# AFTER *GRUTTER*: ENSURING DIVERSITY IN K–12 SCHOOLS

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*The Supreme Court held in* Grutter v. Bollinger *that the attainment of a diverse student body could justify the use of race in admissions decisions in higher education. This decision did not, however, address whether student body diversity could justify race-conscious student assignment policies at the public primary and secondary school level. Several circuit courts dodged this issue prior to* Grutter, *assuming that diversity was a compelling interest but invalidating the race-conscious student assignment plans as not narrowly tailored. Since* Grutter, *the Ninth Circuit, in* Parents Involved in Community Schools v. Seattle School District, No. 1, *held that student body diversity is a compelling interest in the secondary school context yet struck down the policy as not satisfying* Grutter's *narrow tailoring framework.*

*The reluctance on the part of federal courts to uphold voluntary race-conscious student assignment policies, coupled with an increase in the termination of prior desegregation orders, has contributed to the rapid resegregation of public primary and secondary schools. This Comment provides a framework for upholding voluntary race-conscious student assignment policies at the K–12 level to potentially assist in reversing this trend. The author argues that an extension of* Grutter's *diversity rationale is warranted based on the demonstrated academic and societal benefits of diversity in primary and secondary schools, distinctions between the K–12 and higher education contexts, and Supreme Court precedent. The author also describes how school districts seeking to promote diversity through voluntary race-conscious student assignment policies can reasonably comply with* Grutter's *narrow tailoring requirements. Furthermore, the author argues that school districts with non-merit-based race-conscious student assignment policies need not comply with* Grutter's *requirement of individualized consideration, as student assignment in such schools is not predicated on students' distinguishing themselves as individuals.*

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"In a society such as ours, it is not enough that the 3 R's are being taught properly for there are other vital considerations. The children must learn to respect and live with one another in multi-racial and multi-cultural communities and the earlier they do so the better."[1]

## INTRODUCTION

On September 4, 1957, a large crowd of hostile, jeering whites greeted fifteen-year-old Elizabeth Eckford as she attempted to attend Central High School for the first time.[2] Her efforts to enter the Little Rock school were blocked by the Arkansas National Guard, summoned by the Arkansas governor to prevent Eckford and eight other African American students—the "Little Rock Nine"—from racially integrating the school as mandated by *Brown v. Board of Education*.[3] As we celebrate the anniversary of this decision that so splintered America fifty years earlier, it is encouraging to learn that a substantial majority of Americans now believe that the Supreme Court got *Brown* right.[4] In fact, at the fortieth anniversary of this decision, only 15 percent of Southerners, the most ardent opponents of desegregation at the time of *Brown*, believed the case was decided wrongly.[5] Despite the turmoil raised by the forced integration of public schools, it now appears that most Americans not only support but actually prefer creating more

1. Booker v. Bd. of Educ., 212 A.2d 1, 6 (N.J. 1965).

2. *See, e.g.*, Kim Cobb, *After Desegregation: Public Schools Seek New Remedies Where Race-Based Orders Failed*, HOUS. CHRON., June 2, 2002, at A1 (showing Will Counts' 1957 photograph of Hazel Brown screaming at Eckford outside Central High School); Kim Cobb & James Kimberley, *After Desegregation: Disquieting Yesterdays: Americans Recall School Desegregation*, HOUS. CHRON., June 2, 2002, at A11; Nat'l Park Serv., *We Shall Overcome: Historic Places of the Civil Rights Movement: Little Rock Central High School National Historic Site*, *at* http://www.cr.nps.gov/nr/travel/civilrights/ak1.htm (providing an overview of the aggression faced by African American students seeking to attend Central High School).

3. 347 U.S. 483 (1954) (holding segregated schools unconstitutional). Later, Eckford reflected "[t]hat's when I knew that they were just not going to let me go to school . . . that they were not there to protect me, too, like the other students . . . ." Charles Zewe, *Clinton to Hold Door for 'Little Rock Nine,'* CNN INTERACTIVE, Sept. 25, 1997, *at* http://www.cnn.com/US/9709/24/little.rock/ (first ellipses in original). To protect the "Little Rock Nine" and their right to an integrated education, President Dwight Eisenhower dispatched the U.S. Army. *See* Cobb, *supra* note 2; Nat'l Park Serv., *supra* note 2; Zewe, *supra*. The court-ordered integration of Central High School was achieved with the aid of 1200 troops of the 101st Airborne division. *See id.*

4. *See* GARY ORFIELD ET AL., DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION 108 (1996) (citing USA TODAY, May 12, 1994, at 8A). In 1994, a national Gallup Poll reported that 87 percent of Americans supported the Supreme Court's decision in *Brown*. Forty years earlier, only 63 percent agreed with the decision. *Id.*

5. *See id.* At the time of the Supreme Court's decision mandating desegregation, 81 percent of Southerners disagreed with the ruling. Four decades later there had been a marked shift in the attitude of Southerners towards desegregation.

racially integrated schools.[6] This is because children *of all races* educated in diverse schools learn better, develop more positive racial attitudes, and are better prepared to work and live in a diverse workforce and society.[7]

Despite these advantages flowing from racially integrated schools, courts have increasingly released school districts from court orders to desegregate.[8] Recognizing the social and academic benefits of racially integrated schools, many districts have implemented voluntary race-conscious assignment policies.[9] However, courts have shown a reluctance to uphold these voluntary integration policies.[10] As a consequence of the termination of prior desegregation orders and the invalidation of voluntary integration plans, public schools at the K–12 level are becoming rapidly resegregated.[11]

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6. *See id.* at xviii; *see also* ERICA FRANKENBERG ET AL., A MULTIRACIAL SOCIETY WITH SEGREGATED SCHOOLS: ARE WE LOSING THE DREAM? 15 (2003) (citing Gallup Poll Topics: Education, a poll conducted Aug. 1999), *available at* http://www.civilrightsproject.harvard.edu/research/reseg03/AreWeLosingtheDream.pdf. A 1999 Gallup Poll indicated that both blacks and whites highly support integrated schooling. Specifically, 68 percent of Americans expressed their belief that integration provides a higher quality education for blacks, and 50 percent stated that it improved the quality of education for whites. *Id.*

7. *See infra* Part III.A–.B.

8. *See, e.g.*, Belk v. Charlotte-Mecklenburg Bd. of Educ., 269 F.3d 305 (4th Cir. 2001) (en banc); People Who Care v. Rockford Bd. of Educ., 246 F.3d 1073 (7th Cir. 2001). *See generally* FRANKENBERG ET AL., *supra* note 6, at 6 ("Desegregation has been a substantial accomplishment and is linked to important gains for both minority and white students. As more and more convincing evidence of those gains is accumulating, schools systems are actually being ordered to end successful desegregation plans they would prefer to continue."); Ryan Tacorda, Comment, *Acknowledging Those Stubborn Facts of History: The Vestiges of Segregation*, 50 UCLA L. REV. 1547 (2003) (arguing that circuit courts have interpreted the Supreme Court's test for determining when court-ordered desegregation programs can be terminated too narrowly and that an alternative definition of "vestiges" may provide a broader role for courts in school desegregation programs).

9. *See generally* FRANKENBERG ET AL., *supra* note 6, at 6 (noting that "[t]he persisting high levels of residential segregation for blacks and increasing levels for Latinos . . . indicate that desegregated education will not happen without plans to make it happen").

10. *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1, 377 F.3d 949 (9th Cir. 2004); Eisenberg v. Montgomery County Pub. Sch., 197 F.3d 123 (4th Cir. 1999); Tuttle v. Arlington County Sch. Bd., 195 F.3d 698 (4th Cir. 1999); Wessman v. Gittens, 160 F.3d 790 (1st Cir. 1998); McFarland v. Jefferson County Pub. Sch., 330 F. Supp. 2d 834 (W.D. Ky. 2004); *see also infra* Part II; ERICA FRANKENBERG & CHUNGMEI LEE, RACE IN AMERICAN PUBLIC SCHOOLS: RAPIDLY RESEGREGATING SCHOOL DISTRICTS 2 (2002) ("[S]ome federal courts are forbidding even voluntary desegregation plans."), *available at* http://www.civilrightsproject.harvard.edu/research/deseg/Race_in_American_Public_Schools1.pdf. *But see* Hunter *ex rel.* Brandt v. Regents of the Univ. of Cal., 190 F.3d 1061, 1067 (9th Cir. 1999) (upholding a race-conscious admission policy at a research-oriented elementary school dedicated to improving the quality of education in urban public schools); Comfort *ex rel.* Neumyer v. Lynn Sch. Comm., 283 F. Supp. 2d 328, 355 (D. Mass. 2003) (upholding a voluntary race-conscious student assignment policy designed to "prepar[e] students to live in a multiracial society").

11. *See* FRANKENBERG & LEE, *supra* note 10, at 4. Frankenberg and Lee document a trend of decreasing interracial exposure in nearly all K–12 schools analyzed. *Id.* They reveal that black and Latino students are becoming more racially isolated from their white peers. *Id.* at 5. Notwithstanding

The Supreme Court has not yet addressed the constitutionality of a voluntary race-conscious student assignment policy at the K–12 level.[12] The federal courts that have confronted this question have applied strict scrutiny.[13] To withstand an Equal Protection Clause challenge under strict scrutiny, a racial classification must (1) advance a compelling state interest and (2) be narrowly tailored to serve that interest.[14] Most circuit courts that have addressed the issue have relied on the seminal case of *Regents of the University of California v. Bakke*[15] and assumed, without holding, that student body diversity is a compelling state interest at the K–12 level but have struck down the policies as not narrowly tailored.[16]

*Bakke* involved a race-conscious admissions program at the medical school of the University of California, Davis, which reserved sixteen out of the one hundred available seats in the entering class for members of minority groups.[17] In *Bakke*, a divided Supreme Court invalidated the medical school's race-conscious "set-aside" policy because it prevented white applicants from competing for the minority-only positions.[18] However, the Court also reversed the lower court's ruling which prohibited the university from ever employing race as a factor in admissions.[19] An opinion written by Justice Powell provided the fifth vote both for invalidating the "set-aside" policy

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the increasing percentage of minorities in public schools, whites are also becoming more racially segregated from blacks in 53 of the 185 districts examined. *Id.* at 8. The authors suggest that this decreased interracial contact indicates a movement towards resegregation, catalyzed by the termination of desegregation plans and the striking down of voluntary integration plans. *Id.* at 4. *See generally* John Charles Boger, *Education's "Perfect Storm"? Racial Resegregation, High Stakes Testing, and School Resource Inequities: The Case of North Carolina*, 81 N.C. L. REV. 1375 (2003) (examining developments that are resulting in increased racial segregation in the South's public schools, particularly in North Carolina).

12. *See, e.g.*, *Parents Involved in Cmty. Sch.*, 377 F.3d at 989 (Graber, J., dissenting); *McFarland*, 330 F. Supp. 2d at 837.

13. *See, e.g.*, *Parents Involved in Cmty. Sch.*, 377 F.3d at 960; *Eisenberg*, 197 F.3d at 130; *Tuttle*, 195 F.3d at 704; *Wessman*, 160 F.3d at 794; *Comfort*, 283 F. Supp. at 366. *See generally* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (mandating strict scrutiny for all racial classifications).

14. *Adarand*, 515 U.S. at 224.

15. 438 U.S. 265 (1978).

16. *See Eisenberg*, 197 F.3d 123; *Tuttle*, 195 F.3d 698; *Wessman*, 160 F.3d 790; *see also infra* Part II. *But see Parents Involved in Cmty. Sch.*, 377 F.3d 949 (finding that the school district's diversity rationale squared with that articulated in *Grutter v. Bollinger*, 539 U.S. 306 (2003), and therefore constituted a compelling interest).

17. *Bakke*, 438 U.S. at 275.

18. *Id.* at 319.

19. *Id.* at 320; *see also* JOINT STATEMENT OF CONSTITUTIONAL LAW SCHOLARS, REAFFIRMING DIVERSITY: A LEGAL ANALYSIS OF THE UNIVERSITY OF MICHIGAN AFFIRMATIVE ACTION CASES 4 (2003), *available at* http://www.civilrightsproject.harvard.edu/policy/legal_docs/Diversity_ Reaffirmed.pdf.

and, as part of a different majority, for upholding race-consciousness in admissions considerations.

Justice Powell's opinion, joined in part by a majority of the Justices, contrasted the medical school's impermissible "set-aside" policy with the permissible race-conscious admissions policy utilized at Harvard College.[20] At Harvard, all applicants vied for the same seats, and race was utilized as a mere "plus" factor, one of many which were weighed in the admissions decision.[21] In endorsing the use of race to further the compelling interest of a diverse student body, Justice Powell stressed that this "'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples."[22] He underscored that "[e]thnic diversity . . . is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body."[23] Selective universities across the country took note and fashioned race-conscious admissions policies based on the views expressed by Justice Powell.[24] Meanwhile, federal courts grappled with interpreting the Court's fractured ruling and Justice Powell's diversity rationale.[25]

The Supreme Court, in *Grutter v. Bollinger*,[26] finally laid to rest the debate and uncertainty sparked by Justice Powell's opinion by holding that student body diversity is a compelling state interest in higher education. Although the Court has not yet had occasion to extend the diversity rationale to voluntary race-conscious student assignment programs in public elementary and secondary schools, its recent decision in *Grutter* provides strong support for that position. In fact, the Ninth Circuit recently relied on *Grutter* to find diversity a compelling interest in the context of a student

20. *Bakke*, 438 U.S. at 316.

21. *See* JOINT STATEMENT OF CONSTITUTIONAL LAW SCHOLARS, *supra* note 19.

22. *Bakke*, 438 U.S. at 313 (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).

23. *Id.* at 314. According to Justice Powell, "racial or ethnic origin is but a single though important element" in "[t]he diversity that furthers a compelling state interest." *Id.* at 315.

24. *See* Grutter v. Bollinger, 539 U.S. 306, 323 (2003); *see also* Brief of Amici Curiae Amherst College et al. at 27–28, *Grutter* (No. 02-241) (describing colleges' dependence on Justice Powell's opinion in *Bakke*); Brief of Amici Curiae Judith Areen et al. at 12–13, *Grutter* (No. 02-241) (noting that law schools select students using "methods designed from and based on Justice Powell's opinion in *Bakke*").

25. *Compare* Grutter v. Bollinger, 288 F.3d 732 (6th Cir. 2002) (finding *Bakke* still good law and diversity a compelling state interest), *and* Smith v. Univ. of Wash. Law Sch., 233 F.3d 1188 (9th Cir. 2000) (same principle), *with* Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996) (ruling that *Bakke* was no longer good precedent and that diversity was not a compelling governmental interest). *See also* Johnson v. Bd. of Regents, 263 F.3d 1234 (11th Cir. 2001) (assuming, but not holding, that advancing diversity was a compelling state interest but invalidating the University of Georgia's race-conscious admissions policy as not narrowly tailored to advance that interest).

26. 539 U.S. 306.

assignment policy at the secondary school level.[27] In addition, the U.S. District Court for the Western District of Kentucky found that a student assignment plan applying to both primary and secondary schools satisfied the diversity rationale as articulated in *Grutter*.[28] However, both decisions struck down the assignment policies as not narrowly tailored pursuant to the narrow tailoring principles set forth in *Grutter*.[29]

In this Comment, I suggest a framework for upholding voluntary race-conscious student assignment policies at public primary and secondary schools. Part I provides an overview of the Supreme Court's recent decision in *Grutter*. This part examines how the Supreme Court came to find that student body diversity is a compelling state interest in higher education and delineates the factors courts must apply to determine whether a race-conscious admissions policy is narrowly tailored. Part II surveys several federal court decisions regarding voluntary race-conscious student assignment plans at the K–12 level. Part III discusses the educational and societal benefits of diversity to K–12 students and argues that student body diversity at the K–12 level is similarly a compelling governmental interest. I further argue that Supreme Court precedent and distinctions between higher education and K–12 education support an extension of the diversity rationale to student assignment policies in the primary and secondary school setting. In Part IV, I suggest how the narrow tailoring factors articulated in *Grutter* can reasonably be satisfied in most K–12 voluntary race-conscious student assignment policies. Further, in this part, I argue that *Grutter*'s requirement of individualized consideration is inapplicable to non-merit-based K–12 race-conscious student assignment policies.

## I. *GRUTTER V. BOLLINGER* AND RACE-CONSCIOUS ADMISSIONS PROGRAMS IN HIGHER EDUCATION

*Grutter* marked the first time since *Bakke* was decided twenty-five years earlier that the Supreme Court tackled the use of race in selecting applicants for admission to a public university.[30] Under the admissions policy at issue, the University of Michigan Law School sought to attain a student body that was both academically qualified and diverse. Applicants were evaluated on

27. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1, 377 F.3d 949, 964 (9th Cir. 2004). The Ninth Circuit declined to address whether diversity could be a compelling interest in other contexts besides the secondary school level. *Id.* at 964 n.18.

28. McFarland v. Jefferson County Pub. Sch., 330 F. Supp. 2d 834, 837 (W.D. Ky. 2004).

29. *Parents Involved in Cmty. Sch.*, 377 F.3d at 968–69; *McFarland*, 330 F. Supp. 2d at 837.

30. *Grutter*, 539 U.S. at 328.

the basis of their undergraduate grade point average (GPA), Law School Admissions Test (LSAT) score, a personal statement, letters of recommendation, and an essay detailing their potential contributions to the school's diversity. The admissions policy's emphasis on diversity did not place exclusive reliance on racial and ethnic diversity but rather afforded consideration to all diverse qualities. However, it did reinforce the law school's commitment to attaining a student body with a "critical mass" of African American, Hispanic, and Native American students who might be underrepresented otherwise.[31]

The suit was initiated when the law school rejected Barbara Grutter, a white applicant with a 3.8 GPA and 161 LSAT score. Grutter alleged that she had been discriminated against on the basis of her race in violation of the Fourteenth Amendment. She claimed that she was denied admission "because the Law School use[d] race as a 'predominant' factor, giving applicants who belong to certain minority groups a significantly greater chance of admission than students with similar credentials from disfavored racial groups."[32]

Following its long line of cases holding that racial classifications are subject to strict scrutiny, the Court adhered to a two-step analysis in *Grutter*: The Court asked (1) whether student body diversity is a compelling state interest that justifies the differential use of race in an admissions policy, and (2) if it is, whether the admissions policy is narrowly tailored to advance diversity. Placing significant emphasis on Justice Powell's *Bakke* opinion, the Court held that student body diversity is a compelling state interest in higher education and that the law school's race-conscious admissions policy was narrowly tailored to achieve that interest. The decision thus settled the disagreement among the federal courts and put to rest the uncertainty that colleges and universities had faced since Justice Powell raised the issue in *Bakke*—diversity is a compelling governmental interest at the higher education level.[33]

### A. Student Body Diversity is a Compelling State Interest in Higher Education

In *Grutter*, the Court explicitly embraced Justice Powell's diversity rationale and acknowledged that the educational and social benefits of

31. *Id.* at 316.
32. *Id.* at 317 (internal quotation omitted).
33. *See* cases cited *supra* note 25.

diversity for all students are "substantial."[34] Relying on extensive expert reports and research studies, the Court noted that diversity facilitates "learning outcomes, and 'better prepares students for an increasingly diverse workforce and society.'"[35] Among the significant benefits of diversity that the Court recognized were the promotion of "cross-racial understanding"[36] and the reduction of racial stereotypes. According to the Court, these benefits enhance classroom discussions by making them "livelier, more spirited, and simply more enlightening and interesting."[37] The Court acknowledged that enrollment of "only token numbers of minority students" could not achieve the desired reduction in the strength of racial stereotypes.[38]

In ruling that student body diversity is a compelling state interest, the Court also relied on the law school's determination that diversity was critical to its "educational mission."[39] The Court emphasized the deference it has traditionally accorded to the academic decisions of institutions of higher learning: "We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition."[40] The Court also noted that it would presume "'good faith' on the part of a university" in selecting its student body "absent 'a showing to the contrary.'"[41]

### B. Factors for Determining Whether a Race-Conscious Admissions Program is Narrowly Tailored

*Grutter* described five factors that must be considered in determining whether a race-conscious admissions policy is narrowly tailored. The Court borrowed the first two—the prohibition on quotas and the individualized

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

35. *Id.* (quoting Brief for Amici Curiae American Educational Research Ass'n et al. at 3, *Grutter* (No. 02-241)). The Court placed emphasis on the value of diversity in American businesses: "[M]ajor American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints." *Id.* The Court also gave significant weight to the importance to the military of a diverse officer corps to support its conclusion that diversity is a compelling interest in higher education. *Id.* at 331.

36. *Id.* at 330 (citation omitted).

37. *Id.*

38. *Id.* at 333 (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 318–19 (1978)).

39. *Id.* at 328.

40. *Id.* at 330.

41. *Id.* (quoting *Bakke*, 438 U.S. at 318–19).

consideration factors—from Justice Powell's opinion in *Bakke*.[42] The remaining three factors were adapted from the Court's cases dealing with remedying employment discrimination.[43]

1. Prohibition on Quotas and Insulation From Competition

*Grutter* established that an admissions program that employs a quota system, shielding members of certain racial or ethnic groups from competition with the remaining candidates, is not narrowly tailored.[44] An admissions policy may properly take race or ethnicity into account, however, when it is used as a "plus" factor. Thus, to be narrowly tailored, an admissions program must ensure that all applicants be afforded the same chance to compete for open spots, although greater weight may be granted to racial and ethnic diversity than to other diversity factors.[45] The Court distinguished impermissible quotas from permissible goals:

> Properly understood, a "quota" is a program in which a certain fixed number or proportion of opportunities are "reserved exclusively for certain minority groups." Quotas "impose a fixed number or percentage which must be attained, or which cannot be exceeded," and "insulate the individual from comparison with all other candidates for the available seats." In contrast, "a permissible goal . . . require[s] only a good-faith effort . . . to come within a range demarcated by the goal itself," and permits consideration of race as a "plus" factor in any given case while still ensuring that each candidate "compete[s] with all other qualified applicants."[46]

The Court determined that the law school's admissions policy, including its efforts to achieve a "critical mass" of underrepresented minority students,

42. In *Bakke*, Justice Powell identified two factors that must be satisfied in order for a race-conscious admissions policy to be narrowly tailored to further the goal of diversity. *See* JOINT STATEMENT OF CONSTITUTIONAL LAW SCHOLARS, *supra* note 19, at 7. First, the admissions policy cannot employ quotas that shield minority applicants from competition with all other applicants. Second, race may be utilized as a "plus" factor provided it is one of several diversity factors that are taken into account and all applicants are eligible to compete for all spots.

43. In *United States v. Paradise*, 480 U.S. 149 (1987), the Supreme Court articulated five factors necessary for a race-conscious promotions policy to be narrowly tailored: "the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties." *Id.* at 171 (citing Local 28, Sheet Metal Workers v. EEOC, 478 U.S. 421, 481 (1986)). *Tuttle* also borrowed these five factors from the employment discrimination cases in fashioning its narrow tailoring analysis. *See infra* note 86 and accompanying text.

44. *Grutter*, 539 U.S. at 334.

45. *Id.*

46. *Id.* at 335 (citations omitted, alterations in original).

functioned as a goal rather than as a quota. The Court reiterated Justice Powell's contention in *Bakke* that there is "some relationship between numbers and achieving the benefits to be derived from a diverse student body."[47] Accordingly, "'some attention to numbers,' without more, does not transform a flexible admissions system into a rigid quota."[48] In finding the law school's admissions policy to constitute a goal rather than a quota, the Court emphasized that the number of minority applicants admitted each year fluctuated considerably.[49]

2. Flexible "Individualized Consideration"

*Grutter* makes clear that the key characteristic of a narrowly tailored race-conscious admissions program is "individualized consideration" of each applicant's file.[50] This individualized review must make certain "that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application."[51] Accordingly, a race-conscious admissions program cannot grant any "mechanical, predetermined diversity 'bonuses' based on race or ethnicity."[52] Furthermore, to be narrowly tailored, a race-conscious admissions program must take into account the many ways in which applicants might enrich the diversity of the student body in addition to race and ethnicity.[53] The Court ruled that the law school's policy was sufficiently flexible and individualized in its evaluation because each applicant's file was reviewed with both racial and nonracial factors taken into consideration.[54]

3. Good Faith Consideration of Workable Race-Neutral Alternatives

The *Grutter* Court concluded that a narrowly tailored race-conscious admissions policy must also make a "serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the

47. *Id.* at 336 (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 323 (1978)).
48. *Id.* (quoting *Bakke*, 438 U.S. at 323).
49. *Id.*
50. *Id.* at 341.
51. *Id.* at 337.
52. *Id.*
53. *Id.* at 337–38. A race-conscious admissions program should not "limit in any way the broad range of qualities and experiences that may be considered valuable contributions to student body diversity." *Id.* at 338. Instead, the individualized consideration characteristic of a narrowly tailored race-conscious admissions program places significant emphasis on diversity elements besides race. *Id.*
54. *Id.* at 338–39.

university seeks."[55] However, for such an admissions program to be deemed narrowly tailored, it does not need to take into account "every conceivable race-neutral alternative."[56] If race-neutral alternatives would sacrifice diversity or the selective nature of the institution, they are not "workable."[57] The Court found that the law school adequately took into account workable race-neutral alternatives. The Court noted that employing such race-neutral means as a lottery or a deemphasis on GPA or LSAT scores would compromise the school's academic quality and diversity.[58]

4. Not Unduly Burdensome to Nonminority Group Members

To satisfy the narrow tailoring analysis, a race-conscious admissions policy may not "unduly burden" nonminority applicants.[59] The Court determined that the law school's admissions policy satisfied this narrow tailoring requirement because it took into account "all pertinent elements of diversity,"[60] thus enabling the school to "select nonminority applicants who [had] greater potential to enhance student body diversity over underrepresented minority applicants."[61]

5. Limited in Time

Finally, to be narrowly tailored, "race-conscious admissions policies must be limited in time."[62] The Court found that the law school's policy met the time limit requirement based on the school's commitment to end the use of race in its application decisions once feasible.[63]

## II. OVERVIEW OF FEDERAL COURT CASES REGARDING VOLUNTARY RACE-CONSCIOUS STUDENT ASSIGNMENT POLICIES AT THE K–12 LEVEL

*Grutter* only resolved whether the attainment of student body diversity could justify the use of race in admissions decisions in higher education. *Grutter* did not address the applicability of the diversity rationale to student

55. *Id.* at 339.
56. *Id.*
57. *Id.*
58. *Id.* at 340.
59. *Id.* at 341 (citation omitted).
60. *Id.* (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 317 (1978)).
61. *Id.*
62. *Id.* at 342.
63. *Id.* at 342–43.

assignment plans in the K–12 context. Before *Grutter*, many circuit courts had ducked this issue by assuming without holding that diversity was a compelling interest, yet striking down the policies on narrow tailoring grounds.[64] One federal district court departed from the circuit court tradition, finding a particular form of diversity a compelling interest and furthermore upholding the policy as narrowly tailored.[65] Post-*Grutter*, the Ninth Circuit has held that student body diversity is a compelling interest in the secondary school context, but, like most of the circuit decisions pre-*Grutter*, it nonetheless invalidated the policy on narrow tailoring grounds.[66]

### A. *Wessman v. Gittens*

In 1998, the First Circuit, in *Wessman v. Gittens*,[67] became the first federal appeals court to consider the constitutionality of a voluntary race-conscious admissions policy at a public secondary school. From 1974 to 1987, Boston Latin School (BLS), one of three prominent "examination schools" run by the city of Boston, was subject to a federal court order to desegregate.[68] After BLS was released from the desegregation decree, it remained committed to a race-conscious admissions policy.[69]

The admissions plan at issue in *Wessman* based admissions decisions on a combination of an applicant's entrance examination score and grade point average, which together comprised the applicant's composite score. Only those students ranking in the top half of the overall applicant pool (qualified applicant pool) were eligible to be admitted to BLS. Half of the students in BLS's entering class were awarded seats, in rank order, based strictly on their composite score. The remaining seats were allocated in rank order, however with the requirement that the racial/ethnic composition of the students chosen mirror that of the remaining qualified applicants.[70]

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64. *See, e.g.*, Eisenberg v. Montgomery County Pub. Sch., 197 F.3d 123 (4th Cir. 1999); Tuttle v. Arlington County Sch. Bd., 195 F.3d 698 (4th Cir. 1999); Wessman v. Gittens, 160 F.3d 790 (1st Cir. 1998).

65. Comfort *ex rel.* Neumyer v. Lynn Sch. Comm., 283 F. Supp. 2d 328 (D. Mass. 2003).

66. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1, 377 F.3d 949, 964, 968–69 (9th Cir. 2004); *see also* McFarland v. Jefferson County Pub. Sch., 330 F. Supp. 2d 834, 837 (W.D. Ky. 2004) (finding student body diversity in primary and secondary schools to constitute a compelling state interest).

67. 160 F.3d 790.

68. *Id.* at 791.

69. *Id.* at 792.

70. *Id.* at 793. The remaining qualified applicant pool, which was the qualified applicant pool "*minus* those persons already admitted on the basis of composite score rank alone," was categorized into five racial/ethnic groups: white, black, Asian, Hispanic, and Native American. *Id.*

Sarah Wessman, a white student, was denied a seat at BLS, even though she had a higher composite score and rank than black and Hispanic students who were admitted. Her father subsequently filed suit on her behalf.[71] The First Circuit, as the first federal appellate court to face this issue, relied on the "absence of a clear signal" from the Supreme Court to assume, but not hold, that diversity could be a compelling state interest.[72] However, the court determined that the policy failed to satisfy the narrowly tailored analysis, as set forth in *Bakke*.[73] Chiefly, the court found fault with the policy's failure to consider a wide range of qualities that contribute to diversity and rejected its exclusive emphasis on racial and ethnic diversity to admit the second half of the entering class.[74] Essentially, the policy "effectively foreclose[d] some candidates from all consideration for a seat . . . simply because of the racial or ethnic category in which they [fell]."[75] Thus, the First Circuit struck down BLS's voluntary race-conscious admissions program as violative of the Equal Protection Clause.[76]

### B. *Tuttle v. Arlington County School Board*

The following year, the Fourth Circuit, in *Tuttle v. Arlington County School Board*,[77] also failed to decide whether diversity is a compelling interest in the context of a voluntary race-conscious assignment policy at the K–12 level. The admissions policy of Arlington Traditional School (ATS) sought "to promote racial, ethnic, and socioeconomic diversity."[78] One of the policy's goals was "'to prepare and educate students to live in a diverse, global society' by 'reflect[ing] the diversity of the community.'"[79] The policy characterized diversity based on "three equally weighted factors: (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."[80] Due to the large applicant pool and limited number of seats, ATS first extended offers of admission to applicants

71. *Id.* at 793–94.
72. *Id.* at 796.
73. *Id.* at 800.
74. *Id.* at 798. The court noted that "[a]t a certain point in its application process—specifically, during the selection of the second half of each incoming class—the Policy relies on race and ethnicity, and nothing else, to select a subset of entrants." *Id.* at 794.
75. *Id.* at 800.
76. *Id.*
77. 195 F.3d 698 (4th Cir. 1999).
78. *Id.* at 700.
79. *Id.* at 701 (alteration in original).
80. *Id.*

with siblings already attending the school.[81] The school then employed a weighted lottery, based on the three diversity factors, to fill the remaining seats if "the total ATS applicant pool, including siblings, was not within 15% of the county-wide student population percentages for all three factors."[82] Applicants possessing the diversity characteristics had an increased likelihood of being selected for admission in the lottery.[83]

Two children who were not selected for admission to ATS and who did not have siblings attending the school or any diversity factor to increase their chance of selection challenged the constitutionality of the policy under the Equal Protection Clause of the Fourteenth Amendment.[84] Like the First Circuit in *Wessman*, the Fourth Circuit also relied on the Supreme Court's limited guidance to "assume, without so holding, that diversity may be a compelling governmental interest."[85] In evaluating whether the policy was narrowly tailored to achieve diversity, the court took into account five factors: "(1) the efficacy of alternative race-neutral policies, (2) the planned duration of the policy, (3) the relationship between the numerical goal and the percentage of minority group members in the relevant population or work force, (4) the flexibility of the policy, including the provision of waivers if the goal cannot be met, and (5) the burden of the policy on innocent third parties."[86]

The court first criticized the school's policy because the committee considered several race-neutral alternatives before selecting the race-based policy at issue. The court thus found that the district "ha[d] race-neutral means to promote diversity."[87] Second, the court faulted the policy for its failure to indicate a termination date.[88] Third, the court determined that the method utilized by ATS to attain the desired composition of racial and ethnic diversity constituted racial balancing.[89] The court explained that even though "the [p]olicy [did] not explicitly set aside spots solely for certain minorities, it ha[d] practically the same result by skewing the odds of selection in favor of certain minorities."[90] Fourth, the court found that the racial and ethnic diversity factor's grant of preferential treatment to certain applicants based solely on

81. *Id.* at 701–02.
82. *Id.* at 702.
83. *Id.*
84. *Id.* at 702–03.
85. *Id.* at 705.
86. *Id.* at 706 (quoting Hayes v. N. State Law Enforcement Officers Ass'n, 10 F.3d 207, 216 (4th Cir. 1993)).
87. *Id.*
88. *Id.*
89. *Id.* at 707. In addition, the court found that racial balancing was not necessary to achieve the policy's goal of diversity. *Id.*
90. *Id.*

their race violated *Bakke*'s requirement that applicants be treated as individuals.[91] The court's final criticism of the policy was its impact on "young kindergarten-age children like the [a]pplicants who [did] not meet any of the [p]olicy's diversity criteria."[92] The court found "it ironic that a [p]olicy that [sought] to teach young children to view people as individuals rather than members of certain racial and ethnic groups classifie[d] those same children as members of certain racial and ethnic groups."[93]

### C. *Eisenberg v. Montgomery County Public Schools*

The same year, in *Eisenberg v. Montgomery County Public Schools*,[94] the Fourth Circuit again considered and struck down a voluntary race-conscious assignment policy in a public primary school. Although it was never under a court order to desegregate, Montgomery County implemented several programs to dismantle segregation in the county's school system.[95] As part of its efforts to draw a diverse group of students to schools outside the students' area of residence, the county created magnet school programs.[96] Students who wanted to attend one of the magnet schools had to request a transfer from their assigned school. The county weighed four factors in requests for a voluntary transfer: "first, school stability;[97] second, utilization/enrollment;[98] third, diversity profile;[99] and last, the reason for the request."[100] A transfer

91. *Id.*
92. *Id.*
93. *Id.*
94. 197 F.3d 123 (4th Cir. 1999).
95. *Id.* at 125
96. *Id.* "'[M]agnet school' is defined as a public elementary or secondary school or public elementary or secondary education center that offers a special curriculum capable of attracting substantial numbers of students of different racial backgrounds." 20 U.S.C. § 7204 (2000).
97. "Stability refer[red] to whether the assigned school and the requested school [were] undergoing a boundary change, consolidation, or renovation that require[d] students to attend school at an alternative site or whether either school [was] undergoing some other change that require[d] the enrollment to remain stabilized." *Eisenberg*, 197 F.3d at 126 n.5.
98. "An underutilized school [was] operating below 80% capacity and an overutilized school [was] above 100% capacity." *Id.* at 126. Transfer requests involving schools with underutilization or overutilization would likely be denied if they negatively impacted the utilization of either school (for example, a transfer out of an underutilized school). Montgomery County also considered enrollment in addition to utilization to guarantee that schools maintained the optimal enrollment range. *Id.*
99. Students were classified based on their race/ethnicity. "Montgomery County compare[d] the countywide percentage for each racial/ethnic group to the percentage of each group attending a particular school, and also determine[d] whether the percentage of each racial/ethnic group in that school ha[d] either increased or decreased over the past three years." Montgomery County used this information to "assign[ ] to each racial/ethnic group within each school a diversity category." *Id.* (footnote omitted).

request was rejected if it "negatively affect[ed] diversity"[101] at either the assigned or requested school, unless the student could demonstrate "a 'unique personal hardship.'"[102]

Jacob Eisenberg, a white student, applied to transfer to the math and science magnet program at Rosemary Hills Elementary School from his assigned elementary school which had predominantly minority student enrollment. His request was denied due to the "negative impact on diversity" that his transfer would have on his assigned school, and he subsequently filed suit.[103] As in *Tuttle*, the Fourth Circuit again failed to resolve whether diversity was a compelling state interest with regards to a voluntary race-conscious student assignment policy at the K–12 level.[104] The *Eisenberg* court thereby limited its analysis to the narrow tailoring prong in invalidating the race-conscious assignment policy. The court primarily took issue with the fact that the "transfer policy [did] not allow every applicant for a transfer to be eligible for every available spot."[105] Instead, "the transfer policy consider[ed] race as the sole determining factor, absent a 'unique personal hardship'."[106] The court found that if Eisenberg had been of another race, the county would not have denied his transfer.[107] The Fourth Circuit thus concluded that the county's transfer policy was not narrowly tailored to achieve diversity.[108]

### D. *Comfort ex rel. Neumyer v. Lynn School Committee*

The U.S. District Court for the District of Massachusetts, in *Comfort ex rel. Neumyer v. Lynn School Committee*,[109] departed from the circuit court tradition of leaving the question of diversity unsettled and held that a particular form of diversity was a compelling state interest under the circumstances of this case. Moreover, the court found the district's assignment policy to be narrowly tailored.

The Lynn school district permitted every student to attend his or her neighborhood school and further provided students with the option to

100. *Id.* at 125–26.
101. *Id.* at 126.
102. *Id.* at 127. An example of a "unique personal hardship" was "a sibling already attending the requested school." *Id.* at 127 & n.10.
103. *Id.* at 127.
104. *Id.* at 130.
105. *Id.* at 133.
106. *Id.* at 129.
107. *Id.* at 133.
108. *Id.* at 131. The court also found the policy at issue to be unconstitutional "racial balancing." *Id.* at 133.
109. 283 F. Supp. 2d 328 (D. Mass. 2003).

transfer to other schools in the district if the transfer would "contribute to the districtwide integration effort."[110] The Lynn plan established ranges, based on the overall percentage of minority students in the district, within which the minority population of an individual school must fall. The elementary schools' minority population was required to be within +/15 percent of the overall percentage of minority students, and the junior and high schools' minority population was required to be within +/10 percent of the overall percentage of minority students.[111] A school in which the proportion of minority students exceeded the higher range was classified as "racially imbalanced,"[112] and a school in which the number of minority students fell below the lowest range was "racially isolated."[113] Schools in which the proportion of minorities fell within the range were "racially neutral."[114] Accordingly, a minority student would always be allowed to transfer from a racially imbalanced school to a racially isolated school. Furthermore, neutral transfers were allowed, contingent upon approval at the sending and receiving schools. The district also provided an appeals process for transfer denials, overriding those "result[ing] in siblings attending different schools or . . . medical, safety, or other extreme hardship."[115]

Parents of elementary school children challenged the race-conscious student assignment plan as violative of the Equal Protection Clause. In considering whether diversity could be a compelling state interest, the district court found *Wessman* and *Bakke* to be of little guidance. Significantly, the court emphasized that the plans in both *Wessman* and *Bakke* involved admission to competitive public schools for which no comparable education was provided. Lynn's plan, in contrast, did not deny any applicant a comparable education.[116] The court also found it noteworthy that the race-based preferences in *Wessman* and *Bakke* relied on the rationale that racial diversity

110. *Id.* at 348. A proposed transfer would "contribute to the districtwide integration effort" when it was considered "desegregative." *Id.* "A proposed transfer [was] desegregative—always allowed, space permitting—when it would improve the racial balance of the sending *or* the receiving school." *Id.* (footnote omitted). "A transfer [was] segregative, and never allowed, when it would exacerbate an already existing condition of racial imbalance in the sending or receiving school." *Id.*

111. *Id.* "For example, Lynn's student population for the 2001–2002 school year was 42% white and 58% nonwhite. By the Lynn [p]lan's definitions, then, an elementary school that enrolled between 43% and 73% minority students would qualify as racially balanced. Middle and high schools required a tighter fit of between 48% and 68% minority students." *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 349.

116. *Id.* at 378.

is essential to obtain viewpoint diversity, whereas Lynn's plan sought a diverse student body to "prepar[e] students to live in a multiracial society."[117]

The court found racial and ethnic diversity to achieve this goal a compelling state interest, emphasizing that the "the purpose of the public school system is as much to teach citizenship to its students as it is to teach academic subjects."[118] The court stressed that "at the elementary school level . . . teaching citizenship—the proverbial effort to ensure that students 'work and play well with others'—is one of a school's highest educational priorities."[119]

The court also determined that Lynn's plan was narrowly tailored to achieve this specific type of diversity. The court's inquiry was guided by three factors.[120] First, the court considered whether the plan's means were "[n]ecessary to [a]chieve its [e]nds."[121] The court asserted that "[w]hen 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."[122] The court thus reasoned that since the school district could not effectively prepare its students "to function in a multiracial world"[123] through race-neutral means, it was essential for the school to utilize a race-conscious assignment policy to create the "actual intergroup racial contact" necessary to realize this compelling goal.[124] The court also found the plan essential to attain the ends because "token numbers of minorities" would be inadequate to attain "intergroup contact" in a predominantly white school.[125] Furthermore, the court found there to be no adequate race-neutral alternatives.[126]

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117. *Id.* at 355.

118. *Id.* at 375.

119. *Id.* at 375–76.

120. *Id.* at 371. The court explained:

> Three concerns are evident in the case law: (1) the extent to which the challenged policy is *necessary* to pursue a compelling interest (and whether there are adequate race-neutral alternatives), (2) the extent to which the policy is *proportional* to that interest, and (3) the proportionality between the benefits the policy provides and the harm caused to 'innocent persons' as a result of its implementation.

*Id.*

121. *Id.* at 376.

122. *Id.* (citing Brewer v. W. Irondequoit Cent. Sch. Dist., 212 F.3d 738, 752 (2d. Cir. 2000)).

123. *Id.*

124. *Id.*

125. *Id.* at 377. "[T]here is a tipping point of 20% white or nonwhite students, well-recognized by experts in this field and dubbed the 'critical mass,' that is crucial to catalyzing positive intergroup contact." *Id.*

126. *Id.* at 378. The court considered Lynn's current distribution of "residential segregation" and noted the difficulty of redrawing Lynn's "neighborhoods to desegregative effect" without resulting in mandatory busing or the sacrifice of neighborhood schooling. *Id.* at 388. School

Next, the court looked at the "[p]roportionality of the [m]eans" to determine whether the policy was narrowly tailored.[127] The court noted that the plan was not as invasive as other policies the district could have employed.[128] The court found significant that every child could attend his or her neighborhood school and that parents had the additional choice of being involved in Lynn's integration attempts. Furthermore, the court stressed that Lynn's plan did not involve any "rigid quotas, [or] unchanging formula."[129] The plan was additionally found to be proportional to the compelling goal of racial and ethnic diversity because its "use of race [was] flexible, and of limited duration."[130] The court found "[a]n automatic shut-off mechanism" to be "built in" to the plan, as restrictions on transfers ceased when a school's racial makeup corresponded with the district-wide racial composition.[131]

Finally, the court assessed the burden on nonminorities and found it to be "minimal."[132] The court pointed out that school districts are not required to permit parents to select the school their child attends.[133] The court also found the burden on nonminorities slight because admission did not depend on specific academic criteria, and there was no attendant stigma for not gaining acceptance to one's school of preference "or to the government's recognition of an individual's race."[134] Additionally, all students were privileged to the same quality of education, irrespective of whether they received admission to their first choice school.[135]

### E. *Parents Involved in Community Schools v. Seattle School District, No. 1*

The Ninth Circuit, in *Parents Involved in Community Schools v. Seattle School District, No. 1*,[136] became the first appellate court in the wake of *Grutter* to consider the constitutionality of a race-conscious student assignment

assignment by lottery also would not achieve the desired diversity because evidence shows that white parents are inclined to choose schools that are comprised of predominantly white students, and nonwhite parents prefer schools that are predominantly nonwhite. *Id.* at 388–89. Moreover, Lynn had previously attempted, but failed, to attract white students into a minority neighborhood through a magnet school. *Id.* at 388.

127. *Id.* at 377.
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.* at 378.
135. *Id.*
136. 377 F.3d 949 (9th Cir. 2004).

policy in the secondary school context. Although the court agreed that the Seattle school district's diversity rationale matched the rationale articulated in *Grutter* and therefore constituted a compelling interest, it nonetheless held that the policy was not narrowly tailored.[137] Accordingly, the court ruled that the district's use of a racial tiebreaker to determine student assignments violated the Fourteenth Amendment's Equal Protection Clause.[138]

To prevent racial imbalance and to promote racial diversity, the school district implemented an "open choice plan."[139] Under this plan, students ranked the high schools they would like to attend.[140] Accordingly, if a school had more applicants than seats, "tiebreakers" were used to determine which students were admitted.[141] The first tiebreaker preferred siblings of returning students.[142] The second tiebreaker was "based entirely on race" and was only employed in an oversubscribed school when the school's demographic profile varied from the overall demography of the district by more than a set number of percentage points.[143] As such, the racial tiebreaker gave preference to students whose race would help "to balance the racial makeup of the city's public high schools."[144] Any remaining seats at oversubscribed schools were allocated based upon distance to the oversubscribed school[145] and, finally, by a random lottery.[146] Parents Involved in Community Schools, a group of parents whose children had been denied assignment to their schools of choice, sued the district, claiming that the district's use of the racial tiebreaker constituted illegal racial discrimination in violation of the Fourteenth Amendment and Title VI.[147]

Applying strict scrutiny, the court determined that the district's purpose for the "open choice plan" corresponded with *Grutter*'s diversity rationale and therefore constituted a compelling interest.[148] The court dismissed the parents' attempt to limit *Grutter*'s scope by claiming that the Court's

137. *Id.* at 964, 968–69.
138. *Id.* at 976.
139. *Id.* at 955.
140. *Id.*
141. *Id.*
142. *Id.* The district's use of the first tiebreaker determined the assignments of between 15 and 20 percent of the applicants. *Id.*
143. *Id.* at 955–56. Use of the racial tiebreaker accounted for about 10 percent of high school assignments. *Id.* at 955.
144. *Id.* at 955.
145. Those who lived nearest the oversubscribed school were selected for admission first. *Id.* at 956.
146. *Id.* The random lottery tiebreaker was "rarely . . . invoked because distances [were] calculated to one hundredth of a mile for purposes of the preceding tiebreaker." *Id.*
147. *Id.*
148. *Id.* at 964

compelling interest analysis was expressly limited to the use of race in admissions in the context of "the expansive freedoms of speech and thought associated with the university environment."[149] The court conceded that *Grutter* concerned the use of race in admissions in higher education and that the language in *Grutter* reflected this, but the court was unable to discern "a principled basis for concluding that the benefits the Court attributed to the existence of educational diversity in universities [could not] similarly attach to high schools."[150] The court stated that it simply could "not see how the government's interest in providing for diverse interactions among 18 year-old high school seniors is substantially less compelling than ensuring such interactions among 18 year-old college freshmen."[151] Accordingly, the court concluded that the benefits from diversity "are as compelling in the high school context as they are in higher education."[152] The court declined to comment "on the extent to which the diversity rationale extends beyond the secondary educational context."[153]

Turning to the narrow tailoring analysis, the court relied upon the narrow tailoring principles laid out in *Grutter*[154] and found that the district's "racial tiebreaker fail[ed] virtually every one of the narrow tailoring requirements."[155] The court first criticized the policy for its failure to provide applicants with individualized consideration, thereby, "mak[ing] an applicant's race or ethnicity the defining feature of his or her application."[156] Second, the court found that the use of the racial tiebreaker constituted an impermissible racial quota.[157] Third, the court faulted the district's failure to give consideration to the many ways in which an applicant might contribute to a diverse student body, instead automatically admitting applicants solely based on their race.[158] Fourth, the court concluded that the district neglected to seriously consider assignment policies that did not so prominently feature

149. *Id.* at 963–64 (quoting Grutter v. Bollinger, 539 U.S. 306, 330 (2003)).
150. *Id.* at 964.
151. *Id.*
152. *Id.*
153. *Id.* at 964 n.18.
154. The court's narrow tailoring inquiry was also guided by the Supreme Court's recent decision in *Gratz v. Bollinger*, 539 U.S. 244 (2003), where the Court held that the University of Michigan's undergraduate admissions program was not narrowly tailored to achieve diversity, chiefly because it failed to provide adequate individualized consideration.
155. *Parents Involved in Cmty. Sch.*, 377 F.3d at 968–69.
156. *Id.* at 969 (quoting Grutter v. Bollinger, 539 U.S. 306, 337 (2003)).
157. *Id.*
158. *Id.*

race, although several such alternatives had been proposed.[159] Fifth, the court determined that the racial tiebreaker was "not designed to minimize its adverse impact on third parties."[160] The only narrow tailoring requirement the court found the racial tiebreak "even arguably satisfie[d]" was the time limit requirement.[161] For these reasons, the court held that Seattle's policy amounted to "an unadulterated pursuit of racial proportionality" and accordingly struck down the "open choice plan."[162]

## III. ADVOCATING AN EXTENSION OF *GRUTTER*'S DIVERSITY RATIONALE TO VOLUNTARY RACE-CONSCIOUS STUDENT ASSIGNMENT POLICIES AT THE K–12 LEVEL

In recognizing the "substantial" benefits of diversity for all students, the *Grutter* Court placed significant weight on research and expert reports documenting the benefits of diversity in higher education. A vast amount of research has documented these benefits at the K–12 level as well. Despite some inherent differences between the higher education and primary and secondary school contexts, most of the Court's reasons for holding that diversity in higher education is a compelling interest are similarly applicable to primary and secondary schools. These grounds can thus be employed to provide for an extension of *Grutter*'s diversity rationale to voluntary race-conscious student assignment policies at the primary and secondary school

159. *Id.* at 970. The court criticized the district for failing to "*earnestly appraise*[ ]" the adoption of a randomized lottery, which the court recognized "would necessarily produce levels of school diversity statistically comparable to (and perhaps even more proportional than) the [d]istrict's racial tiebreaker." *Id.* The court noted that the reasons for rejecting consideration of a lottery in *Grutter* did not exist in this case because student assignments did not consider merit and there was accordingly "absolutely no possibility that a lottery would diminish the quality of admitted students." *Id.* at 971. The court also faulted the district for not considering "adopting a diversity-oriented policy that [did] not rely exclusively on race, but which instead account[ed] for the wider array of characteristics that comprise the kind of true diversity lauded by Justice Powell in *Bakke* and by the Court in *Grutter* . . . ." *Id.* The court further suggested that the district should have given more consideration to proposals to use English proficiency or eligibility for free or reduced lunch as an alternative tiebreaker. *Id.*

160. *Id.* at 975. The court concluded that "the extent to which [the district] use[d] race [was] not calibrated to the benefits sought. Over time, 'the band' . . . ranged from as much as +/–25 percent to as little as +/–10 percent, and . . . +/–15 percent" at the time of litigation. *Id.* (footnote omitted). The court found that such variance did not represent "the measure of tailored proportionality. Instead, it represent[ed] a stubborn adherence to the use of race for race's sake, with the effect that some non-preferred student applicants [would] be displaced solely because of their racial and ethnic identities—to no benefit at all." *Id.*

161. *Id.* at 976 n.32.

162. *Id.* at 976.

level. In addition, there are several aspects unique to the K–12 setting that make the interest in student body diversity even more compelling at this level.

A. Diversity at the K–12 Level Promotes Academic Achievement

In upholding diversity as a compelling interest, *Grutter* relied on studies documenting the positive impact of diverse classrooms on "learning outcomes."[163] Researchers have attained similar results examining the nexus between diversity and academic achievement at the K–12 level.[164]

One such study, which reviewed student scores from the 1993–1994 Iowa Test of Basic Skills, revealed that segregated primary schools have a negative educational impact on black students. Black students in every segregated school except one scored below the national average. In contrast, black students attending more integrated schools commonly surpassed the national average. Moreover, the educational benefits of attending an integrated primary school were not limited solely to black students; attending an integrated primary school proved beneficial for white students as well. Scores for both groups of students rose by roughly twenty points.[165] Another study, which analyzed the findings of the Virginia Literacy Testing Program, indicated that a substantial gap existed between the pass rates of those attending segregated schools and those attending integrated schools. In fact, students in integrated schools demonstrated a dramatically higher pass rate than students in segregated schools "[i]n all subject areas and in every grade."[166] Researchers have also demonstrated that, like segregation, resegregation can have a detrimental effect on academic achievement. Vivian W. Ikpa's study comparing the achievement test scores for black fourth graders before and after the elimination of busing revealed that test scores dropped

163. Grutter v. Bollinger, 539 U.S. 306, 330 (2003).

164. A recent comprehensive review by Janet Ward Schofield of previous studies confirmed the positive impact of integrated schools on the academic success of students at the K–12 level. Schofield concluded that minority students in integrated schools had significant, albeit modest, increases in their test scores, especially in reading. Janet Ward Schofield, *Review of Research on School Desegregation's Impact on Elementary and Secondary School Students*, *in* HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION 597, 610 (James A. Banks ed., 2001) [hereinafter HANDBOOK]. *See generally* JOHN A. POWELL, AN "INTEGRATED" THEORY OF INTEGRATED EDUCATION (2002) (analyzing research supporting the educational benefits of integration), *available at* http://www.civilrightsproject.harvard.edu/research/reseg02/powell.pdf.

165. *See* ORFIELD ET AL., *supra* note 4, at 131–32. *See generally* Robert E. Slavin, *Cooperative Learning and Intergroup Relations*, *in* HANDBOOK, *supra* note 164, at 628 (showing that "cooperative learning" in diverse groups in integrated K–12 schools leads to social and academic benefits for all students).

166. ORFIELD ET AL., *supra* note 4, at 133.

"in the first year of resegregation."[167] These findings led Ikpa to conclude that "[s]egregated educational settings may serve to retard the development of children."[168]

Despite the documented beneficial effects of diversity on academic achievement, opponents argue that if larger benefits are not realized more rapidly, then integration has proved unsuccessful.[169] As Gary Orfield, a leading expert on school desegregation, points out, however, hardly any educational reform would be able to satisfy such a high standard. In fact, no major educational reform has ever had such an auspicious beginning. Moreover, Orfield argues that the true benefits of diversity will likely become more apparent with the passing of time.[170]

B. Diversity at the K–12 Level Promotes Social Benefits

*Grutter* recognized that a diverse learning environment in higher education helps prepare students to participate in a diverse workforce and society.[171] Recent research conducted by the Civil Rights Project confirms

167. *Id.* at 131 (citing Vivian Ikpa, *The Effects of Changes in School Characteristics Resulting From the Elimination of the Policy of Mandated Busing for Integration Upon the Academic Achievement of African-American Students*, 17 EDUC. RES. Q. 19 (1993)). Ikpa's study revealed that resegregation also widened the gap between the test scores of black and white students.

168. *Id.*; *see also* POWELL, *supra* note 164, at 3 (concluding that "racially segregated education negatively impacts all citizens and undermines the goal of constructing a multi-racial and multi-ethnic democracy").

169. *See* ORFIELD ET AL., *supra* note 4, at 104–05.

170. *Id.* Whereas some researchers have focused on the beneficial impact of diversity on academic achievement, other researchers have suggested that the benefits of diversity cannot adequately be assessed by test scores. For example, a study undertaken in the late 1970s by Johns Hopkins researchers suggested that desegregation actually benefited minority students by affording them access to "mainstream opportunities" previously available only to whites. *Id.* at 105. The researchers identified desegregation and integration as devices for avoiding the inequality created by what is known as the "perpetuation theory." *See, e.g.*, Jomills Henry Braddock II & James M. McPartland, *Social-Psychological Processes That Perpetuate Racial Segregation: The Relationship Between School and Employment Desegregation*, 19 J. BLACK STUD. 267, 267 (1989) (citation omitted) (showing that early "racial segregation tends to be perpetuated over stages of the life cycle and across institutional settings"). More specifically, integration is seen as providing access to "higher education, employment and choice of community." ORFIELD ET AL., *supra* note 4, at 105–06.

171. Employers have expressed their preference for employees who possess the capacity to work effectively in diverse business environments. *See* Grutter v. Bollinger, 539 U.S. 306, 330–31 (2003). *See generally* BUS.-HIGHER EDUC. FORUM, INVESTING IN PEOPLE: DEVELOPING ALL OF AMERICA'S TALENT ON CAMPUS AND IN THE WORKPLACE (2002), *available at* http://www.acenet.edu/bookstore/pdf/investing_in_people.pdf. Additionally, a 1999 study by the U.S. Department of Labor concerning primary and secondary school students determined that the capacity to function effectively in a culturally diverse setting is a skill essential for students to succeed in U.S. businesses. SEC'Y'S COMM'N ON ACHIEVING NECESSARY SKILLS, U.S. DEP'T OF LABOR, SKILLS AND TASKS FOR JOBS: A SCANS REPORT FOR AMERICA 2000, at 1-3 to -4, 2-6 (1999), *available at* http://wdr.doleta.gov/opr/fulltext/document.cfm?docn=6140. The amici curiae brief written on behalf

these benefits in the secondary school context as well. The Civil Rights Project performed a series of studies that focused on the experiences of twelfth-grade students with racial and ethnic diversity.[172] One such study took place in Cambridge, Massachusetts, where the public schools are recognized for their diversity and integration.[173] The results of this study revealed that exposure to the cultures and experiences of other racial and ethnic groups helped students understand different vantage points.[174] Moreover, the students expressed a high level of comfort and an increased willingness "to interact with members of different backgrounds."[175] Over 90 percent of the students reported that their school experiences prepared them to work with people who are different from themselves.[176]

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of the National School Boards Association in *Grutter* identified several benefits attributable to diversity in preparing students for employment in a diverse workforce and in society: "[D]iversity helps all students understand the value of diverse perspectives, become better problem-solvers, and function and communicate more effectively in diverse business settings and in our global marketplace." Brief of Amici Curiae National School Boards Ass'n et al. at 19, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241). *Grutter* relied on studies conducted by Patricia Gurin which found that exposing students to diverse points of view enables them to learn to engage in more critical thinking and comprehend complicated subject matter. CIVIL RIGHTS PROJECT HARVARD UNIV., THE IMPACT OF RACIAL AND ETHNIC DIVERSITY ON EDUCATIONAL OUTCOMES: CAMBRIDGE, MA SCHOOL DISTRICT 3 & n.4 (2002) [hereinafter RACIAL AND ETHNIC DIVERSITY], *available at* http://www.civilrightsproject.harvard.edu/research/diversity/cambridge_diversity.pdf. Research also demonstrates that diverse work teams that incorporate their heterogeneous points of view perform more effectively than non-diverse work teams. Diverse work teams have been shown to develop ideas that are more innovative and practical than homogeneous work teams. *See* Poppy Lauretta McLeod et al., *Ethnic Diversity and Creativity in Small Groups*, 27 SMALL GROUP RES. 248, 260–61 (1996); *see also* RACIAL AND ETHNIC DIVERSITY, *supra*, at 5. However, this benefit only manifests when diverse teams can work well collectively. *See* McLeod et al., *supra*, at 260–61.

172. *See, e.g.*, RACIAL AND ETHNIC DIVERSITY, *supra* note 171, at 1.

173. *Id.* The study gave surveys to 379 students in the twelfth-grade class concerning their educational experiences "in an interracial school and their convictions about the way those experiences have contributed to their education." *Id.* at 1–2. The study examined four separate factors of educational outcomes that can enable students to take full advantage of the benefits of diversity: "(1) student learning and peer interaction; (2) citizenship and democratic principles; (3) future educational aspirations and goals; and (4) perceptions of support by the school." *Id.* at 2. According to the Civil Rights Project, "[t]hese areas are all well established as important goals of education, and build essential skills that students need in order to achieve academic and professional success, and to become responsible citizens." *Id.*

174. *Id.* at 3. "Around forty percent of students across all racial and ethnic groups report[ed] that exposure in the curriculum to different cultures and experiences of different racial and ethnic groups . . . helped them understand points of view different from their own, while a third of Latino students agreed." *Id.*

175. *Id.* at 2, 4. Over 90 percent of the students revealed that they were "comfortable" or "very comfortable" with members of other groups. *Id.* at 4.

176. *Id.* at 6.

Previous research has revealed that students educated in integrated schools are also more likely to work in an integrated work environment.[177] Researchers Jomills Henry Braddock II and James M. McPartland concluded "that both early school desegregation experiences and current community desegregation patterns promote adult desegregation in work environments . . . ."[178] Research also indicates that attending integrated primary and secondary schools helps to reduce segregation in higher education. For example, a 1980 study conducted by Braddock revealed that African Americans who attended a desegregated high school were more likely to attend predominantly white colleges. Given the inclination of racial segregation "to become self-perpetuating," this research indicates that there are positive social benefits of attending an integrated school, namely "breaking down the self-perpetuating cycle of racial segregation in America."[179]

Another benefit of diversity recognized by *Grutter* is its promotion of positive relations among members of different racial and ethnic groups by helping erode racial stereotypes and engender cross-racial understanding. A study by Peter B. Wood and Nancy Sonleitner demonstrated that childhood interracial contact in schools encourages the development of "more tolerant racial attitudes," breaks down harmful racial stereotypes, and decreases whites' prejudice towards blacks. Wood and Sonleitner determined that interracial contact is most effective in reducing stereotypes and prejudice during students' "formative years" and found that these positive effects extended into adulthood.[180] Another study focusing on interracial interactions of students in primary school found "that racially balanced classrooms maximize the

177. *See* ORFIELD ET AL., *supra* note 4, at xviii ("Desegregated schooling helps break a cycle of segregation later in life, thereby leading to better-integrated work places and neighborhoods.").

178. Braddock & McPartland, *supra* note 170, at 286; *see also* Jomills Henry Braddock II, *The Perpetuation of Segregation Across Levels of Education: A Behavioral Assessment of the Contact-Hypothesis*, 53 SOC. EDUC. 178, 178–86 (1980) (finding that black, Latino, and white students who attend integrated schools are more likely to work in racially diverse workplaces); William T. Trent, *Outcomes of School Desegregation: Findings From Longitudinal Research*, 66 J. NEGRO EDUC. 255, 256 (1997) ("School racial composition has a strong, statistically significant, and positive effect on the likelihood that Blacks will have White coworkers and that Whites will have Black coworkers.").

179. Braddock, *supra* note 178, at 184–85; *see also* Marvin P. Dawkins & Jomills Henry Braddock II, *The Continuing Significance of Desegregation: School Racial Composition and African American Inclusion in American Society*, 63 J. NEGRO EDUC. 394, 401–03 (1994) (finding that both blacks and whites educated in desegregated elementary schools are more likely to attend a desegregated college, work in a desegregated environment, and live in a desegregated neighborhood).

180. Peter B. Wood & Nancy Sonleitner, *The Effect of Childhood Interracial Contact on Adult Antiblack Prejudice*, 20 INT'L J. OF INTERCULTURAL REL. 1, 14–15. (1996).

interracial friendliness of both blacks and whites."[181] Increasing the proportion of black students in a classroom relative to whites has been found to encourage students to embrace their peers of other races as their friends.[182] Whites in integrated schools have also been shown to positively change their negative feelings of "fear and avoidance of African Americans" and become more willing to interact with them.[183]

### C. Recognition of Diversity as a Compelling Interest at the K–12 Level Comports With Supreme Court Precedent

In ruling that diversity is a compelling interest, *Grutter* relied on the deference that has traditionally been accorded to a university to make its own decisions as to education, including the selection of its student body.[184] Likewise, the Supreme Court has repeatedly granted deference to the academic decisions of public school authorities in primary and secondary schools,[185] including decisions in the context of public school desegregation.[186] Moreover, the Supreme Court's desegregation cases have recognized that voluntary integration of schools is a sound educational policy within the discretion of local school authorities.[187] In its decision in

181. Maureen T. Hallinan & Steven S. Smith, *The Effects of Classroom Racial Composition on Students' Interracial Friendliness*, 48 SOC. PSYCHOL. Q. 3, 13–14 (1985).

182. *See id.* at 5; *see also* Slavin, *supra* note 165, at 630–33 (providing an overview of research demonstrating that "cooperative learning" in diverse groups in integrated primary and secondary schools fosters improved racial attitudes, including more interracial friendships, closer friendships, and friendships outside the learning groups).

183. *See* Schofield, *supra* note 164, at 610.

184. Grutter v. Bollinger, 539 U.S. 306, 330 (2003).

185. Courts have accorded deference to the decisions of school boards in balancing the constitutional rights of students with the distinctive needs of a public education and its curriculum. *See, e.g.*, Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 226 (1985) (underscoring courts' "reluctance to trench on the prerogatives of state and local educational institutions"); Gross v. Lopez, 419 U.S. 565, 577 (1975) ("Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. . . . By and large, public education in our Nation is committed to the control of state and local authorities." (quoting Epperson v. Arkansas, 393 U.S. 97, 104 (1968))).

186. *See, e.g.*, Freeman v. Pitts, 503 U.S. 467, 490 (1992) ("As we have long observed, 'local autonomy of school districts is a vital national tradition.'" (quoting Daton Bd. of Educ. v. Brinkman, 433 U.S. 406, 410 (1977))); Milliken v. Bradley, 418 U.S. 717, 741–42 (1974) ("No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process.").

187. *See, e.g.*, N.C. State Bd. of Educ. v. Swann, 402 U.S. 43, 45 (1971) ("[A]s 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."); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971). *See generally* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1, 377 F.3d 949, 995 (9th Cir. 2004) (Graber, J., dissenting).

*Swann v. Charlotte-Mecklenburg Board of Education*,[188] the Supreme Court stressed:

> 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 for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court.[189]

Although these words were stated in dicta and in the context of a school district under a court order to desegregate, the Second Circuit, in *Brewer v. West Irondequoit Central School District*,[190] cited *Swann* to support its holding that reducing racial isolation in K–12 schools can justify the use of voluntary race-conscious student assignment policies.[191] Moreover, the *Comfort* court evaluated Lynn's voluntary integration plan against the backdrop of deference to the academic decisions of school administrators.[192] Given this history of deference to school districts' expertise, especially in the context of public school desegregation, deference should be granted to school administrators' educational judgments that integrated schools are essential to their educational mission.[193]

An extension of *Grutter* to the primary and secondary educational setting is also supported by the Court's broad language endorsing the benefits of diversity throughout the educational system, and especially by its reliance on several landmark K–12 decisions.[194] In particular, the Court

188. 402 U.S. 1.

189. *Id.* at 16.

190. 212 F.3d 738 (2d Cir. 2000).

191. *Id.* at 749, 750–53 (holding that "reduction of racial isolation resulting from de facto segregation can be a compelling government interest justifying racial classifications").

192. Comfort *ex rel.* Neumyer v. Lynn Sch. Comm., 283 F. Supp. 2d 328, 374 (D. Mass. 2003); *see also* Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 226 (1985) (recognizing that local school authorities "are the experts in what will or will not work because they are uniquely attuned to the needs of a diverse urban community").

193. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1, 377 F.3d 949, 997 (9th Cir. 2004) (Graber, J., dissenting) (arguing that the high school assignment policy should be considered in light of other Supreme Court cases affording school districts deference, including those involving desegregation of public schools); McFarland v. Jefferson County Pub. Sch., 330 F. Supp. 2d 834, 851 (W.D. Ky. 2004) ("Viewing voluntary school integration as an extension of the Supreme Court's school desegregation jurisprudence makes sense."); *cf.* Petit v. City of Chicago, 352 F.3d 1111, 1114 (7th Cir. 2003) (granting deference, based on *Grutter*, to the "views of experts and Chicago police executives that affirmative action was warranted to enhance the operations" of the Chicago Police Department).

194. *See* JOINT STATEMENT OF CONSTITUTIONAL LAW SCHOLARS, *supra* note 19, at 6.

drew on *Plyler v. Doe*[195]: "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."[196] Also, quoting *Brown*, the Court noted that it has "long recognized that 'education . . . is the very foundation of good citizenship.'"[197] *Grutter*'s reliance on these seminal K–12 decisions in upholding diversity as a compelling state interest at the higher education level suggests that the Court's ruling is equally applicable to the K–12 context.

The history of *Brown*'s focus on "access to equal and integrated schools" also buttresses the diversity rationale at the K–12 level.[198] Although the fiftieth anniversary of *Brown* has spawned a good deal of debate concerning whether the decision realized its original promise, courts still applaud the promise of *Brown*.[199] Because integrating schools by its very nature involves promoting diversity, *Brown*'s desegregation mandate thus suggests that the interest of diversity is just as important if not more important in primary and secondary schools than in the higher education context.[200]

### D. Distinctions Between Higher Education and K–12 Education Support the Diversity Rationale at the K–12 Level

There are several distinctions between higher education and K–12 education which render student body diversity an even more compelling state interest at the K–12 level than at the higher education level. First, public primary and secondary schools reach nine-tenths of U.S. children, and therefore the benefits of student body diversity affect a much broader base of students than at the higher education level.[201] If all races and ethnicities are included beginning only at the higher education level, those who do not attend a college or university are often deprived of the benefits of diverse classrooms due to the segregated housing patterns in many communities.

195. 457 U.S. 202 (1982).

196. Grutter v. Bollinger, 539 U.S. 306, 311 (2003) (quoting *Plyler*, 457 U.S. at 221).

197. *Id.* (quoting Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954)).

198. *See, e.g.*, *McFarland*, 330 F. Supp. 2d at 852.

199. *See* Comfort *ex rel.* Neumyer v. Lynn Sch. Comm., 283 F. Supp. 2d 328, 389 (D. Mass. 2003) (noting that the school district "ha[s] an interest in fulfilling the *promise* of *Brown*" (emphasis added)); *McFarland*, 330 F. Supp. 2d at 836, 852.

200. *See* JOINT STATEMENT OF CONSTITUTIONAL LAW SCHOLARS, *supra* note 19, at 23.

201. *See, e.g.*, *id.* (asserting that the compulsory nature of K–12 education suggests that the interest in student body diversity is "much more significant" at the K–12 level than in higher education); RACIAL AND ETHNIC DIVERSITY, *supra* note 171, at 5.

Thus, it appears that diversity in classrooms might be even more compelling at the K–12 level, where the majority of America's youth are educated.[202]

Second, the academic and social benefits of exposing students to a diverse student body are even more potent when students are at a younger age.[203] A substantial body of research has demonstrated that early exposure to people of different racial and ethnic groups helps contribute to success in diverse environments in life.[204] As one court noted, "[i]t is during their formative school years that firm foundations may be laid for good citizenship and broad participation in the mainstream of affairs."[205]

Finally, by increasing student body diversity at the K–12 level, college and universities eventually will not need to rely on the student body diversity rationale as much in admissions to attain a diverse student population. At present, students are not beginning their quest for higher education on a "level playing field."[206] Instead, many minority students' educational opportunities have been hindered at the K–12 level.[207] Research has shown that "[i]ntergeneration gains" result from the academic benefits accruing to minority students who attend racially integrated K–12 schools.[208] According to William T. Trent, raising the "educational opportunities for one generation of minority individuals raises the socioeconomic status of the next generation, so that those who follow are more apt to begin school at the same starting point as their nonminority classmates."[209] Thus, if students are educated in diverse classrooms at the primary and secondary school level, colleges and universities will "be in a better position regarding diversity."[210]

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202. *See, e.g.*, RACIAL AND ETHNIC DIVERSITY, *supra* note 171, at 5.

203. *See* ORFIELD ET AL., *supra* note 4, at 105. A study by Robert Crain and Rita Mahard found that desegregation that started at the beginning of elementary school and lasted throughout the school years had larger benefits. *Id.*; *see also* Schofield, *supra* note 164, at 601.

204. *See supra* Part III.B.

205. Booker v. Bd. of Educ., 212 A.2d 1, 6 (N.J. 1965).

206. Brief of Amici Curiae National School Board Ass'n et al. at 11 n.14, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241).

207. *See id.*

208. POWELL, *supra* note 164, at 10 (citing Trent, *supra* note 178, at 255–57).

209. Trent, *supra* note 178, at 257 (concluding that integrated schooling has significant enduring benefits for minority students, particularly with regards to making economic opportunities available to them). Trent found that "[p]arents who have attended desegregated schools are more likely to have attended college, have better jobs, and live in desegregated neighborhoods." *Id.* Additionally, parents educated in diverse classrooms are "more likely to provide their children with the skills they need to begin school." *Id. See generally* Braddock, *supra* note 178 (finding that blacks who work in racially mixed workplaces hold better paying jobs than those held by blacks who attended segregated schools).

210. Brief of Amici Curiae National School Board Ass'n et al. at 11 n.14, *Grutter* (No. 02-241).

Nonetheless, there are differences between the K-12 and higher education contexts that may militate against the extension of *Grutter*'s diversity rationale to the primary and secondary school level. Significantly, *Grutter*'s compelling interest analysis stressed "the expansive freedoms of speech and thought associated with the university environment,"[211] reasoning that is less relevant to students in lower grades.[212] In addressing this point, the Ninth Circuit stated that it "[could not] identify a principled basis for concluding that the benefits the Court attributed to the existence of educational diversity in universities could not similarly attach in high schools."[213] Moreover, the U.S. District Court for the Western District of Kentucky found that a student assignment plan applying to both primary and secondary schools satisfied the compelling interest requirement "because it ha[d] articulated *some* of the same reasons for integrated public schools that the Supreme Court upheld in *Grutter*."[214] The court also found that the school board asserted a compelling interest because it "described other compelling interests and benefits of integrated schools, such as improved student education and community support for public schools, that were not relevant in the law school context but are relevant to public elementary and secondary schools."[215]

## IV. APPLYING *GRUTTER*'S NARROW TAILORING ANALYSIS TO RACE-CONSCIOUS STUDENT ASSIGNMENT POLICIES AT THE K–12 LEVEL

The following discussion describes how school districts seeking to foster diversity through race-conscious student assignment policies can reasonably comply with the narrow tailoring requirements set forth in *Grutter*. As I explain below, *Grutter*'s individualized consideration requirement is inapplicable to non-merit-based[216] K–12 race-conscious student assignment plans.

### A. Prohibition on Quotas and Insulation from Competition

School districts can comply with *Grutter*'s requirement that a race-conscious policy not employ quotas by setting a goal that aspires to attain more than a token number of minority students. However, this narrow

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

212. *See* JOINT STATEMENT OF CONSTITUTIONAL LAW SCHOLARS, *supra* note 19, at 23.

213. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1, 377 F.3d 949, 964 (9th Cir. 2004).

214. McFarland v. Jefferson County Pub. Sch., 330 F. Supp. 2d 834, 837 (W.D. Ky. 2004) (emphasis added).

215. *Id.*

216. I use the term "non-merit-based" to refer to schools that do not rely on academic or other criteria in student assignments.

tailoring requirement may not be satisfied if the goal establishes a prescribed number or percentage of minority students. Thus, a policy that seeks a "critical mass" of minority students, such as the policies in *Grutter* and *Comfort*, can be a fitting one for public primary and secondary schools employing race-conscious student assignment policies. Another means of satisfying this narrow tailoring factor may be to implement "numerical targets," which are reviewed each year, similar to those utilized by employers.[217] This periodic review should meet the narrow tailoring requirement, provided that school officials do not accord any additional emphasis to race based on the data from the periodic review.[218]

B. Flexible "Individualized Consideration"

*Grutter*'s requirement that a race-conscious admissions policy be sufficiently flexible and individualized in its evaluation is inapplicable to non-merit-based race-conscious student assignment in K–12 education. Unlike admission to colleges and universities and merit-based admission to public K–12 schools, assignment to a non-merit-based public K–12 school does not take into account an individual student's credentials, such as academic performance, test scores, extracurricular activities, life experiences, or personal statements.[219] The only considerations necessary for placement in most K–12 schools are for students to be of the proper age, from the local geographic school district, and with the appropriate educational background for that specific class or grade in school, for example, having passed the previous grade level. Because non-merit-based assignment to K–12 schools does not depend upon students' distinguishing themselves as individuals, it is not fitting to review and evaluate each student as an individual in weighing non-merit-based school assignment requests. However, where merit is used to determine admission, all applicants must be evaluated in a manner that

217. *See* JOINT STATEMENT OF CONSTITUTIONAL LAW SCHOLARS, *supra* note 19, at 21 (maintaining that a target number does not function as a quota).

218. *See* Grutter v. Bollinger, 539 U.S. 306, 336 (2003). *See generally* JOINT STATEMENT OF CONSTITUTIONAL LAW SCHOLARS, *supra* note 19, at 21 (reflecting on the constitutionality of potential race-conscious admissions policies for colleges and universities in the wake of *Grutter*).

219. *See* Eisenberg v. Montgomery County Pub. Sch., 19 F. Supp. 2d 449, 454 (D. Md. 1998) (distinguishing transfers between first grade classes from admissions to higher education by emphasizing that first grade students do not "have extensive resumes which may be weighed and considered in addition to their race in the District's formulation of how to craft diverse classrooms"), *rev'd*, 197 F.3d 123 (4th Cir. 1999); Paul Diller, Note, *Integration Without Classification: Moving Toward Race-Neutrality in the Pursuit of Public Elementary and Secondary School Diversity*, 99 MICH. L. REV. 1999, 2028 (2001) (discussing that young children "have yet to constitute themselves as individuals").

recognizes the value of individuality and takes into account diversity elements besides race and ethnicity.

In *Parents Involved in Community Schools*, the Seattle school district argued that *Grutter*'s narrow tailoring analysis does not apply to primary and secondary schools. The district maintained that the Court's decision has "meaning only in the context of selective admissions and other 'zero-sum' programs" and that the requirement of individualized review "is not applicable to non-selective school assignments."[220] The Ninth Circuit dismissed the district's argument as "strained efforts both to eat its cake and have it too."[221] The court explained:

> To the argument that this program is 'non-selective,' we can only express bewilderment: The racial tie-breaker [sic] is used to determine student admissions solely to oversubscribed—*and thus necessarily selective*—schools.
>
> . . . Due to the quality of the education they provide, the availability of special academic programs, and their location, more students than can be accommodated seek admission—and the District must therefore determine which applicants will be offered a coveted seat in a more desirable school.[222]

The court was correct in stating that the oversubscribed schools were "selective" in terms of there being more applicants than available seats and this necessarily requiring the district to choose which applicants to admit and which to deny. However, the school district was not "selective" in terms of choosing which students to admit based upon the superior qualifications or characteristics of the applicants, as selective universities do. Accordingly, the school district may have had more success if it had not chosen the word "non-selective" to distinguish its policy from that upheld in *Grutter*. In reality, Seattle's "open choice plan" differed from the plan used by the Michigan law school in that selection for admission under Seattle's plan involved "absolutely no competition or consideration of merit."[223] Therefore, because admission was not merit-based, there would be no reason to evaluate the individual characteristics of the applicants, regardless of whether the policy happened to be "selective."

220. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1, 377 F.3d 949, 976 (9th Cir. 2004).

221. *Id.* at 980.

222. *Id.* at 980 & n.41 (first alteration not in original).

223. *Id.* at 971 (quoting the dissenting opinion).

### C. Good Faith Consideration of Workable Race-Neutral Alternatives

To satisfy the requirement to consider feasible race-neutral alternatives, school districts should carefully evaluate the potential of the alternatives to achieve the desired diversity. School districts are not required to implement all race-neutral alternatives before settling on a race-conscious plan. This requirement can likely be satisfied when race-neutral alternatives have previously been unsuccessful or when other evidence suggests that these alternatives would be ineffective.[224] For instance, the court in *Comfort* found the school district to have satisfied this requirement. Specifically, the court determined that the use of a lottery would not result in a diverse student body, as parents would be likely to choose schools predominantly comprised of students of their own race. In addition, redrawing Lynn's neighborhoods would not achieve the desired diversity without requiring mandatory busing or the sacrifice of neighborhood schooling. Moreover, Lynn had previously failed to attract a diverse student body through a magnet school.[225]

It is possible that other school districts could devise a policy capable of attaining a level of diversity without using race, for example, by substituting test scores or socioeconomic status for race;[226] by creating a magnet program

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224. *See, e.g.*, Comfort *ex rel.* Neumyer v. Lynn Sch. Comm., 283 F. Supp. 2d 328, 378, 388–89 (D. Mass. 2003); EDWIN C. DARDEN ET AL., FROM DESEGREGATION TO DIVERSITY: A SCHOOL DISTRICT'S SELF-ASSESSMENT GUIDE ON RACE, STUDENT ASSIGNMENT AND THE LAW 19 (2004).

225. *Comfort*, 283 F. Supp. 2d at 388–89. *Cf.* Tuttle v. Arlington County Sch. Bd., 195 F.3d 698, 706 (4th Cir. 1999) (finding that that the district "ha[d] race-neutral means to promote diversity" based upon the district's identification of several race-neutral alternatives in a district study committee).

226. *See, e.g.*, CHARLES T. CLOTFELTER, AFTER BROWN: THE RISE AND RETREAT OF SCHOOL DESEGREGATION 197 (2004) (suggesting that free-lunch eligibility or academic achievement may be used in lieu of race); *see also* FRANKENBERG ET AL., *supra* note 6, at 68 (advocating "serious consideration of efforts to keep diversity by social and economic desegregation" where federal courts have struck down desegregation plans). For a discussion of the relationship between racial segregation and poverty, see generally DARDEN ET AL., *supra* note 224, at 6, and FRANKENBERG ET AL., *supra* note 6, at 35. According to Darden:

> [T]here is a high correlation between race and poverty in America. Therefore, a district may achieve some level of racial diversity when pursuing policies designed to promote economic diversity. The benefit is that such efforts may avoid strict scrutiny under the United States Constitution, especially to the extent that the primary goal is economic diversity and racial diversity is an added benefit, though there is some risk that a court will see the district's use of poverty as a pretext for race.

DARDEN ET AL., *supra* note 224, at 6. While acknowledging that there are "significant benefits to promoting socioeconomically integrated schools," Darden also recognizes that "the interests served by economic diversity are not identical to those served by racial diversity. In other words, race still matters in our nation, even controlling for income or wealth." *Id.*

that admits students through a method "stripped of explicit reference to race";[227] or by allowing city-suburban transfers.[228]

### D. Not Unduly Burdensome to Nonminority Group Members

A non-merit-based race-conscious student assignment policy can readily satisfy *Grutter*'s requirement that it not unduly burden nonminority applicants.[229] Unlike admissions programs to colleges and universities, a non-merit-based assignment policy at a public K–12 school still ensures each applicant an education, comparable to the education provided by the student's first choice school.[230] In addition, the denial of assignment at a student's favored school in the K–12 context does not result in postponement of an education.[231] And, because school assignment does not depend on any academic qualifications, denial of a seat at one's first-choice school does not

227. CLOTFELTER, *supra* note 226, at 197 (observing that while race-neutral magnet programs may be used to draw white students to schools of predominantly minority populations, this approach is "less likely to increase interracial contact beyond what neighborhood schools would produce"); *see also* FRANKENBERG ET AL., *supra* note 6, at 68 (advocating inter-district magnet programs, in addition to the continuation of desegregation plans, to help effectuate integrated education). For an overview of magnet schools, see generally JEFFREY A. RAFFEL, HISTORICAL DICTIONARY OF SCHOOL SEGREGATION AND DESEGREGATION: THE AMERICAN EXPERIENCE 149–51 (1998).

228. *See, e.g.*, CLOTFELTER, *supra* note 226, at 198 (noting that voluntary city-suburban transfer policies have been implemented in Boston, Hartford, and St. Louis); FRANKENBERG ET AL., *supra* note 6, at 68 (supporting city-suburban transfer choices, along with the maintenance of desegregation plans, to "help avoid neighborhood transition that is often sped by resegregating neighborhood schools"). For a discussion of the history of busing students as part of the efforts to integrate K–12 schools, see generally GARY ORFIELD, MUST WE BUS?: SEGREGATED SCHOOLS AND NATIONAL POLICY (1978); RICHARD A. PRIDE & J. DAVID WOODARD, THE BURDEN OF BUSING: THE POLITICS OF DESEGREGATION IN NASHVILLE, TENNESSEE (1985); RAFFEL, *supra* note 227, at 41–44 (setting forth both sides of the arguments for busing and noting that the public generally opposes busing to achieve school desegregation even though it supports the principle of school desegregation).

229. *See, e.g.* Julie F. Mead, *Conscious Use of Race as a Voluntary Means to Educational Ends in Elementary and Secondary Education: A Legal Argument Derived From Recent Judicial Decisions*, 8 MICH. J. RACE & L. 63, 125 (2002) ("It is difficult to demonstrate how being told 'no' creates a real burden in the lives of the children whose parents try to overturn schools' denials of requests to transfer from one school to another.").

230. *See, e.g.*, *Comfort*, 283 F. Supp. 2d at 373 (noting that all students receive the same quality of education, regardless of whether they receive admission to their preferred school); Hampton v. Jefferson County Bd. of Educ., 102 F. Supp. 2d 358, 380 (W.D. Ky. 2000) (dictum) ("[T]he Court concludes that as between two regular elementary schools, assignment to one or another imposes no burden and confers no benefit. The same education is offered at each school, so assignment to one or another is basically fungible."); Mead, *supra* note 229, at 125 ("While a preferred program may have aspects that mark it as academically superior in some respect, it does not follow that denying the parent's request relegates the child to a substandard educational experience."); JOINT STATEMENT OF CONSTITUTIONAL LAW SCHOLARS, *supra* note 19, at 23 (arguing that the "interchangeab[ility]" of opportunities at public elementary and secondary schools lessens the narrow tailoring analysis).

231. *See* Mead, *supra* note 229, at 125.

result in any stigma.[232] Thus, *Grutter*'s requirement that a race-conscious policy not unduly harm nonminority applicants will be easier to satisfy in the context of non-merit-based assignment policies to K–12 schools than in the context of college admissions.[233] Indeed, the only burden facing nonminority K–12 applicants where admission is not based on merit seems to be the denial of a choice to attend their first choice school.[234] But, school districts are not even required to permit parents to select the school their child will attend, nor is there a right to attend a specific school.[235] Unlike non-merit-based assignment policies, however, a plan involving admission based on merit to a competitive public school for which there is no comparable education, such as the plan at issue in *Wessman*, may place more burden on nonminority applicants denied admission. In this situation, the nonminority applicant "is likely denied access to a unique educational program; therefore, the harm . . . may be more discernible."[236]

E. Limited in Time

School districts can also craft race-conscious policies for assignment to public primary and secondary schools that satisfy *Grutter*'s durational requirement. *Grutter* did not require a predetermined termination point for race-conscious policies. Instead, it noted that periodic evaluation of the policy could be used to ascertain whether the use of race is still required. Thus, a policy providing for the termination of the use of race upon the attainment of a diverse student body, such as Lynn's, may be able to fulfill *Grutter*'s time limit requirement.[237]

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232. *See Comfort*, 283 F. Supp. 2d at 378 (finding that students are not stigmatized for not being assigned to their preferred K–12 school).

233. *See id.* at 373 ("Innocent third parties are more at risk in decisions about . . . admission into a school of higher education.").

234. *See* Mead, *supra* note 229, at 110.

235. *See Comfort*, 283 F. Supp. 2d at 365 & n.73; *see also Hampton*, 102 F. Supp. 2d at 380 (stating that "[m]ost courts have concluded that there is no individual right to attend a specific school in a district or to attend a neighborhood school").

236. DARDEN ET AL., *supra* note 224, at 21.

237. *See, e.g.*, *Comfort*, 283 F. Supp. 2d at 373 ("Once the problem is 'cured,' the need for race-based standards arguably disappears." (citing Mackin v. City of Boston, 969 F.2d 1273, 1278 (1st Cir. 1992))); DARDEN ET AL., *supra* note 224, at 21 (stating that the use of race to attain a diverse student body "may be appropriate until no longer necessary to realize those benefits or until the benefits no longer accrue to a significant degree"). *Compare* Tuttle v. Arlington County Sch. Bd., 195 F.3d 698, 706 (4th Cir. 1999) (finding a policy statement that race would be used in student assignments for that school year "and thereafter" did not "have a 'logical stopping point'" and was therefore not narrowly tailored (quoting City of Richmond v. Croson, 488 U.S. 469, 498 (1989))).

## CONCLUSION

Notwithstanding the academic and social benefits that accrue to all students educated in diverse primary and secondary schools, courts have increasingly dissolved court orders to desegregate and have struck down voluntary race-conscious student assignment policies for failing to satisfy the existing narrow tailoring framework. This Comment urges courts to extend *Grutter*'s diversity rationale to student assignment plans at the primary and secondary school level. This Comment also explains how most school districts can reasonably satisfy the narrow tailoring factors as fashioned in *Grutter*. Additionally, it proposes that school districts with non-merit-based race-conscious student assignment policies need not comply with *Grutter*'s individualized consideration factor because student assignment is not predicated on students differentiating themselves as individuals. These steps, it is hoped, will help to reverse the rapid resegregation currently underway in our nation's public primary and secondary schools.