

**The “*Grutter-Gratz* split doubleheader”:  
The Use of Student Race in School Admission,  
Attendance, and Transfer Policies at the K-12 Level**

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On June 23, 2003, the United States Supreme Court weighed in on a debate that has divided the academic and legal community for decades, ruling in the *Grutter* and *Gratz* opinions that the University of Michigan's admissions policies at the law school level were constitutionally permissible but that the University's undergraduate admissions policies were unconstitutional.<sup>1</sup> The Court's so-called "Grutter-Gratz split doubleheader"<sup>2</sup> settled the question of whether the attainment of *racial* diversity in a public university student body can, under certain circumstances, be sufficiently compelling to survive strict scrutiny. Clearly it can, provided the university follows the proper procedures, including ensuring that each application is given the appropriate amount of individual review.

The Court's affirmation of the "diversity rationale" to support race-influenced admissions decisions, however, has spawned new questions, not the least of which is whether the attainment of diversity can justify race-conscious decision-making at the public elementary and secondary school level ("K-12"). To be sure, the holdings in *Grutter* and *Gratz* are limited in the sense that they involve only university admissions programs, but this has not stopped commentators from raising the *Grutter* flag in defense of far broader uses of racial preferences. For example, in response to *Grutter*, Julie Underwood, general counsel for the National School Boards Association, proclaimed: "We have clear guidance from the Court: Diversity can be a compelling state interest. That's the green flag."<sup>3</sup> Not to be outdone, the University of Michigan President, Mary Sue Coleman, also trumpeted the *Grutter* holding in expansive terms: "This is a

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<sup>1</sup> See *Grutter v. Bollinger*, 123 S.Ct. 2325 (2003); *Gratz v. Bollinger*, 123 S.Ct. 2411 (2003).

<sup>2</sup> *Grutter*, 123 S.Ct. at 2349 (Scalia, J., dissenting).

<sup>3</sup> Ben Feller, *Public School Leaders Hail Court Ruling*, The Associated Press Online (June 25, 2003) (available at 2003 WL 57825311).

resounding affirmation that will be heard across the land, from our college classrooms to our corporate boardrooms.”<sup>4</sup>

Despite these pronouncements, the degree to which the *Grutter* diversity rationale applies in the K-12 context remains an open question. Indeed, given the fact that *Grutter* is an explicit affirmation of Justice Powell’s opinion in *Bakke*,<sup>5</sup> which caused dramatic divisions in the lower courts on the question of whether student body diversity is a compelling state interest that can justify the use of race in university admissions, one can rightly question whether *Grutter* has settled anything at all, even in the university context. At the very least, legal observers and school district counsel should be wary to reflexively apply the *Grutter* rationale to public school decision-making.

This article explores the applicability of the diversity rationale in *Grutter* to K-12 school admission, attendance, and transfer policies, with a view toward determining whether federal courts applying *Grutter* are likely to construe the decision narrowly or more broadly.<sup>6</sup> First, the article briefly discusses relevant Supreme Court precedent, ending with a discussion of *Grutter*

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<sup>4</sup> *Supreme Court Narrowly Upholds Affirmative Action*, Chicago Tribune (June 24, 2003) (available at 2003 WL 57850189). Although beyond the scope of this article, a separate, yet related, question raised by the *Grutter* holding is the extent to which the diversity rationale can support racial preferences in the area of employment. Despite admonitions from Justice Scalia that *Grutter* portends a broad expansion of “racial discrimination” in other areas, *Grutter*, 123 S.Ct. at 2349, this result does not at first consideration seem foreordained, especially in light of *Grutter*’s focus on the significance of a so-called “robust exchange of ideas” which seems less central to the mission of businesses in employing individuals. *Id.* at 2339 (quoting *Bakke*, 438 U.S. 265, 312).

<sup>5</sup> *Grutter*, 123 S.Ct. at 2337. (“[T]oday we endorse Justice Powell’s view that student body diversity is a compelling state interest that can justify the use of race in university admissions.”).

<sup>6</sup> The focus of this article is on *Grutter* rather than *Gratz* because *Grutter* helps define what constitutes constitutionally permissible uses of race, while *Gratz* stands for the more narrow proposition that the specific use of race employed by the University of Michigan in the undergraduate context was unconstitutional. *Gratz* thus sheds little light on what consideration of race may be permissible in the K-12 context, apart from the increasingly self-evident rule that any admissions system that assigns a fixed number of points based solely on race will be struck down.

and the rationale underlying its holding. Next, this article summarizes federal court precedent directly related to K-12 public school admission, attendance, and transfer policies, and examines how this precedent may still be relevant in the post-*Grutter* era.<sup>7</sup> Finally, this article examines the language of *Grutter* that can be fairly read to either limit its rationale to the university setting or expand it to the K-12 setting and examines this language in light of the federal cases previously discussed, bringing them together to argue that *Grutter* may have limited applicability in the K-12 context. This article concludes by discussing some of the (many) remaining questions that survive *Grutter*.

## **I. SUPREME COURT PRECEDENT ON RACE AND SCHOOLING**

### **Pre-Grutter Precedent**

*Grutter* has been viewed by many as the first significant Supreme Court pronouncement on the subject of race, affirmative action, and schooling since *Bakke*.<sup>8</sup> While *Grutter* is certainly a signal decision, *Grutter* is more properly viewed simply as the latest in a long line of Supreme Court cases dealing with race and schooling in the United States. Indeed, relevant Supreme Court precedent stretches back to the days well before Alan Bakke pointedly challenged the use of racial preferences in professional school admissions.

In fact, not even *Brown v. Board of Education*,<sup>9</sup> the decision that ushered in the era of school desegregation law, provides the proper starting point for an informed discussion of the Supreme Court's consideration of race and schooling. While there had been several nineteenth-

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<sup>7</sup> The focus herein is on public school admission, attendance, and transfer policies, although the distinctions between these categories tend to blur in the K-12 context. Attendance zones are largely determined by school districting and school districting, in turn, sets the boundaries used, in part, for determining a district's transfer policy. Because of the overlapping concerns that arise in these three categories, they are discussed together in this article.

<sup>8</sup> *Regents of University of California v. Bakke*, 438 U.S. 265 (1978).

<sup>9</sup> *Brown v. Board of Education*, supra, 347 U.S. 483, 495 (1954).

century forays into the question of race and schooling, the Supreme Court's examination of race and schooling began in earnest in the 1930s, when individuals began to challenge the machinery of segregated education that prevailed in many parts of the country. The proper constitutional standard at the time, of course, was the separate but equal standard announced in *Plessy v. Ferguson*.<sup>10</sup> As a result, these early cases focused largely on whether states that practiced formal *de jure* segregation afforded the constitutionally required "separate but equal" opportunity to their African-American children.

With *Brown*, however, this analysis shifted. No longer would courts consider whether states afforded their citizens "equal," though concededly segregated, educational opportunities and facilities. Instead, racial segregation itself became entirely incompatible with the constitution, regardless of whether a state gave its African-American students a theoretically "equal" education.<sup>11</sup> Thus began the long, slow move toward legal integration in public educational facilities, both at the K-12 and university level. It is in this line of school desegregation decisions, not *Bakke* and its progeny, that the Supreme Court began expressly to consider the constitutional limitations on the use of race in K-12 schooling.

Despite these sweeping terms, these initial school desegregation decisions had only a minimal impact on actual segregation. It was not until the late 1960s, after the Civil Rights Act of 1964, that desegregation began in any systematic manner. Indeed, in 1964, fully ten years after *Brown*, only 1.2% of African-American students in the South attended integrated schools.<sup>12</sup>

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<sup>10</sup> *Plessy v. Ferguson*, 163 U.S. 537 (1896).

<sup>11</sup> *Brown*, 347 U.S. at 495 ("In the field of public education the doctrine of separate but equal has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated . . . are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.")

<sup>12</sup> James T. Patterson, *The Troubled History of Brown v. Board of Education* 7 (2001) (available at <http://wwics.si.edu/topics/pubs/ACF236.pdf>).

By the late 1960's, however, the federal courts had developed a body of substantive law designed to dismantle the “dual” school systems that formerly pervaded the American South. In their place, the courts sought to create “unitary” districts, namely school districts in the which the former separate black and white systems were merged, and in which the “vestiges” of the prior discrimination were remedied to the extent practicable. In this context, federal courts superintended the desegregation process, in which school districts explicitly considered race in an effort to integrate their schools.

Out of these earlier decisions came the recognition that school districts going through the desegregation process (and transitioning from “dual” status to “unitary” status) can explicitly consider race. Accordingly, it became well-established that school districts can use race when acting pursuant to a valid school desegregation plan. Such a use is deemed “remedial,” a distinction that gained importance as more and more federal courts considered the use of race outside the desegregation context.<sup>13</sup> Nor could it be any other way—desegregating schools without considering race would seem like a practice in the absurd. In the words of Justice Blackmun, “[i]n order to get beyond racism, we must first take account of race. There is no other way.”<sup>14</sup> This use of race as a remedial measure to combat prior discrimination was acknowledged in *Grutter*,<sup>15</sup> and is a staple of school desegregation law. Accordingly, *Grutter* changed nothing for schools under court desegregation orders or consent decrees: They can still make race-based decisions to achieve an appropriate racial balance.

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<sup>13</sup> See, e.g., *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 504 (1989). Federal courts uniformly allow school districts to consider race in attempting to remedy the effects of past discrimination.

<sup>14</sup> *Bakke*, 438 U.S. at 407 (separate opinion).

<sup>15</sup> *Grutter*, 123 S.Ct. at 2351 (“[T]he Court has recognized as a compelling state interest a government’s effort to remedy past discrimination for which it is responsible.”) (Thomas, J. dissenting).

The more difficult question, of course, is whether school districts that do not have a history of racial segregation or those that have remedied the effects of the prior segregation (and are thus deemed “unitary”) can nevertheless take race into account in making student assignment and other decisions. In 1971, in the landmark desegregation case *Swann v. Charlotte-Mecklenburg Bd. of Ed.*,<sup>16</sup> the Supreme Court suggested that school districts may be able to make race-based decisions as a matter of discretion (even if the federal courts could not):

School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, 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.<sup>17</sup>

Under this view, school districts have the discretion to use race as a factor in admissions, attendance, and transfer decisions, even if they are not under formal court orders to desegregate and even *absent* a finding of unconstitutional discrimination. This view, while arguably a part of the holding in *Swann*, became increasingly untenable, however, as the Court considered more modern desegregation cases and began to reject the notion that modern educational inequities constituted “vestiges” of prior state-sponsored discrimination.

Beginning with *Milliken v. Bradley*<sup>18</sup> in 1977, the Supreme Court evinced an increasing reluctance to order desegregation remedies in cases where the connection between racially uniform schools and *de jure* segregation was more attenuated. In *Milliken*, for instance, the Court ruled that an interdistrict busing program designed to desegregate a region (the

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<sup>16</sup> 402 U.S. 1 (1971)

<sup>17</sup> *Id.* (emphasis added).

<sup>18</sup> 418 U.S. 717 (1974). In *Milliken*, the Court held that it was improper to impose a multidistrict remedy for single-district *de jure* segregation in the *absence* of findings that the other included districts had failed to operate unitary school systems or had committed acts that effected segregation.

metropolitan Detroit area), was not a constitutionally permissible remedy because the districts to which the students would be bused had not been guilty of unconstitutional discrimination. Although *Milliken* concerned the busing of African-American students from the Detroit public schools to the surrounding suburban region, its lessons had a much wider reach. In fact, to justify race-based student assignment decisions after *Milliken*, school districts would need to demonstrate that they had acted in response to an identifiable history of discrimination (*i.e.*, a constitutional violation) that made the use of a race-based remedial program constitutionally permissible. The simple lesson of *Milliken* is that federal courts would not act affirmatively to integrate school systems where the segregation was caused by private choices like housing patterns and residential segregation rather than by state action.

The Supreme Court's reluctance to order broad desegregation remedies was illustrated more recently in *Freeman v. Pitts*.<sup>19</sup> Reaffirming several years of desegregation rulings, the Court stated plainly that “[o]nce the racial imbalance due to the *de jure* violation has been remedied, the school district is under no duty to remedy imbalance that is caused by demographic factors.”<sup>20</sup> A school district's duty to desegregate, of course, is different from having the discretion to affirmatively consider race in attaining a diverse student body. Still, the *Freeman* Court made clear that segregation caused by demographic factors (and unrelated to prior constitutional violations) was increasingly viewed as something outside the power of the courts to remedy. Although slightly obscured by the unique history of the desegregation cases, the Court's reasoning in *Freeman* plain: Desegregation orders are designed to remedy prior segregative discrimination. To the extent a school district manifests “vestiges” of segregation caused by prior illegal discrimination, courts may remedy this segregation by supervising the

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<sup>19</sup> 503 U.S. 467 (1992).

<sup>20</sup> *Id.* at 494.

school district's use of race in making admissions, assignment, and transfer decisions. As years pass, however, and as the demographics of a given district changes, it becomes more likely that any resulting segregative effect is caused not by prior discrimination but by intervening factors, including shifting neighborhood characteristics, population dispersion, demographic changes, and the like.<sup>21</sup>

As a result of *Milliken*, *Freeman*, and similar cases, any reading of *Swann* that would permit the use of race in a non-remedial context in K-12 schools became increasingly implausible. In the years leading up to *Grutter*, however, numerous federal courts grappled with school districts' use of race, in magnet school admissions, in drawing attendance zones, in implementing transfer programs, and in other similar settings. In some measure, these cases begat *Grutter* because they created inconsistent interpretations among the lower courts, thus creating the need for Supreme Court clarification. These cases illustrate that *Grutter* does not exist in a vacuum, especially as it relates to K-12 schooling. In fact, extensive federal precedent on the subject of racial preferences in the K-12 context exists and must be understood before the lessons of *Grutter* are applied to K-12 schools.

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<sup>21</sup> This point was made clearly by Justice Scalia in *Freeman v. Pitts*, 503 U.S. 467, 506 (1992). (“Since a multitude of private factors has shaped school systems in the years after abandonment of de jure segregation--normal migration, population growth (as in this case), "white flight" from the inner cities, increases in the costs of new facilities--the percentage of the current makeup of school systems attributable to the prior, government-enforced discrimination has diminished with each passing year, to the point where it cannot realistically be assumed to be a significant factor. At some time, we must acknowledge that it has become absurd to assume, without any further proof, that violations of the Constitution dating from the days when Lyndon Johnson was President, or earlier, continue to have an appreciable effect upon current operation of schools.”).

## II. FEDERAL COURT PRECEDENT DIRECTLY RELATED TO K-12 PUBLIC SCHOOL ADMISSION, ATTENDANCE, AND TRANSFER POLICIES.

Before *Grutter*, federal courts struggled to apply *Bakke*'s holding in the context of challenges to race-based decision-making at the K-12 level. The issue arose most frequently where an aggrieved applicant challenged a racial preference on constitutional grounds, arguing that, but for the school district policy, he would have been admitted, allowed to transfer, or would have received some other perceived benefit. The most prominent of these cases are discussed below, divided into two groups: Cases involving admissions programs and those involving attendance/transfer programs.

### Admissions Programs

#### *Tuttle v. Arlington County School Board*<sup>22</sup>

*Tuttle* involved a challenge to a race-conscious kindergarten admissions program designed to “promote racial, ethnic, and socioeconomic diversity.”<sup>23</sup> The court first assumed without deciding that diversity was a compelling governmental interest, thus avoiding the need to delve into the fractured *Bakke* analysis. The court then examined the program under the second prong of the equal protection analysis, namely whether the admissions program was narrowly tailored to meet the presumed compelling interest of diversity. The court concluded that the program was designed only to achieve racial balancing, (*i.e.*, a student population with the same racial proportion as the district's overall population) and thus invalidated the program.

#### *Wessmann v. Gittens*<sup>24</sup>

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<sup>22</sup> 195 F.3d 698 (4th Cir. 1999).

<sup>23</sup> *Id.* at 701. Significantly, the program in question was not designed to remedy past discrimination, so the question before the court was rather narrow: In the non-remedial context, when, if ever, is it permissible to consider race in making student admissions decisions?

<sup>24</sup> 160 F.3d 790 (1<sup>st</sup> Cir. 1998).

In *Wessman*, the Boston City Schools had implemented a race-based admissions program that granted preferences to certain underrepresented minorities for admission to one of three competitive enrollment schools within the system.<sup>25</sup> Echoing the *Tuttle* approach, the court assumed without deciding that diversity could be a compelling interest, noting that the law was unsettled in that area (although it did question the very utility of the term “diversity”). The court then struck down the program, reasoning that even if racial diversity could theoretically be a compelling interest, the need for such diversity would have to be “acute,” a standard not met by Boston’s program. Moreover, the court stated that the school district’s policy in favor of diversity boiled down to “a means for racial balancing,” which is almost always constitutionally forbidden.

***Hunter v. Regents of the University of California***<sup>26</sup>

In *Hunter*, the Ninth Circuit considered the constitutionality of a research oriented elementary school that explicitly considered race/ethnicity in selecting its student body. The school was dedicated to improving the quality of education in urban public schools. Unlike the *Tuttle* and *Wessman* courts, the *Hunter* court directly considered whether the operation of a diverse elementary school was a compelling governmental interest, concluding that it was. The court further held that the school’s consideration of race/ethnicity was “narrowly tailored” to

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<sup>25</sup> *Id.* at 793-94. The program at issue in *Wessman* created a two-tiered admissions system. Students wishing to matriculate in one of the three competitive schools completed a standardized test. An applicant’s score on this test was combined with the student’s grade point average to yield a composite score. Half of the applicants were admitted based on this composite score (and without regard to race, ethnicity, or the degree to which the student furthered any diversity goals). The other half of the applicants were also admitted based on their composite score, but competed only with persons in their same racial category, with the provision that the racial composition of the students admitted must match the racial composition of the applicant pool. 50% of the students admitted were therefore excluded from competition with students from outside their racial category.

<sup>26</sup> 190 F.3d 1061 (9th Cir. 1999).

further that interest. In support of its holding, the court credited expert testimony stating that without specifically utilizing race as an admission factor, it would be highly unlikely that the small school would be representative of the state's population. Significantly, and contrary to other circuit precedent, the court expressly rejected the notion that remedying the effects of past discrimination is the only acceptable justification for utilizing ethnic/racial criteria in admissions.

***Parents Involved In Community Schools v. Seattle Sch. Dist. No. 1***<sup>27</sup>

In this case, the Seattle School District implemented a high school assignment policy that relied on a racial-balancing tie-breaker. The policy was challenged on the basis that it violated the Washington Constitution. The district court held that the policy did not violate state law because, under the Washington Constitution, school districts have an obligation to integrate schools and to provide an equal educational opportunity. The court reasoned that the Seattle program was permissibly directed toward desegregation and did not grant anyone a racial “preference” (as that term was defined in Washington). The district court held that diversity was a compelling interest, and that the School Board had a compelling interest in preventing its schools from becoming resegregated.

On appeal, the Ninth Circuit reversed the District Court and held that Seattle's “tie-breaker” policy violated the Washington State Civil Rights Act, which prohibits according “preferential treatment” or “discriminating against” someone on the basis of race. The court concluded that while the Washington Constitution permits school districts to use race-based classifications to achieve racial diversity, nothing in the Constitution mandates such policies. Because the court was able to resolve the case under state law, it did not address the federal constitutional questions. Due to the uncertainty of Washington law on the question of racial

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<sup>27</sup> 137 F. Supp.2d 1224 (W.D. Wash. 2001), *rev'd* 285 F.3d 1236 (9th Cir. 2002).

preferences, the Ninth Circuit, on petition for rehearing, vacated its opinion, and certified a question to the Washington Supreme Court: whether the use of a racial tiebreaker to determine high school assignments discriminated against, or granted preferential treatment to, any individual or group on the basis of race, color, ethnicity, or national origin.

On certification, the Washington Supreme Court held that the school district's "open choice" assignment plan does not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, color, ethnicity, or national origin in the operation of public education in violation of Washington's discrimination statute.<sup>28</sup> In essence, the court rendered a split decision, concluding that the act in question prohibits some, but not all, race-cognizant government action. Affirmative action programs which advance a less qualified applicant over a more qualified applicant were held impermissible under the law, but programs which are racially neutral, such as open choice plan, were held lawful.

***Hampton v. Jefferson Co. Bd. of Educ.***<sup>29</sup>

In *Hampton*, the court considered the effect a "unitary status" finding had on a school district's ability to consider race when making admissions decisions. The *Hampton* case is especially significant because it addresses whether a school district declared unitary can continue to use race in some fashion to ensure that the recently-achieved desegregated status of the district can be maintained. The court held that any individual magnet school admissions decision will impose burdens and/or benefits on the students involved and that race could not be used to determine which students would be granted admission. As a result, the court ruled that a race-

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<sup>28</sup> *Parents Involved in Community Schools v. Seattle School Dist., No. 1*, 149 Wash.2d 660, (Wash. 2003).

<sup>29</sup> 102 F. Supp. 2d 358 (W.D. Ky. 2000)

conscious cap on enrollment previously required by the court's desegregation orders could no longer be used to determine magnet school admissions.

***Belk v. Charlotte-Mecklenburg Bd. of Ed.***<sup>30</sup>

In *Belk*, the Fourth Circuit considered the effect a unitary status designation had on a district's ability to consider race in making student assignment decisions. A majority of the *en banc* court agreed that the District had achieved unitary status and *Belk* (much like *Hampton*) concerns the extent to which race can be used (or may continue to be used) after this finding. A different majority of the court held that the Board could not be held liable for its use of race in assigning students to magnet schools, because that program had been adopted pursuant to a desegregation order. This majority, however, said that if the same plan were adopted after the District had been declared unitary, it would be clearly unconstitutional under the Fourth Circuit precedent.<sup>31</sup>

**Transfer/Assignment Programs**

***Eisenberg v. Montgomery County Public Schools.***<sup>32</sup>

In *Eisenberg*, the Montgomery County Public Schools instituted a transfer policy designed to ensure that each school in the district had a racial/ethnic make-up that approximated the racial demographics of the county as a whole. Significantly, the program was not crafted in response to a legal challenge or pursuant to a desegregation order.<sup>33</sup> Instead, the school district

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<sup>30</sup> 269 F.3d 305 (4th Cir. 2001).

<sup>31</sup> The court relied on *Tuttle v. Arlington County Sch. Bd.* (4th Cir. 1999) and *Eisenberg v. Montgomery County Public Schools* (4th Cir. 1999) to support its holding.

<sup>32</sup> 197 F.3d 123 (4th Cir. 1999).

<sup>33</sup> The district's policy was not a remedial measure required by a court to correct past discrimination. In fact, the county had never been under a court order to desegregate, but acted voluntarily to dismantle segregation after the Supreme Court's ruling in *Brown*.

acted affirmatively to ensure a measure of racial balance in its district's schools. Because there had never been a finding that the Montgomery County Public Schools were not unitary, the court ruled that the transfer policy could not be deemed remedial.

In this non-remedial context, the use of race was deemed highly suspect and the court struck down what it considered to be an effort to achieve a certain level of racial diversity in each school. As it had in *Tuttle*, the Court did not resolve whether diversity is a compelling government interest, but rather determined that the program was not narrowly tailored to achieve diversity because the program consisted of mere racial balancing. That the diversity profile for each school was reviewed and adjusted each year was not an ameliorating factor, according to the court, because this review simply reflected the district's impermissible focus on racial balancing.

***Brewer v. West Irondequoit Central School District.***<sup>34</sup>

In one of the few circuit level cases upholding the explicit use of race in the K-12 context, the Second Circuit found that there were sufficiently serious questions as to the existence of *de facto* (*i.e.*, non-intentional and not imposed by law) segregation in Rochester to justify the use of race-conscious remedies. Because it used race-based classifications, the program had to satisfy strict scrutiny—it had to serve a compelling government interest in a narrowly-tailored fashion. The court agreed with the First Circuit in *Wessmann* that the law was unsettled concerning what government interests (aside from remedying past discrimination) are sufficiently compelling to justify race-conscious actions.

The court concluded, however, based on prior precedent in the Second Circuit, that remedying *de facto* segregation is a compelling state interest. In other words, programs designed

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<sup>34</sup> 212 F.3d 738 (2d Cir. 2000), *superseded on other grounds*, *Zervos v. Verizon New York, Inc.*, 252 F.3d 163 (2nd Cir. 2001).

to combat racial isolation can serve a compelling governmental interest, at least in this narrow context. The court also concluded that the transfer program was narrowly tailored. The purpose of the Rochester transfer program was not to achieve diversity but to prevent “racial isolation.” Since students’ race was the only relevant factor in preventing racial isolation, the court held that it was permissible for the transfer program to consider only that factor.

***Comfort v. Lynn Sch. Comm.***<sup>35</sup>

The School District in Lynn, Massachusetts adopted a plan to control transfers in an effort to maintain the racial balance of its schools. The stated goal of the program was for the racial composition of the schools to remain within 15% of the racial composition of the entire district. Under this policy, transfers were allowed as long as such transfers did not result in racial isolation (too low a minority percentage) or racial imbalance (too high a minority percentage). In denying injunctive relief, the court noted that the school district could not rely on racial generalities to support its transfer program. The court also noted that if it were to allow such a plan, the school district had a “substantial burden” to link the plan to “reliable social science evidence.”

The court relied on expert testimony that the plan was “necessary to achieve the educational benefits of preparing students to live in a pluralistic society.” The Court also considered it important that the schools at issue were not magnet schools, but were regular schools that were “more fungible” and there was “no clear objective benefit to attending any one school over another.” No one student was excluded from a benefit; “all students attend a school.” Finally, the court noted that the Plan was “limited in its scope” (*i.e.*, only students who

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<sup>35</sup> 100 F. Supp. 2d 57 (D. Mass. 2000).

did not want to attend their neighborhood school were affected) and was “flexible” because no student was “forced to transfer against his or her will.”

***Equal Open Enrollment Association v. Board of Ed. Of Akron***<sup>36</sup>

This case is instructive because it involves a school district’s attempt to promote integration by adopting a policy that conflicted with applicable state law. The Akron Board of Education, in order to maintain a certain racial balance, adopted a policy preventing white students from transferring to adjacent districts (in violation of the provisions of an Ohio open enrollment statute) and non-white students from transferring into Akron. The court rejected the Board’s argument that the open enrollment statute, by permitting white flight, actually constituted a means of enforcing intentional *de jure* segregation and that the Board’s policy was necessary to combat the effect of the unconstitutional State policy, and held there was no proof that racial discrimination was a motivating factor behind the open enrollment statute. Nor could the School Board assert a compelling interest in the policy as a “preventative measure” aimed at preventing *de facto* segregation: “[A]bsent a finding of past discrimination, no race-based regulation has been upheld.” Additionally, even if the School District were able to prove that a compelling state interest existed, the court held that the Board policy was “drastic,” and could have been more narrowly tailored.

As these cases illustrate, prior to *Grutter* the Federal Circuit Courts were divided over the extent to which race can be used to make admissions and transfer decisions at that K-12 level. *Grutter*, of course, with its affirmation of the diversity rationale, changes the playing field. The question this poses for school districts is whether the lessons of *Grutter*, when coupled with the federal cases above, permits race-conscious policies at the K-12 level.

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<sup>36</sup> 937 F. Supp. 700 (N.D. Ohio 1996).

### III. GRUTTER'S APPLICATION TO K-12 SCHOOLS

For twenty-five years, *Bakke* provided the ground rules for race-based school decision-making. This remained largely unchanged until *Grutter* held that, at least in the university context, student body diversity is a compelling state interest that can justify the use of race.

At issue in *Grutter* was the extent to which the University of Michigan Law School could constitutionally use race to ensure a “critical mass” of underrepresented minority students. In the Sixth Circuit, a 5-4 majority of the *en banc* court held that diversity is a compelling state interest under *Bakke* and that the program was sufficiently narrowly tailored to pass constitutional muster.<sup>37</sup> In finding the Law School’s admission policy narrowly tailored, the Sixth Circuit was influenced by the fact that all students compete in the same pool (*i.e.*, the Law School did not have a separate admissions track for minority students) and that the admissions policy does not utilize quotas, as evidenced by the variance in the number and percentage of minority students admitted over the years.<sup>38</sup> The court also, although somewhat obliquely, endorsed the Law School’s pursuit of a “critical mass” of minority students to ensure that those admitted did not feel isolated. The court was also persuaded by the Law School’s evidence that it uses a student’s race only as a “plus” factor in the admissions process and does so along with numerous other non-racial factors.<sup>39</sup>

After the *Grutter* decision in the Sixth Circuit, the Supreme Court took the rather unusual step of consolidating *Gratz* and *Grutter* on appeal, despite the fact that *Gratz* had not been fully

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<sup>37</sup> *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002).

<sup>38</sup> *Id.* at 736-37.

<sup>39</sup> The dissenting judges were highly critical of the majority opinion, focusing on the fact that the minority students’ GPAs and LSAT scores were lower than those of the non-minorities denied admission, that the Law School had not attempted to achieve diversity through race-neutral means, that the program had no durational limits, and that the “critical mass” goal amounted to a prohibited quota.

settled in the lower courts.<sup>40</sup> This procedure alluded to the significance of the issues facing the Court, which heard oral argument in the cases on April 1, 2003. The cases drew a record number of *amici curiae*, or friend of the court briefs, from a wide variety of groups with highly disparate interests. Illustrative of this diversity are briefs from the military and from a consortium of Fortune 500 companies, both of which supported Michigan's affirmative action policies.<sup>41</sup> As consolidated, *Gratz* and *Grutter* presented the Supreme Court with an opportunity to address directly the question of racial preferences in university admissions, something it had not done in the twenty-five years since *Bakke*.<sup>42</sup>

More particularly, the Court addressed whether the educational benefits of diversity are sufficiently compelling to survive judicial scrutiny and, if so, whether Michigan's use of racial preferences is narrowly tailored to achieve those benefits. Up until *Grutter*, lower federal courts had split on this issue (as illustrated by the foregoing cases), and commentators looked to the Michigan cases to provide guidance to the lower courts, universities and school districts on the extent to which they may utilize race in making decisions about admissions.

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<sup>40</sup> *Gratz* involved a class action challenge to Michigan's race-conscious admissions policy at the undergraduate level. *Gratz v. Bollinger*, 122 F. Supp. 2d 811 (E.D. Mich. 2000). Before being struck down by the Supreme Court, Michigan's undergraduate policy explicitly considered race and awarded 20 automatic points to certain "underrepresented" minorities. The policy also allowed counselors to "flag" specific applications of students who would otherwise not have passed the first selection procedure, causing the application to receive further consideration. The district court held that diversity is a compelling governmental interest and upheld the university's admissions policy. In support of its holding, the court noted that university's former admissions system, which reserved some seats for minorities and used separate scoring grids for white and minority applicants, violated white applicant's equal protection rights, but that the university had replaced that system.

<sup>41</sup> These cases were also noteworthy because they raised the question directly, without any of the complicating procedural concerns that sometimes obscure important questions of constitutional law.

<sup>42</sup> *Grutter* is also important because the University of Michigan conceded that it gave a substantial preference to certain preferred racial minority groups (*i.e.*, all racial minority groups with the exception of those of Asian origin, who were not deemed "underrepresented").

*Grutter* could not be clearer in this regard. In an opinion penned by Justice O'Connor,<sup>43</sup> the Court explicitly adopted Justice Powell's view from *Bakke*. In so doing, *Grutter* held that diversity is a compelling interest in higher education and that race is one of a number of factors that can be taken into account to achieve the educational benefits that flow from a diverse student body.<sup>44</sup> The Court seemed persuaded that the individualized review used in the University of Michigan Law School's admissions process, even if it gave a "plus" to certain preferred racial minorities, was narrowly tailored to achieve the educational benefits of diversity.

In defining the governmental interest justifying Michigan's race-conscious admissions program, the Court arguably veered from the jurisprudential principles that typically ground an equal protection analysis.<sup>45</sup> In particular, the Court listed the asserted benefits that flow from a racially diverse student body, including: "cross-racial understanding," "livelier, more spirited, and simply more interesting and enlightening [classroom discussion]," students who are better prepared for an "increasingly diverse workforce and society," and, in a flourish that will certainly occupy social scientists and psychometricians for coming decades "better learning outcomes."<sup>46</sup> Moreover, the Court recognized the importance of education in preparing students to sustain "our political and cultural heritage,"<sup>47</sup> and cited statistics concerning the large percentage of senators

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<sup>43</sup> Justice O'Connor's opinion was joined by Justices Stevens, Souter, Ginsburg, and Breyer, creating a firm majority and avoiding the problem that arose from the fractured opinions in *Bakke*.

<sup>44</sup> *Grutter*, 123 S.Ct. at 2340-41.

<sup>45</sup> Even the most forgiving reading of *Grutter* must admit a certain discomfort with the Court's lack of precision when discussing the proffered governmental interest.

<sup>46</sup> *Grutter*, 123 S.Ct. at 2340.

<sup>47</sup> *Id.*

and congressmen with law degrees, noting that “universities, and in particular, law schools, represent the training ground for a large number of our Nation's leaders.”<sup>48</sup>

In response to the argument that the elusive “critical mass” of underrepresented minority students was merely a quota system in disguise, the Court held:

We are satisfied that the Law School’s admissions program . . . does not operate as a quota. 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.<sup>49</sup>

Although acknowledging “some relationship between numbers and achieving the benefits to be derived from a diverse student body, and between numbers and providing a reasonable environment for those students admitted,”<sup>50</sup> the Court rejected the quota argument offered by opponents of the Michigan Law School’s racial preference program. The Court’s argument in this regard is a bit circular in that it defines a quota in contradistinction to a “permissible goal,” yet fails to examine whether a university’s failure to meet this permissible goal may be proper grounds for additional racial preferences. Indeed, one begins to wonder what precisely is meant by a number that “come[s] within a range demarcated by the goal itself.” For instance, if the

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<sup>48</sup> *Id.* at 2341. An additional benefit noted by the Court was increasing the credibility of the “integrity” of elite educational institutions. *Id.* (“In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our society must have confidence in the openness and integrity of the educational institutions that provide this training.”).

<sup>49</sup> *Id.* at 2342-43 (internal quotation marks and citations omitted). See *Bakke*, 438 U.S. at 323 (opinion of Powell, J.) (“10 or 20 black students could not begin to bring to their classmates and to each other the variety of points of view, backgrounds and experiences of blacks in the United States.”).

<sup>50</sup> *Grutter*, 123 S.Ct. at 2343 (quoting *Bakke* 438 U.S. at 323.)

“range demarcated by the goal” is a student body composed of 12%-16% underrepresented racial minorities, is it constitutionally permissible to adjust admissions standards to assure that the lower end of the range is reached? Stated differently, if 12% is the minimum percentage required to meet the admissions “goal” and the evidence suggests that the University reached that level every year, is not the 12% operating more as a quota than as a goal? Provocative questions aside, the Court’s holding should provide ammunition for school districts seeking to establish racial attendance “goals.”

The Court also laid to rest the notion that strict scrutiny, as applied, is “strict in theory, but fatal in fact.”<sup>51</sup> Under this theory, legal scholars had long argued that the invocation of strict scrutiny foreordained the result, and that application of strict scrutiny was merely a prelude to the Court’s invalidation of the law or regulation at issue.<sup>52</sup> But with *Grutter*, the Court rejected this assertion and its corollary, which seemed quite reasonable after *Freeman*, that “the only governmental use of race that can survive strict scrutiny is remedying past discrimination.”<sup>53</sup> Thus, the Court made clear that the non-remedial use of race can survive strict scrutiny (and be judged constitutional).

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<sup>51</sup> *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995) (internal quotation marks and citation omitted).

<sup>52</sup> The other exception to this rule exists in the area of national security. In *Korematsu v. United States*, perhaps the most reviled Supreme Court decision that still has precedential value, the Supreme Court upheld the internment of persons of Japanese heritage. Purporting to apply strict scrutiny, the Court held that “[p]ressing public necessity may sometimes justify the existence of [racial discrimination].” 323 U.S. 214, 216 (1944).

<sup>53</sup> *Grutter*, 123 S.Ct. at 2338. The Court conceded that their earlier opinions in fact suggested such an approach. *Id.* (“It is true that some language in those opinions might be read to suggest that remedying past discrimination is the only permissible justification for race-based governmental action.”). See also *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion) (stating that unless classifications based on race are “strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility”).

Although language in *Grutter* suggests that the holding may have some applicability to K-12 schools, there are reasons to be cautious in extending its reach. The first and most obvious point of distinction is that *Grutter* concerned university admissions, where many of the asserted benefits of diversity may have special application. Apart from the setting, there is much in the text of *Grutter* that appears limited to the university context. Indeed, in support of its holding, the Court drew on a long line of cases recognizing the unique role played by universities in fostering the free exchange of ideas:

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. In announcing the principle of student body diversity as a compelling state interest, Justice Powell invoked our cases recognizing a constitutional dimension, grounded in the First Amendment, of educational autonomy[.]<sup>54</sup>

While freedom of speech and thought are not exclusively reserved for university students, of course, these concepts take on special meaning at the university setting, where students generally come from a wider range of backgrounds and communities (as compared to the students assigned to a single school). More to the point, the “expansive freedoms of speech and thought associated with the university environment” may be present at the K-12 level, but it is unlikely they are present to the same degree.<sup>55</sup>

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<sup>54</sup> *Grutter*, 123 S.Ct. at 2339 (emphasis added). See also *Bakke* 438 U.S. at 312 (“The freedom of a university to make its own judgments as to education includes the selection of its student body.”); *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957); *Shelton v. Tucker*, 364 U.S. 479, 487 (1960); *Keyishian v. Board of Regents of Univ. of State of N. Y.*, 385 U.S. 589, 603 (1967).

<sup>55</sup> Likewise, these rights may take on a slightly different meaning in the K-12 setting, especially when balanced against school officials’ discretion to promulgate rules of conduct. For instance, in *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988), the Supreme Court addressed the question of students’ freedom of speech, holding that school officials retain the right to impose reasonable restrictions on student speech that appears in a school newspaper.

Similarly, the vaunted “robust exchange of ideas” first lauded by Justice Powell in *Bakke* seemingly applies with less force in the K-12 arena, especially given the increasing focus on standardized testing at the K-12 level. Although student exchange of ideas is no doubt key to the educational process, dubious is any argument that third graders preparing for a state-mandated arithmetic test, for example, would benefit from their classmates’ perspective concerning the prescribed subject matter.

This is not to say that such an exchange of ideas among classmates is not an important part of K-12 education, just that the governmental interest necessary for sustaining a race-conscious admissions or assignment program against a constitutional challenge would need to demonstrate that such an interest is compelling. To the extent a school district is able to demonstrate that its interest in promoting a robust exchange of ideas is greater at the secondary level than at the elementary level, high school districts may have more success defending race-conscious admissions or transfer programs than their elementary counterparts. In this context, it may well be that the government’s interest in promoting a “robust exchange of ideas” varies (on a sliding scale) as one progresses from kindergarten through the twelfth grade and that courts may treat school districts differently depending on the level of schooling involved.

One might also ask whether the goals of Michigan’s policy are even possible in the K-12 context (or, for that matter, among less selective regional universities with fewer opportunities for substantial racial diversity or without the substantial resources required to conduct individualized review). The University of Michigan Law School is an elite national law school that draws a self-selected group of applicants from across the nation. School districts, by contrast, are in some sense constrained by the demographics of their particular attendance zone. Given the persistence of residential segregation, many districts simply do not have the “applicant

pool” required to promote substantial racial diversity. Indeed, federal courts have increasingly recognized the futility of continuing judicial supervision over desegregation cases where demographic changes have made the school district in question, for all intents and purposes, racially monolithic. Certainly a “critical mass” approach is a statistical impossibility in a racially monolithic school district, absent interdistrict remedies that have been foreclosed by Supreme Court precedent.<sup>56</sup>

In light of these difficulties in application, it may well be that comparative levels of student integration are not the best measure of educational progress. The fact of the matter is that the vast majority of inner-city school districts no longer have sufficient numbers of white students to allow meaningful integration. Is this cause for concern? Certainly. But should it detract from the real promise of *Brown*—increased educational opportunity? That question is more difficult to answer. While *Brown* held plainly that racially segregated schools are, by their nature, unconstitutional, the spirit that animated *Brown* was the call for increased educational opportunity for African-American children attending demonstrably inferior schools. To update *Brown*’s mandate, school districts might do well to focus less on external realities like housing patterns and more on internal factors that affect student achievement. If the real goal is student achievement, these strategies can be addressed to the well-documented achievement gap that persists between white and Asian students, on one hand, and black, Latino, and Native American students, on the other.<sup>57</sup>

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<sup>56</sup> See, e.g., *Missouri v. Jenkins*, 515 U.S. 70 (1995) (holding that district court orders designed to attract nonminority students from outside the school district into the school district sought interdistrict goal which was beyond the scope of intradistrict violation).

<sup>57</sup> Given the reality of residential segregation, one might consider anew the real goal of racial preference programs. Is increased educational opportunity (and achievement) the real goal, or is integration (regardless of achievement levels) the proper measure of educational programs? Indeed, as a policy matter, the existence of fully integrated, mediocre schools

A second point of departure is that *Grutter*, at its most basic level, is an explicit reaffirmation of *Bakke*. In the words of Justice O'Connor: "[F]or the reasons set out below, today we endorse Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions."<sup>58</sup> Why a reaffirmation of the *Bakke* rationale should breathe new life into the expanded use of race in public school decision-making is not immediately apparent, especially in light of the confusion *Bakke* occasioned in the lower federal courts. Indeed, *Bakke* was followed by twenty-five years of tortured (and often convoluted) federal court rulings taking nearly every position imaginable on the holding.

Despite these difficulties in application, *Grutter* does offer two innovations. First, *Grutter* expressly held that the attainment of diversity can be a compelling governmental interest, a question that had confounded courts for a generation. In examining this issue in the wake of *Bakke*, many federal courts side-stepped the question altogether. For example, the Fourth Circuit, in the *Tuttle* and *Eisenberg* cases noted above, assumed without deciding that diversity was a compelling governmental interest, yet struck down the school policies under the second prong of the equal protection analysis—that the programs were not narrowly tailored to meet the asserted governmental interest (or that there were race-neutral policies that could achieve the same governmental interest).

Second, Justice O'Connor's opinion in *Grutter* commanded a solid majority of the Court, avoiding the complications that arise when plurality decisions must be parsed with concurring

churning out minimally qualified graduates does not seem as desirable as marginally (or even substantially) segregated schools with rapidly improving student achievement levels. In this context, does it make sense for the Chicago Public Schools, for example, to seek a critical mass of students in specified schools so the students attending those schools can benefit from better cross-racial understanding or would resources be more efficiently allocated if focused more narrowly on student instruction?

<sup>58</sup> *Grutter*, 123 S.Ct. at 2337

and dissenting opinions to determine the Court's actual holding.<sup>59</sup> *Marks v. United States* sets forth the procedure to be applied where no single rationale is joined by a majority of the Court, as was the case in *Bakke*: "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds."<sup>60</sup> The Court was thus able to issue an opinion supported by the full precedential weight of the Court, a significant accomplishment given the tentative way in which courts had dealt with *Bakke*.<sup>61</sup>

*Grutter* also made clear, as Justice O'Connor put it, that "context matters."<sup>62</sup> The context in *Grutter* is an elite, highly competitive professional school that decided to devote substantial resources to applicant review, with a view toward ensuring that its student body has a certain level of racial diversity, or as Justice Thomas more caustically put it, a certain "aesthetic."<sup>63</sup> Whether the court would view a similar effort at the K-12 level, which by necessity would be narrower in scope, with similar favor is difficult to predict. Taken literally, Justice O'Connor's "context matters" admonishment seems designed to force courts to treat equal protection

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<sup>59</sup> *Grutter*, 123 S.Ct. at 2336-37. ("In the wake of our fractured decision in *Bakke*, courts have struggled to discern whether Justice Powell's diversity rationale, set forth in part of the opinion joined by no other justice, is nonetheless binding precedent under *Marks*.").

<sup>60</sup> 430 U.S. 188, 193 (1977) (citations omitted).

<sup>61</sup> The Supreme Court itself had questioned the precedential value of *Bakke*. See *Adarand v. Peña*, 515 U.S. at 218 ("*Bakke* did not produce an opinion for the Court."). This arguably undermined Justice Powell's opinion and provided ammunition to those lower court judges not persuaded by Justice Powell's diversity rationale and inclined to find ways to limit its reach.

<sup>62</sup> *Grutter*, 123 S.Ct. at 2238. The Supreme Court has used this rationale before. See *Gomillion v. Lightfoot*, 364 U.S. 339, 343-344 (1960) ("[I]n dealing with claims under broad provisions of the Constitution, which derive content by an interpretive process of inclusion and exclusion, it is imperative that generalizations, based on and qualified by the concrete situations that gave rise to them, must not be applied out of context in disregard of variant controlling facts").

<sup>63</sup> *Grutter*, 123 S.Ct. at 2352 n.3 (Thomas, J. dissenting).

challenges to racial classifications at the K-12 level just as the University of Michigan treated its applicants—with individualized, holistic review.<sup>64</sup> Setting aside the predictive difficulties raised by such an *ad hoc* approach, there is certainly enough room in *Grutter* to allow for divergent lower court holdings.

One might even consider whether *Grutter* provides a basis to reinvigorate legal theories long since discarded. The Court’s solicitude towards racial preferences in admissions, for example, might serve to place back at issue the seemingly vanquished “benign discrimination” theory espoused in defense of the affirmative action programs at issue in the *Adarand* and *Croson* decisions nearly a decade earlier.<sup>65</sup> Under this theory, certain forms of discrimination (*i.e.*, those deemed benign) were examined under the more forgiving glare of intermediate scrutiny, thus ensuring that only so-called “invidious” discrimination was subject to strict scrutiny.<sup>66</sup> Of course, the line separating benign from invidious discrimination was far from clear, and often depended upon which side of the line a given plaintiff was on. That discrimination might be treated differently based on whether it sought to promote a supposed benign outcome was certainly a novel proposition; but applying the test proved difficult and frequently resulted in disproportionate outcomes, so the Court wisely laid the benign/invidious

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<sup>64</sup> Fairness aside, whether this is an efficient approach as a judicial matter remains to be seen.

<sup>65</sup> The benign discrimination theory was seemingly laid to rest in *Croson*: “Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are ‘benign’ or ‘remedial’ and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to ‘smoke out’ illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen ‘fit’ this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.” *Croson*, 488 U.S. at 493 (plurality opinion of O’Connor, J.).

<sup>66</sup> For the most famous pronouncement on the benign discrimination theory, see *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547, 564-565 (1990).

distinction to rest. That a largely discredited legal theory might make a comeback on the heels of *Grutter* might comport with the law of unintended consequences, but it does not portend well for future court challenges to race-based K-12 admissions and transfer decisions (or to counsel concerned with defending a school district's policies).

Although *Grutter* left much unsettled, this much is clear. Racial quotas are, by definition, unconstitutional. Admissions or transfer policies that assign a fixed number of points based solely on race are conclusively unconstitutional. Multiple-tier admissions or transfer policies based on race are presumptively unconstitutional. Beyond these rather rudimentary points of law (which were largely apparent even before *Grutter*), the field is now wide open. Indeed, if the recent past is any indication, lower federal courts considering race-based will struggle anew with the many questions left unsettled by *Grutter*:

- To what extent does the existence of race-neutral alternatives to affirmative action programs in student assignment and transfer programs render reliance on race impermissible? If, for example, studies suggest that the use of socioeconomic factors as a basis for preferential treatment results in only slightly less racial diversity and substantially greater economic diversity within the student population, can racial preference programs still survive under *Grutter*?
- What does “individualized” review mean at the elementary and secondary school level, particularly given the limited budgetary resources such schools are likely to devote to such review?
- Does *Grutter* conclusively establish that single-race academies are unconstitutional? Single-sex academies? What of academies with a textually open enrollment policy but that employ an ethnic-theme curriculum?
- If seeking a “critical mass” of underrepresented students is sufficient reason to support race-based student assignment and transfer decisions, what methods can be used to seek this critical mass? Race-based recruiting? Targeted mailings? Racially preferential pre-enrollment “bridge programs”?
- Does *Grutter* have any application in the private school context, assuming private academies and parochial schools accept state vouchers? Can such schools also seek desired levels of racial diversity through admissions decisions?

- Can K-12 schools directly consider race in drawing district lines or making student assignment decisions? If so, how can school districts, as a matter of proof, demonstrate compliance with *Grutter*'s standards?
- How can K-12 schools walk the fine line between promotion of racial diversity through allowable "ranges," yet avoid impermissible "quotas"?
- In schools recently declared unitary (or slowly emerging from dual status), can race now be used to assure the maintenance of a desired level of racial diversity?
- What is *Grutter*'s application in public schools with admissions prerequisites? For instance, can magnet schools promote racial diversity by giving preferences to certain applicants? Can state charter school laws (which currently provide for admission by lottery when the number of applicants exceeds the total) be modified to allow for racial preferences?
- Are race-neutral alternatives to affirmative action in student assignments and transfers more permissible than race-based programs? School districts in places as diverse as Raleigh, North Carolina and San Francisco have attendance policies which seek to create diversity by taking the socioeconomic status of students into account when making assignments. Assuming these programs provide sufficient levels of diversity, is that conclusive proof that race-neutral methods can achieve the desired result? If so, is any further use of race unconstitutional?
- Opponents of racial preferences have long argued that affirmative action alternatives (*i.e.*, class-based programs, regional attendance zones) are merely proxies for race and therefore unconstitutional. Does *Grutter* undermine this proxy argument by explicitly allowing the consideration of race?
- Does the Court's holding that "race-conscious admissions policies must be limited in time" suggest a "sunset provision" in *Grutter*? Does *Grutter*'s suggestion that racial preference policies would not be needed 25 years from now provide a constitutional end date to such policies?
- Given the shifting demographics of America's public school constituency, is race as a concept even a reasonable or efficient factor to use in seeking a diverse enrollment?
- Do the "ten percent plans" used in Texas and Florida, in which the top ten percent of students (in terms of class rank) in every public school within the State are guaranteed admission to one of the State's public universities, have any application in the K-12 context? Are these programs an effective substitute for race-based affirmative action? Do they retain any viability in light of *Grutter*?
- Under what circumstances can a school district defend an action against it by relying on the individual plaintiff's qualifications (*i.e.*, that an applicant would have been rejected even if race was not a factor)?

- To what extent is viewpoint diversity, as opposed to racial diversity, an appropriate factor in determining whether a “critical mass” is reached?
- Now that diversity can be a compelling governmental interest, is the goal of “reducing racial isolation” a compelling governmental interest?

These are only some of the questions left unanswered by the *Grutter* Court. However, if *Grutter* is read together with recent federal precedent on the question of racial preference programs in K-12 school admissions, assignment, and transfer policies, trends emerge that shed light on many of these questions.

In the final analysis, *Grutter* is best viewed as a starting point. If it is true, as Justice O’Connor wrote that “[n]ot every decision influenced by race is equally objectionable,”<sup>67</sup> one is left with the more pressing question: Precisely how is a court to determine which decisions influenced by race are constitutionally objectionable and which are not? Of course, courts have the legal machinery of the equal protection clause to guide their analyses, with its shifting governmental interest balanced by the means used to accomplish that interest (with a dash of least restrictive means thrown in for good measure). Applying this test will prove difficult as a practical matter, however, because, as demonstrated above, *Grutter* may well raise more questions than it answers.

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<sup>67</sup> *Grutter*, 123 S.Ct. at 2238.