Voluntary Integration: Asking the Right Questions

JAMES E. RYAN*

A little more than fifty years ago, the central legal question regarding school desegregation was whether some schools would be required to integrate. Today, remarkably, the central legal question is whether schools are permitted to integrate voluntarily. Lower courts and commentators have disagreed over the question of whether the Constitution permits public elementary and secondary schools to take race into account when assigning students. This Article explores the doctrinal issues raised by voluntary integration plans and explains why such plans further a compelling interest and can be sufficiently narrowly tailored to pass strict scrutiny.

Court-ordered integration of public schools is fading from view and school integration is not happening organically. Levels of segregation by race and income are remarkably high, and they are rising rather than falling.[1] As busing plans give way to neighborhood school assignments, public schools are becoming as segregated as the neighborhoods in which they are located. Until residential integration increases dramatically, most public schools will remain racially isolated unless school boards adopt conscious measures to achieve integration. It is that simple.

Some districts have already adopted integration plans, and these programs are typically voluntary in two ways. First, they are not court-ordered but generated by local legislative action. Second, they involve some degree of school choice. Students may choose among schools, both regular and specialized, but their choices are shaped by the goal of achieving greater racial integration in some or all schools within the district or metropolitan region.[2] Some districts, for example, allow students to transfer from their

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* William L. Matheson & Robert M. Morgenthau Distinguished Professor, and Academic Associate Dean, University of Virginia Law School. Thanks to the participants in The Ohio State University Moritz College of Law 2004–2005 Symposium, *Meeting the Challenge of* Grutter*: Affirmative Action in Twenty-Five Years*, where I presented an earlier version of this Essay, as well as to the organizers of that fine event, especially Professor john a. powell. Thanks also to John Kabealo and Chinh Le for helpful comments on earlier drafts.

[1] *See, e.g.*, Erica Frankenberg et al., *A Multiracial Society with Segregated Schools: Are We Losing the Dream?*, Jan. 16, 2003, http://www.civilrightsproject.harvard.edu/research/reseg03/resegregation03.php (describing trends).

[2] *See generally* Lisa J. Holmes, Comment, *After* Grutter*: Ensuring Diversity in K-12 Schools*, 52 UCLA L. REV. 563, 575–85 (2004) (describing voluntary integration plans that have been subject to court challenge).

neighborhood school to another if the transfer will enhance integration.[3] Other districts take race into account when admitting students to magnet or other specialized schools.[4] Still others offer students numerous choices among regular and specialized schools, and they consider race at the margins in order to achieve some degree of racial balance among the schools.[5]

In many instances, neighborhood schools remain the default option, meaning that students have a right to attend their neighborhood school. Race is taken into account only when students seek to attend a school outside of their neighborhood or a specialized school not linked to a particular residential area. These plans are thus relatively mild by comparison to the "forced busing" ordered by courts in desegregation cases. Nonetheless, these and other types of plans remain controversial.

Part of the controversy, not surprisingly, is political. Race and public schools remain an explosive mixture, and some see desegregation as a failed experiment that need not be repeated. I disagree with the latter perspective and have written elsewhere about the benefits of racial and socioeconomic integration.[6] In my view, these benefits can be substantial, at least when attention is paid to the conditions under which integration occurs, and they can easily exceed the costs associated with voluntary integration plans. To address the question around which this symposium was organized, for example, Justice O'Connor's hope that affirmative action in admissions to colleges and universities will no longer be needed in a generation may be

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[3] *See, e.g.*, Comfort v. Lynn Sch. Comm., 418 F.3d 1, 7–9 (1st Cir. 2005) [hereinafter *Comfort II*] (describing voluntary integration plan adopted by Lynn, Massachusetts). *Comfort II* is the en banc opinion of the First Circuit, which reversed the earlier decision by a First Circuit panel. *See* Comfort v. Lynn Sch. Comm., 2004 U.S. App. LEXIS 21791, at *1 (1st Cir. Oct. 20, 2004) [hereinafter *Comfort I*]. *See also* Brewer v. West Irondequoit Cent. Sch. Dist., 212 F.3d 738, 741–42 (2d Cir. 2000) (describing voluntary integration plan in Rochester, New York metropolitan area).

[4] *See, e.g.*, Eisenberg v. Montgomery County Pub. Sch., 197 F.3d 123, 125–26 (4th Cir. 1999) (describing admissions process for magnet schools in Montgomery County, Maryland); Tuttle v. Arlington County Sch. Bd., 195 F.3d 698, 701–03 (4th Cir. 1999) (describing admissions process for "alternative" schools in Arlington County, Virginia); Wessman v. Gittens, 160 F.3d 790, 793–94 (1st Cir. 1998) (describing admissions process to the Boston Latin School, a public "examination" school).

[5] *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 377 F.3d 949, 954–56 (9th Cir. 2004) [hereinafter *Parents Involved I*] (describing "open choice" plan for Seattle high schools), *rev'd* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 426 F.3d 1162 (9th Cir. 2005) (en banc) [hereinafter *Parents Involved II*]; McFarland v. Jefferson County Pub. Sch., 330 F. Supp. 2d 834, 841–48 (W.D. Ky. 2004) (describing student assignment plan in Jefferson County, Kentucky), *aff'd* McFarland v. Jefferson County Pub. Sch., 416 F.3d 513 (6th Cir. 2005) (per curiam).

[6] James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 296–307 (1999).

overly optimistic under the best of circumstances.[7] But it seems farfetched to suppose that racial preferences in admissions will be rendered obsolete while public schools remain racially and socioeconomically segregated, given the wide gaps in performance between predominantly minority, urban, high-poverty schools and their predominantly white, suburban, middle-class counterparts.[8]

Rather than rehash the benefits of integrated schools, however, I would like to focus instead on another source of controversy surrounding voluntary integration plans, and this has to do with their constitutionality. To readers who are familiar with the long and sometimes violent struggle to integrate schools, but less familiar with the Court's affirmative action decisions, it might seem odd that there is any real doubt that school districts can take affirmative steps to integrate schools. Did we not just spend fifty years trying to force recalcitrant districts to do precisely this? Did not the Court once think it obvious that school officials could choose to integrate schools if they so desired?[9] Have we reached a point of "terminal silliness" in constitutional law where school districts are prohibited from doing what federal courts were ordering them to do just a few years ago?[10]

Despite a reader's understandable surprise, there is actually a live question about whether and when public schools may take race into account in assigning students.[11] The central issue concerns the relevance and applicability of the Supreme Court's affirmative action decisions in *Grutter* and *Gratz*, which involved higher education, to the context of voluntary K-12

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[7] *See* Grutter v. Bollinger, 539 U.S. 306, 343 (2003) ("We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.").

[8] *See* Ryan, *supra* note 6, at 274 (describing performance gap).

[9] *See, e.g.*, Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1, 16 (1971). The Court observed that school authorities have

> broad power to formulate and implement educational policy and might well conclude . . . that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. *To do this as an educational policy is within the broad discretionary powers of school authorities* . . . .

Id. (emphasis added).

[10] The phrase is borrowed from Justice Scalia's dissenting opinion in *Romer v. Evans*, 517 U.S. 620, 639 (1996) (Scalia, J., dissenting) (arguing that the majority's analysis brought the Court's equal protection jurisprudence to the point of "terminal silliness"). The court in *McFarland* made a similar point, observing that "[i]t would seem rather odd that the concepts of equal protection, local control and limited deference are now only one-way streets to a particular educational policy, virtually prohibiting the voluntary continuation of policies once required by law." *McFarland*, 330 F. Supp. 2d at 851.

[11] *See* Holmes, *supra* note 2, at 575–85 (reviewing cases).

integration plans. Before *Grutter* and *Gratz*, a number of decisions struck down voluntary integration plans on the ground that they were not sufficiently narrowly tailored.[12] There have been three decisions by courts of appeals since *Grutter* and *Gratz*, and all three courts have upheld the plans at issue.[13] Despite the uniformity of results, these cases have provoked a great deal of disagreement among appellate judges. Two of the three decisions were decided by en banc courts which, by split votes, reversed contrary panel decisions.[14] Commentators are as divided as these courts over the constitutionality of voluntary integration in light of *Grutter* and *Gratz*.[15] And, most importantly, the Supreme Court has yet to decide the issue. Thus, while the early trend in post-*Grutter* cases is favorable toward voluntary integration plans, the law is not yet settled.

The disagreement evident in the courts of appeals' decisions and the commentary is somewhat understandable. Neither *Grutter* nor *Gratz* provides any guideline to their application outside the setting of undergraduate or law school admissions, and K-12 education is both similar to and different from post-secondary education. At the same time, however, I believe that the issues are less complicated than the split decisions and the divided commentary suggest, and that common sense and an appreciation of history point the way toward resolution. This Article explains why.

I. ASKING THE RIGHT QUESTIONS

A. *The Wrong Question*

Alexander Bickel smartly advised that "no answer is what the wrong question begets."[16] Heeding this advice, the first question is one to put aside. There should be little doubt that some voluntary integration plans are

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[12] See cases cited *supra* note 4.

[13] *Parents Involved II*, 426 F.3d 1162 (9th Cir. 2005); McFarland v. Jefferson County Pub. Sch., 416 F.3d 513 (6th Cir. 2005); *Comfort II*, 418 F.3d 1 (1st Cir. 2005).

[14] *Parents Involved II*, 426 F.3d at 1162 (decided 7-4); *Comfort II*, 418 F.3d at 1 (decided 3-2).

[15] *Compare, e.g.*, Holmes, *supra* note 2, at 586–600 (arguing that voluntary integration plans should be upheld as constitutional), *with* Wendy Parker, *The Legal Cost of the "Split Double Header" of* Gratz *and* Grutter, 31 HASTINGS CONST. L.Q. 587, 602–03 (Fall 2003) (suggesting that voluntary integration plans that do not rely on individualized, merit-based decisions regarding assignments are constitutionally vulnerable).

[16] ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 103 (1962).

constitutional.[17] It is implausible to imagine that the Supreme Court would allow colleges and graduate schools to use race in selecting students but would bar school boards from using race to integrate public schools. However enmeshed in the tangles of doctrine the Supreme Court might find itself in some cases, surely it will avoid any doctrinal trap that would allow law schools but not public schools to integrate.

This situation calls to mind *Bolling v. Sharpe*,[18] the companion case to *Brown v. Board of Education*,[19] which involved segregation in the D.C. schools. As the Court itself acknowledged—or confessed, really, as a means of justifying a less than persuasive doctrinal analysis—it simply could not condone segregation in the nation's capital after striking it down in the states.[20] The same is true here: it is unthinkable that the Court would allow affirmative action in admissions but would completely bar public schools from taking steps to integrate. To the extent that constitutional law consists of predicting what the Court will do, which seems apt as a description if not as a normative proposition, let me express with utmost confidence that it *must* be constitutional for school boards, under some circumstances, to use race to integrate.[21]

Which points to the real question: under what circumstances can school boards use race for the purpose of voluntarily integrating schools? Answering this question requires covering some familiar terrain.

B. Grutter *and* Gratz

The Court has made clear that (almost) any use of race by any government official, whether for supposedly benign or obviously nefarious purposes, triggers strict scrutiny. Indeed, just this past term, in a case involving the segregation of prisoners, the Court again emphasized that strict scrutiny remains the appropriate standard, regardless of the institutional

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[17] By "constitutional," I simply mean a prediction of what the Supreme Court will likely decide, based on precedent. This assumes, as I believe safe in this context, that the Court will rely primarily if not exclusively on precedent, rather than the original meaning of the text, structure, or other sources. I take no position here, of course, on the general issue of the proper methodology for deciding constitutional cases.

[18] Bolling v. Sharpe, 347 U.S. 497 (1954).

[19] Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[20] *Bolling*, 347 U.S. at 500 ("In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be *unthinkable* that the same Constitution would impose a lesser duty on the Federal Government.") (emphasis added).

[21] *Cf. Parents Involved II*, 426 F.3d 1162, 1176 (9th Cir. 2005) (noting that "it would be a perverse reading of the Equal Protection Clause that would allow" universities to consider race when assembling their student bodies but not allow public schools to consider race in an effort to integrate their student bodies).

setting in which race is employed.[22] There are some slight exceptions, most notably regarding legislative redistricting, where strict scrutiny is not triggered unless race is the predominant factor in drawing boundary lines.[23] Nonetheless, it seems safe to start with the presumption that voluntary integration plans will be subject to strict scrutiny.[24]

In order to survive strict scrutiny, voluntary integration plans must advance a compelling interest and must be narrowly tailored to achieve that interest. This is where *Grutter* and *Gratz* come into play. In *Grutter*, the Court reaffirmed Justice Powell's opinion in *Bakke* and confirmed that diversity in higher education is indeed a compelling interest.[25] The Court also set out a list of criteria by which to judge whether the use of race to achieve the goal of diversity is narrowly tailored. In the admissions context, those criteria require that (1) no quotas are used; (2) applicants are afforded individualized and holistic consideration; (3) the plan does not unduly harm members of any racial group; (4) the plan is adopted only after serious, good-faith consideration has been given to race-neutral alternatives; and (5) the plan is temporary.[26]

The different outcomes in *Grutter*, which upheld the admissions policy of the University of Michigan Law School, and *Gratz*, which struck down the University of Michigan's undergraduate admissions policy, turned on the narrow tailoring criteria. The law school policy satisfied them,[27] while the undergraduate policy fell short, primarily because the Court concluded that the policy failed to consider each applicant as an individual and instead used race in an automatic and mechanical way.[28]

So how do *Grutter* and *Gratz* bear on the question of when voluntary integration plans are constitutional? Some judges[29] and commentators[30]

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[22] Johnson v. California, 543 U.S. 499, 506 (2005) (rejecting argument that lower standard should apply in prison setting and confirming that the Court applies "strict scrutiny to *all* racial classifications to 'smoke out' illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool") (alteration in original) (citation omitted).

[23] *See, e.g.*, Miller v. Johnson, 515 U.S. 900, 916 (1995) (explaining that strict scrutiny is triggered only when race is the "predominant" motivating factor in redistricting).

[24] *But see Parents Involved II*, 426 F.3d at 1194 (Kozinski, J., concurring) (arguing for "realistic rational basis review" because voluntary integration plans are different from invidious discrimination, segregation and affirmative action).

[25] Grutter v. Bollinger, 539 U.S. 306, 328–33 (2003).

[26] *Id.* at 333–44.

[27] *Id.*

[28] Gratz v. Bollinger, 539 U.S. 244, 271–76 (2003).

[29] *See, e.g.*, *Parents Involved II*, 426 F.3d at 1209–20 (Bea, J., dissenting, joined by Judges Kleinfeld, Tallmen, and Callahan); *Parents Involved I*, 377 F.3d 949, 968–69 (9th Cir. 2004).

would adopt the analysis from *Grutter* and *Gratz* jot for jot, assuming that what is good for graduate schools is good for elementary schools. This view assumes that public schools are advancing the same interest as universities, namely diversity writ large, and that they must be subject to the same narrow tailoring criteria. As explained below, however, it seems a mistake to assume that *Grutter* and *Gratz* resolve all of the questions presented by voluntary integration plans.

C. *Law School Is Not Grade School*

The equation of higher education and K-12 education is overly facile and misses the point of strict scrutiny, especially the narrow tailoring inquiry. Colleges and graduate schools on the one hand, and public schools on the other, are not attempting to achieve exactly the same goals when using race in selecting students, and the correct application of strict scrutiny requires careful attention to these differences. Similarly, using the same narrow tailoring inquiry in both contexts ignores the fundamental differences between these contexts and risks turning strict scrutiny into a sort of shell game—where the use of race is condoned in principle but prohibited in practice.

1. *Compelling Interests*

Colleges and graduate schools use race in admissions in an effort to achieve a student body that is diverse along a number of dimensions, including race, geography, experience, and talent. The benefits of this kind of broad diversity are many, as the Court recognized.[31] They include the promotion of cross-racial understanding and the amelioration of racial stereotypes. Broad diversity also promotes a more "robust exchange of ideas" and leads to more enriched, enlightening, and livelier classroom discussions.[32] In this sense, achieving diversity along racial, geographic, or

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[30] *E.g.*, Parker, *supra* note 15, at 602–03 (arguing that "[e]ven if diversity is deemed a compelling governmental interest in primary and secondary schools, choice-based programs will have greater difficulty falling within the example of [*Grutter*] because of the absence of merit based admissions"); David Levine, *Public School Assignment Methods After* Grutter *and* Gratz*: The View from San Francisco, Part I*, 30 HASTINGS CONST. L.Q. 511, 518 (2003) ("[S]chool officials . . . will have little trouble articulating a compelling governmental interest after *Grutter*," but "this does not necessarily mean that they will be able to act upon that desire. If the officials seek to use race as an express means of selecting and assigning students, after *Gratz*, they will have significant difficulty meeting the narrow tailoring prong of the strict scrutiny analysis.").

[31] *Grutter*, 539 U.S. at 328–33.

[32] *Id.* at 329.

experiential lines is a way to ensure viewpoint diversity.[33] In addition, a diverse student body helps prepare students for a diverse workplace and an increasingly global marketplace.[34] Finally, colleges and professional schools, law schools in particular, train future leaders, and "[i]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership is visibly open to talented and qualified individuals of every race and ethnicity."[35]

Public schools use race in student assignments for a somewhat different set of goals, which revolve around the benefits of *racially integrated* schools. These benefits overlap with some of the benefits derived from a diverse college or graduate student body. For example, racially integrated schools, like diverse college campuses, promote cross-racial understanding, help break down stereotypes, and prepare students for a diverse workplace.[36] But other goals and benefits diverge. Racially integrated schools, for example, can promote academic achievement among minority students, typically because racial integration and socioeconomic integration go hand in hand.[37] Racially integrated schools can also help create a system of roughly comparable schools, rather than a system of black and mostly poor schools on the one hand and white and mostly middle-class schools on the other. Schools that adopt *racial* integration plans, moreover, are not typically seeking to enhance viewpoint diversity in classroom discussions, especially at the primary school level, nor are they seeking to ensure that the "path to leadership" remains visibly open to all.[38]

It is important, therefore, that the compelling interest question be posed with some precision. The question is not, as some judges and commentators have assumed, whether public schools, like universities, have a compelling interest in achieving a broadly diverse student body. The precise question is whether they have a compelling interest in creating or maintaining a racially integrated student body.[39] *Grutter* and *Gratz* provide only a partial answer, insofar as the Court accepted as "substantial" the benefits of promoting

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[33] *See Comfort I*, 418 F.3d 1, 15 (1st Cir. 2005) ("The admissions plan at issue in *Grutter* strove for diversity along many axes, including race, in an effort to create a student body with diverse viewpoints, thereby enriching classroom discussion and academic experiences.").

[34] *Grutter*, 539 U.S. at 330–31.

[35] *Id.* at 332.

[36] *See* Ryan, supra note 6, at 303, 306–07.

[37] *See, e.g.*, McFarland v. Jefferson County Pub. Sch., 330 F. Supp. 2d 834, 852–55 (W.D. Ky. 2004) (discussing Jefferson County School Board's defense of its voluntary integration plan).

[38] *See Comfort II*, 418 F.3d 1, 15 (1st Cir. 2005)

[39] *See Parents Involved II*, 426 F.3d 1162, 1173–79 (5th Cir. 2005); *Comfort II*, 418 F.3d at 15.

cross-racial understanding and breaking down racial stereotypes. But to the extent that *Grutter* and *Gratz* also rely on viewpoint diversity, or on making sure that the "path to leadership" is visibly open to all, those decisions do not answer the precise question raised by voluntary integration plans at the public school level.

This is not to suggest that the decisions in *Grutter* and *Gratz* make this a hard question. Concluding that a diverse student body at colleges and graduate schools furthers compelling interests does not mean, by negative implication, that racially integrated schools are not important. Instead, it simply means that courts, and ultimately the Supreme Court, will have to focus on the specific benefits of public school integration and not just parrot the findings and conclusions from *Grutter* and *Gratz*. As discussed below, those benefits are substantial, and there seems to be little reason to doubt that the Court would find them compelling.

2. *Narrow Tailoring*

Framing the compelling interest question correctly is crucial because it informs the narrow tailoring inquiry.[40] If courts assume that public schools are trying to achieve the same ends as colleges and universities, they are going to be inclined to require them to follow the same means. Indeed, some judges have already made this mistake and have asked, for example, why voluntary integration plans focus solely on race and not on other student characteristics that might enhance the overall diversity of the student body.[41] This question would make sense if public schools were trying to replicate the broad diversity on college campuses, but that is not the point of most voluntary integration plans.

As the Court made clear in *Grutter*, the narrow tailoring inquiry must itself be tailored to the asserted compelling interest and the specific context in which race is used.[42] Consider, for example, the differences between university admissions and the public school context. The admissions process for selective colleges and graduate schools is competitive, merit-based, and in some respects a zero-sum game. A student denied admission to the University of Michigan Law School is not automatically sent to another school, much less to a school of comparable quality. In the public school context, by contrast, all students are guaranteed placement in a school, and the schools themselves (at least those within the same district) are typically comparable. The process of assigning students, moreover, is not competitive

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[40] *See Parents Involved II*, 426 F.3d at 1173.

[41] *Id.* at 1210 (Bea, J., dissenting); *Parents Involved I*, 377 F.3d 949, 970–72 (9th Cir. 2004).

[42] Grutter v. Bollinger, 539 U.S. 306, 333–34 (2003).

and merit-based, outside of a few selective magnet or "examination" schools at the secondary level. Indeed, although often lumped together, voluntary integration plans at the public school level are *not* affirmative action plans.

The narrow tailoring inquiry ought to take these differences into account. The initial narrow tailoring question, then, is not *whether* voluntary integration plans satisfy the five criteria from *Grutter* and *Gratz*, but rather *what* narrow tailoring criteria are appropriate in this context.[43] Although the Court acknowledged the importance of context in *Grutter*, it did not indicate how that inquiry should change when the context changes, nor did it give much clue as to the proper inquiry in the public school context. Nonetheless, one can begin to outline an appropriate inquiry by referring to the primary purpose of the narrow tailoring requirement, which is to ensure that plans are no broader than necessary to achieve their stated goals.

To recap, the constitutionality of voluntary integration plans has not been resolved by *Grutter* and *Gratz*. Those decisions, mostly by virtue of the results, make it safe to assume that voluntary integration plans are constitutional under some conditions. But they do not specify what those conditions might be. To identify them, one must first determine the actual goals of voluntary integration plans. Assuming those goals are sufficiently compelling, one must then formulate the appropriate restrictions on the use of race to achieve them.

II. SOME ANSWERS

A. *The Compelling Interests Advanced By Racially Integrated Schools*

Whether racially integrated schools advance a compelling state interest ought to be considered an easy question to answer, especially if one consults both political and legal history. Presumably, the historical struggle to integrate schools, carried out by parents, schoolchildren, federal courts, and the federal executive, was not done for sport. To be sure, efforts to integrate were remedial and triggered by a finding of purposeful segregation; the Court never recognized a free-standing right to attend integrated schools. At the same time, however, it would be strange indeed if the remedy of integration were pursued so vigorously, over so much objection, despite the fact that there is little value in racially integrated schools. The better conclusion seems to be that, at some point after *Brown*, courts and federal officials, not to mention a large segment of the public, came to embrace the notion that black and white children should actually go to school together. In this sense, racially integrated schools carry forward what might be called the moral ideal

[43] *See Comfort II*, 418 F.3d at 18–20 (recognizing this point).

of *Brown*, namely that schools should not simply be desegregated but also integrated.[44]

One need not rest on history, however, to conclude that there is continued value to racially integrated schools. Racially integrated schools offer proven social and academic benefits.[45] As described by school districts that have adopted voluntary integration plans, racially integrated schools can increase racial tolerance and crossracial understanding, break down racial stereotypes, and help prepare all students for a diverse workplace.[46] In addition, racially integrated schools can provide a better academic setting for all students, and can lead in particular to increased achievement among minority students, primarily because racially integrated schools are less likely to be schools of concentrated poverty.[47] Finally, racially integrated schools can benefit the school system as a whole by creating schools that are at least roughly comparable and not identifiable by race or family income. This in turn helps create support for the school system as a whole among a wide spectrum of parents.[48]

Notice that these benefits are tied specifically to *racially integrated* schools, and not to schools that are broadly diverse like colleges or graduate schools. Some of the benefits, again, are similar in the two settings. But not all are, and courts faced with voluntary integration plans must focus on the asserted benefits of *racial* integration—not on the benefits of an imaginary plan that seeks broad-based diversity along a number of axes.[49]

Most of the benefits said to attend racially integrated schools are supported by social science evidence, which plaintiffs challenging voluntary integration plans have done little to rebut. This is not to say that the evidence is pellucid or beyond challenge. Indeed, there is a cottage industry of conflicting studies regarding the short and long-term benefits of racial integration.[50] Not all integration plans will produce sparkling results, and many integrated schools have thoroughly segregated classrooms. Although plaintiffs thus far have not questioned the benefits of racial integration as vigorously as they might, surely others will.

This raises the question of what courts should do if the evidence presented regarding the benefits of racial integration is mixed. In *Grutter*, a

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[44] *Cf.* McFarland v. Jefferson County Pub. Sch., 330 F. Supp. 2d 834, 852 (W.D. Ky. 2004) (observing that "*Brown*'s original moral and constitutional declaration has survived to become a mainstream value of American education").

[45] *See, e.g.*, Ryan, *supra* note 6, at 296–307.

[46] *See Comfort II*, 418 F.3d at 14; *McFarland*, 330 F. Supp. 2d at 853.

[47] *McFarland*, 330 F. Supp. 2d at 853; *Parents Involved I*, 377 F.3d 949, 991–96 (9th Cir. 2004) (Graber, J., dissenting).

[48] *McFarland*, 330 F. Supp. 2d at 854.

[49] *Parents Involved I*, 377 F.3d at 991–92 (emphasizing this point).

[50] *See* Ryan, *supra* note 6, at 296–307.

similar question arose about the benefits of diversity in law schools, and the Court deferred to the academic judgment of law school officials that diversity did indeed produce numerous benefits.[51] It did so in light of the Court's traditional deference "to a university's academic decisions," which "includes the selection of its student body."[52] The Court thus accepted the law school's assertion that achieving a diverse student body was "at the heart" of its proper institutional mission and presumed that the law school was acting in good faith to accomplish that mission.[53]

Public schools should be afforded similar deference, but for different reasons and because of a different tradition. That tradition is one of local control. In numerous desegregation decisions, the Court has recognized that the tradition of local control is "deeply rooted,"[54] "vital,"[55] and worthy of the Court's respect. It has relied on that tradition to justify limiting the geographical reach of desegregation decrees and to justify terminating those decrees.[56] The Court also relied on the tradition of local control in *San Antonio v. Rodriguez*, where it upheld unequal spending among public school districts that resulted in part from local control over funding. Local control over schools, the Court observed, "affords some opportunity for experimentation, innovation, and a healthy competition for educational excellence."[57]

Obviously, the principle of local control should not shield all decisions of school officials from constitutional scrutiny, and some of the Court's previous invocations of local control can surely be questioned. But just as obviously, racially integrated schools are perfectly consistent with constitutional norms, in a way that other policies—for example, intentionally segregating students by race—are not. In this context, therefore, respect for local control (not to mention consistency with prior Court decisions and statements) demands respect for a school board's conclusion that integrated

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[51] Grutter v. Bollinger, 539 U.S. 306, 328–29 (2003).

[52] *Id.* (citation omitted).

[53] *Id.* at 329.

[54] Milliken v. Bradley, 418 U.S. 717, 741 (1974) ("No single tradition in public education is more deeply rooted than local control over the operation of schools . . . . ").

[55] Freeman v. Pitts, 503 U.S. 467, 490 (1992) ("As we have long observed, 'local autonomy of school districts is a vital national tradition.'") (citation omitted).

[56] The Court limited the reach of desegregation decrees in *Milliken*, and it set forth criteria for terminating those decress in, *inter alia*, *Freeman*. *See also* Bd. of Educ. of Okla. City Pub. Sch. v. Dowell, 498 U.S. 237, 248 (1991) (emphasizing the importance of local control in decision that also sets forth criteria for terminating desegregation decrees).

[57] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 49–50 (1973).

schools can indeed provide substantial educational benefits.[58] Evidence regarding those benefits may be mixed, and, again, not every plan will maximize all potential benefits. But courts would do violence to the tradition of local control of public schools if they required local officials to prove beyond a reasonable doubt that one or more of these benefits will be realized. Instead, courts should respect a local district's conclusion that racially integrated schools are part of its institutional mission and presume that local officials are acting in good faith to achieve that mission.[59]

B. *Narrow Tailoring*

Given that the Court has never developed a uniform list of narrow tailoring criteria for every context, a useful place to begin this inquiry is with general principles that have informed the Court's various narrow tailoring inquiries. In general, the Court has sought to ensure that any use of race is necessary and proportional to the declared purpose of the plan or policy, and also to ensure that the plan does not unduly burden third parties.[60] The basic point of the inquiry is to "smoke out" illegitimate uses of race by ensuring that the means of using race tightly fit the desired end.[61]

The specific criteria to use, as already described, must depend on the context. The inquiry, in the Court's words, "must be calibrated to fit the distinct issues raised by the use of race" in a particular context, and it must take "'relevant differences'" among different contexts into account.[62] Importantly, the Court also made relatively clear in *Grutter* that the narrow tailoring requirement is not intended to submarine a particular use of race that has already been deemed compelling.[63] The Court rejected the notion, advanced by the dissent, that narrow tailoring would require the University to choose between maintaining a highly selective admissions process and admitting minority students.[64] It would seem to follow that narrow tailoring

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[58] *See Parents Involved II*, 426 F.3d 1162, 1196 (5th Cir. 2005) (Kozinski, J., concurring).

[59] *Cf. id.* at 1188 n.3 (concluding that the school district should be afforded deference in identifying institutional values); *Comfort II*, 418 F.3d 1, 15 (1st Cir. 2005) (refusing to second guess the district court's finding that the purpose of Lynn's voluntary integration plan was to obtain the educational benefits that racial diversity provides).

[60] *See, e.g.*, City of Richmond v. J.A. Croson, 488 U.S. 469, 509–10 (1989) (plurality opinion); United States v. Paradise, 480 U.S. 149, 171 (1987) (plurality opinion); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 280–84 (1986); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 316–20 (1978) (opinion of Powell, J.).

[61] Grutter v. Bollinger, 539 U.S. 306, 326, 333 (2003).

[62] *Id.* at 333–34 (citation omitted).

[63] *Id.* at 339.

[64] *Id.*

in the context of voluntary integration plans should not require public schools to choose between integrated schools and fundamentally altering the way that they assign students to those schools.[65]

With these general principles in mind, one can turn to the narrow tailoring criteria employed in *Grutter* and *Gratz* to assess which ones are relevant and which ones are not. To repeat, the criteria impose the following five requirements: (1) no quotas; (2) individualized, holistic consideration; (3) no undue harm to third parties; (4) consideration of race-neutral alternatives; and (5) that the plan be temporary.[66]

The last three seem relevant and well-suited to the context of voluntary integration plans, as a recent opinion from the First Circuit recognized.[67] Ensuring minimal impact on third parties ensures that the plan sweeps no more broadly than necessary. Demanding that district officials give good faith consideration to plausible race-neutral alternatives ensures that the consideration of race is actually necessary to achieve the stated goals of any plan. And requiring that the plan be limited in time essentially means that district officials must periodically review voluntary integration plans to determine whether they are still necessary to achieve racial integration. This, too, ensures that the use of race is necessary and that the (temporal) scope of the plan is duly constrained.

The first two requirements (no quotas, and individualized consideration) fit less comfortably into this context. The first certainly has symbolic value, which is diminished outside of the context of merit-based admissions but does not disappear entirely. Regardless of its precise value in this context, it is nonetheless easy enough to meet if prohibiting quotas simply means that plans cannot "impose a fixed number or percentage which must be attained, or which cannot be exceeded."[68] I confess that it has never been clear to me why quotas, so defined, are impermissible per se, nor have I ever had much luck distinguishing between "minimum goals," achieving a "critical mass," or paying "some attention" to numbers (all of which are allowed), and quotas (which are not).[69] The formalistic definition of quotas, in any event, seems merely to require that plans establish rough goals or ranges of permissible

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[65] *Cf. Parents Involved II*, 426 F.3d 1162, 1181 (9th Cir. 2005) (making similar point).

[66] *Grutter*, 539 U.S. at 333–44.

[67] *Comfort II*, 418 F.3d 1, 16 (1st Cir. 2005); *see also Parents Involved II*, 426 F.3d at 1180 (suggesting that all but one are criteria—"individualized consideration"—should be used).

[68] *Grutter*, 539 U.S. at 335 (internal quotation omitted).

[69] *Cf.* Ian Ayres, *Narrow Tailoring*, 43 UCLA L. REV. 1781 (1986) (arguing that both race-specific plans and a limited form of quota—basically, establishing a floor under which numbers should not drop—can be more narrowly tailored than race neutral plans that forbid any and all types of quotas).

enrollments, which most plans already do and which is easy enough to fix in plans that do not.

But the prohibition of quotas is also tied, in *Grutter* and *Gratz*, to the use of race as merely a "plus" factor in admissions, in which race can be given weight but cannot be dispositive.[70] In this sense, the prohibition of quotas bleeds into the second requirement of individualized consideration and holistic review, which demands that each applicant be "evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application."[71] Nothing is lost, and some ease of exposition gained, by combining these various requirements under the heading of "individualized consideration."

This factor is perhaps the most important one to emerge from the lower court opinions on voluntary integration plans. Courts that have upheld plans under review have generally concluded that the factor is not relevant or should be given little weight, while those that have struck them down have applied it and found the plans wanting.[72] The latter result is not surprising, because most voluntary integration plans do not even pretend to consider each "applicant" on an individualized basis. Instead, if they involve school choice, they make transfers or choices of schools dependant, at least in part, on the student's race. Only a few selective examination or magnet schools come close to considering individual students and basing decisions on merit. The bulk of voluntary integration plans, by contrast, rely neither on merit nor on individualized consideration.

Getting this point correct, therefore, matters—a lot. To me, it seems plain that individualized, holistic consideration should not be a requirement in this context. Consider why this is a narrow tailoring requirement in the context of admissions to selective colleges or graduate schools. Individualized consideration ensures that universities achieve their stated goal of broad-based diversity. As the University of Michigan described, its admissions policies were designed to "assemble a student body that is diverse in ways

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[70] *Grutter*, 539 U.S. at 334–39; Gratz v. Bollinger, 539 U.S. 244, 271–76 (2003).

[71] *Grutter*, 539 U.S. at 337.

[72] *Compare Parents Involved II*, 426 F.3d 1162, 1180–84 (9th Cir. 2005) (concluding that the individualized consideration requirement is inapplicable in context of voluntary integration plans and upholding plan under review); *Comfort II*, 418 F.3d at 17–18 (same), *with* Eisenberg v. Montgomery County Pub. Sch., 197 F.3d 123, 132–33 (4th Cir. 1999) (striking down plan because it focused exculsively on race); Tuttle v. Arlington County Sch. Bd., 195 F.3d 698, 707 (4th Cir. 1999) (same). *But see* McFarland v. Jefferson County Pub. Sch., 330 F. Supp. 2d 834, 859 (W.D. Ky. 2004) (applying individualized review requirement and concluding that plan offered "individualized attention of a different kind" by focusing on students' place of residence and choice of schools).

broader than race."[73] The University valued broad-based diversity in part because it was interested in attaining viewpoint diversity. Focusing solely on race would not necessarily achieve viewpoint diversity and might also reinforce the stereotype that minority students share a viewpoint that is different from the viewpoint of white students.[74] Individualized consideration of each applicant is also important because the process is competitive and merit-based. Considering all students individually, and comparing all applicants together, avoids the risk that the admissions process will enforce a stereotype that racial minorities "are unable to achieve success without special protection."[75]

Most voluntary integration plans, by contrast, are designed to achieve racial integration. If reducing racial isolation and increasing racial integration are considered constitutionally permissible goals, it would seem to follow that race alone—and not each student's overall potential to enhance diversity—can and should form the basis for decisions.[76] In addition, because most voluntary integration plans are not merit-based, the risk of stigmatic harm from the use of race is largely reduced.[77] Finally, requiring individualized consideration of each student in voluntary integration plans would require either drastic changes to most plans or lead to their elimination. As one commentator remarked, it is a little ridiculous to imagine "phalanxes of public school admissions officers purporting to conduct searching, individualized 'holistic reviews' of detailed files of millions of four-year olds applying to kindergartens across the country."[78]

In short, demanding that K-12 schools use race only in the same manner as universities ignores the fundamental differences between those institutions and the reason for the narrow tailoring inquiry in the first place. Narrow tailoring should ensure a close fit between means and ends, not ensure that a use of race considered compelling can never be implemented. There is nothing in *Grutter* or *Gratz* that suggests that public schools must adopt merit-based admissions policies before they can use race to achieve integrated schools, nor are the purposes behind narrow tailoring served by essentially thwarting most voluntary integration plans.

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[73] *Grutter*, 539 U.S. at 340.

[74] *See Gratz*, 539 U.S. at 271–72.

[75] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 298 (1978) (opinion of Powell, J.).

[76] *Cf. Parents Involved II*, 426 F.3d at 1183 (focusing solely on race is acceptable when the school district has a compelling interest in reducing de facto racial segregation); Brewer v. W. Irondequoit Cent. Sch. Dist., 212 F.3d 738, 752 (2d Cir. 2000) (concluding that, if reducing racial isolation is a compelling interest, "then there is no more effective means of achieving that goal than to base decisions on race").

[77] *See Comfort II*, 418 F.3d at 18.

[78] Levine, *supra* note 30, at 521.

With that said, courts—and ultimately the Supreme Court—may nonetheless see value in at least requiring that race not be the only factor that guides student assignments. One sees in *Grutter* and *Gratz*, and *Bakke* before them, evidence of a belief that it is better if the use of race is hidden rather than overt.[79] The motivation to hide the use of race is tied, in the admissions context, to the danger of stigmatic harm and to the racial hostility that might be generated by a more overt process that reserves seats for "less qualified" minority students. This precise risk does not arise when students are assigned a school without consideration of merit. Nonetheless, there is a risk that *any* overt consideration of race, especially a mechanical one where students can transfer or not depending on their race, "will breed cross-racial tension."[80] And although students denied the ability to transfer from one school to another are not denied a public education, they are obviously denied their first choice among schools. However courts might downplay the significance of that harm, parents and students denied entrance to a particular school because of race will surely *feel* harmed.

It is questionable, of course, whether anyone denied admission to a university or entrance to a public school would feel less harmed by the covert use of race. Perhaps courts overestimate the opacity of any process in which race is purportedly just a "plus-factor," and underestimate the degree to which those denied admission or entrance will nonetheless view the process as not only wrong or immoral (because race is determinative) but also dishonest (because everyone knows, but officials cannot admit, that race is determinative). Nonetheless, it surely remains plausible to suppose that downplaying the use of race, all things considered, is better than flaunting it.

One could thus imagine, and even defend, a decision to retain some requirement that race not be the sole factor in assigning students in the context of voluntary integration plans. The requirement should not be so stringent that it requires a holistic review of the merits of each student and an evaluation of his or her ability to enhance diversity. Instead, courts could require that the ability to choose a particular school, or transfer from one to the other, be tied to a number of requirements, such as geography, proximity, or the fit between a school's particular programs and a student's interests or talents.[81] Race could be one factor, and a strong one, but it could be relegated

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[79] Justice Ginsburg, for example, chided the majority in *Gratz* on just this point: "If honesty is the best policy, surely Michigan's accurately described, fully disclosed College affirmative action program is preferable to achieving similar numbers through winks, nods, and disguises." *Gratz*, 539 U.S. at 305 (Ginsburg, J., dissenting). For an elegant defense of *Grutter* and *Bakke*'s treatment of this issue, see John C. Jeffries, Jr., Bakke *Revisited*, 55 SUP. CT. REV. 1, 17 (2003).

[80] *Comfort II*, 418 F.3d at 30 (Selya, J., dissenting).

[81] McFarland v. Jefferson County Pub. Sch., 330 F.Supp. 2d 834, 859 (W.D. Ky. 2004) (concluding that the plan at issue provided sufficient attention to individuals

to the status of a "'plus' factor."[82] This would add some administrative burdens to voluntary integration plans, to be sure, but they would not be so onerous as to effectively preclude them. Some analytical rigor in court decisions and transparency in governmental decisions would be lost, but perhaps the purported gain in racial harmony would offset those costs.[83]

A proper narrow tailoring inquiry in this context, therefore, would certainly ask whether race-neutral alternatives were considered in good faith, whether the plan will be revisited periodically to ensure it is necessary, and whether the plan unduly harms a particular group of students. In addition, the formal prohibition on quotas can and should be carried over to this context. The requirement of individualized consideration, however, ought to be largely if not completely abandoned.[84] If it plays any role at all, it should be used only to ensure that factors other than race (such as geography, proximity, or student interest) also inform assignments, and not to force public schools to choose between integrating their schools and adopting a merit-based admissions process for public school students.

III. CONCLUSION

The analysis I have sketched would likely lead to the approval of most voluntary integration plans, although some might have to be tweaked a bit, especially if courts decide to require that race only be a "plus" factor. I am not hesitant to reveal that this result coheres with my own policy preferences, in part because I disagree with what seems to be the prevailing sentiment that those who favor integrated schools should be somewhat embarrassed by that preference—or at least quiet about it. Of course, I recognize that, in this age of cynicism regarding constitutional analysis, this admission may be enough to disqualify my legal analysis in the eyes of some readers. I nonetheless believe that mine is an honest and fair application of the Court's case law—but then again, so say the cynics, I *would*.

Notwithstanding whatever skepticism might linger in readers, it is my hope that this analysis might play some small role in helping to dispel the legal uncertainty that hangs over voluntary integration plans. In my view, removing legal uncertainty is the least we can do for districts that have the far-sightedness and fortitude to adopt voluntary integration plans. Consider

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because it considered a student's place of residence and choice of school or program in addition to race).

[82] *See Comfort II*, 418 F.3d at 31 (Selya, J., dissenting) (suggesting that a transfer program, where race is a "'plus' factor" but not determinative, would be constitutional).

[83] *Cf.* Jeffries, *supra* note 79, at 21 (discussing *Bakke's* "sacrifice of cogency for wisdom").

[84] *See Parents Involved II*, 426 F.3d 1162, 1180–84 (9th Cir. 2005); *Comfort II*, 418 F.3d at 18–19.

for a moment just how difficult, politically, it must be to create and implement voluntary integration plans, and consider how courageous those officials who persist must be. Consider as well that most parents care deeply about where their children attend school, and that those parents used to getting their way in life will not sit idly by if they feel that school districts are slighting their children. There is no chance that voluntary integration plans are going to be adopted without intense public debate and scrutiny by all who might be affected.

This does not seem like a situation crying out for extensive involvement by federal courts that, in prior incantations of the desegregation debate, have issued paeans to local control.[85] School districts that create voluntary integration plans ought to be applauded, and others ought to be encouraged to follow their lead. Without these plans, many of our public schools will (continue to) be as racially isolated as our law schools and colleges would be without affirmative action. School boards need and deserve our help to fashion workable, sustainable plans that maximize the benefits of integration and minimize the costs necessary to achieve it. They do not need, and do not deserve, litigation designed to derail and deter even modest efforts at integration.

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[85] *See Parents Involved II*, 426 F.3d at 1196 (Kozinski, J., concurring) ("When it comes to a [voluntary integration] plan such as this—a plan that gives the American melting pot a healthy stir without benefiting or burdening any particular group—I would leave the decision to those much closer to the affected community . . . . ").