—reveals that diversity was a crucial factor in the development of the right to education. The existing literature has overlooked the role of diversity, which was a vital element in the education-rights movement in India. In essence, education achieved its status as a fundamental right to advance, *inter alia*, diversity in India’s educational system. The original obligation of Article 45 was fulfilled for the most affluent members of Indian society, but the most underprivileged members of Indian society remained unaided.³⁷³ The right to education subsequently became a fundamental right because the government intended to eradicate illiteracy and extend educational opportunities to the most underprivileged minorities in the country.³⁷⁴ By elevating education to the pinnacle of the law, the Amendment compels the government to provide access and better

372. Unni Krishnan J.P. v. State of Andhra Pradesh, (1993) 1 S.C.R. 594, 706.

373. See *Number of Literates & Literacy Rate*, OFFICE OF THE REGISTRAR GEN. & CENSUS COMM’R (2001) http://censusindia.gov.in/Census_Data_2001/India_at_glance/literates1.aspx (reporting a 58.7 percent literacy rate in rural areas as compared with a 79.9 percent literacy rate in the more wealthy, urban areas).

374. See Sripati & Thiruvengadam, *supra* note 284, at 154–56 (discussing the debate over the efficacy of the constitutional amendment at meeting its goal of providing quality education). Access to education in mid-twentieth century India was available only to the most affluent members of society. The total literacy rate in India in 1951 was a dismal 18.33 percent, with a clear disparity between male and female literacy rates. Kewlani, *supra* note 151, at 377. Although the literacy rate has grown remarkably to 64.84 percent since independence, there is a near 20 percent disparity between the urban–rural and male–female literacy rates. *Number of Literates & Literacy Rate*, *supra* note 373. This is not surprising given the fact that the majority of SC and ST live in rural areas. The data provided by the 2001 Census clearly illustrates two trends. First, rural areas perform dramatically worse than urban areas in providing access to education. Second, women as a group are more likely to be denied access to education than men, especially in rural areas. The disparity between male and female literacy rates could presumably exist because women in India are traditionally charged with home-related duties like caring for younger siblings, cooking, and maintaining the home. For an overview of the social and cultural discrimination young girls face in India, see a collection of essays published in *UNWANTED DAUGHTERS: GENDER DISCRIMINATION IN MODERN INDIA* (T.V. Sekher & Neelambar Hatti eds., 2010).

funding to education of the underprivileged classes, thereby guaranteeing the rise of diversity in primary, secondary, and higher education, as well as the future of the Indian labor force. The policies aimed at benefiting underprivileged groups exhibit India's commitment to promote diversity.

4. Compelling Treatment

Advancing diversity in society has been a daunting task for India's government. Despite India's status as the most demographically diverse and pluralistic country, the caste system and other institutions of Indian society have strengthened and perpetuated social segregation. The stratification of Indian society through the caste system is a fairly recent development.³⁷⁵ Caste was justified as necessary to bring harmony to the social order by allocating particular tasks to individuals born into certain roles—in the case of the Dalits, those tasks included digging graves, cleaning streets, and disposing of animal carcasses and human feces.³⁷⁶ However, scholars believe that caste was introduced as a scheme designed to consolidate the power of the elite.³⁷⁷ Individuals outside the four major categories of the caste system were outcasts and deemed untouchable.³⁷⁸ Because of their rank in the caste system, the Dalits faced severe penalties for violating laws prohibiting any physical contact with higher castes.³⁷⁹ For example, when entering a Hindu community, Dalits had to beat drums to warn people to keep their distance.³⁸⁰ Due to invidious laws, discrimination against Dalits and other outcaste groups quickly became institutionalized, which ultimately lead to profound poverty and segregation.³⁸¹

The framers of India's Constitution were well aware of the evils of de jure discrimination, and they legally abolished untouchability in Article 17 of Part III of the Constitution.³⁸² Despite the legal dismantling of untouchability, however, discrimination continues to be a part of everyday life, particularly in rural areas where belonging to a scheduled caste or tribe remains a social burden.³⁸³ In rural

375. Bagley, *supra* note 278, at 181.

376. *Id.* at 181–82.

377. *Id.*

378. SOWELL, *supra* note 144, at 25.

379. *Id.*

380. *Id.*

381. See Bagley, *supra* note 278, at 182–83 (describing current-day Dalit poverty, segregation, and political situation in the context of Indian history).

382. See INDIA CONST. art. 17 (“Untouchability is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of ‘Untouchability’ shall be an offence punishable in accordance with law.”).

383. SOWELL, *supra* note 144, at 27.

India, Dalits are prohibited from using local water sources due to claims that they will contaminate the water.³⁸⁴ Consequently, Dalits must travel miles just to reach drinkable water.³⁸⁵

The list of discriminatory practices is extensive, as a recent Human Rights Watch report indicates.³⁸⁶ India's agrarian economy is sustained primarily by Dalits, who tend to be landless peasants working in deplorable conditions for wages of less than one dollar a day.³⁸⁷ More than one million Dalits in India work exclusively by cleaning feces from public and private latrines and carrying waste to dumping sites.³⁸⁸ Any Dalit who refuses to perform assigned tasks—even without being paid—is likely to receive physical punishment.³⁸⁹ The slightest attempt to deviate from village traditions, challenge the social order, or demand political rights or better pay for wages is met with violence or economic retaliation by upper castes.³⁹⁰

These pervasive discriminatory practices affect other areas. For example, the right to vote is often denied to Dalits.³⁹¹ Intimidation from police and upper caste militia makes it difficult for Dalits to register to vote,³⁹² and death threats and violent acts are the norm when Dalits run for political office.³⁹³ Moreover, although upper castes consider Dalits untouchable, that has not prevented the rape and sexual mutilation of countless young Dalit girls and women at the hands of depraved men from all castes.³⁹⁴ Additionally, discrimination in India is not unique to the countryside. Though most overt discrimination takes place in rural areas, covert discrimination is common in urban areas, where Dalit colonies still exist.³⁹⁵ The law does not require Dalits to inhabit any particular

384. Bagley, *supra* note 278, at 183. For instance, in a case documented on December 8, 1978, a girl who collected water from a well set aside exclusively for caste Hindus had her ears severed from her head as punishment. See SOWELL, *supra* note 144, at 25. Unfortunately, these incidents are not isolated to a particular region and when they occur, they are often accompanied with escalated violence and other atrocities. *Id.* at 25–28.

385. Bagley, *supra* note 278, at 183.

386. 13 HUMAN RIGHTS WATCH, CASTE DISCRIMINATION: A GLOBAL CONCERN 18 (2001), <http://www.hrw.org/legacy/reports/2001/globalcaste/caste0801.pdf>.

387. *Id.*

388. *Id.* at 13.

389. Bagley, *supra* note 278, at 182.

390. HUMAN RIGHTS WATCH, *supra* note 386, at 19.

391. *Id.*

392. *Id.*

393. *Id.* Upper caste groups often employ intimidation to hinder Dalit representation in government posts. In 1997, for instance, members of an upper caste group murdered six Dalits, including the newly elected village council president, in the village of Melavalavu, located in Tamil Nadu's Madurai District. *Id.* (citation omitted).

394. Bagley, *supra* note 278, at 183.

395. *Id.* at 182.

areas of a city, but their poor socioeconomic standing compels them to live in segregated zones.³⁹⁶

In education, discrimination is no different. Dalit children enrolled in schools tend to be segregated from the rest of the population and must eat separately.³⁹⁷ They often lack access to toilets and potable water and quickly become the targets of bullying and violence.³⁹⁸ The prejudice faced by Dalit children is not confined to classmates: school officials and teachers instill the notion in Dalit children that they are backward, stupid, and destined to failure.³⁹⁹

The constant harassing of Dalit children is a major contributing factor for the exorbitant dropout rates in India.⁴⁰⁰ The *National Commission for Scheduled Castes and Tribes' 1996–1997 and 1997–1998 Report* estimated that the national dropout rate for Dalit children in India was roughly 50, 68, and 78 percent at the primary, middle, and secondary levels respectively.⁴⁰¹ If Dalits overcome obstacles in their search for education and obtain degrees in higher education, they continue to face heightened societal discrimination.⁴⁰² Despite obtaining degrees, educated Dalits have difficulty finding employment related to their area of expertise or any employment at all—except for menial tasks, which are always readily available to Dalits.⁴⁰³ Many scholars compare the trials of Indian Dalits to the slavery and segregation that African-Americans experienced in the United States.⁴⁰⁴ Similar to many minority groups in the United

396. *Id.*

397. *Id.* at 185.

398. *Id.*

399. *Id.* In some cases the consequences of discrimination against Dalit children go beyond mere mental damage. For instance, a young Dalit boy living in Gujarat was slapped and threatened with expulsion for playing with his teacher's scooter. See HUMAN RIGHTS WATCH, *supra* note 386, at 17 n.86. After the boy's father, a "manual scavenger," forcedly signed a letter of apology, the teacher allowed the boy to return to class. *Id.* However, the teacher told the boy that he would never let him "study or amount to anything in life." *Id.* That evening, the boy's body was found cut into pieces on a railroad track with a suicide note in his pocket. *Id.* The note depicted his lack of hope for ever progressing in life and his belief that the denial of study or progress rendered life meaningless. *Id.*

400. HUMAN RIGHTS WATCH, *supra* note 386, at 16–17.

401. *Id.* at 17.

402. Bagley, *supra* note 278, at 186.

403. *Id.*

404. *Id.* at 181–82. The level of discrimination faced by many Dalits could plausibly be in equal footing with the struggles of Blacks before the American Civil War and the Reconstruction Amendments to the U.S. Constitution. However, the same cannot be said about minority groups in America today. Similar to the Dalits, many minority groups in the United States experience segregation caused by socioeconomic factors and private housing patterns, but no social or governmental institution in the United States condones the extent of stratification and discrimination faced by Dalits in India. The current plight of undocumented foreign nationals in American society can arguably provide better context because some "illegal aliens" tend to be marginalized

States, the Dalits are promised protection by a constitution that guarantees legal rights on paper, but allows segregation and obstructs integration in practice.

It is no coincidence, given the widespread segregation across Indian schools, that the government experimented with policies to increase diversity. Governments around the world realize that access to universal primary education is the starting point for the eradication of poverty.⁴⁰⁵ The Indian Court held that the Constitution allows for the reservation of seats and preferences for members of SC and ST in higher education.⁴⁰⁶ However, the government has placed an even greater emphasis on diversity in primary education. For instance, starting in the 1960s, India's Education Commission, also known as the Kothari Commission, recommended the introduction of the Common School System (CSS).⁴⁰⁷ To eradicate segregation in educational facilities, the CSS advocated the creation of "neighborhood schools," which all children would attend regardless of "caste, creed, community, religion, economic condition, or social status."⁴⁰⁸ In 1968, the National Policy for Education (NPE) adopted the Commission's recommendations with the goal of implementing the concept of neighborhood schools within twenty years.⁴⁰⁹

from mainstream society and often work in slave-like conditions for low wages. However, even undocumented foreign nationals in the United States enjoy more protections and better living standards than Dalits. *See e.g.*, Plyler v. Doe, 457 U.S. 202, 230 (1982) (prohibiting a state from denying public education to a discrete and insular minority group of undocumented children). Nevertheless, the struggles of Dalits in India help us to better understand the rationale behind the government's efforts to increase diversity and benefit those for whom equal protection under the law remains out of reach.

405. *See, e.g.*, SHENGEN FAN ET AL., GROWTH, INEQUALITY, AND POVERTY IN RURAL CHINA: THE ROLE OF PUBLIC INVESTMENTS 49 (2002) (reporting that government expenditure and investment on education in less developed areas of rural China had a great impact on the reduction of poverty and regional inequality); JANDHYALA B. G. TILAK, EDUCATION AND ITS RELATION TO ECONOMIC GROWTH, POVERTY, AND INCOME DISTRIBUTION: PAST EVIDENCE AND FURTHER ANALYSIS (1989) (pointing to global empirical research and analysis to highlight the role of education in reducing poverty); A. Mushtaque R. Chowdhury, *Equity Gains in Bangladesh Primary Education*, 49 INT'L REV. EDUC. 601 (2003) (providing an account of progress made in Bangladesh in terms of equity levels and trends in primary education); Kumar, *supra* note 285, at 239, 241 (stressing the necessity of universal primary education as a tool to eradicate poverty, and noting India's recognition of the importance of education).

406. *See* Ashoka Kumar Thakur v. Union of India, (2008) 4 S.C.R. 1 (upholding a law that provides for 27 percent reservation of lower castes in educational institutions supported by the central government); *see also* Ajay Kumar v. State of Bihar, (1994) 4 S.C.C. 401 (India) (holding that reservations in medical colleges are constitutionally permitted).

407. Jha, *supra* note 296, at 129.

408. *Id.*

409. *Id.* at 130.

By the beginning of the 1980s, the Sixth Five-Year-Plan set out to combat segregation by focusing on the educational needs of the most disadvantaged states.⁴¹⁰ The dropout rate was one of the biggest obstacles in poverty-ridden states with high populations of SC and ST.⁴¹¹ Consequently, the government introduced measures to keep children in school, such as offering free meals, uniforms, and learning materials; providing day care facilities and financial aid to families of SC and ST girls; changing the school hours to suit local preferences; and introducing a non-formal system of learning.⁴¹² In addition, the government introduced regulations that required disadvantaged states to boost enrollment rates.⁴¹³

During the late 1980s, the Seventh Five-Year-Plan introduced teacher education programs, such as Operation Blackboard, with the objective of improving school facilities and informal instruction.⁴¹⁴ The NPE also reviewed the recommendations made by the Education Commission two decades earlier and shifted the CSS focus to a national system of education in which all students have access to a comparable quality of education.⁴¹⁵ By 1990, the government realized that the implementation of the CSS was inefficient and established a committee to investigate the system's inefficiency.⁴¹⁶ The committee reported that elites and affluent members of society preferred to send their children to private schools, thereby removing incentives to invest in government schools.⁴¹⁷ In light of this discovery, the government immediately devised integration plans to work in tandem with private schools, which began to run afternoon informal education centers in their facilities.⁴¹⁸

The partnership between government and private schools has proven successful in making education available to children working and living in urban slums, and many of these children have been integrated into modern society.⁴¹⁹ For example, the Loreto Day School, a private school affiliated with the government, has been closely studied for its success in achieving social integration, inclusive schooling, and equal access to quality education.⁴²⁰ At Loreto, regular students tutor street children individually and the school

410. Kumar, *supra* note 285, at 243.

411. *Id.*

412. *Id.*

413. *Id.*

414. *Id.* at 244.

415. Jha, *supra* note 296, at 130.

416. *Id.*

417. *Id.*

418. *Id.* at 131–32.

419. *Id.* at 132–34.

420. Madan Mohan Jha, *Barriers to Student Access and Success: Is Inclusive Education an Answer?*, in INTERNATIONAL PERSPECTIVES, *supra* note 13, at 33, 40–41.

runs community outreach programs.⁴²¹ Loreto brings poor children face to face with wealthier children and cultivates the expectation that all students can succeed regardless of socioeconomic status.⁴²²

India and other developed and developing countries understand that education for all, equal access, and integration are important tools in developing vibrant economies. As a result, these countries treat diversity as a compelling interest that justifies measures to integrate pupils from different races, castes, religions, and cultures in educational facilities.⁴²³

IV. SOMETHING'S GOTTA GIVE

Today, the law governing diversity in America stands at a crossroad. On one hand, *Grutter's* viewpoint diversity is awkwardly out of place in the K–12 context.⁴²⁴ On the other hand, if diversity

421. *Id.*

422. *Id.*

423. For the reasons articulated at the beginning of this section, the discussion here has focused on India. However, efforts to promote diversity in education can be seen all over the world—albeit with various degrees of success. For instance, to promote diversity and end segregation, most former communist states in Eastern Europe are reforming their educational systems to help integrate Roma (Gypsy)—the most marginalized ethnic group in Europe—pupils by building teacher training establishments, hiring Roma teaching assistants and home-school liaison officers in areas with high Roma populations, and even offering post-statutory education for Roma adults. Hilary Gray, *Diversity, Inclusion and Education: The Educational Needs of Children from Severely Disadvantaged Socio-Cultural Groups in Europe*, in INTERNATIONAL PERSPECTIVES, *supra* note 13, at 104, 110. Similarly, to address the underachievement of the Roma population, the European Union has established its only support fund dedicated to a single ethnicity to benefit Roma pupils. *Id.* at 105. To further diversity, Taiwan and South Korea recently overhauled their university admissions systems to shift focus away from test scores in favor of more holistic review that includes unique talents, essays, and extracurricular activities. Jha, *supra* note 420, at 37–38. To address segregation and promote diversity, in racial and religious sectarianism contexts, Northern Ireland instituted the Bill of Rights in Schools (BIOS) project, which focused on citizenship education of five key human rights concepts: equality, freedom, justice, respect, and participation. Jackie Reilly et al., *Education for a Bill of Rights for Northern Ireland*, in TEACHERS, HUMAN RIGHTS AND DIVERSITY, *supra* note 184, at 53, 56. In China, the communist regime instituted diversity-related policies in the 1990s whereby ethnic minorities can be exempt from the one-child restrictions and granted preferential treatment in admission to higher education. SOWELL, *supra* note 144, at 9.

424. A reliance on *Grutter's* jurisprudence to justify the use of race-based admissions policies in the K–12 context is misguided. *Grutter* explicitly applies to higher education because the use of racial tiebreakers in an open-choice, noncompetitive elementary and secondary public school assignment plan is sharply different than the use of race as a factor in admission to an elite institution of higher education. See *United States v. Fordice*, 505 U.S. 717, 728–29 (1992) (“[A] state university system is quite different in very relevant respects from primary and secondary schools.”). First, universities are distinguishable from K–12 schools in that

does not constitute a compelling governmental interest that justifies measures to achieve integration and quality education in K–12 schools, the crisis of segregated schools will only exacerbate.

Private housing patterns in America's socioeconomic landscape depict a gloomy future in the battle against segregation.⁴²⁵ Judicial intervention is needed, now more than ever, to delineate the constitutional boundaries of voluntary race-based assignment plans designed to eradicate segregated districts. Society must take proactive steps to deal with racial isolation, regardless of whether it is the result of de jure or de facto segregation. This Part proposes a new approach to equal protection jurisprudence that reconciles Parts I, II, and III in light of recent changes to Fourteenth Amendment jurisprudence and the role of international law in our system.

A. *Grutter Upholds, but Changes the Nature of, Strict Scrutiny*

The concept of strict scrutiny can be traced back to *Korematsu v. United States*.⁴²⁶ The case involved the constitutionality of a military

they foster an environment for “robust exchange of ideas” that derives from “expansive freedoms of speech and thought.” See *Grutter v. Bollinger*, 359 U.S. 306, 329 (2003). The educational autonomy universities enjoy is based on First Amendment principles. *Id.* “It is the business of a university to provide [an] atmosphere which is most conducive to speculation, experiment, and creation.” *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957). In contrast, most K–12 institutions are highly standardized and operate to provide a basic education. Second, universities, unlike K–12 public schools, maintain an exclusionary admissions system in which competition plays a crucial role. The K–12 system does not allow for holistic review of an applicant—a key factor in the survival of the law school's affirmative action plan in *Grutter*. *Grutter*, 539 U.S. at 337. Third, *Grutter's* narrow ruling is clear: the Supreme Court granted certiorari in *Grutter* to determine “[w]hether diversity is a compelling state interest that can justify the narrowly tailored use of race . . . for admission to public universities.” *Id.* at 322. The Court could just as well have used “schools” or “learning institutions” in lieu of “universities” if it intended a broad interpretation. Fourth, any potential benefits that flow from *Grutter's* diversity rationale, even if valid, are not pressing enough to constitute an *a fortiori* compelling government interest because of the harm they create. Schools in a de facto segregated district are generally far from being qualitatively fungible. Thus, if the quality of education provided at any given school is inherently unequal, the school district would be harming any child that is denied admission to one of its schools. The harm is substantial as employment opportunities for minorities, as for all groups, are closely related to educational opportunities. See SCHILLER, *supra* note 110, at 192–93 (discussing some of the disparate outcomes resulting from racial discrimination in schools).

425. Residential racial segregation in the top fifty U.S. metropolitan areas remains high and has changed very little since the 1980s. See, e.g., LEWIS MUMFORD CTR., ETHNIC DIVERSITY GROWS, NEIGHBORHOOD INTEGRATION LAGS BEHIND (2001), <http://mumford1.dyndns.org/cen2000/WholePop/WPreport/MumfordReport.pdf>.

426. 323 U.S. 214, 216 (1944). *Korematsu* marked the first time that a heightened level of scrutiny—strict scrutiny—was applied in the Supreme Court's history. The *idea* of levels of scrutiny under constitutional law originated from a footnote that appeared in a case six years earlier. See *United States v. Carolene*

decree whereby Americans of Japanese descent were evacuated and interned in camps during World War II.⁴²⁷ The Court upheld the racial classification of Japanese-Americans and declared that the government could take whatever steps were necessary to “prevent espionage and sabotage.”⁴²⁸ More importantly, the Court approached the equal protection challenge in a new light, holding that “all legal restrictions which curtail the civil rights of a single racial group are immediately suspect” and warrant the use of “the most rigid scrutiny.”⁴²⁹ The Court found that “racial antagonism” could never justify racial classifications that burden a particular group of people,⁴³⁰ but a “pressing public necessity,” such as a threat to national security during a time of war, could justify racial restrictions.⁴³¹ Hence, *Korematsu* created a national security exception to the Fourteenth Amendment. The case has been highly criticized because of the overinclusiveness of the racial classification and the unfair imprisonment of Japanese-Americans.⁴³² However, *Korematsu*’s holding regarding strict scrutiny, and the national security exception it created, remains the law of the land.⁴³³

In 1989, the Supreme Court declared that affirmative action programs should be examined under strict scrutiny.⁴³⁴ For nearly five decades, since the inception of *Brown* and its progeny, the Supreme Court endorsed a narrow interpretation of what constitutes a compelling governmental interest that survives strict scrutiny.⁴³⁵ Under this interpretation, no use of race was sufficiently compelling to justify preferential treatment unless it was instituted to remedy

Products Co., 304 U.S. 144, 153 n.4 (1938) (“It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.”). *Carolene Products* applied a rational basis standard of review to the federal law in question, and merely suggested in dicta, that various degrees of judicial scrutiny may be appropriate under different circumstances. *Id.* at 152–53.

427. See *id.* at 216–23.

428. *Id.* at 217.

429. *Id.* at 216.

430. *Id.* at 217.

431. *Id.* at 216.

432. See WILLIAM R. MANCHESTER, *THE GLORY AND THE DREAM* 300–01 (1974) (providing a narrative of the deplorable conditions at the Japanese internment camps).

433. ANGELO N. ANCHETA, *RACE, RIGHTS, AND THE ASIAN EXPERIENCE* 62 (2d ed. 2006).

434. *City of Richmond v. Croson*, 488 U.S. 469, 493 (1989) (“[T]he purpose of strict scrutiny is to ‘smoke out’ illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool.”).

435. See, e.g., *Plyler v. Doe*, 457 U.S. 202, 230 (1982) (holding that preservation of limited state resources is not a compelling government interest that survives strict scrutiny).

the present effects of past discrimination.⁴³⁶ However, this narrow interpretation widened when *Grutter* held that viewpoint diversity is a compelling interest that justifies the limited use of race in institutions of higher education.⁴³⁷ *Grutter*'s brand of strict scrutiny found an interest in obtaining a "critical mass"⁴³⁸ of minority students to achieve the benefits of student body diversity.⁴³⁹

Grutter rejected the notion that the remedial purpose was the only compelling interest that could survive strict scrutiny. For the first time in history, the Court applied a more relaxed approach to diversity in education.⁴⁴⁰ *Grutter* distinguished strict scrutiny for compensatory purposes from strict scrutiny for benign purposes, and this distinction created a new exception to the Equal Protection Clause.

B. Johnson Carves Another Exception to the Fourteenth Amendment

A little less than two years after *Grutter*, the Supreme Court again altered equal protection law in *Johnson v. California*.⁴⁴¹ *Johnson* involved a constitutional challenge to the California

436. *Croson*, 488 U.S. at 505–06.

437. *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003) ("[W]e endorse Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions.").

438. *Id.* at 330. The Court defined critical mass "by reference to the educational benefits that diversity is designed to produce." *Id.*

439. The law school listed the following among its objectives: the "goal of assembling a class that is both exceptionally academically qualified and broadly diverse," *id.* at 329; the desire to bolster classroom discussion and make it "livelier, more spirited, and simply more enlightening and interesting," *id.* at 330; the search for applicants that would contribute "to the intellectual and social life of the institution," *id.* at 315; and "to provide adequate opportunities for the type of interaction upon which the educational benefits of diversity depend; and to challenge all students to think critically and examine stereotypes," *id.* at 380.

440. The complexity and importance of *Grutter*'s holding is, without doubt, a reflection of the topic addressed. The flexible approach to strict scrutiny employed by the Court was possible because the Court acknowledged that education "is the very foundation of good citizenship," *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954), and vitally important in maintaining the "fabric of society." *Plyler*, 457 U.S. at 221. Justice Powell's flexible approach to equal protection analysis persuaded the *Grutter* Court. *Grutter*, 539 U.S. at 325–26. As a strong ally of equality in education, Justice Marshall believed that education is a fundamental right and, therefore, should be granted special protections in the Constitution. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 102–03 (1973) (Marshall, J., dissenting) (arguing that it is necessary to afford protection to interests interrelated with specific constitutional guarantees). Marshall's opinions in *Rodriguez* and *Plyler* suggest that he would have applauded *Grutter* but regretted *PICS*.

441. 543 U.S. 499, 512 (2005) ("The 'necessities of prison security and discipline' are a compelling government interest justifying only those uses of race that are narrowly tailored to address those necessities.").

Department of Corrections (CDC) policy of segregating prisoners on the basis of race for up to two months following their arrival.⁴⁴² During this time, the CDC would assign cellmates, and inmates of different races were almost never placed together.⁴⁴³ The state-sponsored racial segregation of inmates applied only to the prisoners' cells.⁴⁴⁴ All other areas in the state prison were fully integrated.⁴⁴⁵ After the first two months of imprisonment, the state allowed prisoners to select their own cellmates, regardless of race.⁴⁴⁶

In a 5–3 decision,⁴⁴⁷ the Court affirmed the applicability of the strict scrutiny standard of review for racial classifications, rather than a “reasonably related to legitimate penological interest” standard.⁴⁴⁸ In addition, the Court held that the “necessities of prison security and discipline” constitute a compelling government interest that justifies the narrowly tailored use of race.⁴⁴⁹ The CDC justified its discriminatory policy by reference to racial violence among the prison gangs and argued, successfully, that it was essential to “segregate all inmates while it determines whether they pose a danger to others.”⁴⁵⁰ Following *Grutter*'s approach to strict scrutiny, *Johnson* recognized another new compelling interest to justify racial segregation.

*C. Finding Needles in a Haystack—Carving a
New Integration Exception*

Grutter and *Johnson* altered the equal protection landscape. After decades of Fourteenth Amendment litigation, the Court found only one interest sufficiently compelling to justify racial discrimination: the remedy of past discrimination. However, *Grutter* and *Johnson* marked the beginning of what appears to be a new willingness to find compelling interests that survive strict scrutiny.⁴⁵¹

442. *Id.* at 502.

443. *Id.* at 503.

444. *Id.*

445. *Id.*

446. *Id.*

447. Chief Justice Rehnquist took no part in *Johnson*. *Id.* at 501.

448. *Id.* at 509–10.

449. *Id.* at 512.

450. *Id.* at 503.

451. Indeed, in a 2006 Supreme Court decision, at least four Justices (Scalia, Thomas, Alito, and Roberts) declared their readiness to find a compelling governmental interest in complying with federal antidiscrimination laws. See *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 518 (2006) (Scalia, J., dissenting) (addressing alleged violations of a congressional redistricting plan on equal protection and Voting Rights Act grounds).

There are currently four—and potentially six⁴⁵²—compelling interests that justify the limited use of race: national security, remedial measures against past discrimination, diversity in higher education, and penal security.

Certainly, any addition to this list of compelling interests requires constitutional justification. The Supreme Court can rely not only on the importance of diversity in American schools, but also on the trend of constitutional theory found in its rulings in *Grutter* and *Johnson* to carve a new “integration exception” to the Equal Protection Clause.⁴⁵³ The new integration exception would derive from the benefits that flow from a racially and ethnically integrated student body in K–12 schools.

However, this new trend is only one of several weapons in the Court’s arsenal that supports a compelling interest in diversity in K–12 education. The *PICS* opinions focused on the current crisis in the United States’ private housing patterns.⁴⁵⁴ As the dissent correctly indicated, distinguishing between the causes of segregation to determine what is constitutionally permitted or prohibited is an exercise in futility.⁴⁵⁵ It makes no difference that segregation is a monster with two faces—one *de jure* and another *de facto*. Splitting hairs to debate whether the Equal Protection Clause merely proscribes segregation, or whether it also requires or permits integration, as the Justices did in *PICS*, does not alleviate the harms created by separation of the races. Instead, the Court should expand its reasoning by utilizing another weapon from the arsenal: America’s path to a diminished standing in the international community.

With more and more frequency, experts report that the United States appears to be lagging behind other modern societies in the field of education.⁴⁵⁶ These experts suggest that America’s international influence will decrease when the unskilled underclass it is raising matures.⁴⁵⁷ Diversity in education plays a crucial role in this discussion because *de facto* segregation creates and perpetuates

452. The other two interests that have fallen one vote short of compelling status in recent years are the interest of achieving a fully-integrated student body in K–12 education, *see* Part I.C (discussing *Parents Involved*); and the interest of complying with federal antidiscrimination laws, *see supra* note 451 and accompanying text.

453. Arguably, *PICS* concentrated on only two interests—remedial measures and higher education viewpoint diversity—because those are the only ones applicable in the education setting thus far. However, the trend I point to is not constricted to a particular area of the law. Rather, it demonstrates that Fourteenth Amendment jurisprudence has experienced surprising transformations in recent years.

454. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 712 (2007) (noting that the segregated nature of Seattle’s housing pattern results in *de facto* segregation in the city’s public schools).

455. *Id.* at 820.

456. PACINO, *supra* note 171, at 31.

457. *Id.*

an underclass of minorities.⁴⁵⁸ It is no coincidence that the schools with the least resources, staffing, adequate funding, and measurable achievements are those predominantly attended by segregated minority pupils.⁴⁵⁹ America operates some of the best K–12 schools in the world, but it also runs too many schools that are dismal compared to the schools of other nations.⁴⁶⁰ The new era of globalization is forcing the world to reassess curricular policies and old school system structures that impede the advancement of diversity in education.⁴⁶¹ For this reason, jurists and policy makers should avail themselves of the benefits of metanationalism.⁴⁶²

It is in the interest of the United States to examine the failures and successes of school systems around the world. For example, it would be useful for jurists and scholars to examine Finland's approach to multiculturalism. The Scandinavian nation sits at the zenith of the international league tables on comparable tests of reading, math, and science. Moreover, it has an excellent record, compared to other European nations, of instituting diversity policies to integrate children of immigrants and refugees.⁴⁶³

Using metanationalism, the Court might discover that America's problem with diversity in education is not exclusively American. Both developing and developed nations realize the importance—or compelling nature—of diversity in the era of globalization.⁴⁶⁴ Hence, to justify an integration exception, the Court could apply its evolving

458. See *Plyler v. Doe*, 457 U.S. 202, 239 (1982) (Powell, J., concurring) (stating that segregation in education will result in “the creation of an underclass of future citizens”).

459. SCHILLER, *supra* note 110, at 194. A disproportionately high number of Black and Latino children attend schools with at least 50 percent minority enrollment. The resegregation trend of the American school system is alarming. Nearly 80 percent of Latinos and 73 percent of Blacks attend predominantly minority schools, compared to 55 percent and 77 percent respectively in 1968. *Id.* tbl.11.1, at 195. The Latino dropout rate is also the highest in the country at 24 percent. *Id.* at 193. The higher percentage of segregation corresponding to Latinos could be attributed to the fact that Latinos face segregation by language in addition to segregation by race and class.

460. GARY ORFIELD & CHUNGMEI LEE, *HISTORIC REVERSALS, ACCELERATING RESEGREGATION, AND THE NEED FOR NEW INTEGRATION STRATEGIES* 8, <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/historic-reversals-accelerating-resegregation-and-the-need-for-new-integration-strategies-1/orfield-historic-reversals-accelerating.pdf>.

461. See discussion *supra* Part III.A.2.

462. See discussion *supra* Part III.C.

463. Christopher R. Bagley, *Crisis, Rhetoric and Progress in Education for the Inclusion of Diverse Ethnic and Social Groups*, in *INTERNATIONAL PERSPECTIVES*, *supra* note 13, at 195, 199–200.

464. Compare *id.* (explaining the commitment of Finland and Britain to ethnically integrated educational systems), with Jha, *supra* note 420, at 40–41 (explaining India's effort to provide equal education to all of its citizens).

jurisprudence regarding international law to recognize diversity in education as a *global* compelling interest.

America has changed over the last two centuries. Today's America is culturally and ethnically rich, and it is part of a global society that thrives in unity.⁴⁶⁵ The United States cannot afford to continue its pattern of resegregation, under which a small elite class has access to a quality education, while an underclass of minorities remains ill equipped to face the challenges of the future.⁴⁶⁶ Diversity at early stages of life can teach children to function in a pluralistic society. More importantly, it can help to eradicate the need for affirmative action programs in the future.⁴⁶⁷ If everyone starts with the same opportunities, affirmative assistance by states would no longer be justifiable on racial grounds.⁴⁶⁸ Indeed, increasing diversity in elementary education could mark the overdue beginning of the end for all racial preferences in education and other areas. Contrary to the Court's holding in *Grutter*, it is delusional to believe that an abstract concept baptized as a sunset provision will end affirmative action in the year 2028.⁴⁶⁹ Without a K–12 integration exception, the more plausible scenario is one experienced by other nations, where race-based preferential policies become akin to a stubborn trick candle that reignites itself over and over again.⁴⁷⁰

465. Today, minorities account for almost one-third of the U.S. population and by 2042, minorities are expected to become the majority. Press Release, U.S. Census Bureau, An Older and More Diverse Nation by Midcentury (Aug. 14, 2008), <http://www.census.gov/Press-Release/www/releases/archives/population/012496.html>. In the next twelve years, more than half the youth population will be of minority origin. *Id.*

466. See *Plyler v. Doe*, 457 U.S. 202, 239 (1982) (Powell, J., concurring) (stating that segregation in education will result in “the creation of an underclass of future citizens”).

467. See *Grutter v. Bollinger*, 539 U.S. 306, 346 (2003) (Ginsburg, J., concurring) (“[P]rogress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action.”).

468. See *id.* at 344 (noting that once the objectives of affirmative action programs are achieved, the programs should be terminated).

469. Not much has changed since *Grutter* in terms of minority enrollment in law school or closing the gap in LSAT scores, and there is no recent evidence to suggest things will change during the next decade. See Susan P. Dalessandro et al., *LSAT Performance with Regional, Gender, and Racial/Ethnic Breakdowns: 2001–2002 Through 2007–2008 Testing Years* 13 (LSAC Research Report Series, 2009) (reporting the virtually unchanged mean and standard deviation LSAT scores for minorities since 2001); *Matriculants by Ethnic and Gender Group*, LAW SCH. ADMISSION COUNCIL, <http://www.lsac.org/LSACResources/Data/vs-ethnic-gender-metrics.asp> (last visited Oct. 15, 2010) (indicating that in the past decade, the percentage of minority law school matriculants has increased, but only slightly).

470. For example, India, the first modern nation to institute positive discrimination policies, had provisions in its original constitution whereby preferential action would expire in twenty years. SOWELL, *supra* note 144, at 23. However, those policies have been extended repeatedly despite evidence that they disproportionately

Critics might argue that carving another exemption to the Fourteenth Amendment would only chip away at its integrity until it is left fragile and obsolete. But there is no reason to believe that the judiciary will use a carefully conceived and narrow exception as the basis to fabricate unfounded interests.⁴⁷¹ To the contrary, if the Court speaks with candor and moral clarity, it will encourage honesty in school districts' efforts to prevent resegregation.⁴⁷² Lastly, a compelling interest to promote integration would give the Supreme Court an opportunity to revisit the second prong of strict scrutiny vis-à-vis diversity in K-12 institutions.⁴⁷³ Clear guidance from the Court on all fronts of strict scrutiny would ensure that race-conscious public school admissions programs do not exceed the Fourteenth Amendment's powerful mandate against discrimination.

CONCLUSION

The pursuit of racial and ethnic diversity is a laudable goal worthy of constitutional compelling treatment. This Article uses diversity in education as a putative framework for evolving constitutional jurisprudence. To that end, it conceptualizes metanationalism, a theory that provides the context necessary to understand the rationale behind analyzing social problems using both a domestic and an international perspective. In addition, this piece

benefit the most fortunate members of a disadvantaged group while ignoring the less fortunate, who do not know how to take advantage of the policies designed to help them. *Id.* at 48-49. Similarly, Pakistan, which began positive discrimination in 1949, repeatedly renewed preferential policies meant to expire in five to ten years. *Id.* at 5.

471. See *infra* note 473 and accompanying text.

472. In essence, *PICS* compels districts to mask assignment plans to achieve racial integration under the guise of constitutionally sanctioned criteria such as language or socioeconomic status. Furthermore, courts considering whether to lift judicial supervision from school districts still operating under court order might delay a district's release if integration efforts become illegal overnight. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 722, 856 (Breyer, J., dissenting) (suggesting that courts would hesitate to find unitary status if student assignment plans in segregated districts would be legal one day and illegal the next).

473. Although the "narrowly tailored" prong of strict scrutiny is beyond the scope of this Article, it is still relevant to the diversity discussion. The current five hallmarks of the narrowly tailored analysis set forth in *Grutter* have proved problematic in the K-12 context. All lower courts that have examined the issue of diversity in K-12 schools (*Parents Involved*, *McFarland*, *Comfort*, and *Cavalier*) struck down the integration plans as violative of the Equal Protection Clause. Ironically, although the *PICS* plurality found *Grutter* inapplicable in K-12 institutions, it spent the bulk of its opinion explaining how the plans failed to comply with *Grutter's* specific brand of narrow tailoring. *Parents Involved*, 551 U.S. at 722, 724. Strict scrutiny under *Grutter's* jurisprudence renders voluntary plans an exercise in futility. Therefore, a new integration exception, accompanied by narrowly tailored criteria fit for elementary and secondary public schools would ensure diversity in our children's classrooms.

explores the universal human problem of diversity, suggesting that it now constitutes a *global* compelling interest. This proposition is proven by examining the benefits of diversity, as well as the effects of multiculturalism in educational policies cemented by globalization, from a domestic and global standpoint. In this era of global pluralism, societies cannot afford to analyze complex issues affecting the world with a myopic lens. Surely, diversity in education posits difficult challenges not amenable to simple solutions. However, these challenges present an opportunity to promote a blueprint of constructive social architecture that respects constitutional principles. Thus, this Article aims to redefine the normative approach to global problems and open new pathways for interdisciplinary research to resolve them.