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Race as a Factor in K-12 Student Assignment Plans: Balancing the Promise of Brown with the Modoern Realities of Strict Scrutiny

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COMMENTS

RACE AS A FACTOR IN K-12 STUDENT ASSIGNMENT PLANS: BALANCING THE PROMISE OF *BROWN* WITH THE MODERN REALITIES OF STRICT SCRUTINY

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Over fifty years after the Supreme Court's landmark decision in *Brown v. Board of Education*,[1] the issue of racial integration in American public schools is gaining renewed attention.[2] As courts have dissolved mandatory desegregation decrees[3] and schools increasingly have become segregated again,[4] many school districts have implemented voluntary integration plans.[5] Stressing the importance of integrated schools in our

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1. 347 U.S. 483 (1954) (holding that the intentional segregation of students by race in public schools violated the Equal Protection Clause of the Constitution).

2. *See* ERICA FRANKENBERG & CHUNGMEI LEE, RACE IN AMERICAN PUBLIC SCHOOLS: RAPIDLY RESEGREGATING SCHOOL DISTRICTS 6 (2002) (noting that in schools with an enrollment larger than 25,000, racial segregation is increasing), *available at* http://www.civilrightsproject.harvard.edu/research/deseg/Race_in_American_Public_Schools1.pdf. Research indicates that "decreasing black and Latino exposure to white students . . . [and] declining white exposure to blacks and Latinos" is occurring in many school districts throughout the United States. *Id.* at 22.

3. *See, e.g.*, Freeman v. Pitts, 503 U.S. 467, 491 (1992) (upholding the incremental release of the DeKalb County (Ga.) School District from a court-ordered desegregation plan); Bd. of Educ. of Okla. City Pub. Sch. v. Dowell, 498 U.S. 237, 249 (1991) (releasing the school district from a court-ordered desegregation plan implemented in 1972). *See generally* MARY F. EHRLANDER, EQUAL EDUCATIONAL OPPORTUNITY: BROWN'S ELUSIVE MANDATE 276 (2002) (describing the Supreme Court's retreat from mandatory desegregation orders beginning in the 1990s); ERICA FRANKENBERG ET AL., A MULTIRACIAL SOCIETY WITH SEGREGATED SCHOOLS: ARE WE LOSING THE DREAM? 69-75 (2003) (providing an overview of desegregation rulings between 1990 and 2002), *available at* http://www.civilrightsproject.harvard.edu/research/reseg03/AreWeLosingtheDream.pdf.

4. *See* FRANKENBERG & LEE, *supra* note 2, at 6 (noting the resegregation of schools in many large districts between 1986 and 2000). For example, in one Georgia school district Black exposure to Whites declined by forty-five percent and Latino exposure to Whites declined by nearly sixty percent over the fourteen years studied. *Id.*

5. *See, e.g.*, Comfort v. Lynn Sch. Comm., No. 03-2415, 2004 U.S. App. LEXIS 21791, at *9 (1st Cir. Oct 20, 2004) (describing a Massachusetts school district's transfer

increasingly diverse society, one federal district court judge recently observed, "In order to teach that the 'content of [one's] character' does not depend on color, a child must interact with children of other races."[6] Despite noble goals, however, recent legal attacks on voluntary integration plans threaten the ability of school districts to use race as a factor when carrying out such programs.[7]

Legal challenges to voluntary integration plans in public schools have arisen against the backdrop of the Supreme Court's recent decisions in the University of Michigan affirmative action cases.[8] Although the Michigan cases helped settle many questions regarding the use of race in

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program designed to integrate schools that would otherwise be segregated due to housing patterns), *withdrawn and reh'g en banc granted*, 2004 U.S. App. LEXIS 24662 (1st Cir. Nov. 24, 2004); Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1, 377 F.3d 949, 954-55 (2004) (describing the Seattle School District's high school enrollment plan that was designed to ameliorate the effects of segregated housing patterns on racial representation in high schools throughout the district), *vacated and reh'g en banc granted*, 395 F.3d 1168 (9th Cir. 2005); Eisenberg *ex rel.* Eisenberg v. Montgomery County Pub. Sch., 197 F.3d 123, 125-26 (4th Cir. 1999) (describing a Maryland school district's enrollment plan for magnet schools that was designed to foster racial integration).

6. Comfort *ex rel.* Neumyer v. Lynn Sch. Comm., 283 F. Supp. 2d 328, 333-34 (D. Mass. 2003) (quoting Martin Luther King, Jr., I Have a Dream, *in* A CALL TO CONSCIENCE: LANDMARK SPEECHES OF DR. MARTIN LUTHER KING JR. 75 (2002)), *aff'd in part and rev'd in part sub nom.* Comfort v. Lynn Sch. Comm., No. 03-2415, 2004 U.S. App. LEXIS 21791 (1st Cir. Oct. 20, 2004), *withdrawn and reh'g en banc granted*, 2004 U.S. App. LEXIS 24662 (1st Cir. Nov. 24, 2004). Similarly, Fourth Circuit Judge J. Harvie Wilkinson III has commented on the integrative ideals stemming from *Brown*:

> The values of *Brown* are most poignantly implicated [in public education], because society has traditionally relied upon public schools to lay the bedrock for integration. Elementary and secondary schools were not only designed to prepare students for the challenges and opportunities of American life; they were also meant to serve as melting pots where interracial friendship could counteract prejudice at an early age. Separatist educational arrangements threaten both of these traditional goals.

J. Harvie Wilkinson III, *The Law of Civil Rights and the Dangers of Separatism in Multicultural America*, 47 STAN. L. REV. 993, 1018-19 (1995) (footnote omitted).

7. *See, e.g.*, *Comfort*, 2004 U.S. App. LEXIS 21791, at *51 (striking down a voluntary student transfer program designed to reduce racial segregation); *Parents Involved in Cmty. Sch.*, 377 F.3d at 988-89 (striking down a high school student assignment plan designed to foster racially integrated schools). Challenges to race-based policies in K-12 settings are based on the Equal Protection Clause of the Constitution which commands that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

8. *See* Grutter v. Bollinger, 539 U.S. 306, 332-33 (2003) (holding that achieving diversity in public university admissions is a compelling governmental interest so long as the methods used are narrowly tailored to achieve the compelling interest); Gratz v. Bollinger, 539 U.S. 244, 270 (2003) (holding that the University of Michigan's undergraduate admissions policy was not narrowly tailored).

higher education admissions,[9] the decisions have not settled the simmering debate on the use of race as a factor in student assignment decisions for kindergarten through twelfth grade (K-12) public schools.[10] Lacking clear guidance from the Supreme Court in the K-12 context, courts must reconcile the legacy of *Brown* with the Court's recent affirmative action jurisprudence in higher education.[11]

Challenges to voluntary race-based policies in K-12 public schools initially focused on the use of race as a factor in determining admission to magnet schools and selective high schools.[12] More recently, the controversy in K-12 schools has shifted to more general student assignment and transfer plans that do not involve such specialized programs.[13] Lower courts have variously struck down and upheld such policies using race as a factor in student placements.[14]

Since the Supreme Court has not directly addressed the voluntary use of race as a factor in K-12 educational decisions,[15] lower courts have

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9. *Comfort*, 2004 U.S. App. LEXIS, at *31-32 (noting that *Grutter* clarified the Court's position that having a diverse student body in university admissions is a compelling interest and defined the parameters of narrow tailoring analysis when evaluating race-based university admissions policies).

10. *See* James Nial Robinson II, *Trying To Push a Square Peg Through a Round Hole: Why the Higher Education Style of Strict Scrutiny Review Does Not Fit When Courts Consider K-12 Admissions Programs*, 2004 B.Y.U. EDUC. & L.J. 51, 73 ("The circuit courts are divided on the constitutionality of [K-12 admissions] programs, and the lower courts are just now beginning to digest the implications of the Supreme Court's recent University of Michigan decisions."). Robinson explains that "[s]ome courts have applied strict scrutiny review [in K-12 cases] . . . in much the same manner [as they do] . . . affirmative action in higher education. On the other hand, other courts distinguish between the K-12 and higher education programs and attempt to tailor their analysis accordingly." *Id.*

11. *Id.* (explaining that until the Supreme Court considers race-based policies in K-12 settings, lower courts likely will hear many cases regarding K-12 school assignment plans). The First Circuit alluded to the lack of clarity in this area in *Comfort*, using the Supreme Court's analytical framework from the higher education context until the Court addresses the issue in K-12 settings. *Comfort*, 2004 U.S. App. LEXIS 21791, at *51.

12. *See, e.g.*, Eisenberg *ex rel.* Eisenberg v. Montgomery County Pub. Sch., 197 F.3d 123, 125 (4th Cir. 1999) (concerning the school district's policy on the assignment of students to magnet schools); Wessmann v. Gittens, 160 F.3d 790, 792 (1st Cir. 1998) (concerning the Boston School District's admission policy for three elite high schools).

13. *See, e.g.*, *Comfort*, 2004 U.S. App. LEXIS 21791 (involving a challenge to a school district's generally applicable student transfer policy); Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1, 377 F.3d 949 (9th Cir. 2004) (involving a challenge to the school district's high school assignment policy), *vacated and reh'g en banc granted*, 395 F.3d 1168 (9th Cir. 2005).

14. *See, e.g.*, *Parents Involved in Cmty. Sch.*, 377 F.3d at 988-89 (striking down the school district's high school assignment policy); Brewer v. W. Irondequoit Cent. Sch. Dist., 212 F.3d 738, 753 (2d Cir. 2000) (upholding an urban-suburban interdistrict student transfer policy).

15. *See Comfort*, 2004 U.S. App. LEXIS, at *6.

relied on the Court's decisions regarding race-based policies in public university admissions.[16] Prior to the Michigan decisions, courts sought guidance from the Supreme Court's fractured decision in *Regents of the University of California v. Bakke*,[17] where a divided Court recognized that public universities could permissibly consider race in admissions.[18] The recent decision in *Grutter v. Bollinger*[19] has clarified the Court's position on the permissible use of race in the admissions process for higher education by affirming that achieving diversity is a compelling governmental interest.[20] Recently, lower courts have applied these principles to K-12 settings.[21]

This Comment examines the use of race as a factor in K-12 public school assignment and transfer plans. First, this Comment traces the Supreme Court's jurisprudence concerning race-based policies in American public schools and other settings. Next, this Comment addresses recent litigation concerning race-based policies in the K-12 context. This Comment then analyzes the application of the Court's affirmative action jurisprudence to K-12 situations, including what constitutes a compelling state interest and how school districts must narrowly tailor their actions to achieve that interest. Finally, this Comment suggests that courts and school districts must carefully weigh the ideals of *Brown* against the realities of strict scrutiny when considering race-based policies in K-12 settings.

I. THE EVOLUTION OF PUBLIC SCHOOL INTEGRATION: FROM MANDATORY TO VOLUNTARY

A. Mandatory Remedies for De Jure Segregation

In 1954 the Supreme Court dramatically changed the landscape of many public school systems when it repudiated the doctrine of "separate but equal"[22] within the context of public education.[23] The Court's

16. *See, e.g.*, *Parents Involved in Cmty. Sch.*, 377 F.3d at 960-63; Tuttle v. Arlington County Sch. Bd., 195 F.3d 698, 706 (4th Cir. 1999); *Eisenberg*, 197 F.3d at 130-35.

17. 438 U.S. 265 (1978).

18. *Id.* at 315.

19. 539 U.S. 306 (2003).

20. *See* J. Kevin Jenkins, Grutter, *Diversity, and Public K-12 Schools*, 182 ED. L. REP. 353, 353 (2004) ("[I]n *Grutter*, the Court clarified an area of law that had been decidedly unclear since the *Bakke* decision.").

21. *See, e.g.*, *Comfort*, No. 03-2415, 2004 U.S. App. LEXIS 21791, at *41-42 (1st Cir. Oct. 20, 2004), *withdrawn and reh'g en banc granted*, 2004 U.S. App. LEXIS 24662 (1st Cir. Nov. 24, 2004); *Parents Involved in Cmty. Sch.*, 377 F.3d at 964.

22. Plessy v. Ferguson, 163 U.S. 537, 550-51 (1896) (sustaining a Louisiana law that called for separate but equal accommodations for White and Black railroad passengers). The *Plessy* decision provided justification for government-sponsored racial segregation

decision in *Brown*, holding de jure[24] segregation in public schools unconstitutional, began the difficult process of dismantling the racially segregated school systems that pervaded much of the South.[25]

Cases following *Brown* further shaped the process of desegregation.[26] In *Green v. County School Board*,[27] the Court intervened when a Virginia school system attempted to circumvent the *Brown* mandate to desegregate by using a parental choice program that, when applied, preserved segregated schools within the district.[28] The Court struck down the system, reinforcing the desegregation mandate of *Brown* and establishing an "affirmative" duty for boards of education to integrate schools.[29]

In *Swann v. Charlotte-Mecklenburg Board of Education*,[30] the Court addressed the problems of desegregating schools in large urban areas

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that lasted for over fifty years. *See* EHRLANDER, *supra* note 3, at 6-8 (describing the *Plessy* decision and its impact on segregation).

23. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (holding that "[s]eparate educational facilities are inherently unequal"). Richard Kluger has described *Brown* as "nothing short of a reconsecration of American ideals," explaining:

> The Court had restored to the American people a measure of the humanity that had been drained away in their climb to worldwide supremacy. The Court said, without using the words, that that ascent had been made over the backs of black America—and that when you stepped on a black man, he hurt. The time had come to stop.

RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 710 (1975).

24. The Court has defined de jure segregation as "resulting from intentional state action." Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 205-06 (1973).

25. *Brown*, 347 U.S. at 495 (indicating the complexities involved in providing relief due to the wide applicability of the decisions and the unique conditions present in local school districts). In a follow-up decision the next year, the Court ordered school districts to desegregate with "all deliberate speed." Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955). The Court placed the districts involved under the supervision of the courts in which the claims originated, ordering districts to take steps to facilitate the transition from a dual system of schools to a unitary system. *Id.* at 299.

26. *See infra* notes 28-40 and accompanying text.

27. 391 U.S. 430 (1968).

28. *Id.* at 433-34 (considering an open choice enrollment system that allowed parents to choose which school their children would attend). The district consisted of only two schools from which students could choose—one was traditionally all Black and the other all White. *Id.* at 432. Under the plan, no White children chose to attend the Black school. *Id.* at 441. While 115 Black children opted to attend the White school, eighty-five percent of all Black children remained in their prior school. *Id.*

29. *Id.* at 437-38 (stating that school boards 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"). The Court further held school boards were required to demonstrate that any plan would provide "meaningful and immediate progress toward disestablishing state-imposed segregation." *Id.* at 439.

30. 402 U.S. 1 (1971).

where official policies had exacerbated the effects of de facto segregation resulting from housing patterns.[31] By permitting the use of busing as a means to integrate schools, the Court acknowledged "a presumption against schools that are substantially disproportionate in their racial composition."[32]

The Supreme Court further expanded its desegregation jurisprudence when it addressed mandatory integration of schools in a northern city for the first time in *Keyes v. School District No. 1.*[33] While the South had created segregated schools through direct, official policies, school segregation in urban areas outside the South was a result of less obvious official polices that capitalized on racially segregated housing patterns.[34] In *Keyes*, the district court found that Denver had operated its school system under long-running and subtle policies such as gerrymandered attendance zones and school construction to contain Black expansion into White schools.[35]

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31. *Id.* at 7. The Court stated that de facto segregation exists "where racial imbalance exists in the schools but with no showing that this was brought about by discriminatory actions of state authorities." *Id.* at 17-18. At the time, the district was the forty-third largest in the country, encompassing Charlotte, North Carolina and the surrounding county. *Id.* at 6-7. The Court acknowledged that the school board decisions did not create the segregated housing, but found that the boards actions based on the housing patterns "resulted in segregated education." *Id.* at 7.

32. *Id.* at 26.

33. 413 U.S. 189, 213 (1973). By acknowledging in *Swann* that de facto segregation could lead to unconstitutional results when accompanied by discriminatory intent on the part of school boards, the Court paved the way for desegregation cases in the North. *See* J. HARVIE WILKINSON III, FROM BROWN TO BAKKE 194-99 (1979) (indicating that while rural areas of the South became leaders in school integration, students in major cities in the North continued to attend substantially segregated schools).

34. *See* WILKINSON III, *supra* note 33, at 195-99. Colorado's State Constitution prohibited segregated schools and the state generally had a positive history of race relations. *Id.* When Denver's Black population began to grow, however, many Whites were resistant to the encroachment of Black students into predominately White schools. *Id.* Trying to keep the schools in the Park Hill neighborhood of the city White as long as possible, the school board rescinded a voluntary integration program and engaged in practices designed to maintain predominately White schools. *Id.*

35. *Keyes*, 413 U.S. at 192. Although there was no statutory dual system in Denver, the Court did cite evidence that the school district had "engaged in an unconstitutional policy of deliberate racial segregation . . . '[with] an undeviating purpose to isolate Negro students' in segregated schools." *Id.* at 198-99 (citation omitted). The Court found that where intentional actions on the part of a school board resulted in segregation in meaningful portions of a district, the district shouldered the burden of demonstrating that segregation in schools in other portions of the district was not the result of segregative intent. *Id.* at 208-09. If a district failed to meet this burden, mandatory desegregation was necessary. *Id.* at 213. The Court stated that where "school authorities have carried out a systematic program of segregation . . . it is only common sense to conclude that there exists a predicate for finding the existence of a dual system." *Id.* at 201. Although it was more difficult to establish de jure segregation in northern cities, court-ordered integration

B. The Court's Implied Approval of Voluntary Integration Plans

Brown and its progeny mandated integration in school districts where de jure segregation existed;[36] however, the Supreme Court did not mandate integration where there had been only de facto desegregation.[37] Driven by the goals of *Brown* and the threat of litigation, some districts voluntarily implemented programs to integrate schools within their boundaries.[38] Although the Court never directly addressed voluntary integration programs in its desegregation jurisprudence, it did address the issue indirectly.[39]

The Court first hinted at the permissibility of voluntary integration plans in *Swann*.[40] In dicta, the Court indicated that the power to implement voluntary integration programs was within the school board's traditional power to set educational policy.[41] In a companion case, *North*

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was no longer strictly a southern issue after *Keyes*. *See* WILKINSON III, *supra* note 33, at 198-99. The difficulty in demonstrating de jure segregation in the North stemmed from the fact that segregation had to be tied to official wrongdoing. *Id.* In the South, school desegregation statutes created a presumption that segregation resulted from nefarious intent. *Id.* at 198. In the North, plaintiffs faced the more tedious effort of examining past school board decisions to demonstrate that official policies led to segregated schools. *Id.* at 198-99.

36. *See* discussion *supra* Part I.A.

37. *See Keyes*, 413 U.S. at 208-09 (emphasizing that intent is the differentiating factor between de jure segregation, which necessitates a remedy, and de facto integration). *See generally* Mark Tushnet, *Implementing, Transforming, and Abandoning* Brown, *in* BROWN AT 50: THE UNFINISHED LEGACY 128, 132 (Deborah L. Rhode & Charles J. Ogletree, Jr. eds., 2004) (describing how courts confined their desegregation mandates to situations involving deliberate decisions, either through statutory law or administrative processes, that resulted in segregation).

38. *See supra* text accompanying note 5 (indicating recent court decisions concerning voluntary integration plans in public schools); *see also* Kevin Brown, *The Constitutionality of Racial Classifications in Public School Admissions*, 29 HOFSTRA L. REV. 1, 1 (2000) ("Driven by federal court decrees, political beliefs that an integrated society was a better one, and educational policy decisions fostering multiculturalism, many public elementary and secondary schools instituted voluntary measures to produce integrated student bodies.").

39. *See infra* notes 40-56 and accompanying text (describing numerous cases in which the Supreme Court has indicated at least tacit support for voluntary integration plans).

40. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971).

41. *Id.* (noting that the powers of local authorities are broader than the remedial powers of federal courts). Writing for the majority, Chief Justice Burger stated:

> School authorities are traditionally charged with 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 of the district as a whole. To do this as an educational policy is within the broad discretionary powers for school authorities.

Id.

Carolina State Board of Education v. Swann,[42] the Court reinforced its position, stating that "as a matter of educational policy school authorities may well conclude that some kind of racial balance in the schools is desirable quite apart from any constitutional requirements."[43]

Justice Powell expressed his approval for voluntary integration plans in two desegregation cases.[44] In a concurring opinion in *Keyes*, he supported the proposition that school boards could initiate policies to promote integration, asserting that nothing prevented school boards from "exceeding minimal constitutional standards in promoting the values of an integrated school experience."[45] Justice Powell again commented on voluntary integration in a dissenting opinion in *Columbus Board of Education v. Penick*.[46] Voicing his approval of a voluntary majority to minority transfer program in Wisconsin, he stated that such programs were "the sort of effort that should be considered by state and local officials."[47]

In *Bustop, Inc. v. Board of Education*,[48] the Court upheld a California Supreme Court ruling requiring desegregation based on provisions of the California State Constitution.[49] Writing for the majority, then Justice Rehnquist held that states could permissibly "impose more stringent restrictions on the operation of a local school board" than federal courts

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42. 402 U.S. 43 (1971).

43. *Id.* at 45.

44. *See* Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 488 n.7 (1979) (Powell, J., dissenting); Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 242 (1973) (Powell, J., concurring).

45. *Keyes*, 413 U.S. at 242 (Powell, J., concurring) ("[I]t is essential that . . . students of all races learn to play, work, and cooperate with one another in their common pursuits and endeavors.").

46. *Penick*, 443 U.S. at 488 n.7 (Powell, J., dissenting). The majority in *Penick* supported the district court's determination that the Columbus Board of Education acted with a segregative purpose which had a current impact on the district and warranted a mandatory desegregation order. *Id.* at 468. In his dissent, Justice Powell stated his belief that there was insufficient evidence to demonstrate that intentional violations of the Fourteenth Amendment led to the segregated schools. *Id.* at 480 (Powell, J., dissenting). Rather, he believed that the district court made a conclusory determination based merely on the absence of integration in the district. *Id.* (Powell, J., dissenting). Although Justice Powell expressed concerns with the coercive nature of judicial mandates, he acknowledged the importance of integrated schools, stating that "[i]t is essential that the diverse peoples of our country learn to live in harmony and mutual respect. This end is furthered by when young people attend schools with diverse student bodies." *Id.* at 485 n.5 (Powell, J., dissenting).

47. *Id.* at 488 n.7 (Powell, J., dissenting).

48. 439 U.S. 1380 (1978).

49. *Id.* at 1383 (denying a stay of the California Supreme Court's order to implement a desegregation plan in Los Angeles). The California court ordered the plan after finding that de facto segregation was prohibited under its state constitution. *Id.*

had the authority to do.[50] Justice Rehnquist explained that he had "very little doubt" that California was within its powers to act in the absence of a federal court mandate.[51]

The Court again addressed the application of state law to desegregation policies aimed at remedying de facto segregation in *Washington v. Seattle School District No. 1*.[52] The Seattle School District had implemented a mandatory busing plan to bring racial balance to its schools.[53] In response, opponents of the plan gained statewide approval of an initiative that made mandatory busing for purposes of racial integration illegal.[54] The Supreme Court struck down the state's anti-busing initiative, allowing the district to implement mandatory busing.[55] Thus, Seattle was able to maintain a voluntary desegregation program that went beyond Constitutional requirements.[56]

C. Equal Protection and Affirmative Action

1. Race as a Factor in Higher Education Admissions

Although the Supreme Court has never addressed the use of voluntary measures aimed at desegregation of public schools, the Court has addressed affirmative action policies in other contexts.[57] One such area, most parallel to K-12 public schools, is higher education.[58] The Court

50. *Id.* at 1382.

51. *Id.* at 1383.

52. 458 U.S. 457, 459-61 (1982).

53. *Id.* at 461.

54. *Id.* at 461-63.

55. *Id.* at 470 (basing its decision on equal protection grounds because the initiative used race as a defining element in restricting local decisionmaking). The Court explained that prior to the initiative, decisions such as student assignments and desegregation were "firmly committed to the local board's discretion" and "[t]he question of whether to provide an integrated learning environment rather than a system of neighborhood schools" fell within that discretion. *Id.* at 479-80. The initiative placed the authority to order desegregative busing in state hands, and in so doing differentiated between issues involving racial matters and those that did not. *Id.* at 480. By removing only the power to address racial decisions, the initiative created an impermissible distinction based on race. *Id.* at 486-87.

56. *See* Brown, *supra* note 38, at 10.

57. *See* discussion *infra* Part I.C (discussing the Supreme Court's affirmative action jurisprudence in higher education and government contracting and employment).

58. *See* Comfort v. Lynn Sch. Comm., No. 03-2415, 2004 U.S. App. LEXIS 21791, at *46 (1st Cir. Oct. 20, 2004) (indicating that the higher education decisions in *Grutter* and *Gratz* set forth "relevant guideposts" for evaluating the state's interest in achieving diversity in K-12 settings), *withdrawn and reh'g en banc granted*, 2004 U.S. App. LEXIS 24662 (1st Cir. Nov. 24, 2004). Although both higher education and K-12 settings involve public education, there remain substantial differences that affect the application of affirmative action in higher education versus the K-12 context. *See infra* Part II.B-C.

first addressed affirmative integration policies, or affirmative action, within public higher education in *Regents of the University of California v. Bakke*[59] where it considered a challenge to the admissions policy of the Medical School of the University of California at Davis.[60] With Justice Powell providing the deciding vote for a divided court,[61] the Court struck down the university's admissions plan but upheld some consideration of race as a factor in the admissions process.[62]

In his opinion, Justice Powell recognized that diversity was a compelling interest in university admissions,[63] but he found that the program's racial classification was not necessarily tailored to promote that interest.[64] He found it significant that applicants were competing for a limited number of positions, and the use of race guaranteed a specific number of positions to some students based on race, excluding Whites from being considered for those positions.[65] In the competitive process of medical school admissions, he determined that race was permissible as a "plus" factor, but could not be used to "insulate the individual from comparison with all other candidates for the available seats."[66]

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59. 438 U.S. 265 (1978).

60. *Id.* at 269-70. A White male applicant who had been denied admission to the school brought the action, challenging the school's special admission program in which sixteen of 100 positions were reserved for minority students. *See id.* at 275-79.

61. *Id.* at 271-72. *See generally* WILKINSON III, *supra* note 33, at 299-301 (describing Justice Powell's role in serving as the middle ground between four justices fully in favor of the university's plan and four justices wholly opposed to any use of race as a factor in admissions). Chief Justice Burger and Justices Stevens, Stewart, and Rehnquist argued that Title VI of the 1964 Civil Rights Act precluded the university from using race to deny admission. *Id.* at 299-300. On the other hand, Justices Brennan, White, Marshall, and Blackmun argued that Title VI and the Constitution allowed for the use of race as a means to overcome past discrimination. *Id.* at 300. Justice Powell agreed in striking down the university's admissions plan, but he also agreed with the latter group in upholding some use of race as a factor in admissions decisions. *Id.* at 302.

62. *Bakke*, 438 U.S. at 320 (affirming the California Supreme Court's decision invalidating the university's admission program but recognizing that "the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin").

63. *Id.* at 314-15 (opinion of Powell, J.). Justice Powell stated that the "attainment of a diverse student body" was "clearly a constitutionally permissible goal for a institution of higher education." *Id.* at 311-12 (opinion of Powell, J.).

64. *Id.* at 315 (opinion of Powell, J.).

65. *Id.* at 319-20 (opinion of Powell, J.). Justice Powell explained that under the medical school's plan "[n]o matter how strong [an applicant's] qualifications . . . they [were] never afforded the chance to compete with applicants from the preferred groups" for a set number of positions. *Id.* at 319 (opinion of Powell, J.).

66. *Id.* at 317 (opinion of Powell, J.). Justice Powell cited a Harvard University admissions policy as an example of a permissible policy. *Id.* at 316 (opinion of Powell, J.). The policy stated that race could be used to "tip the balance" in favor of one qualified candidate over another in order to achieve a diverse student body. *Id.* at 315 (opinion of

The splintered decision in *Bakke* upholding diversity as a compelling state interest and acknowledging that universities could use race as a factor in admissions did not end the debate over race in admissions.[67] Because *Bakke* lacked a clear rationale for the majority holding, the decision was not universally embraced.[68]

The uncertainty *Bakke* engendered was clarified when the Court again addressed affirmative action in higher education admissions in *Grutter v. Bollinger*[69] and *Gratz v. Bollinger*.[70] Both cases concerned admissions policies at the University of Michigan, *Grutter* involving a challenge to the law school's admissions policy[71] and *Gratz* dealing with a challenge to the undergraduate admissions policy.[72] Like *Bakke*, both cases concerned highly-competitive admissions programs in which applicants were compared using merit-based criteria.[73]

In *Grutter*, the Court clarified *Bakke* by endorsing Justice Powell's rationale.[74] In a five to four decision, the Court held diversity to be a compelling state interest that can justify the use of race as a factor in public university admissions.[75] Highlighting the benefits stemming from

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Powell, J.). The policy also indicated that although the university was to avoid quotas, "some attention to numbers" was necessary to have sufficient numbers to realize the benefits of diversity and avoid the problem of diverse groups feeling isolated. *Id.* at 323 (opinion of Powell, J.).

67. *See, e.g.*, Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996) (striking down the University of Texas School of Law's admissions program).

68. *See id.* at 944. The *Hopwood* court questioned the continued vitality of *Bakke*, holding that "consideration of race or ethnicity by the law school for the purpose of achieving a diverse student body [was] not a compelling interest under the Fourteenth Amendment." *Id.*

69. 539 U.S. 306 (2003).

70. 539 U.S. 244 (2003).

71. *Grutter*, 539 U.S. at 311.

72. *Gratz*, 539 U.S. at 249-50. The Court struck down the undergraduate admissions program on narrow tailoring grounds. *Id.* at 251. Under the University of Michigan's undergraduate admissions program, each applicant accrued points, needing at least 100 points to secure admission. *Id.* at 255. The points were awarded based on academic merit, quality and rigor of high school curriculum, in-state residency, alumni relationship, personal essay, and personal achievement or leadership. *Id.* Applicants who were part of an underrepresented minority group gained an extra twenty points under a "miscellaneous" category. *Id.* The Court found that the university's use of a points system that automatically gave a minority student one-fifth of the points needed to guarantee admission had the effect of making the use of race decisive. *Id.* at 271-72.

73. *Grutter*, 539 U.S. at 312-14 (indicating that the law school admits only about ten percent of applicants and that it admits only those students who are "among the most capable"); *see Gratz*, 539 U.S. at 255.

74. *Grutter*, 539 U.S. at 325.

75. *Id.* In reaching its decision, the Court deferred to the law school's judgment that diversity was critical to its educational mission, noting that the Court has "long recognized that . . . universities occupy a special niche in our constitutional tradition." *Id.* at 328-29.

diversity, the Court noted that the "admissions policy promotes 'cross-racial understanding,' helps to break down racial stereotypes, and 'enables [students] to better understand persons of different races.'"[76] In securing the benefits of a diverse student body, the Court accepted the law school's determination that it needed a "critical mass" of underrepresented minorities.[77]

The Court also upheld the law school's plan on the grounds that it was narrowly tailored to achieve the compelling state interest.[78] It determined that to be narrowly tailored, an admissions plan: (1) cannot involve an impermissible quota or racial balancing and must be sufficiently flexible so as to consider each applicant as an individual; (2) must take into account race-neutral alternatives; (3) must not impose an undue burden on third parties; and (4) must be limited in time.[79] Evaluating each of these factors, the Court determined that the law school had met the standard of strict scrutiny.[80]

In applying the narrow-tailoring factors, the Court first found that the "goal of attaining a critical mass" of minority students did not constitute a quota.[81] The Court honed in on the evidence that the school's review of

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The Court based its deference on First Amendment grounds, explaining that educational autonomy includes the ability of a university to select its student body so as to promote a "robust exchange of ideas." *Id.* at 329 (internal quotation marks omitted) (citations omitted).

76. *Id.* at 330 (alteration in original) (citation omitted). As support for its position, the Court cited social science evidence that "diversity promotes learning outcomes and 'better prepares students for an increasingly diverse workforce and society.'" *Id.* (quoting Brief of Amici Curiae American Educational Research Association et al. at 3, *Grutter* (No. 02-241)). Justices Scalia and Thomas disagreed with the majority on this point, asserting that any benefits derived from diversity are out place in the law school setting. *Id.* at 347-48 (Scalia, J., concurring in part and dissenting in part). Justice Scalia stated that diversity is "a lesson of life rather than law." *Id.* at 347 (Scalia, J., concurring in part and dissenting in part).

77. *Id.* at 333. The law school described "critical mass" as "enough to create significant opportunities for personal interaction, to show that there is no consistent 'minority viewpoint' on particular issues, and to ensure that 'minority students do not feel isolated or like spokespersons for their race, and feel comfortable discussing issues freely based on their personal experiences.'" Respondent's Brief at *2-3, Grutter (No. 02-241), 2003 WL 402236 (citation omitted).

78. *See Grutter*, 539 U.S. at 334-42.

79. *Id.*

80. *Id.* at 334. As in *Bakke*, the Court emphasized that universities cannot "insulate applicants who belong to certain racial or ethnic groups from the *competition* for admission." *Id.* (emphasis added).

81. *Id.* at 335-36 (explaining that some attention to numbers is permissible in order to attain a "critical mass" of underrepresented minorities). Chief Justice Rehnquist, joined by Justices Scalia, Kennedy, and Thomas, disagreed with the majority arguing that "[s]tripped of its 'critical mass' veil, the Law School's program is revealed as a naked effort to achieve racial balancing." *Id.* at 379 (Rehnquist, C.J., dissenting). The Chief Justice

applicants flexibly considered "a wide variety of characteristics besides race and ethnicity" when selecting a diverse student body.[82] In the Court's view, such individualized review also mitigated any possible harm to non-minority applicants.[83] The Court further found that the university adequately considered race-neutral alternatives.[84] Finally, the Court accepted the university's pledge that it would continue to seek a race-neutral admissions plan so as to limit the duration of the current plan.[85]

2. The Development of Strict Scrutiny of Race-Based Classifications in Government Contracting and Employment

Between *Bakke* and the Michigan cases, the Supreme Court tackled several key cases addressing affirmative action policies in government contracting and employment.[86] These cases have helped shaped the manner in which courts apply strict scrutiny in other contexts related to affirmative action, including those concerning race-based policies in K-12 settings.[87]

In a key employment case decided in 1987, *United States v. Paradise*,[88] the Court upheld a district court ruling ordering the Alabama Department of Public Safety to implement an affirmative action program for state patrol promotions.[89] The Court recognized that the state had a compelling interest in remedying the prior exclusion of Blacks from

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expressed concern with the fact that the percentage of minority students admitted by the law school varied very little from the overall percentages in the applicant pool, giving the appearance that the admissions program was "in practice, a carefully managed program designed to ensure proportionate representation of applicants from selected minority groups." *Id.* at 384-86 (Rehnquist, C.J., dissenting).

82. *Id.* at 336-40.

83. *Id.* at 341.

84. *Id.* at 339-40 (noting that the university was not required to exhaust all possible race-neutral alternative and that it undertook "serious, good faith consideration" of such alternatives).

85. *Id.* at 343.

86. Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); United States v. Paradise, 480 U.S. 149 (1987).

87. *See, e.g.*, *Grutter*, 539 U.S. at 326 (citing *Adarand* as a framework for strict scrutiny); Tuttle v. Arlington County Sch. Bd., 195 F.3d 698, 706-07 (4th Cir. 1999) (applying the narrow-tailoring factors of *Paradise* to a K-12 setting).

88. 480 U.S. 149 (1987).

89. *Id.* at 185 (plurality opinion). In 1972 the U.S. District Court for the Middle District of Alabama found that the Alabama Department of Public Safety (Department) had systematically excluded Blacks from employment. *Id.* at 153 (plurality opinion). Eleven years later, after the Department failed to develop adequate promotion procedures, the Court imposed a fifty percent promotional quota for available Black candidates as long as the Department remained less than twenty-five percent Black and had not developed an appropriate promotional plan. *Id.* at 163 (plurality opinion).

employment positions.[90] The Court determined that when evaluating "whether race-conscious remedies are appropriate" it must consider "the necessity for the relief and . . . alternative remedies; the flexibility and duration of the relief . . . ; the relationship of the numerical goals to the relevant market; and the impact of the relief on the rights of third parties."[91] Despite the fact that *Paradise* was a remedial case and did not involve affirmative action to achieve diversity, these factors have since guided the narrow tailoring analysis of many courts when evaluating voluntary desegregation programs in the K-12 context.[92]

Two years following *Paradise*, in *City of Richmond v. J.A. Croson Co.*,[93] the Supreme Court grappled with a Richmond, Virginia plan designed to remedy past discrimination.[94] The city's plan required prime contractors to award at least thirty percent of construction subcontracts to minority businesses.[95] In *Croson*, the Court defined the purpose of strict scrutiny, explaining that "the means chosen [must] 'fit' [the] compelling goal so closely that there is little or no possibility that the motive for the classification [is] illegitimate racial prejudice or stereotype."[96] Holding that strict scrutiny applies to all laws that create classifications,[97] the Court went on to strike down the plan for lacking a compelling state interest.[98]

The Court revisited the issue of affirmative action in 1995 in *Adarand Constructors, Inc. v. Pena*.[99] Adarand, a subcontractor on highway projects, challenged the Department of Transportation's policy of providing financial incentives to prime contractors who hired "'socially and economically disadvantaged individuals'" as subcontractors.[100] The

90. *Id.* at 167 (plurality opinion).

91. *Id.* at 171 (plurality opinion).

92. *See, e.g.*, *Tuttle*, 195 F.3d at 706; Eisenberg *ex rel.* Eisenberg v. Montgomery County Pub. Sch., 197 F.3d 123, 130-33 (4th Cir. 1999).

93. 488 U.S. 469 (1989).

94. *Id.* at 478. The city determined that low minority participation in the city's construction contracts was based on discrimination despite a lack of direct evidence that the city or its prime contractors had ever discriminated against minority-owned subcontractors. *Id.* at 479-80.

95. *Id.* at 477. The plan defined minority businesses as those that were owned and controlled by at least fifty-one percent minority group members. *Id.* at 478.

96. *Id.* at 493.

97. *Id.* at 493-94.

98. *Id.* at 505 (finding that the city did not demonstrate adequate need for remedial action). Specifically, the Court found that remedying the present effects of past discrimination did not represent a compelling government interest. *Id.* at 499.

99. 515 U.S. 200 (1995).

100. *Id.* at 205-06. Adarand specifically pointed to the fact that it had the low bid which would have been accepted if the prime contractor had not received additional payment for hiring a minority subcontractor. *Id.* at 205-06.

lower courts had applied an intermediate standard of review in granting the defendant's summary judgment.[101] The Supreme Court disagreed, however, declaring that "*all* racial classifications . . . must be analyzed by a reviewing court under strict scrutiny."[102] The Court also acknowledged that the "fundamental purpose" of strict scrutiny requires that the court take "'relative differences' into account,"[103] emphasizing that strict scrutiny does not foreclose governments from taking race-based actions.[104]

D. Challenges to Voluntary Integration Plans in K-12 Settings

*1. Pre-*Grutter *and* Gratz *Cases*

The Second Circuit most recently addressed the use of race in a student assignment plan in *Brewer v. West Irondequoit Central School District*.[105] In *Brewer*, the district participated in a voluntary interdistrict transfer plan with the Rochester School District.[106] The goal was to reduce the racial isolation resulting from segregated housing patterns in urban Rochester.[107] The court noted that only minority pupils were allowed to transfer from "predominantly minority city schools" to participating suburban schools.[108]

In *Brewer*, the court held that the district's goal of reducing racial isolation to ameliorate de facto segregation resulting from housing patterns was a compelling interest.[109] As support for its holding, the court cited previous decisions within the circuit upholding race-based policies designed to foster integration[110] as well as support from the Supreme

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101. *Id.* at 237 (explaining that the court of appeals found the government's program to be narrowly tailored to a significant government purpose rather than applying the more stringent compelling interest standard).

102. *Id.* at 227 (emphasis added). The Court went on to remand the case to the court of appeals for determination under the appropriate standard of review. *Id.* at 237.

103. *Id.* at 228.

104. *See id.* at 237.

105. 212 F.3d 738 (2d Cir. 2000).

106. *See id.* at 741-43. The district, a suburb or Rochester, voluntarily participates in the program along with five other suburban districts. *Id.*

107. *See id.* at 742.

108. *Id.* In addition, the court observed that "non-minority students [could] transfer from suburban schools to city schools provided that their transfers '[did] not negatively affect the racial balance of the receiving school.'" *Id.*

109. *Id.* at 752.

110. *See id.* at 749-50; Parent Ass'n of Andrew Jackson High Sch. v. Ambach (Andrew Jackson II), 738 F.2d 574, 577 (2d Cir. 1984) ("'[T]o promote a more lasting integration is a sufficiently compelling purpose to justify as a matter of law excluding some minority students from schools of their choice.'" (quoting Parent Ass'n of Andrew Jackson High Sch. v. Ambach (Andrew Jackson I), 598 F.2d 705, 719 (2d Cir. 1979)); *Andrew Jackson I*,

Court's desegregation jurisprudence.[111] After concluding that the state demonstrated a compelling interest, the court went on to find that "[i]f reducing racial isolation is . . . a constitutionally permissible goal . . . then there is no more effective means of achieving that goal than to base decisions on race."[112]

Prior to *Brewer*, the Fourth Circuit in 1999 addressed the use of race-based policies in two cases concerning admission policies related to specialized programs available to all students.[113] Without the benefit of the Supreme Court's decisions in *Grutter* and *Gratz*, the court looked to *Bakke* and *Paradise* for guidance.[114] In both cases, the court struck down the district's admissions policy on narrow tailoring grounds.[115]

In *Tuttle v. Arlington County School Board*,[116] the Fourth Circuit considered a challenge to a school district's admission policy used for three specialized schools designed to "teach students in a 'traditional' format."[117] Initially, the admissions policy allowed unrestricted applications to the schools, but implemented a weighted lottery, which included diversity as a factor, when schools became oversubscribed.[118]

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598 F.2d at 717-21 (holding that as a matter of law the sate has a compelling interest in ensuring school's are integrated). These cases involved a New York City school which saw its minority enrollment soar from eighteen percent to over ninety-nine percent in a twenty-year period. *Andrew Jackson II*, 738 F.2d at 576. In an attempt to stem the tide of segregation, the district initiated a plan that permitted minority student transfers to other schools so long as the White enrollment at the receiving school was above a fifty percent "tipping point" that the district believed would trigger resegregation. *See id.* at 576-77. In addition, the plan limited transfers to those that would not decrease the receiving school's racial balance by more than four percent in a year. *Id.* at 577. Although the court recognized reducing racial isolation as a compelling interest in both cases, it did not reach a definitive ruling and remanded both cases to determine whether specific aspects of the plan were necessary. *See id.* at 583; *Andrew Jackson I*, 598 F.2d at 720-21.

111. *See Brewer*, 212 F.3d at 750.

112. *Id.* at 752. The court distinguished the district's goal of addressing racial isolation from the goal of attaining "true diversity." *Id.* at 752-53. The court asserted that cases involving a more broadly defined goal of "true diversity" were not applicable to instances where a program's goal was to ameliorate *racial* isolation. *Id.*

113. *See* Tuttle v. Arlington County Sch. Bd., 195 F.3d 698, 700-01, 706 (4th Cir. 1999); Eisenberg *ex rel.* Eisenberg v. Montgomery County Pub. Sch., 197 F.3d 123, 130-35 (4th Cir. 1999).

114. *Tuttle*, 195 F.3d at 707; *Eisenberg*, 197 F.3d at 133.

115. *Tuttle*, 195 F.3d at 707; *Eisenberg*, 197 F.3d at 133.

116. 195 F.3d 698 (4th Cir. 1999).

117. *Id.* at 700-01. These schools operated as an alternative to neighborhood schools and availability was limited. *Id.* The policy was designed "'to prepare and educate students to live in a diverse, global society' by 'reflect[ing] the diversity of the community.'" *Id.* (alteration in orginal).

118. *See id.* at 701-02. Under the admissions plan, students with siblings already attending the school were offered admission. *Id.* at 702. If the applicant pool failed to match the district's diversity factors to within fifteen percent of the county population

Without deciding the issue, the *Tuttle* court assumed that the state had a compelling interest and instead focused its attention on narrow tailoring.[119] Applying the factors from *Paradise*, the court held that the weighted lottery was not narrowly tailored.[120] The court again focused on numerical relationships, interpreting the lottery as a means for the district to achieve racial balance proportional to the district average, and holding that the policy resulted in impermissible racial balancing.[121]

The Fourth Circuit also confronted admission to a specialized program in *Eisenberg v. Montgomery County Public Schools*, considering the district's policy on transfers to magnet schools.[122] Under the plan, students were assigned to a neighborhood school but could voluntarily request transfer to a magnet program.[123] Diversity was one factor the district used in approving transfers.[124] The parents of a White student

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percentages, the weighted lottery was used. *Id.* The diversity factors used were "(1) whether the applicant was from a low-income or special family background, (2) whether English was the applicant's first or second language, and (3) the racial or ethnic group to which the applicant belonged." *Id.* at 701. The lottery was structured so the underrepresented groups had an increased probability of admission. *Id.*

119. *See id.* at 705 (stating that "[u]ntil the Supreme Court provides decisive guidance, we will assume . . . that diversity may be a compelling governmental interest"). Notably, both *Eisenberg* and *Tuttle* were decided prior to the Supreme Court's decision in the Michigan affirmative action cases. Arguably, the Fourth Circuit would have considered the Michigan decisions as decisive guidance on whether diversity could be a compelling interest. *See* Comfort v. Lynn Sch. Comm., No. 03-2415, 2004 U.S. App. LEXIS 21791, at *4-5 (1st Cir. Oct. 20, 2004) (holding diversity to be a compelling interest in a K-12 setting in light of the Supreme Court's decision in *Grutter*), *withdrawn and reh'g en banc granted*, 2004 U.S. App. LEXIS 24662 (1st Cir. Nov. 24, 2004).

120. *Tuttle*, 195 F.3d at 706-07.

121. *Id.* As explanation, the court stated:

> Although the Policy does not explicitly set aside spots solely for certain minorities, it has practically the same result by skewing the odds of selection in favor or certain minorities. Even if the final results may have some statistical variation, what drives the entire weighted lottery process . . . is racial balancing.

Id. at 707. In addition to finding the policy to be racial balancing, the court also found that the district had not adequately considered race-neutral alternatives, that the policy was not flexible enough, and that the burden on third parties was too great. *Id.* at 706-07.

122. Eisenberg *ex rel.* Eisenberg v. Montgomery County Pub. Sch., 197 F.3d 123, 124-25 (4th Cir. 1999). The court described magnet schools as those schools "offering enriched curricula emphasizing specific areas; e.g., science, math, or a foreign language." *Id.* at 125 n.3.

123. *See id.* at 125.

124. *See id.* at 126-27. The transfer policy specified that "[t]ransfers that negatively affect diversity are usually denied." *Id.* at 126. In implementing the plan, the county assigned each racial/ethnic group within a school a category. *Id.* at 126-27. Category one included groups whose percentage was higher than the countywide percentage and continued to increase over time. *Id.* at 126. Transfers typically were not allowed. *Id.* Category two included groups whose percentages were higher than the county average but had been declining. *Id.* Some transfers were permitted. *Id.* Category three included

challenged the policy when their child was denied admission to a district magnet school under the diversity policy.[125]

Finding the transfer program outside the scope of the narrowly tailored analysis, the court struck down the policy.[126] Because the program was "administered with an end toward maintaining . . . [a] racial balance in each school" and was equivalent to the percentage of each race throughout the entire system,[127] the court declared it to be "by definition, racial balancing."[128] As in *Tuttle*, the court did not reach a decision on whether the state had a compelling interest.[129]

In a 1998 case, *Wessman v. Gittens*,[130] the First Circuit addressed a high school admissions program distinctly different from magnet school programs and more analogous to the higher education context.[131] Much like the Michigan cases, the program in *Wessman* involved selective admission to a prestigious, highly competitive school.[132] In determining admission, half of the positions were allocated based on applicants' composite scores determined by grade point average and test scores.[133] The other half were allocated based on racial and ethnic guidelines.[134]

Evaluating the program under strict scrutiny, the First Circuit found the plan was not justified on the basis of diversity or as a means of remedying past discrimination.[135] The court did not decide whether diversity could serve as a compelling interest, but assumed that *Bakke* controlled and that some forms of diversity could be sufficiently

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groups below the county average which had tended to decline over time. *Id.* Category four included groups below the county average which had tended to increase. *Id.* at 127.

125. *See id.* at 124. Specifically, the district denied the student's transfer request because his assigned school had a declining White enrollment that was significantly below the district average, and his transfer would have contributed to the school becoming more racially isolated. *Id.* at 127.

126. *See id.* at 131, 133.

127. *Id.*

128. *Id.*

129. *Id.* The district advanced two interests: diversity and reducing racial isolation. *Id.* at 129. The court saw these interests as "one and the same." *Id.* at 130. Without deciding, the court assumed that "diversity may be a compelling governmental interest." *Id.*

130. 160 F.3d 790 (1st Cir. 1998).

131. *Compare Wessmann*, 160 F.3d at 793 (considering merit-based criteria), *with* Gratz v. Bollinger, 539 U.S 244, 255 (2003) (involving an undergraduate admissions plan that used merit-based criteria as a factor).

132. *Wessmann*, 160 F.3d at 791. The school involved in this case, the Boston Latin School, was one of three "examination" schools operated by the city of Boston. *Id.*

133. *Id.* at 793.

134. *Id.* In applying these guidelines, officials first determined the proportions of five different categories within the remaining pool of qualified applicants. *Id.* The remaining positions were then filled in rank order, but the number of students taken had to match the proportion within the remaining pool of qualified applicants. *Id.*

135. *Id.* at 800.

compelling.[136] In striking down the plan, however, the court found that the district's use of diversity as a rationale for its admissions policies was merely a pretext for racial balancing.[137]

*2. Post-*Grutter *and* Gratz *Cases*

Recently, the First and Ninth Circuits confronted two cases related to general student assignment plans in K-12 education.[138] Applying the standards the Supreme Court enunciated in *Grutter* and *Gratz*, both courts recognized diversity as a compelling interest.[139] However, both courts also struck down the plans after applying the narrow tailoring guidelines the Court outlined in *Grutter*.[140] Exemplifying the volatility of this issue, each circuit has since vacated its original decision and granted a rehearing en banc.[141] The First Circuit heard arguments on February 7, 2005,[142] and the Ninth Circuit is expected to address the issue by the middle of 2005.[143]

The First Circuit confronted the issue of voluntary K-12 student assignment policies in *Comfort v. Lynn School Committee*,[144] invalidating the student transfer program of the Lynn School District in

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136. *Id.* at 796 ("[W]e assume arguendo—but we do not decide today—that *Bakke* remains good law and that some iterations of 'diversity' might be sufficiently compelling . . . to justify race-conscious actions.").

137. *Id.* at 798. Commenting on the plan's use of racial and ethnic guidelines, the court stated:

> Although Justice Powell endorsed diversity as potentially comprising a compelling interest, he warned that a proper admissions policy would be such that if an applicant "loses out" to another candidate, he will "not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname."

Id. at 800 (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 318 (1978)).

138. *See* Comfort v. Lynn Sch. Comm., No. 03-2415, 2004 U.S. App. LEXIS 21791 (1st Cir. Oct. 20, 2004), *withdrawn and reh'g en banc granted*, 2004 U.S. App. LEXIS 24662 (1st Cir. Nov. 24, 2004); Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1, 377 F.3d 949 (9th Cir. 2004), *vacated and reh'g en banc granted*, 395 F.3d 1168 (9th Cir. 2005).

139. *Comfort*, No. 03-2415, 2004 U.S. App. LEXIS 21791, at *31; *Parents Involved in Cmty. Sch.*, 377 F.3d at 964.

140. *Comfort*, No. 03-2415, U.S. App. LEXIS 21791, at *61; *Parents Involved in Cmty. Sch.*, 377 F.3d at 969-70.

141. *Parents Involved in Cmty. Sch.*, 395 F.3d at 1168; *Comfort*, 2004 U.S. App. LEXIS 24662, at *1.

142. *Comfort*, 2004 U.S. App. LEXIS 24662, at *1.

143. *See* Linda Shaw, *School Battle To Get Another Hearing; Racial Tiebreaker in Seattle is Issue–2nd Appeals Court Panel To Hear Case*, SEATTLE TIMES, Feb. 2, 2005, at B1, LEXIS, News Library, Seattm File.

144. No. 03-2415, 2004 U.S. App. LEXIS 21791 (1st Cir. Oct. 20, 2004), *withdrawn and reh'g en banc granted*, 2004 U.S. App. LEXIS 24662 (1st Cir. Nov. 24, 2004).

Massachusetts.[145] Under the Lynn plan, each student was entitled to attend his or her neighborhood school.[146] Students could transfer beyond their neighborhood school if the transfer assisted the district's desegregation efforts or if the transfer had a neutral effect.[147] Acknowledging that the Lynn plan "aspire[d] to create many of the same benefits that were cited approvingly by the *Grutter* Court," the court recognized diversity as a compelling interest in a K-12 setting.[148] However, the First Circuit disagreed with the district court on the matter of narrow tailoring, finding that the plan did not conform to the guidelines set forth in *Grutter*.[149]

Applying the *Grutter* factors, the First Circuit focused much of its attention on the Court's requirement that university admissions programs avoid quotas and be flexible and non-mechanical in nature.[150]

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145. *Comfort*, No. 03-2415, 2004 U.S. App. LEXIS 21791, at *3-6. The State of Massachusetts has since petitioned the First Circuit for an en banc review of the decision. *State Appeals Lynn Schools Ruling*, BOSTON GLOBE, Nov. 4, 2004, at B2, LEXIS, News Library, Bglobe File. Both parties to the case believe that the case is likely headed to the Supreme Court. Anand Vaishnav, *Court Eyes Race in School Assigning: Lynn Families Sue for Choice*, BOSTON GLOBE, Aug. 6, 2004, at B1, LEXIS, News Library, Bglobe File. It is worth noting that prior to implementation of the Lynn plan, the district was beset by racial tension. Appellees Brief at 9-11, *Comfort* (No. 03-2415). Most schools were predominately White, and those with high minority enrollments offered inferior educational opportunities. *Id.* at 10. After the plan was implemented, the district realized improved racial relations and academic performance. *Id.*

146. *Comfort*, 2004 U.S. App. LEXIS 21791, at *9.

147. *Id.* at *10-11. To provide a framework for considering whether a transfer assisted desegregation, schools were classified as racially balanced, racially isolated, or racially imbalanced. *Id.* A school was racially balanced if its minority enrollment was within a set percentage of the overall minority enrollment in the district (fifteen percent for elementary schools and ten percent for middle and high schools). *Id.* at *10. If the minority enrollment exceeded this range, the school was considered racially imbalanced. *Id.* at *10-11. If the number of White students fell below the target range, a school was considered racially isolated. *Id.* at *10. Transfers were deemed to assist desegregation if they improved the racial balance of the sending or receiving school. *Id.* at *11. Transfers were not allowed when they negatively affected a racial imbalance at the sending or receiving school. *Id.*

148. *Id.* at *42. Although the school district asserted separate interests of diversity and avoiding racial isolation, the court analyzed the interests as one, stating that "[w]hether stated as achieving the benefits of intergroup contact and critical mass or avoiding the pitfalls of racial isolation, the central idea is that students—all students—are better off in racially diverse schools." *Id.* at *37.

149. *Id.* at *43-45. In evaluating whether the Lynn plan was narrowly tailored, the court referred to the *Paradise* factors as a broad formulation of the narrow-tailoring requirement before turning to *Grutter* and *Gratz*. *Id.* at *43-44. Acknowledging that the Supreme Court has not yet ruled on race-based policies in K-12 settings, the First Circuit asserted that the Michigan cases "furnish some relevant guideposts for how the narrow-tailoring inquiry should function . . . in the K-12 setting." *Id.* at *44-45.

150. *Id.* at *50.

The court recognized that K-12 settings provide a different context than university admissions, acknowledging that the race-based provisions of the Lynn plan "neither skew a competitive process nor substitute race as a proxy for an applicant's merit."[151] Although the court stated that the Lynn plan did not constitute a "pure quota system" and the "question [was] close,"[152] it found that the Lynn plan was excessively mechanical because it did not provide for individualized consideration and made race the decisive factor in determining transfers.[153]

The First Circuit also evaluated the Lynn plan on the other *Grutter* factors.[154] Analyzing the undue burden factor, the court found the plan's focus on proportional representation went beyond what was necessary to achieve "a critical mass" of minority students and therefore constituted an undue burden.[155] The court also found that despite considering a number of race-neutral alternatives, the district failed adequately to consider policies geared toward proportionality and not attaining a "critical mass."[156] In addition, the court found that there were inadequate measures in place for periodic review of the plan so as to limit its duration.[157]

The Ninth Circuit confronted similar issues in *Parents Involved in Community Schools v. Seattle School District, No. 1*.[158] A group of parents

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151. *Id.* at *49.

152. *Id.* at *50-51.

153. *Id.* The court indicated that the Lynn plan's use of race could "foster the unwarranted presumption that that all members of a given racial group present the same viewpoint" and "breed cross-racial tension." *Id.* at *50. In determining that the plan was overly mechanical in nature, the court stated that it included "no individualized consideration of a student's qualifications, no head-to-head comparison of one student to another, and no weight given to a student's other potential contributions to diversity." *Id.* at *47.

154. *Id.* at *51-62.

155. *Id.* at *51-56. The court cited expert testimony indicating that "critical mass" required approximately twenty percent of a given group as compared with the Lynn plan's range that would require a higher percentage. *Id.* at *54-55. The district contended that the benefits of diversity increased the closer a school's racial balance is to the racial composition of the community. *Id.* at *53. However, the court found that the plan went too far and thus became an excessive burden on those students denied transfers. *Id.* at *53-55.

156. *Id.* at *52-53. The court listed six alternatives that the district considered, finding the efforts "laudable." *Id.* at *56-58. However, the court determined that because the district only considered alternatives that would result in racial proportions in excess of the critical mass of approximately twenty percent indicated by the district's expert, the consideration of race-neutral alternatives was geared toward the wrong goal. *Id.* at *58.

157. *Id.* at *60-61. Although the district continually monitored demographic data and adjusted its plan accordingly, the court took issue with the lack of a periodic review to determine whether the program remained necessary. *Id.*

158. 377 F.3d 949 (9th Cir. 2004) (2-1 decision).

challenged the Seattle School District's use of race as a tiebreaker in its high school assignment plan.[159] Due to Seattle's racially-segregated housing patterns,[160] the district adopted an open choice plan rather than assigning students to neighborhood schools.[161] Where more students wanted to attend a particular school than space was available, the district implemented a series of tiebreakers, one of which was a "racial integration tiebreaker" that took race into account.[162]

Although the Ninth Circuit recognized that the district had established a compelling interest in diversity,[163] the court determined that the use of race was not narrowly tailored to further that interest.[164] Applying the narrow tailoring analysis of *Grutter*, the court found the plan was "virtually indistinguishable from a pure racial quota" because it used a computer program to determine a percentage range with "both a floor *and* a ceiling."[165] In addition, the court found that the district did not adequately consider race-neutral alternatives[166] and that the tiebreaker adversely affected third parties.[167]

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159. *Id.* at 956-57.

160. *Id.* at 954 n.4 (indicating that Seattle's minority population is concentrated in the southern half of the city, while nearly seventy percent of the White population lives in the northern half of the city).

161. *Id.* at 955. The plan allowed students to select from any of the ten high schools in the district. *Id.* Students ranked the high schools in order of preference and the district attempted to assign students to the highest ranked school with available space. *Id.*

162. *Id.* When space became an issue at a school it was considered "oversubscribed." *Id.* In the tiebreaker system, preference was first given to students with siblings already attending the requested school. *Id.* The second tiebreaker was an "integration tiebreaker" determined by whether the student's race would correct racial imbalance in the school. Brief of Appellees at 11-12, *Parents Involved in Cmty. Sch.* (No. 01-35450), *available at* 2001 WL 34090888. This tiebreaker became a factor where the school's enrollment was plus or minus fifteen percent of the district's overall racial demographic of sixty percent minority students and forty percent White students. *Id.* at 3-4. For instance, if a school had fewer than forty-five percent minority students and more than fifty-five percent White, minority students were assigned ahead of White students. *Id.* at 4. If a school had fewer than twenty-five percent White students and more than seventy percent minority students, White students were assigned ahead of minority students. *Id.* Once a school fell within the acceptable range for being racially balanced, the next tiebreaker, distance from the student's home to school, was applied. *Id.* at 12.

163. *Parents Involved in Cmty. Sch.*, 377 F.3d at 963-64 (recognizing that the district's interests related to diversity, and reducing racial isolation fell "comfortably within the diversity rationale" of *Grutter*).

164. *Id.* at 969.

165. *Parents Involved in Cmty. Sch.*, 377 F.3d at 969.

166. *Id.* at 970-75 (asserting that although the school district did examine alternatives, it did not earnestly consider several options). *Contra* Brief of Appellees at 60-61, *Parents Involved in Cmty. Sch.* (No. 01-35450), *available at* 2001 WL 3409088 (asserting that race-neutral alternatives examined by the school board would have defeated the central goals of the school assignment plan). The dissent in this case asserted that all alternatives were seriously considered but rejected for legitimate reasons, stating that "[w]hen race is a

In addition to the First and Ninth Circuits, a district court in Kentucky recently applied the *Grutter* standards to a student assignment plan using race as a factor.[168] In *McFarland v. Jefferson County Public Schools*,[169] the court addressed a voluntary integration plan implemented after the district had been released from a court-ordered desegregation plan.[170] As a central component, the Jefferson County plan required that schools seek a broad range of Black student enrollment between fifteen and fifty percent.[171] Other factors, including place of residence, program popularity, and school capacity were considered prior to any consideration of race; however, where the racial composition of a school was at either end of the range, race could determine a child's school assignment.[172]

After finding that the district established a compelling interest,[173] the *McFarland* court examined each of the *Grutter* narrow-tailoring factors and upheld the Jefferson County plan.[174] Holding that the plan did not constitute a quota,[175] the court distinguished the school district from the law school, downplaying the need for individualized review since the

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principal element of the government's compelling interest, then race-neutral alternatives seldom will be equally efficient." *Parents Involved in Cmty. Sch.*, 377 F.3d at 1008-10 (Graber, J., dissenting).

167. *Parents Involved in Cmty. Sch.*, 377 F.3d at 975 (arguing that the district was presented with evidence that it could have expanded the diversity band without sacrificing the benefits of diversity).

168. McFarland v. Jefferson County Pub. Sch., 330 F. Supp. 2d 834, 848-49 (W.D. Ky. 2004).

169. 330 F. Supp. 2d 834 (W.D. Ky. 2004).

170. *Id.* at 836. The Sixth Circuit initially ordered the district court to formulate a desegregation plan in 1973. *Id.* at 841. In 2000, a Kentucky district court dissolved the desegregation decree and ordered the district to end the use of racial quotas and reevaluate its admissions procedures for its magnet schools. Hampton v. Jefferson County Bd. of Educ., 102 F. Supp. 2d 358, 382 (W.D. Ky. 2000).

171. *McFarland*, 330 F. Supp. 2d at 842 (reflecting a range above and below the racial composition of the entire district).

172. *Id.*

173. *Id.* at 850 ("[T]he Court has no doubt that Defendants have proven that their interest in having integrated schools is compelling by any definition.").

174. *Id.* at 856-61. Although the court approved the district's overall student assignment plan, it did invalidate a subset of the plan which applied to the district's "traditional schools." *Id.* at 862-64 (holding that the plan was not narrowly tailored because of its use of separate assignment tracks and enrollment lists that made race a defining feature of a student's application). The results of Jefferson County's integration plan have been positive, with over ninety percent of high school juniors in the district reporting that they were comfortable working with students of other races. *See* FRANKENBERG ET AL., *supra* note 3, at 13.

175. *McFarland*, 330 F. Supp. 2d. at 857-58.

district's plan did not involve competition and comparative criteria.[176] Considering the undue harm factor of *Grutter*, the court again distinguished the public school setting from higher education, pointing out that "the consequences of assigning students to various public schools are quite different from denying an applicant admission to a selective college or job placement."[177] In reaching its decision, the *McFarland* court approached the issues differently from the First and Ninth Circuits, viewing voluntary integration plans as an extension of the Supreme Court's desegregation jurisprudence[178] and accepting the promise of *Brown* as a key value of the American educational system.[179]

II. THE CHALLENGE OF STRICT SCRUTINY IN K-12 SETTINGS

A. Standard of Review for Race-Based Classifications

Because the Supreme Court has not addressed the use of race-based policies in the K-12 context, much remains unsettled.[180] Nevertheless, the standard of review is clear: *any* racial classification will merit strict scrutiny.[181] Although some civil rights advocates and at least one district court have suggested an intermediate level of review in the K-12 context,[182] lower courts have generally followed the Supreme Court's guidance in their decisions on race-based policies in public schools.[183]

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176. *Id.* at 858-59 (finding that the use of race in the plan constituted a permissible "tipping factor" in determining student assignments). The court explained:

> Unlike the law school, JCPS does not deny anyone the benefits of an education. Unlike the law school, JCPS does not have the goal of creating elite and highly selective school communities . . . [and] does not involve weighing comparative criteria in a competitive manner. Rather than excluding applicants, the Board's goal is to create more equal school communities for educating all students.

Id. at 859.

177. *Id.* at 860.

178. *Id.* at 851.

179. *Id.* at 852 ("*Brown*'s original moral and constitutional declaration has survived to become a mainstream value of American education and [interests in integrated schools] are entirely consistent with these . . . values. They reinforce our intuitive sense that education is about a lot more than just the 'three Rs.'").

180. *See* Suzanne E. Eckes, *How Will the* Grutter *and* Gratz *Affirmative Action Decisions Impact K-12 Diversity Plans?*, 29 T. MARSHALL L. REV. 1, 16 (2003) ("[U]ntil we have a Supreme Court decision specifically addressing the K-12 arena, the constitutionality of race-conscious transfers and admissions decisions in grade schools will remain uncertain.").

181. Grutter v. Bollinger, 539 U.S. 306, 326 (2003) (stating that "all 'governmental action based on race . . . should be subjected to detailed judicial inquiry'" (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995))).

182. *See* Comfort *ex rel.* Neumyer v. Lynn Sch. Comm., 283 F. Supp. 2d 328, 366 (D. Mass 2003) ("[A]lthough I am convinced by amici that intermediate scrutiny is the correct test to apply here, my analysis below will apply the more rigorous standard."), *aff'd in part*

Despite the strong likelihood of a strict scrutiny standard of review, school districts are not foreclosed from using race as a factor.[184] The Court has stated that strict scrutiny is not "strict in theory, but fatal in fact,"[185] and is intended "to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant the use of a highly suspect tool."[186] Strict scrutiny entails a careful and flexible analysis that takes "relevant differences into account" and allows race-based policies when sufficiently justified.[187] Just as the University of Michigan Law School's policies overcame strict scrutiny, K-12 public schools have a strong basis on which to pass strict scrutiny as well.[188]

At issue remains how, after *Grutter*, courts should apply strict scrutiny in K-12 settings.[189] What state interests are compelling?[190] What factors must courts consider in determining whether policies are narrowly tailored to achieve a compelling state interest?[191] These questions are at the forefront of the developing controversy related to student assignments in the K-12 context.

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and rev'd in part sub nom. Comfort v. Lynn Sch. Comm., No. 03-2415, 2004 U.S. App. LEXIS 21791 (1st Cir. Oct. 20, 2004), *withdrawn and reh'g en banc granted*, 2004 U.S. App. LEXIS 24662 (1st Cir. Nov. 24, 2004); *see also* Amended Brief of Amici Curiae at 7-8, Comfort *ex rel.* v. Lynn Sch. Comm., 283 F. Supp. 2d 328 (D. Mass. 2003) (No. 99-CV-11811 NG) ("While it is true that courts . . . use sweeping language to suggest that *any* consideration of race by a governmental actor must satisfy strict scrutiny . . . this standard is in fact not as broadly applicable.").

183. *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1, 377 F.3d 949, 960 (9th Cir. 2004), *vacated and reh'g en banc granted*, 395 F.3d 1168 (9th Cir. 2005); *McFarland*, 330 F. Supp. 2d at 837.

184. *See Grutter*, 539 U.S. at 327 ("When race-based action is necessary to further a compelling governmental interest, such action does not violate the constitutional guarantee of equal protection so long as the narrow-tailoring requirement is also satisfied.").

185. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995).

186. City of Richmond v. J.A. Croson Co., 488 US. 469, 493 (1989). The Court reiterated this sentiment in *Grutter*, stating: "Not every decision influenced by race is equally objectionable, and strict scrutiny is designed to provide a framework for carefully examining the importance and sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context." *Grutter*, 539 U.S. at 327.

187. *Adarand*, 515 U.S. at 228.

188. *See McFarland*, 330 F. Supp. 2d at 859-62 (acknowledging the contextual distinctions between higher education and K-12 settings in upholding the district's student assignment plan).

189. *See* Goodwin Liu, Brown, Bollinger, *and Beyond*, 47 HOW. L.J. 705, 755 (2004) (explaining that *Grutter* leaves open the question of whether race-conscious policies are permissible in K-12 settings).

190. *See* discussion *infra* Part II.B.

191. *See* discussion *infra* Part II.C.

B. Compelling State Interests in K-12 Public Schools: Extending the Scope of the Higher Education Diversity Interest

The Michigan affirmative action cases bring much needed clarity to the question of what interests may be compelling. Prior to the Supreme Court's decision in *Grutter*, lower courts were reluctant to fully endorse diversity as a compelling state interest.[192] The Fifth Circuit went so far as to claim past discrimination was the only rationale for using racial classifications.[193] Until the ample clarification in the *Grutter* decision, lower courts remained reluctant to support diversity as a compelling state interest due to the lack of guidance provided by the Supreme Court after *Bakke*.[194] After the Court acknowledged diversity as a compelling state interest, lower courts began to embrace diversity as a compelling state interest in higher education admissions.[195]

While *Grutter* focused on higher education, its central principles are transferable to the K-12 context.[196] By relying on K-12 decisions, including *Brown*, *Grutter* exemplifies the validity of a diversity interest in public elementary and secondary schools.[197] Recent federal court decisions have supported an extension of *Grutter* to K-12 situations.[198] In *Parents Involved in Community Schools*, the Ninth Circuit strongly backed an extension of the Court's higher education diversity rationale to the K-12 context, stating that "*Grutter* plainly accepts that constitutionally compelling internal educational and external societal benefits flow from the presence of racial and ethnic diversity in

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192. *See* discussion *supra* notes 119, 129, 136 and accompanying text.

193. Hopwood v. Texas, 78 F.3d 932, 944 (5th Cir. 1996).

194. 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 . . . .").

195. *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1, 377 F.3d 949, 963-64 (9th Cir. 2004), *vacated and reh'g en banc granted*, 395 F.3d F.3d 1168 (9th Cir. 2005); Petit v. City of Chicago, 352 F.3d 1111, 1114-15 (7th Cir. 2003); McFarland v. Jefferson City Pub. Sch., 330 F. Supp. 2d, 834, 852-53 (W.D. Ky. 2004).

196. *See Parents Involved in Cmty. Sch.*, 377 F.3d at 964 ("[W]e cannot identify a principled basis for concluding that the benefits the Court attributed to the existence of educational diversity in universities cannot similarly attach in high schools.").

197. *Grutter*, 539 U.S. at 331 ("This Court has long recognized that 'education . . . is the very foundation of good citizenship.'" (omission in original) (quoting Brown v. Bd. of Educ., 347 U.S. 483, 493 (1958))). The Court added, "We have repeatedly acknowledged the overriding importance of preparing students for work and citizenship, describing education as pivotal to 'sustaining our political and cultural heritage' with a fundamental role in maintaining the fabric of society." *Id.* (quoting Plyler v. Doe, 457 U.S. 202, 221 (1982)).

198. *See, e.g.*, *McFarland*, 330 F. Supp. 2d at 853 (finding that "the benefits of racial tolerance and understanding are equally as 'important and laudable' in public elementary and secondary education as in higher education" (quoting *Grutter*, 539 U.S. at 330)).

educational institutions."[199] In addition, the First Circuit recognized an extension of a diversity interest to K-12 settings with its decision in *Comfort*.[200]

While the diversity interest outlined by the *Grutter* Court transfers to the K-12 context,[201] the nature of K-12 settings is quite different from other contexts.[202] A key goal of diversity in higher education is attaining a variety of viewpoints.[203] However, in the K-12 context, the diversity interest extends well beyond providing a stimulating academic environment. It encompasses broader goals of exposing children to "interaction with peers of other races,"[204] which the Court has accepted as well within the domain of public schools.[205] Such interaction helps schools "cultivate positive racial attitudes and teach children how to think critically so that they can live and work in increasingly diverse

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199. *Parents Involved in Cmty. Sch.*, 377 F.3d at 964.

200. Comfort v. Lynn Sch. Comm., No. 03-2415, 2004 U.S. App. LEXIS 21791, at *40 (1st Cir. Oct. 20, 2004) ("There is no reason to believe that [diversity] interests are substantially more potent in the context of higher education than in the context of elementary and secondary education."), *withdrawn and reh'g en banc granted*, 2004 U.S. App. LEXIS 24662 (1st Cir. Nov. 24, 2004).

201. *See, e.g.*, *Parents Involved in Cmty. Sch.*, 377 F.3d at 964 (acknowledging diversity as a compelling interest in the high school context); *see also* David I. Levine, *Public School Assignment Methods After* Grutter *and* Gratz*: The View From San Francisco*, 30 HASTINGS CONST. L.Q. 511, 515-16 (2003) ("In all probability, a public elementary and secondary school district will have little trouble asserting a compelling governmental interest in a diverse student body under the *Grutter* and *Gratz* opinions.").

202. *See* Comfort *ex rel.* Neumyer v. Lynn Sch. Comm., 283 F. Supp. 2d 328, 381 n.90 (D. Mass. 2003) ("The value of a diverse classroom setting . . . does not inhere in the range of perspectives and experience that students can offer in discussions; rather, diversity is valuable because it enables students to learn racial tolerance by building cross-racial relationships."), *aff'd in part and rev'd in part sub nom.* Comfort v. Lynn Sch. Comm., No. 03-2415, 2004 U.S. App. LEXIS 21791 (1st Cir. Oct. 20, 2004), *withdrawn and reh'g en banc granted*, 2004 U.S. App. LEXIS 24662 (1st Cir. Nov. 24, 2004).

203. *See* Grutter v. Bollinger, 539 U.S. 306, 329 (2003) (acknowledging a university's interest in selecting students who will contribute to "the robust exchange of ideas" crucial to its mission).

204. *See Parents Involved in Cmty. Sch.*, 377 F.3d at 993 (Graber, J., dissenting); *see also Comfort* ex rel. *Neumyer*, 283 F. Supp. 2d at 376-77 ("If the compelling goal . . . is to train citizens to function in a multiracial world, actual intergroup racial contact is essential."). Research studies have demonstrated the benefits of cross-racial interaction on racial stereotypes. *See* Brief of the Civil Rights Project at Harvard University as Amicus Curiae at 16, *Comfort*, 2004 U.S. App. LEXIS 21791 (No. 03-2415).

205. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986) (indicating that the purpose of public schools is to "'inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation'" (quoting C. BEARD & M. BEARD, NEW BASIC HISTORY OF THE UNITED STATES 228 (1968))); Ambach v. Norwick, 441 U.S. 68, 76-77 (1979) (observing that one of the objectives of public education is "inculcating fundamental values necessary to the maintenance of a democratic political system").

communities."[206] Furthermore, the need for exposure to other races is more urgent in elementary and secondary schools, as the benefits of cross-racial interaction are most profound at younger ages.[207]

These differences highlight the need for a broader diversity interest in K-12 settings than in higher education contexts.[208] Several courts have

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206. Brief of Amici Curiae for the Council of the Great City Schools et al. in Support of Petition for Rehearing En Banc by Appellees at 9, *Parents Involved in Cmty. Sch.* (No. 01-35450). *See generally* Derek Black, *The Case for the New Compelling Government Interest: Improving Educational Outcomes*, 80 N.C. L. REV. 923, 950-54 (2002) (providing an overview of research on the benefits of cross-racial interaction in elementary and secondary schools).

207. *See* Susanne E. Dutton et al., *Racial Identity of Children in Integrated, Predominately White, and Black Schools*, 138 J. SOC. PSYCHOL. 41, 42 (1998). Research indicates that "[t]he early school years are crucial for the formation of the child's own racial identity as well as an understanding of prejudice and fairness." *Id.* At between five and eight years old children begin to form perceptions about their own identity and the differences between themselves and others. *Id.* By the time children reach eight to twelve years old, they begin to "internalize, to act upon, and, in turn, to perpetuate society's expectations." *Id.* Social science studies also indicate that children in integrated schools are more likely to choose opposite-race friends than are children in non-integrated schools. *Id.* at 50. In addition, both White and Black students in non-integrated schools are more likely to dislike persons of the opposite race than students in integrated schools. *Id.*; *cf. Grutter*, 539 U.S. at 347 (Scalia, J., dissenting). In his criticism of the need for diversity in law schools, Justice Scalia stated:

> For it is . . . essentially the same lesson taught to (or rather learned by, for it cannot be 'taught' in the usual sense) people three feet shorter and twenty years younger than the full-grown adults at the University of Michigan Law School, in institutions ranging from Boy Scout troops to public-school kindergartens.

Id.

208. *Parents Involved in Cmty. Sch.*, 377 F.3d at 994 (Graber, J., dissenting). As the dissent explained:

> Universities . . . are not . . . responsible for the welfare of the entire universe of their applicants . . . . Public school districts, on the other hand, must consider not only the affirmative effect that a student's assignment to a particular school will have on the level of diversity in that school, but also the concomitant effect of that assignment on the entire school system.

Id. (Graber, J., dissenting). Circuit Judge Graber went on to add that the Supreme Court's desegregation cases support the concept that "school districts have a prospective, even if not a remedial, interest in avoiding and ameliorating real, identifiable de facto racial segregation." *Id.* at 995.

School districts cannot change racially segregated housing patterns, but they can "shape educational environments that neutralize the effects of these patterns, to make certain that [they] are not determinative of a child's opportunity." *Comfort ex rel. Neumyer*, 283 F. Supp. 2d at 384. Research has shown that de facto segregation is a growing problem in America's schools. FRANKENBERG & LEE, *supra* note 2, at 27. Research by the Civil Rights Project at Harvard University indicates that

> [w]hile the public school enrollment reflects the country's growing diversity, our analysis of the nation's large school districts indicates a disturbing pattern of growing isolation. We find decreasing black and Latino exposure to white students is occurring in almost every large district as well as declining white

acknowledged the differences between higher education and K-12, but have argued for a separate compelling interest of reducing racial isolation.[209] However, other courts have been reluctant to recognize a separate compelling interest because the same concepts can be expressed as an extension of the diversity interest rather than as a separate concept.[210]

Brown and its progeny support a broader diversity interest as viewed through the lens of reducing racial isolation.[211] As the Second Circuit explained in *Brewer*, the Supreme Court has provided "strong support" for promoting a reduction in racial isolation.[212] This support is evidenced by the Court's statements in its desegregation cases indicating strong deference to school board policies.[213] Such statements, while not binding, have "never been disclaimed by the Supreme Court."[214] It would make

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> exposure to blacks and Latinos in almost one-third of large districts. Black and Latino students display high levels of segregation from white students in many districts. . . . [E]ven when white students are only a small percentage of total enrollment they tend to be concentrated in a few schools, which results in lower exposure of black and Latino students to white students . . . .

Id.

209. *E.g.*, Brewer v. W. Irondequoit Cent. Sch. Dist., 212 F.3d 738, 752 (2d Cir. 2000) (recognizing reducing racial isolation as a compelling interest); *Comfort ex rel. Neumyer*, 283 F. Supp. 2d at 375 (recognizing multiple compelling interests, including "promoting . . . diversity, increasing educational opportunities for all students . . . and ensuring student safety" as well as remedying the effects of racial isolation).

210. Comfort v. Lynn Sch. Comm., No. 03-2415, 2004 U.S. App. LEXIS 21791, at *35-37 (1st Cir. Oct. 20, 2004) (explaining that whether stated as reducing racial isolation or attaining diversity, the central tenet remains that students are better off in a diverse school), *withdrawn and reh'g en banc granted*, 2004 U.S. App. LEXIS 24662 (1st Cir. Nov. 24, 2004).

211. *See Brewer*, 212 F.3d at 750-51 (citing the Supreme Court's comments in support of voluntary integration programs in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), and *Washington v. School District No. 1*, 458 U.S. 457 (1982)).

212. *Brewer*, 212 F.3d at 750-51. Further supporting a diversity interest that incorporates reducing racial isolation, Congress has expressed support for voluntary integration in the No Child Left Behind Act. In its findings authorizing the Magnet Schools Assistance Program, Congress noted that "[i]t is in the best interests of the United States . . . [to] support . . . local educational agencies that are voluntarily seeking to foster meaningful interaction among students of different racial and ethnic backgrounds." 20 U.S.C. § 7231(a)(4) (Supp. 2001). Congress added that the purpose of the program is "to assist in the desegregation of schools . . . by providing financial assistance to eligible local educational agencies for . . . the elimination, reduction, or prevention of minority group isolation in elementary schools and secondary schools with substantial proportions of minority students." *Id.* § 7231(b)(1), (3).

213. *See* discussion *supra* Part I.B (describing the Supreme Court's indications of approval for voluntary integration plans).

214. *Brewer*, 212 F.3d at 750.

little sense that courts may order districts to remedy racial inequities in schools if they could not also act independently of court mandates.[215]

C. Finding the Right Approach to Narrow Tailoring

While *Grutter* helped clarify whether diversity can serve as a compelling interest, the application of narrow tailoring to K-12 situations appears far less certain.[216] Where K-12 student assignment plans have been struck down, courts have done so on the grounds that they were not narrowly tailored.[217] While *Grutter* and *Gratz* provided guidelines for narrow tailoring in higher education, the Court offered no indication of how or if courts should apply them in the K-12 context.[218]

In striking down K-12 student assignment plans, courts have often applied strict scrutiny more rigidly than the Supreme Court has indicated they should.[219] The Supreme Court has maintained that narrow tailoring "must be calibrated to fit the distinct issues raised by the use of race to achieve student body diversity in public higher education"[220] and that "*[c]ontext matters* when reviewing race-based governmental action."[221] It

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215. *See, e.g.*, Comfort *ex rel.* Neumyer v. Lynn Sch. Comm., 283 F. Supp. 2d 328, 384 (D. Mass. 2003) ("It would make no sense if officials were obliged to take responsibility for addressing these adverse consequences but at the same time were constitutionally barred from taking voluntary action."), *aff'd in part and rev'd in part sub nom.* Comfort v. Lynn Sch. Comm., No. 03-2415, 2004 U.S. App. LEXIS 21791 (1st Cir. Oct. 20, 2004), *withdrawn and reh'g en banc granted*, 2004 U.S. App. LEXIS 24662 (1st Cir. Nov. 24, 2004); Hampton v. Jefferson County Bd. of Educ., 102 F. Supp. 2d 358, 379-80 (W.D. Ky. 2000) ("It is incongruous that a federal court could at one moment require a school board to use race to prevent resegregation of the system, and at the very next moment prohibit that same policy.").

216. *See* Comfort v. Lynn Sch. Comm., No. 03-2415, 2004 U.S. App. LEXIS 21791, at *51 (1st Cir. Oct. 20, 2004) (implying a need for guidance from the Supreme Court regarding race-based policies in K-12 settings), *withdrawn and reh'g en banc granted*, 2004 U.S. App. LEXIS 24662 (1st Cir. Nov. 24, 2004).

217. *See, e.g.*, *id.* at *43-45; Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1, 377 F.3d 949, 969 (9th Cir. 2004), *vacated and reh'g en banc granted*, 395 F.3d 1168 (9th Cir. 2005); Tuttle v. Arlington County Sch. Bd., 195 F.3d 698, 707-08 (4th Cir. 1999); Eisenberg *ex rel.* Eisenberg v. Montgomery County Pub. Sch., 197 F.3d 123, 133 (4th Cir. 1999).

218. *See supra* note 189 and accompanying text.

219. *See* Robinson II, *supra* note 10, at 69 (remarking that some courts have applied narrow tailoring in an arbitrary and rigid manner).

220. Grutter v. Bollinger, 539 U.S. 306, 334 (2003).

221. *Id.* at 327 (emphasis added). The Court stated that "[n]ot every decision influenced by race is equally objectionable, and strict scrutiny is designed to provide a framework for carefully examining the importance and sincerity of the reasons advanced by the governmental decisionmaker for the use of race *in that particular context*." *Id.* (emphasis added).

follows that courts must also apply an appropriately contextualized approach when confronting race-based policies in K-12 education.[222]

The Supreme Court focused on competition in the affirmative action contexts;[223] however, competition is not present in K-12 student assignment plans.[224] Employment and contracting both involve a highly selective process in which applicants compete for limited governmental benefits based on set qualifications or standards.[225] Likewise, in higher education "[t]he Court's underlying concern is for fair competition—to prevent race from being used as an outright substitute for merit in the competition for access to a limited government resource."[226] In the K-12 context, such competition rarely exists. Only in *Wessman*, the elite Boston high school with competitive, merit-based admissions, did a lower court confront a situation in K-12 that is analogous to the competitive nature of other contexts.[227]

The lack of competition in K-12 settings most directly impacts the Court's requirement in *Grutter* "that each applicant [must be] evaluated as an individual."[228] In expressing this requirement, the Court relied extensively on Justice Powell's opinion in *Bakke* which discussed higher education admissions in terms of competition based on an applicant's qualifications.[229] Because K-12 student assignment plans do not involve merit-based competition in which students are directly compared with

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222. *See* Hampton v. Jefferson County Bd. of Educ., 102 F. Supp. 2d 358, 379-80 (W.D. Ky. 2000) ("The workplace, marketplace, and higher education cases are poor models for most elementary and secondary public school education precisely because they always involve vertical choices—one person is hired, promoted, receives a valuable contract, or gains admission.").

223. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 204-06 (1995) (involving competitive bidding for subcontracting); United States v. Paradise, 480 U.S. 149, 153 (1987) (plurality opinion) (upholding a court-ordered remedial promotion program where some higher-qualified White applicants were passed over to meet the court's mandate). It is worth noting that *Paradise* involved a suit contesting a remedial affirmative action program rather than the non-remedial situations to which the factors have been applied. *Id.* at 167.

224. *See* Comfort v. Lynn Sch. Comm., No. 03-2415, 2004 U.S. App. LEXIS 21791, at *47 (1st Cir. Oct. 20, 2004) (indicating that competition was absent in the Lynn School District's transfer plan), *withdrawn and reh'g en banc granted*, 2004 U.S. App. LEXIS 24662 (1st Cir. Nov. 24, 2004).

225. *See Adarand*, 515 U.S. at 205 (involving a competitive bidding process used in awarding government contracts); *Paradise*, 480 U.S. at 161 (describing the use of merit-based eligibility rankings to determine police department promotions).

226. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1, 377 F.3d 949, 999 (9th Cir. 2004), *vacated and reh'g en banc granted*, 395 F.3d 1168 (9th Cir. 2005).

227. *See* Wessmann v. Gittens, 160 F.3d 790, 793 (1st Cir. 1998) (describing the use of merit-based criteria for admission to an elite high school).

228. Grutter v. Bollinger, 539 U.S. 306, 337 (2003).

229. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 318 (1978).

one another, the Court's asserted interest in avoiding preferred groups insulated from competition is less compelling.[230] Likewise, the Court's argument that "preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection"[231] does not apply where competition is absent.[232]

The *Grutter* factors also require that any use of race cannot place an undue burden on non-favored parties.[233] However, in the K-12 context, the impact is negligible due to the nature of school assignments.[234] Unlike the selection of students at an elite university or the awarding of a government contract, school systems do not deny any students the benefits of an education when they assign students to a school.[235] In most K-12 situations the question "is not whether a given plaintiff will receive a given limited benefit . . . to which he or she is entitled. Rather, it is

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230. *See Grutter*, 539 U.S. at 334. Arguably, there is competition for available positions in magnet programs since the benefit is limited; however, such programs remain distinguishable from higher education settings because they do not determine assignments based on merit. *See, e.g.*, Eisenberg *ex rel.* Eisenberg v. Montgomery County Pub. Sch., 197 F.3d 123, 125 (4th Cir. 1999) (describing how all interested students could apply to the magnet school at issue which offered specialized instruction in math and science).

231. *See Bakke*, 438 U.S. at 298.

232. *See* Comfort v. Lynn Sch. Comm., No. 03-2415, 2004 U.S. App. LEXIS 21791, at *49 (1st Cir. Oct. 20, 2004) (stating that the dangers of reinforcing stereotypes are "far less ominous, if not altogether absent, in the K-12 setting"), *withdrawn and reh'g en banc granted*, 2004 U.S. App. LEXIS 24662 (1st Cir. Nov. 24, 2004).

233. *See Grutter*, 539 U.S. at 341.

234. *See* John Charles Boger, *The New Legal Attack on Educational Diversity in America's Elementary and Secondary Schools*, in RIGHTS AT RISK: EQUALITY IN AN AGE OF TERRORISM 43, 52 (Dianne M. Piché et al. eds., 2002) (describing how school districts provide a system of common public schools that provide fungible benefits available to all students), *available at* http://www.cccr.org/CCCRReport.pdf.

235. McFarland v. Jefferson County Pub. Sch., 330 F. Supp. 2d 834, 860 (W.D. Ky. 2004). The court explained:

> The difference between the use of race in graduate school admissions and the [district's] student assignment plan result from the vastly different concept of each system. The law school admissions program excludes many applicants because of its goal of creating an elite community. The [district's] policy of creating communities of equal and integrated schools for everyone excludes no one from those communities.

Id.; *see also* Boger, *supra* note 234 ("Access to second-grade teachers or fifth-grade classrooms . . . is not a scarce resource but a public good. Every child is sent to school; no child is denied."). Boger states:

> What public school students learn from each other when they arrive at school is neither limited to, nor constrained by, the assignment plans that have brought them together. Schools, principals, and teachers often mix together elementary students for a variety of reasons: those with different academic strengths; boys with girls; stronger readers with weaker—all to pursue valid educational goals.

Id. at 55.

whether any student is entitled to a particular school assignment at all."[236] Schools have always retained the ability to assign students to individual schools regardless of a student's preference.[237]

Courts have also consistently looked for whether or not the school considered race-neutral alternatives.[238] When schools develop student assignments, their goals are more closely intertwined with race than other contexts.[239] Where racial diversity is clearly integral to the overall goal, using race to achieve that goal creates the tight fit necessary in narrow tailoring.[240] However, as the First Circuit has explained, any

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236. Comfort v. Lynn Sch. Comm., 283 F. Supp. 2d 328, 373 (D. Mass 2003), *aff'd in part and rev'd in part sub nom.* Comfort v. Lynn Sch. Comm., No. 03-2415, 2004 U.S. App. LEXIS 24662 (1st Cir. Oct. 20, 2004), *withdrawn and reh'g en banc granted*, 2004 U.S. App. LEXIS 24662 (1st Cir. Nov. 24, 2004).

237. *See* Zander III v. Mo. State High Sch. Activities Ass'n (*In re* United States), 682 F.2d 147, 152 (8th Cir. 1982) ("Students have no indefeasible right to associate through choice of school. Mandatory assignment to public schools based on place of residence or other factors is clearly permissible."); Citizens Against Mandatory Bussing v. Palmason, 495 P.2d 657, 663 (Wash. 1972) ("We find no authority in law for the proposition that parents have a vested right to send their children to, or that children have a vested right to attend, any particular public school."). One author has described the nature of a school's authority to assign students as such:

> [T]he guarantee [of a student's preferred school] would be impractical. In drafting attendance plans, school boards have always been free to deny parental preference for any one of a hundred reasons . . . . And once a child is in a public school, the parent cannot dictate what teacher he gets, what courses he takes, what grades he receives, or what discipline he meets. Parental views are often welcomed (or tolerated) by school authorities, but parental control over an offspring's education has always been circumscribed.

WILKINSON III, *supra* note 33, at 109.

238. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 339 (2003) ("Narrow tailoring does . . . require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks."). The Court added the caveat that "[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative." *Id.*

239. *See Comfort* ex rel. *Neumyer*, 283 F. Supp. 2d at 372. The court explained that

> an important mission of K-12 schools, in addition to fostering academic achievement, is the cultivation of social skills that enable students to function as citizens in a complex and diverse world. If "narrow tailoring" is about "fit," the creation of an integrated school environment is surely likely to be a better "fit" relative to this goal than an integrated workplace is to a commercial setting.

Id.

240. *See id.* at 376 ("When a government's ends are fundamentally concerned with race—and those ends are recognized as compelling—it is natural that race-conscious means provide the 'snuggest fit' to those ends."); *see also* Robinson II, *supra* note 10, at 72-73. The author states:

> [T]he Supreme Court is most concerned about illegitimate discrimination tactics disguised as legitimate admissions programs. This danger is not present when a local school board acts to remedy clearly identifiable and obvious racial isolation . . . . [C]ourts should be less concerned with applying rigid factors and more concerned with determining whether a given program is a good "fit"—and there

alternatives considered must correspond to permissible goals to meet this test.[241]

Quotas and issues of racial proportionality have been major factors in the narrow tailoring analysis of race-based policies.[242] Although the Supreme Court has demonstrated some flexibility regarding the permissible use of numeric targets,[243] it has steadfastly refused to allow any policy resembling outright racial balancing.[244] Instead, race-based plans may only strive to attain a "critical mass" of preferred individuals.[245] In *Comfort*, the First Circuit was critical of the district's goal of proportionality,[246] especially in light of expert testimony indicating that the benefits of diversity begin to accrue when the percentage of minority or non-minority students reaches a "critical mass" of twenty percent.[247] The First Circuit implied that had the plan been tailored toward a critical mass rather than proportionality, this factor would not have been an issue.[248]

The Fourth Circuit neglected to take account of the distinctions between K-12 settings and other contexts when it struck down the programs in *Tuttle* and *Eisenberg*.[249] Instead, the court relied on the

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> is no better "fit" to achieve an integration of the races . . . than a program that considers the race of the individual applicants.

Id. (footnotes omitted).

241. Comfort v. Lynn Sch. Comm., No. 03-2415, 2004 U.S. App. LEXIS 21791, at *61-62 (1st Cir. Oct. 20, 2004) (holding that consideration of race-neutral alternatives are insufficient where they have been geared toward achieving impermissible racial balancing), *withdrawn and reh'g en banc granted*, 2004 U.S. App. LEXIS 24662 (1st Cir. Nov. 24, 2004).

242. *See, e.g.*, *Grutter*, 539 U.S. at 334 ("To be narrowly tailored, a race-conscious admissions program cannot use a quota system.").

243. *Id.* at 335 (explaining that quotas are a "fixed number or percentage which must be attained, or which cannot be exceeded" while "a permissible goal . . . require[s] only a good-faith effort . . . to come within a range demarcated by the goal itself" (omissions and alteration in original) (internal quotation marks omitted) (quoting Local 28 of Sheet Metal Workers v. EEOC, 478 U.S. 421, 495 (1986))).

244. *See id.* at 330 (describing measures designed to achieve a specified percentage of minority students as "outright racial balancing, which is patently unconstitutional"); Freeman v. Pitts, 503 U.S. 467, 494 (1992) ("Racial balance is not to be achieved for its own sake.").

245. *Grutter*, 539 U.S. at 316.

246. *Comfort*, 2004 U.S. App. LEXIS 21791, at *53-54 (explaining that the compelling interest was "in attaining the educational benefits of a level of racial diversity commensurate with critical mass . . . not some other, more grandiose goal").

247. *Id.* at *52; *see also* Brief of Appellees, at 22-23, *Comfort* (No. 03-2415).

248. *See Comfort*, 2004 U.S. App. LEXIS 21791, at *55 ("Using racial restrictions to achieve benefits otherwise absent is one thing; using those restrictions to edge closer to racial balance is quite another.").

249. *See* Johnson v. Bd. of Regents of the Univ. of Ga., 263 F.3d 1234, 1252 (11th Cir. 2001) (accepting the Fourth Circuit's use of the *Paradise* factors in *Eisenberg* and *Tuttle*,

Paradise factors from the employment context, failing to note any differences between employment settings and public school student assignments, most notably the absence of merit-based competition.[250] Likewise, the Ninth Circuit also failed to consider adequately the differing circumstances between K-12 higher education settings when it strictly adhered to the narrow tailoring guidelines of *Grutter*.[251] Although *Grutter* provides a more contextualized set of guidelines than the *Paradise* factors employed by the First Circuit, they remain a step removed from the K-12 context and therefore, a more appropriately tailored standard is necessary.[252]

Since *Grutter* and *Gratz*, the only courts to make a concerted effort to contextualize narrow-tailoring analysis to take account of such differences are the First Circuit in *Comfort* and the district court in *McFarland*.[253] The *Comfort* court acknowledged the Supreme Court's "admonition that context matters" when it highlighted the lack of competition in K-12 settings.[254] However, it continued to adhere closely to the *Grutter* factors in other respects, indicating that "[i]f there is to be a retreat from the Supreme Court's blueprint, the Court itself must light the way."[255] The *McFarland* court also highlighted the lack of merit-

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but indicating that the factors must be "adjusted slightly" to take account of the unique issues raised in the education context); *see also* Robinson II, *supra* note 10, at 70-71 (critiquing the Fourth Circuit's narrow-tailoring analysis in *Tuttle*).

250. Tuttle v. Arlington County Sch. Bd., 195 F.3d 698, 706 (4th Cir. 1999); *see also*, United States v. Paradise, 480 U.S. 149, 171 (1987) (plurality opinon).

251. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1, 377 F.3d 949, 998 (9th Cir. 2004) (Graber, J.,dissenting) ("Because of the differences in setting, several of the narrow-tailoring factors employed by the Supreme Court in *Grutter* and *Gratz*—and by the majority in this case–have no logical relevance to the evaluation of secondary school assignment plans like the District's.").

252. *Compare Grutter*, 539 U.S. at 334-42, *with Tuttle*, 195 F.3d at 706-07. Both methods of analysis consider the availability of race-neutral alternatives, the impact on third parties, the flexibility of the policy, and its planned duration. *Grutter*, 539 U.S. at 334-42; *Tuttle*, 195 F.3d at 706-07. The methods diverge in respect to numerical goals, with *Grutter* focusing on avoiding quotas, 539 U.S. at 334-36, and *Tuttle* (employing the *Paradise* factors) considering the proportionality of the policy to the interest involved, 195 F.3d at 706-07.

253. *See Comfort*, 2004 U.S. App. LEXIS 21791, at *41-43 (explaining that some factors present in higher education settings are absent in K-12 settings); McFarland v. Jefferson County Pub. Sch., 330 F. Supp. 2d 834, 859-60 (W.D. Ky. 2004) (setting forth the relevant differences between higher education and K-12 settings that impact how strict scrutiny is applied).

254. *Comfort*, 2004 U.S. App. LEXIS 21791, at *48.

255. *Id.* at *51.

based criteria,[256] but also observed that students have no constitutional right to choose a particular school.[257]

III. STRIVING FOR BALANCE: THE IDEALS OF *BROWN* AND THE MODERN REALITIES OF STRICT SCRUTINY OF RACE-BASED CLASSIFICATIONS

A. Broadening the Concept of Diversity as a Compelling Interest

To accommodate the unique nature of public schools and the promise of *Brown*, courts must adapt their analysis to the K-12 setting.[258] As a starting point, courts must adopt a broader diversity interest than that required in *Grutter*.[259] Such an interest should recognize the need to provide cross-racial interaction at a young age, so as to enable schools to continue to be "the foundation[s] of good citizenship" envisioned by *Brown*.[260] In addition, courts should follow the lead of the Second Circuit in *Brewer* by recognizing an expanded view of diversity that thoroughly incorporates the entire array of interests related to reducing racial isolation.[261]

B. Adapting Narrow Tailoring to the K-12 Context

Courts must also apply more nuanced narrow tailoring guidelines so as to recognize the unique context of public education.[262] *Grutter* provides some guidance; however, courts must further adapt its general framework to the K-12 setting.[263] Because the nature of the interests in K-12 settings differ from other contexts and competition is absent, courts should apply a more focused standard.[264]

Admission to selective programs, such as the magnet school described in *Eisenberg*, remain susceptible to challenge, as such programs involve specialization that courts may construe as a more limited benefit than

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256. *McFarland*, 330 F. Supp. 2d at 859.

257. *Id.* at 860.

258. *See supra* Part II.B-C.

259. *See* discussion *supra* text accompanying notes 201-08.

260. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954); *see* discussion *supra* note 207 and accompanying text.

261. *See supra* notes 211-12 and accompanying text.

262. *See* Kevin Brown, *Equal Protection Challenges to the Use of Racial Classifications To Promote Integrated Public Elementary and Secondary Student Enrollments*, 34 AKRON L. REV. 37, 64 (2000) (arguing that the special characteristics of public schools demand a different analysis than other contexts).

263. *See* Comfort v. Lynn Sch. Comm., No. 03-2415, 2004 U.S. App. LEXIS 21791, at *44-45 (1st Cir. Oct. 20, 2004), *withdrawn and reh'g en banc granted*, 2003 U.S. App. LEXIS 24662 (1st Cir. Nov. 24, 2004).

264. *See id.* at *44.

more generalized student assignment plans.[265] Despite lacking the competition inherent in higher education and the merit-based program struck down in *Wessman*, courts may regard these programs as parallel to the limited benefits protected in other contexts.[266]

Generalized student assignment plans such as those in *Comfort* and *Parents Involved in Community Schools* are even further removed from higher education, government contracting, and employment contexts than the cases involving magnet programs.[267] These plans offer access to the same educational opportunities even when a student is not assigned to his or her first choice.[268] Furthermore, they more closely align with the

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265. *Compare* Eisenberg *ex rel.* Eisenberg v. Montgomery County Pub. Sch., 197 F.3d 123, 125 (4th Cir. 1999) (involving transfer applicants to an elementary school magnet program), *with* Grutter v. Bollinger, 539 U.S. 306, 312-13 (2003) (involving law school admissions). While the lack of a merit-based competition for slots in magnet programs makes these situations distinguishable, they both involve a limited number of slots for access to a specialized curriculum. *See* Hampton v. Jefferson County Bd. of Educ., 102 F. Supp. 2d 358, 380-81 (W.D. Ky. 2000) (indicating that admission to a high school offering magnet programs not offered at other schools would be treated differently than a district's general student assignment plan).

266. *See* Liu, *supra* note 189 (indicating that courts may approach narrow tailoring differently for selective high schools, magnet schools, and charter schools, than for general student assignment plans). *But see* Boger, *supra* note 234, at 55 ("Neither *Tuttle*'s weighted lottery plan for magnet schools nor *Eisenberg*'s transfer plan . . . purported to assess the individual merit of student applicants . . . thus, the considerations of fairness that were central in the 1st Circuit's decision in . . . *Wessman* . . . are not applicable in the more routine assignment case.").

267. *See* Boger, *supra* note 234. Whereas special programs offered by schools have a limited number of slots, general assignment plans guarantee that each student will attend a school. *Id.* The Citizens' Commission on Civil Rights describes the absence of a limited benefit as such:

> Access to second-grade teachers or fifth-grade classrooms . . . is not a scarce resource but a public good. Every child is sent to school; no child is denied. Of course, every public elementary and secondary school has its own special characteristics: its history, its identifying architectural features, its corps of teachers (each with their own special talents and personalities). Yet as Chief Justice Rehnquist observed in *Bustop, Inc.*, there is no "federal right" granted any parent or child that assures attendance at any particular public school. For legal purposes, public schools have been deemed equivalent and fungible, and to that extent, at least, our law normally recognizes no "winners" and "losers" in the distribution of public school resources.

Id. (endnotes omitted).

268. *Comfort*, 2004 U.S. App. LEXIS 21791, at *40 (noting that both parties stipulated that all schools offered a comparable education); Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1, 377 F.3d 949, 1001 (9th Cir. 2004) (Graber, J., dissenting) (noting that "perceived or actual differences in academic quality" did not create a competition for limited benefits), *vacated and reh'g en banc granted*, 395 F.3d 1168 (9th Cir. 2005). In the Seattle case, the dissent went on to explain that even when taking into account perceptions about the quality of high schools in the districts, every student had the opportunity to enroll in at least one of the preferred schools. *Id.* (Graber, J., dissenting).

goals of the Supreme Court's desegregation cases.[269] Thus, courts should afford such plans a nuanced narrow tailoring analysis by deemphasizing the need for individualized consideration required under *Grutter* and acknowledging the limited burden placed on third parties.[270] To do so would maintain a tight fit between the ends and means while also furthering the promise of *Brown*.[271]

C. *Avoiding Proportionality in School District Policies*

Although more contextualized judicial application of strict scrutiny is necessary, school districts must do their part to use race appropriately.[272] The Court has clearly indicated resistance to any use of proportionality when race is involved[273] and has instead expressed a preference for measures aimed at achieving a "critical mass" of diversity.[274] Future school assignment plans will have greater likelihood of surviving strict scrutiny if they seek a range of diversity focused on attaining a "critical mass," at which point the benefits of diversity begin to accrue.[275]

IV. CONCLUSION

The Supreme Court's desegregation and affirmative action jurisprudence seemingly collide when voluntary integration plans are challenged.[276] To resolve the inherent tension between the ideal of

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269. *See supra* Part I.B.

270. *See supra* notes 233-35 and accompanying text.

271. *See* Robinson II, *supra* note 10, at 73. Describing the necessary fit between ends and means, the author states:

> [T]he Supreme Court is most concerned about illegitimate discrimination tactics disguised as legitimate admissions programs. This danger is not present when a local school board acts to remedy clearly identifiable . . . racial isolation . . . . In these instances, programs seek to implement the very concept that the Supreme Court itself set forth [over] 50 years ago.

Id. at 71-72 (footnote omitted).

272. *See Comfort*, 2004 U.S. App. LEXIS 21791, at *62 ("[C]harting a course that depends upon racial classifications is, in constitutional terms, risky business.").

273. *See* Grutter v. Bollinger, 539 U.S. 306, 329-30 (2003); *see also* Freeman v. Pitts, 503 U.S. 467, 494 (1992).

274. *See Grutter*, 539 U.S. at 335-36 (describing how attaining a critical mass of a minority group does not transform it into a quota).

275. *See* discussion *supra* text accompanying notes 242-48. The plan approved by the district court in *McFarland* offers one solution: by first considering a variety of other factors, with race serving only as a permissible "tipping" factor under narrow circumstances, the plan avoided mechanical application aimed at proportionality. McFarland v. Jefferson County Pub. Sch., 330 F. Supp. 2d 834, 859 (W.D. Ky. 2004).

276. *See* Tushnet, *supra* note 37, at 138. Professor Tushnet describes the tensions engendered by Brown as such:

> Race does not matter, constitutionally, because the Constitution deals with individuals, not groups; but race does matter . . . because the experiences of the

integrated schools and our society's aversion to race-based decisions, both courts and school districts must make efforts to adapt.[277] As courts have used affirmative action precedent from outside the K-12 context to strike down student assignment plans, they have failed to grasp the unique nature of public schools.[278] To keep the promise of *Brown* intact, courts must begin to employ a more contextualized approach to strict scrutiny that recognizes the distinct characteristics in K-12 public schools.[279] At the same time, however, school districts must avoid school assignment plans designed to achieve racial proportionality, and instead strive to achieve a "critical mass" of students in racially isolated settings.[280]

> nation's racial groups differ . . . . As Americans, we seem to think both that eliminating race as a basis for government decision making is an important national goal, and that because race does matter in shaping our experiences, governments should be allowed and sometimes encouraged to take race into account in making policy. *Brown*'s legacy has been to show that grappling with the tensions in our views about race and social policy will be a continuing challenge in the next fifty years as well as the last.

Id. at 138.

277. *See* discussion *supra* Part III.A-C.

278. The Massachusetts district court summed up this sentiment best, stating:

> To say that school officials in the K-12 grades . . . cannot take steps to remedy the extraordinary problems of de facto segregation and promote multiracial learning, is to go further than ever before to disappoint the promise of *Brown*. It is to admit that . . . resegregation of the schools is a tolerable result, as if the only problems *Brown* addressed were bad people and not bad impacts.

Comfort *ex rel.* Neumyer v. Lynn Sch. Comm., 283 F. Supp. 2d 328, 391 (D. Mass. 2003), *aff'd in part and rev'd in part sub nom.* Comfort v. Lynn Sch. Comm., No. 03-2415, 2004 U.S. App. LEXIS 21791 (1st Cir. Oct. 20, 2004), *withdrawn and reh'g en banc granted*, 2004 U.S. App. LEXIS 24662 (1st Cir. Nov. 24, 2004).

279. *See* discussion *supra* Part III.B. Indicating the need for courts to balance affirmative action principles with the legacy of *Brown*, Justice Breyer has stated:

> *Brown* and *Grutter* express the same educational hope, a hope that concerns "the opportunity of an education." *Brown* says that it is a "right which must be made available to all on equal terms." *Grutter* adds that educators must have "affirmative action" leeway so that they, together with others, may turn Brown's hope into reality.

Stephen G. Breyer, *Turning* Brown*'s Hope into Reality*, *in* BROWN AT 50: THE UNFINISHED LEGACY 146, *supra* note 42, at 142, 146.

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