

Take Comfort: Diversity is More Compelling in Primary and Secondary Schools

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Abstract

This Comment explores the conscious use of race in K-12 student assignment plans to attain racial diversity, and recent challenges to such plans under the 14th Amendment. Grutter v. Bollinger and Gratz v. Bollinger empowered the federal circuits to declare diversity compelling in K-12 education, and yet at least one circuit has eschewed the Supreme Court's precise narrow tailoring framework. This Comment argues that the scope and purposes of K-12 education make diversity more compelling in that context, and offers guidelines for K-12 educational policy makers to meet the Supreme Court's narrow tailoring requirement.

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. . . . This Court has long recognized that 'education . . . is the very foundation of good citizenship.' For this reason, the diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity.¹

In *Grutter v. Bollinger*, the Court largely relied on and accepted the University of Michigan Law School's assertion that diversity constitutes a compelling governmental interest in *law school* admissions. In support of that proposition, Justice O'Connor's Opinion for the Court noted that "the path to leadership [must] be visibly open to talented and qualified individuals of every race and ethnicity" so that our nation's leaders will have "legitimacy in the eyes of the citizenry."² It can scarcely be said that diversity in a law school setting is so much more important than diversity in primary and secondary education. And the path to leadership does not begin at the law school doors.

Diversity as a supporting rationale for affirmative action in professional school admissions, quite simply, is diversity misplaced. By the time students reach college or professional school, their socialization has largely been accomplished, and any latent views of other racial groups or stereotypes have long since formed. The importance of diverse

¹ *Grutter v. Bollinger*, 539 U.S. 306, 331 (2003) (citing *Plyler v. Doe*, 457 U.S. 202, 221 (1982); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)).

² *Grutter*, 539 U.S. at 332.

experiences in a child's early socialization cannot be overstated, and K-12 education plays a fundamental role in this process. Coupled with its attendant educational benefits, it follows that diversity is more beneficial, and thus more compelling, in the context of K-12 education.

In an effort to promote diversity, many school districts and some private entities have voluntarily initiated school placement reforms of two general types: urban-suburban transfer programs and intra-district student assignment policies. Although the primary aim of these programs is to create integrated educational opportunities, parents often view the programs as a way to gain access to greater educational opportunity for their children than that available in inner-city schools, or an assigned neighborhood school. In a very real sense, voluntary integration programs provide a way up for students who might otherwise be trapped in a failing system. Such programs have seen marked success.

One example of successful outcomes is Boston's Metropolitan Council for Educational Opportunity program. In Boston, parents and local activists were too troubled by the inadequate conditions in the city's schools to wait for court-ordered solutions. They wanted to remove their children from segregated, under-funded city schools and place them on the path to opportunity.³ In 1966, these parents and activists accomplished peacefully what the courts could not by forming METCO, the Metropolitan Council for Educational Opportunity.⁴ This voluntary inter-district transfer program centered on a partnership with suburban school districts in the greater Boston area, and had as its twin aims equal educational opportunity for urban blacks and a racially diverse experience for all students.⁵ By both measures, METCO has enjoyed considerable success. Participants have consistently performed at higher levels than their peers in the Boston Public Schools, and go on to attend post-secondary institutions at a markedly

³ SUSAN E. EATON, *THE OTHER BOSTON BUSING STORY: WHAT'S WON AND LOST ACROSS THE BOUNDARY LINE* 3 (2001).

⁴ EATON, *supra* note 3, at 3.

⁵ EATON, *supra* note 3, at 4. Children in many large cities have no choice but to "attend school in conditions of concentrated poverty" where they are "programmed for failure early with inadequate resources and poor teaching." William L. Taylor, *Assessment as a Means to a Quality Education*, 8 *GEO. J. POVERTY LAW & POL'Y* 311, 313 (2001).

higher rate.⁶ Moreover, former METCO students have reported that their integrated education prepared them to function effectively and succeed in majority-dominated colleges and workplaces.⁷ Although it is the oldest privately-run voluntary integration program, METCO is not the only program of its kind.⁸

With the waning of court-ordered desegregation plans, voluntary integration programs have become virtually the only means of maintaining a racially diverse student population in the face of resegregative phenomena.⁹ Yet, in recent years, such voluntary programs have come under fire, attacked as violations of the 14th Amendment's guarantees of Equal Protection.¹⁰ In some such cases, the NAACP has discouraged proponents of such programs from appealing to the Supreme Court,¹¹ a move driven by concern that, given the opportunity, the Supreme Court would decide such voluntary programs violate the Constitution and invalidate them nationwide.

The overwhelming trend in the circuits has been to analyze voluntary integration programs under the Supreme Court's affirmative action framework. Before the Supreme Court's decisions in *Grutter v. Bollinger* and *Gratz v. Bollinger*, the circuits largely evaded pronouncements on whether diversity is a compelling state interest in the context of K-12 education, invalidating the plans as not narrowly tailored. Following *Grutter* and *Gratz*, the circuits evinced less reluctance in addressing the compelling interest prong of the analysis,

⁶ METCO Presentation to the Commonwealth of Massachusetts Joint Committee on Ways and Means, available at <http://www.metcoinc.org/waysmeans.ppt> (last viewed August 26, 2005). For example, while "81% of METCO 10th Graders passed the 2002 MCAS Mathematics test . . . [o]nly 48% of the Boston 10th Graders" passed the same test. *Id.*

⁷ EATON, *supra* note 3, at 224 (noting that METCO enabled them to "feel more comfortable [in predominantly white settings], and be more likely to succeed and less likely to be intimidated or scared off by initial awkwardness related to racial and cultural difference").

⁸ Rochester, New York's Urban-Suburban Interdistrict Transfer program is the nation's oldest government-run voluntary desegregation program. See *Brewer v. West Irondequoit Cent. Sch. Dist.*, 212 F.3d 738 (2nd Cir. 2000).

⁹ So-called "white flight" from urban settings to suburban communities has resegregative effects. White flight, in turn, has been attributed to various causes, including increasing crime rates. Joanna R. Zahler, Note, *Lessons in Humanity: Diversity as a Compelling State Interest in Public Education*, 40 B.C. L. REV. 995, 1028 (1999).

¹⁰ See, e.g., *Wessmann v. Gittens*, 160 F.3d 790 (1st Cir. 1998); *Anderson v. Boston Sch. Comm.*, 375 F.3d 71 (1st Cir. 2004); *Comfort v. Lynn Sch. Comm.*, 2005 WL 1404464 (1st Cir. 2005); *Brewer v. West Irondequoit Cent. Sch. Dist.*, 212 F.3d 738 (2nd Cir. 2000); *Tito v. Arlington County Sch. Bd.*, 1997 WL 33164931 (4th Cir. 1997); *Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698 (4th Cir. 1999); *Eisenberg v. Montgomery County Pub. Schs.*, 197 F.3d 123 (4th Cir. 1999); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 377 F.3d 949 (9th Cir. 2004).

¹¹ The First Circuit invalidated an affirmative action program at Boston Latin School. The school committee wanted to appeal to the Supreme Court, however "the NAACP persuaded the committee to remain silent, for fear that the Supreme Court might agree with the First Circuit and thereby end all such preference admissions across the country." Nat Hentoff, *How Much Diversity is Enough?*, VILLAGE VOICE, April 1, 2003, at 31.

acknowledging that diversity may constitute a compelling interest in primary and secondary school. Even then, however, the programs sometimes faltered on the narrow tailoring prong.

This Comment will argue that the circuit courts have chosen the appropriate framework for analyzing 14th Amendment challenges to voluntary integration programs, but that many of the courts have erred in failing to acknowledge fundamental differences between higher education and the K-12 context. Part II will provide a more detailed overview of the METCO program. Part III will discuss the Supreme Court's affirmative action jurisprudence, and the voluntary integration cases in the lower courts. Part IV-A will examine the potential outcome of Supreme Court review of voluntary integration plans, and will propose an alternative model for voluntary programs going forward in the K-12 setting. Finally, Part IV-B will consider the implications of the analysis for the METCO program, and others like it.

II. THE METROPOLITAN COUNCIL FOR EDUCATIONAL OPPORTUNITY

The Metropolitan Council for Educational Opportunity ("METCO") is a voluntary inter-district transfer program that began in 1966 with 220 students.¹² In its first year of operation, the program placed students residing in the Boston Public School system in seven suburban school districts.¹³ Boston students interested in participating in METCO were required to apply, and the program committed to "accept[ing] students with a range of academic accomplishments – high achievers, average achievers and low achievers – with most being in the average range."¹⁴ METCO interviewed each applicant along with their parent or guardian, and METCO staff inquired into how the applicant had learned about the program, as well as their reasons for applying.¹⁵ Most applicants sought a better quality education; few mentioned the benefits of an integrated setting.¹⁶ In selecting the first student group, METCO achieved a balanced representation of both genders, a cross-section of academic ability and divergent family

¹² Metropolitan Council for Educational Opportunity, Inc., History, at <http://www.metcoinc.org/history.htm> (last viewed on August 26, 2005). I include METCO within the category of "Urban-Suburban Transfer" program.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*; see also EATON, *supra* note 3, at 6 (noting the "central goal of METCO parents [was] to get a better education for their children").

backgrounds, participation from various Boston neighborhoods, and “independent[ly] spirit[ed]” students.¹⁷ Moreover, “[a]ll of the students selected were black with the exception of two,” both of which had extenuating circumstances surrounding their acceptance.¹⁸

Today, the program continues as a voluntary integration program and remains committed to its twin aims of providing better educational opportunities to urban minority students, and fostering integrated learning environments.¹⁹ The METCO Mission Statement sets forth one additional programmatic goal – that of fostering cooperation and understanding among urban and suburban residents in the greater Boston area.²⁰ In all respects, METCO has seen overwhelming success. A significantly greater percentage of the program’s graduates attend post-secondary school than their counterparts in Boston’s city schools.²¹ The program’s promotion of diverse classrooms has prepared black students to function in “predominantly white colleges, workplaces, and social situations,” and has diminished racial isolation too often encountered by suburban white students.²² This, in turn, has encouraged a community of understanding in the Boston metropolitan area.

While the program’s successes have remained constant, the racial composition of METCO’s participants has changed somewhat. Currently, the program serves a population roughly proportionate to the minority population of Boston Public Schools, and less than 3% of METCO students are white.²³ METCO’s selection process has also evolved in response to a

¹⁷ Metropolitan Council for Educational Opportunity, Inc., History, at <http://www.metcoinc.org/history.htm> (last viewed on August 26, 2005).

¹⁸ *Id.* METCO made one exception for the only white applicant – a student who lived in the neighborhood METCO had set for selection. *Id.*

¹⁹ EATON, *supra* note 3, at 4; see also Metropolitan Council for Educational Opportunity, Inc., Facts about the Success of the METCO Program, at <http://www.metcoinc.org/success.htm> (last viewed on August 26, 2005). The METCO program is enabled by the Commonwealth of Massachusetts’ Racial Imbalance Law, which provides that “the school committee of any city or town or any regional school district may adopt a plan for attendance at its schools by any child who resides in another city, town, or regional school district in which racial imbalance exists.” MASS. GEN. LAWS ANN. ch. 76 § 12A (West 2005). Pursuant to state law, the plan should “tend to eliminate racial imbalance in the sending district” as well as “alleviate racial isolation in the receiving district.” MASS. GEN. LAWS ANN. ch. 71, § 37D (West 2005).

²⁰ Metropolitan Council for Educational Opportunity, Inc., Mission, at <http://www.metcoinc.org/mission.htm> (last viewed on August 26, 2005).

²¹ Metropolitan Council for Educational Opportunity, Inc., Massachusetts’ Investment in the METCO Program Returns Big Dividends, at <http://www.metcoinc.org/news.htm> (last viewed on August 26, 2005) (reporting that over 92% of its graduates last year went on to post-secondary school, while Boston public school graduates only continued their education at a rate of 70%).

²² EATON, *supra* note 3, at 47, 49.

²³ The minority population of Boston Public Schools is 60% African-American, 30% Hispanic, and 10% Asian. *Id.* Note, however, that the Massachusetts Department of Education presents a different racial breakdown among 2002’s

level of demand that consistently outpaces available seats in any given year.²⁴ METCO has developed fairly set criteria for placement in the program: The program makes placement decisions on the basis of a student's application, school records, space available in participating schools, and race, among other things.²⁵

Despite the remarkable educational and social benefits the METCO program has afforded its many graduates, this program may soon fall victim to the wave of litigation challenging the conscious use of race in voluntary integration programs. In order to assess the vulnerability of the METCO program, and others like it, I will begin with a thorough examination of the Supreme Court's affirmative action jurisprudence, and subsequently will examine its application to voluntary integration programs in the circuit courts.

III. BACKGROUND

A. *Affirmative Action*

This Part examines the law of affirmative action as set forth by the Supreme Court. The Court has stated that strict scrutiny applies in all cases involving racial classifications.²⁶ This is so irrespective of the avowedly 'benign' purposes advanced for the classification.²⁷ As a result, affirmative action or racial preference policies must be narrowly tailored to serve a compelling governmental interest.²⁸

The touchstone of the Supreme Court's affirmative action jurisprudence has been an emphasis on treating all candidates *individually*,²⁹ and programs precluding individualized

participants, namely, 80.84% African-American students, 12.26% Hispanic, 3.69% Asian, 2.93% Caucasian, and 0.28% Native American. Massachusetts Department of Education, METCO Program: FY03 Distribution of METCO Students by Race, Gender, Income, and Grade Level, at http://www.doe.mass.edu/metco/fy03enroll_data.html (last viewed on August 26, 2005).

²⁴ Massachusetts Department of Education, METCO Program FAQ, at <http://www.doe.mass.edu/metco/faq.asp> (last viewed on August 26, 2005).

²⁵ *Id.* DOE further notes "[t]here is no stipulation that a student speaks English in order to register or get placed in METCO . . . [as t]o deny a placement based on language proficiency would be a civil rights violation." *Id.*

²⁶ *Adarand Constructors v. Peña*, 515 U.S. 200, 224 (1995).

²⁷ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 470 (1989).

²⁸ *Id.* at 505.

²⁹ *See, e.g., Croson*, 488 U.S. at 469 (noting that "programs are less problematic from an equal protection standpoint [where] they treat all candidates individually, rather than making the color of an applicant's skin the sole relevant consideration"); *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003) ("Universities can . . . consider race or ethnicity more flexibly as a 'plus' factor in the context of individualized consideration of each and every applicant."); *Gratz v. Bollinger*, 539 U.S. 244, 274 (2003) (invalidating the admissions policy as not narrowly tailored and noting "individualized consideration . . . is the exception and not the rule in the operation of the . . . program"); *see also, e.g., Hopwood v. Texas*,

consideration have seldom been upheld as narrowly tailored. This follows naturally from the long-standing notion that “rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights.”³⁰ Thus, a virtually irrebuttable presumption has arisen against strict racial quotas, racial balancing,³¹ and set-aside programs devoid of some waiver process. While state actors have attempted to justify such programs by extolling the virtues of administrative efficiency, for example, the Court has been loath to forsake a more individualized method for those ends.³² While not always determinative, the Court has carefully considered whether state entities adopting preferential treatment programs have considered alternative means to accomplish their proffered goals.³³ Moreover, the Court has often taken into account the likelihood that the preferential treatment program will unduly harm members of some racial group.³⁴

The Supreme Court first established strict scrutiny as the appropriate test in reviewing the use of racial classifications by state and local government actors, whether employed in traditional discrimination or in the nature of a preferential program, in *City of Richmond v. J.A. Croson Co.*³⁵ There, the Court invalidated a minority set-aside provision in place for city contracting in Richmond, Virginia.³⁶ The Court began by noting that the 30% quota was not remedial in that it could not “be tied to any injury suffered by anyone.”³⁷ For the Court, “the mere recitation of a ‘benign’ or legitimate purpose for a racial classification, is entitled to little or no weight.”³⁸ The

78 F.3d 932, 947 (5th Cir. 1996) (“To foster . . . diversity, state universities and law schools and other governmental entities must scrutinize applicants individually, rather than resorting to the dangerous proxy of race.”).

³⁰ *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948).

³¹ See, e.g., *Freeman v. Pitts*, 503 U.S. 467, 494 (1992) (“Racial balance is not to be achieved for its own sake.”).

³² See, e.g., *Croson*, 488 U.S. at 508.

³³ *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003) (observing that while “[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative,” it does “require serious, good faith consideration of workable race-neutral alternatives”). Even where the state entities have considered alternatives, however, the possibility remains that such consideration – and rejection, as the case may be – might constitute no more than a pretext.

³⁴ *Id.* at 341.

³⁵ 448 U.S. 469, 493-94 (1989) (“[T]he standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification.”).

³⁶ *Id.* at 469. The provision required prime contractors working on city-funded projects to sub-contract at minimum 30% of the total contract amount to one or more Minority Business Enterprises (MBEs).

³⁷ *Id.* at 499.

³⁸ *Id.* at 470.

Court applied strict scrutiny to evaluate the program, despite its asserted benign purpose, and held that Richmond had not established a compelling interest for its set aside program.³⁹

The Court initially determined the appropriate level of scrutiny in evaluating affirmative action programs on the basis of the program's origin, applying the more deferential standard of intermediate scrutiny to federal programs. In *Metro Broadcasting v. FCC*, for example, the Supreme Court reviewed minority preference policies in place at the Federal Communications Commission.⁴⁰ The Court held that the program survived intermediate scrutiny, finding Congress's role in approving and mandating the program to be of "overriding significance."⁴¹

This trend in the Court's jurisprudence was short-lived, however, as the Court overruled *Metro Broadcasting* five years later. In its place, the Court adopted a single standard of review vis-à-vis federal, state, and local government actors, requiring that all racial classifications be analyzed under strict scrutiny, in *Adarand Constructors v. Peña*.⁴² There, the Court considered a contracting set-aside program enacted by the federal government that gave additional compensation to contractors who hired "subcontractors certified as small businesses controlled by 'socially and economically disadvantaged individuals,'" a group presumptively including various racial minorities and "any other individual found to be disadvantaged."⁴³ The Court applied the principle of congruence initially set forth in *Bolling v. Sharpe*, modeling the analysis of federal action under the 5th Amendment Equal Protection component after state action analysis under the 14th Amendment Equal Protection Clause.⁴⁴ The Court did not ultimately decide whether the program met strict scrutiny, however, as it remanded the case to the lower court for decision.

The Supreme Court first considered the matter of affirmative action in the context of higher education in *Regents of the University of California v. Bakke*.⁴⁵ Justice Powell, writing for

³⁹ *Id.* at 505.

⁴⁰ 497 U.S. 547 (1990).

⁴¹ *Id.* at 563-65.

⁴² 515 U.S. 200 (1995).

⁴³ *Id.* at 204, 205.

⁴⁴ *Id.* at 224.

⁴⁵ 438 U.S. 265 (1978).

a plurality, examined the University of California Medical School admissions policy, which set aside 16 seats for ‘special admissions’ applicants – all of which were members of racial minority groups.⁴⁶ Powell applied strict scrutiny in evaluating the policy, noting that when a policy “touch[es] upon an individual’s race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest.”⁴⁷ The University proffered four state interests.⁴⁸ Justice Powell found only the State’s fourth asserted interest – attaining the educational benefits of a diverse student body⁴⁹ – to be a compelling state interest for an institution of higher education.⁵⁰ In so doing, Powell relied in large part on the notion that a university’s academic freedom encompasses the freedom to select and shape its student body.⁵¹

Nevertheless, the program ultimately failed to meet with strict scrutiny on the narrow tailoring prong. For Justice Powell, the admissions program focused too narrowly on racial diversity, virtually ignoring “a far broader array of qualifications and characteristics” necessary to attain true diversity.⁵² Powell characterized the Harvard scheme as the paradigm of narrow tailoring in admissions, as it defined diversity broadly to encompass not only race, but socioeconomic status, geographic location, and unique experiences or attributes, among other qualities.⁵³ Under the flexible Harvard model, rather than being determinative of an applicant’s admission, “race or ethnic background may be deemed a ‘plus’ in a particular applicant’s file.”⁵⁴

⁴⁶ *Id.* at 275-76.

⁴⁷ *Id.* at 299.

⁴⁸ The University’s first three asserted interests were (1) addressing the historical discrepancy in admission of “traditionally disfavored minorities” to medical schools; (2) redressing societal discrimination; and (3) boosting the number of physicians practicing in underserved communities. *Id.* at 306. Justice Powell rejected the first and third claimed interests. *Id.* at 307, 310. With respect to the second interest, Powell agreed that the “State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination,” but added that the Court had never upheld a classification addressed to that purpose “in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations.” *Id.* at 307. Notably, Justices Brennan, White, Marshall, and Blackmun, concurring in the judgment in part and dissenting in part, found the “articulated purpose of remedying the effects of past societal discrimination . . . sufficiently important to justify the use of race-conscious admissions programs where there is a sound basis for concluding that minority underrepresentation is substantial and chronic, and that the handicap of past discrimination is impeding access” *Id.* at 362.

⁴⁹ *Id.* at 306.

⁵⁰ *Id.* at 311-12.

⁵¹ *Id.* at 312.

⁵² *Id.* at 315.

⁵³ *Id.* at 316.

⁵⁴ *Id.* at 317.

For Powell, the University of California Medical School admissions plan failed to comport with the paradigm by foreclosing individualized consideration.⁵⁵ Because the University's program evinced a facial intent to discriminate, and because some segment of the applicants were precluded entirely from consideration for the 16 "special admissions" seats, Justice Powell invalidated the program as not narrowly tailored.⁵⁶ Because of the fractured nature of the Court in *Bakke*, the opinion did not lay down a clear rule of law for educational affirmative action programs.

The companion cases of *Grutter v. Bollinger* and *Gratz v. Bollinger* constitute the Court's first binding pronouncements on the subject, and provide a useful, and the most current, synthesis of the Supreme Court's affirmative action framework. *Grutter* examined the University of Michigan Law School admissions policy, wherein the school begins by considering an applicant's undergraduate grade point average, LSAT score, personal statement, letters of recommendation, and an essay detailing the applicant's unique prospective contribution to the Law School's diversity.⁵⁷ The school then goes on to examine various other criteria, all the time aiming to "achieve that diversity which has the potential to enrich everyone's education and thus make a law school class stronger than the sum of its parts."⁵⁸ While the policy did not establish strict quotas on the basis of race, it did operate with a target of admitting a so-called "critical mass of underrepresented minority students" to secure the educational benefits flowing from diversity.⁵⁹ In this way, race might not be a significant consideration with respect to some admissions, while for other applicants it could be determinative.⁶⁰

The Court applied strict scrutiny, and held that the Law School has a compelling interest in assembling a diverse student body.⁶¹ The Court deferred to the University's judgment as to the fundamental importance of diversity, notably taking pains to emphasize the tradition of

⁵⁵ *Id.* at 320 (citing *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948)) (noting the "fatal flaw in [the University's] preferential program is its disregard of individual rights as guaranteed by the Fourteenth Amendment").

⁵⁶ *Id.* at 319-20.

⁵⁷ *Grutter v. Bollinger*, 539 U.S. 306, 314 (2003).

⁵⁸ *Id.* at 315.

⁵⁹ *Id.* at 318.

⁶⁰ *Id.* at 319.

⁶¹ *Id.* at 327-28.

deference to universities in their academic decisions.⁶² It further recognized the significance of a diverse student body vis-à-vis both the “institutional mission” of the law school and its unique environment.⁶³ The Court then proceeded to examine the educational benefits the Law School sought through its focus on diversity, finding the policy encourages ‘cross-racial understanding,’ breaks down racial stereotypes, and facilitates understanding.⁶⁴ Moreover, the Court cited expert evidence indicating that student body diversity stimulates educational outcomes, and lays the groundwork for success in “an increasingly diverse workforce and society, and better prepares [students] as professionals.”⁶⁵

In examining the program’s fit to its proffered goal, the Court echoed Justice Powell’s plurality opinion in *Bakke*, noting that a quota system or a system preclusive of individualized consideration would not be narrowly tailored.⁶⁶ For the Court, a university may use race as a ‘plus factor;’ however, narrow tailoring requires (1) room for flexibility and individualized consideration of applicants,⁶⁷ (2) “serious, good faith consideration of workable race-neutral alternatives;”⁶⁸ (3) no likelihood of “undu[e] harm [to] members of any racial group;”⁶⁹ and (4) a duration limited in time.⁷⁰

Justice Ginsburg and Justice Breyer, concurring, praised the program for its role in correcting for continuing societal discrimination.⁷¹ They took pains to describe the inequalities persisting in K-12 education today, observing that minorities continue to be educated predominantly in schools where they receive inadequate and unequal educational opportunities.⁷²

⁶² *Id.* (emphasis added).

⁶³ *Id.* at 329-330.

⁶⁴ *Id.* at 330.

⁶⁵ *Id.* at 330.

⁶⁶ *Id.* at 334 (citing *Bakke*, 438 U.S. at 315, 317).

⁶⁷ *Id.* at 336-37. This may include consideration of diversity factors aside from race or ethnicity. *Id.* at 338.

⁶⁸ *Id.* at 339.

⁶⁹ *Id.* at 341.

⁷⁰ *Id.* at 342.

⁷¹ *Id.* at 345 (Ginsburg, J., Concurring) (“It is well documented that conscious and unconscious race bias, even rank discrimination based on race, remain alive in our land, impeding realization of our highest values and ideals.”).

⁷² *Id.* at 345-46 (Ginsburg, J., Concurring) (“As to public education, data for the years 2000 – 2001 show that 71.6% of African-American children and 76.3% of Hispanic children attended a school in which minorities made up a majority of the student body.”).

Justices Rehnquist, Scalia, Kennedy, and Thomas dissented in *Grutter*. Notably, Justice Scalia's dissent observed that the law school attempts to teach "a lesson of life rather than law – essentially the same lesson taught to . . . people three feet shorter and twenty years younger than the full-grown adults at the University of Michigan Law School, in institutions ranging from Boy Scout troops to public-school kindergarten."⁷³ Justice Thomas characterized the law school's goal of diversity as 'aesthetic,' dismissing the institution's diversity goals as "social experiments on other people's children."⁷⁴ Justice Thomas seemed most concerned with the notion that affirmative action policies do nothing to remedy the inequalities in educating all youth.⁷⁵

Grutter's companion case, *Gratz*, involved a challenge to the University of Michigan Undergraduate admissions policy, which operated on the basis of a 'selection index.'⁷⁶ Applicants could receive a maximum of 150 points on the basis of various criteria under the system,⁷⁷ and applicants were admitted, postponed, delayed, or rejected on the basis of their point allocation.⁷⁸ The challenge to the admissions policy centered primarily on the additional 20 points awarded some applicants merely on the basis of racial or ethnic minority status.⁷⁹ A student showing extraordinary talent, on the other hand, might receive an additional 5 points.⁸⁰ Moreover, the University implemented a new policy allowing admissions counselors to 'flag' an application for special consideration on the basis of several factors, including "socioeconomic disadvantage, and underrepresented race, ethnicity, or geography."⁸¹

Justice Rehnquist, writing for the majority, accepted the Court's decision in *Grutter* that diversity constitutes a compelling state interest in higher education and, therefore, did not

⁷³ *Id.* at 396 (Scalia, J., Dissenting).

⁷⁴ *Id.* at 372 (Thomas, J., Dissenting).

⁷⁵ *Id.* at 375-76.

⁷⁶ *Gratz v. Bollinger*, 539 U.S. 244, 255 (2003).

⁷⁷ The points were awarded on the basis of "high school grade point average, standardized test scores, academic quality of an applicant's high school, strength or weakness of high school curriculum, in-state residency, alumni relationship, personal essay, and personal achievement or leadership." *Id.*

⁷⁸ *Id.* ("This index was divided linearly into ranges generally calling for admissions dispositions as follows: 100-150 (admit); 95-99 (admit or postpone); 90-94 (postpone or admit); 75-89 (delay or postpone); 74 and below (delay or reject).").

⁷⁹ *Id.*

⁸⁰ *Id.* at 273.

⁸¹ *Id.* at 256.

examine the issue independently.⁸² However, the Court invalidated the plan as not narrowly tailored.⁸³ For the Court, the additional points available to an applicant solely because of race implied a direct correlation between race and some “specific and identifiable contribution to a university’s diversity” – a notion Justice Powell flatly rejected in *Bakke*.⁸⁴ In rejecting the plan, the Court relied heavily on its lack of individualized consideration: Some applicants received a near-determinative boost because of race, and only those applicants lucky enough to have their file ‘flagged’ reaped the benefits of true individualized consideration.⁸⁵

Justice O’Connor, concurring, echoed the majority in highlighting the policy’s failure to provide individualized consideration.⁸⁶ Justice Thomas concurred in invalidating the plan, and reiterated his belief that the Equal Protection Clause unconditionally forbids racial preference policies.⁸⁷ Justice Stevens dissented, reasoning that the case should have been dismissed for lack of Article III standing.⁸⁸ Justice Souter also felt the case should be dismissed for lack of standing, but noted he would have upheld the program as narrowly tailored.⁸⁹

Justice Ginsburg dissented, suggesting that affirmative action plans should be held to a different standard of review under equal protection than traditional discriminatory action.⁹⁰ Justice Ginsburg attributed enduring racial disparities in access to quality education and continual – if latent – social prejudice to the overtly discriminatory practices in our nation’s not-too-distant past.⁹¹ Her analysis eschewed application of traditional strict scrutiny and rather relied on the notion that “honesty is the best policy.”⁹² Because the University could ostensibly consider race and ethnicity without strict racial classifications, she saw no constitutional problem with an admissions policy that openly accounted for race.⁹³

⁸² *Id.* at 268.

⁸³ *Id.* at 270.

⁸⁴ *Id.* at 271 (citing *Bakke*, 438 U.S. at 315).

⁸⁵ *Id.* at 271-74.

⁸⁶ *Id.* at 277 (O’Connor, J., Concurring).

⁸⁷ *Id.* at 281 (Thomas, J., Concurring).

⁸⁸ *Id.* at 282 (Stevens, J., Dissenting).

⁸⁹ *Id.* at 298 (Souter, J., Dissenting).

⁹⁰ *Id.* at 298 (Ginsburg, J., Dissenting).

⁹¹ *Id.* at 298-300.

⁹² *Id.* at 304-05.

⁹³ *Id.*

It is within the rubric of the Court's affirmative action jurisprudence, as set forth above, that opponents of voluntary integration programs have challenged local attempts to encourage diversity in K-12 education.

B. Voluntary Integration

In recent years, a number of voluntary integration programs have been challenged in federal court as racial preferences violative of the Equal Protection Clause. The analysis under *Bakke*, and subsequently under *Grutter* and *Gratz*, has produced somewhat mixed results.

1. Pre-Grutter and Gratz

In the voluntary integration cases decided before *Grutter* and *Gratz*, federal courts considering the challenges largely declined to address whether diversity constitutes a compelling governmental interest, relying instead on the narrow tailoring inquiry to dispose of the case.⁹⁴ However, on at least one occasion, a federal circuit court found that diversity did not rise to the level of a compelling government interest in an alternative kindergarten admissions scheme.⁹⁵

The Fourth Circuit Court of Appeals in *Tito v. Arlington County School Board* examined the policy employed by Arlington Traditional School (ATS) in admitting students to its oversubscribed program.⁹⁶ The ATS admissions policy, as challenged, did not take ability or achievement into account; rather, students were admitted, first, if their siblings already attended ATS and, second, on the basis of a 'random' selection process coupled with minority preferences.⁹⁷ In evaluating the policy, the Fourth Circuit applied strict scrutiny, noting that the plan did not serve remedial purposes and explicitly employed a racial classification.⁹⁸ The

⁹⁴ See, e.g., *Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698, 705 (4th Cir. 1999), *cert. dismissed*, *Arlington County Sch. Bd. v. Tuttle*, 529 U.S. 1050 (2000) ("Since we conclude below that the Policy was not narrowly tailored, we leave the question of whether diversity is a compelling interest unanswered."); *Eisenberg v. Montgomery County Pub. Schs.*, 197 F.3d 123, 130 (4th Cir. 1999), *cert. denied*, *Montgomery County Pub. Schs. v. Eisenberg*, 529 U.S. 1019 (2000) (noting the court's decision to leave "whether diversity is a compelling government interest . . . unresolved"); *Wessmann v. Gittens*, 160 F.3d 790 (1st Cir. 1998) (observing that the court "need not definitively resolve this conundrum today" and "assum[ing] *arguendo* . . . that some iterations of 'diversity' might be sufficiently compelling").

⁹⁵ See, e.g., *Tito v. Arlington County Sch. Bd.*, 1997 WL 33164931 (4th Cir. 1997).

⁹⁶ 1997 WL 33164931, at *1 (4th Cir. 1997). *Arlington Traditional School* is one of "several alternative schools open to all students in the county . . . with an emphasis on what it calls a 'traditional' method of instruction." *Id.*

⁹⁷ *Id.* The ATS applicant pool consisted of over three-fourths white applicants and, thus, ATS implemented the minority preferences to "compensate for the disproportionality of the applicant pool." *Id.* The School Board's goal in the process is to admit students of an ethnic distribution proportional to the distribution of the school district as a whole. *Id.*

⁹⁸ *Id.* at *3.

admissions policy, in the view of the court, did not serve a compelling state interest because “[n]o court has ever accepted the goal of racial diversity as a compelling state interest that would justify racial discrimination.”⁹⁹ The Court further found that the ATS policy failed to satisfy the narrow tailoring requirement for two reasons: First, the admissions program impermissibly made race decisive for many applicants; and second, the policy’s “failure to distinguish among minority groups” rendered it overbroad.¹⁰⁰

A mere two years later, the Fourth Circuit re-examined admissions to ATS in *Tuttle v. Arlington County School Board*.¹⁰¹ By then, the Arlington School Board had modified and implemented a new ATS admissions policy, transforming it into a so-called ‘weighted lottery’ with a goal of “promot[ing] racial, ethnic, and socioeconomic diversity.”¹⁰² To achieve this goal, the policy defined three factors bearing on an applicant’s diversity: race, socioeconomic class, and English as a second language status.¹⁰³ Under the modified policy, applicants with a sibling attending the school retained preference, and the school allotted the remaining seats on the basis of lottery numbers weighted to increase the likelihood of selecting diverse applicants.¹⁰⁴ The court applied strict scrutiny, declining to reach the question of whether diversity is a compelling interest in the context of elementary school, but invalidating the policy’s use of race as not narrowly tailored.¹⁰⁵ On the question of narrow tailoring, the court began by noting that “nonremedial racial balancing is unconstitutional.”¹⁰⁶ The court then considered several factors,¹⁰⁷ finding the School Board reviewed and rejected three race-neutral alternatives to the modified plan, and that the plan had no predetermined stopping point, employed straight racial

⁹⁹ *Id.* at *4.

¹⁰⁰ *Id.* at *4-5 (noting that 17% of the students admitted – aside from the sibling preference applicants – are Asian, while “Asians make up only 9.1% of the general school population”).

¹⁰¹ 195 F.3d 698 (4th Cir. 1999).

¹⁰² *Id.* at 700.

¹⁰³ *Id.* at 701.

¹⁰⁴ *Id.* at 702.

¹⁰⁵ *Id.* at 705. The court’s holding did not extend to the income and language factors of the policy. *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ The factors include “(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 . . . and (5) the burden of the policy on innocent third parties.” *Tuttle*, 195 F.3d at 706 (citing *Hayes v. N. State Law Enforcement Officers Ass’n*, 10 F.3d 207, 216 (4th Cir. 1993)).

balancing, failed to provide individualized consideration to applicants, and burdened innocent third parties.¹⁰⁸ Ultimately, the court invalidated the plan.

The Fourth Circuit again considered a voluntary integration plan in *Eisenberg v. Montgomery County Public Schools*, this time involving Montgomery County's efforts to integrate its elementary and secondary schools by combining a magnet program with voluntary transfers from assigned schools.¹⁰⁹ Admission to the magnet program at issue in *Eisenberg* did not involve consideration of merit;¹¹⁰ rather, pursuant to Montgomery County's established policy, the schools considered transfer requests in light of school stability, utilization and enrollment, the diversity profile of the relevant schools, and the reason for the request, in that order.¹¹¹ The School Board's policy guidance provides that transfers adversely impacting the diversity profile of the relevant schools will generally be denied.¹¹² Thus, a white student requesting a transfer to a school with a white enrollment rate higher than the countywide percentage, or from a school with a white enrollment rate lower than that percentage, would likely be denied the opportunity to transfer.¹¹³ The court applied strict scrutiny, first concluding that Montgomery County's proffered interests – avoiding racial isolation and promoting student diversity – were essentially “one and the same,” and subsequently leaving the question of whether diversity represents a compelling state interest unresolved.¹¹⁴ Instead, the court invalidated the plan as not narrowly tailored, equating it with “mere racial balancing in a pure form.”¹¹⁵

Through these three decisions – *Tito*, *Tuttle*, and *Eisenberg* – one may discern a consistent approach to voluntary integration programs in the Fourth Circuit. In all three instances, the court applied strict scrutiny to policies determining school assignment or admissions in part on

¹⁰⁸ *Id.* at 706-707.

¹⁰⁹ *Eisenberg v. Montgomery County Pub. Schs.*, 197 F.3d 123, 125-26 (4th Cir. 1999), *cert. denied*, *Montgomery County Pub. Schs. v. Eisenberg*, 529 U.S. 1019 (2000).

¹¹⁰ *Id.* at 125 n.3.

¹¹¹ *Id.* at 126.

¹¹² *Id.*

¹¹³ This over-simplifies the nature of the program at issue. For a more complete description of the program, see *id.* at 126-127.

¹¹⁴ *Id.* at 129-130.

¹¹⁵ *Id.* at 131.

the basis of race.¹¹⁶ The court, in two of the three decisions, declined to address whether diversity constitutes a compelling state interest.¹¹⁷ Moreover, the court found all three policies – to the extent they employed race – failed the narrow tailoring prong. In each case, the plans amounted to racial balancing,¹¹⁸ and an applicant’s race could be potentially determinative vis-à-vis the school’s admissions decision in two.¹¹⁹ Each plan arguably burdened third parties to the extent that students desiring admission or a change in school assignment were denied their request.¹²⁰

Not long after the Fourth Circuit’s *Eisenberg* decision, the Second Circuit reviewed the City of Rochester Urban-Suburban Interdistrict Transfer program – the nation’s oldest voluntary desegregation plan – in *Brewer v. West Irondequoit Central School District*.¹²¹ The product of a partnership between the City of Rochester and six suburban school districts, this program facilitates the transfer of minority pupils to suburban schools, and non-minority pupils to city schools.¹²² These transfers serve the program’s articulated goal “to reduce, prevent and eliminate minority group isolation” in Rochester’s schools.¹²³ It operates with funding from the State of New York and, should the program allow non-minority students to transfer out of Rochester schools into the participating suburban districts, it would lose state funding.¹²⁴ However, to continue in its original form, the program had to survive strict scrutiny, given its explicit use of race-based classifications.¹²⁵

The court applied binding Second Circuit precedent, which accepted reducing de facto segregation as a compelling government interest.¹²⁶ In evaluating the continued strength of that precedent, the court observed that “the danger identified by the Supreme Court as inherent in

¹¹⁶ *Tito*, 1997 WL 33164931, at *3; *Tuttle*, 195 F.3d at 705; *Eisenberg*, 197 F.3d at 129-30.

¹¹⁷ *Tuttle*, 195 F.3d at 705; *Eisenberg*, 197 F.3d at 130.

¹¹⁸ *Tito*, 1997 WL 33164931, at *1; *Tuttle*, 195 F.3d at 705; *Eisenberg*, 197 F.3d at 131.

¹¹⁹ *Tito*, 1997 WL 33164931, at *4; *Eisenberg*, 197 F.3d at 133.

¹²⁰ *Tuttle*, 195 F.3d at 706; *Eisenberg*, 197 F.3d at 133.

¹²¹ 212 F.3d 738 (2nd Cir. 2000).

¹²² *Id.* at 741.

¹²³ *Id.* at 741-742.

¹²⁴ *Id.* at 744.

¹²⁵ *Id.* at 745 (citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 225-26 (1995)).

¹²⁶ *Id.* at 749. “Applying a strict scrutiny analysis [in *Andrew Jackson I*], we held that, as a matter of law, the state has a compelling interest in ensuring that schools are relatively integrated.” *Id.* at 750 (citing *Parent Ass’n of Andrew Jackson High Sch. v. Ambach (“Andrew Jackson I”)*, 598 F.2d 705, 717-21 (2nd Cir. 1979)).

non-remedial based programs [in the only relevant cases decided by the Court since *Andrew Jackson I*] . . . is not present when a local school board acts to remedy clearly identifiable, indeed obvious, racial isolation in particular school districts.”¹²⁷ Thus, the Second Circuit found the reduction of racial isolation, as caused by de facto segregation, to be a compelling interest.¹²⁸ The court then remanded the case to the district court for a more appropriate narrow tailoring inquiry.¹²⁹ Thus, in clear contrast to the Fourth Circuit, the Second Circuit boldly found a compelling state interest of reducing racial isolation in K-12 education. The Second Circuit’s take, however, does little to elucidate the steps a school district must take to narrowly tailor its program to that interest.

The First Circuit’s examination of voluntary integration programs before *Grutter* and *Gratz* proceeds more cautiously, in line with the Fourth Circuit approach. In *Wessmann v. Gittens*, the First Circuit considered a non-remedial plan governing admissions to a selective public examination school – Boston Latin School (BLS).¹³⁰ The admissions policy allocated one-half of the open seats at BLS solely on the basis of the applicants’ composite score,¹³¹ while the remaining one-half were assigned in accordance with “flexible racial / ethnic guidelines,” where the racial composition of admitted candidates mirrored the proportions in the ‘remaining pool of qualified applicants.’¹³² Like the Fourth Circuit in *Tuttle* and *Eisenberg*, the First Circuit here did not definitely decide whether diversity is compelling in selective secondary school admissions.¹³³ Instead, the court applied Justice Powell’s analysis from *Bakke*, invalidating the plan as not narrowly tailored. The court likened the plan to outright racial balancing and impermissible

¹²⁷ *Id.* at 751.

¹²⁸ *Id.* at 752.

¹²⁹ *Id.* at 753. This case ultimately settled before the district court issued a decision on remand, and the school district has since maintained its program. Jay Tokasz, *Urban-Suburban Settlement OK’d*, ROCHESTER DEMOCRAT & CHRONICLE, Sept. 28, 2000, at 1A.

¹³⁰ 160 F.3d 790 (1st Cir. 1998). Although Boston had been under a court-ordered desegregation plan, the policy challenged in this case went into effect after the system achieved unitary status. *Id.* at 792. Under the court-ordered plan, BLS had operated with a 35% minority set-aside, which it discontinued in 1995 – some 8 years after the system was declared unitary. *Id.* at 792-93.

¹³¹ Composite scores were based upon a combination of the applicant’s standardized test score and grade point average. *Id.* at 793.

¹³² *Id.*

¹³³ *Id.* at 796.

stereotyping,¹³⁴ finding it problematic that the plan “effectively forecloses some candidates from all consideration for a seat at an examination school simply because of the racial or ethnic category in which they fall.”¹³⁵ However, diversity was not the school district’s only proffered interest.

The court also examined the school district’s claim that the admissions plan redressed the vestiges of prior discrimination, as evidenced by the achievement gap between blacks and Hispanics on one hand, and whites and Asians on the other.¹³⁶ In support of its assertion, the School District put forth sociological testimony linking low teacher expectations for minority students – one vestige of segregation – to the achievement gap.¹³⁷ The court, however, found that evidence anecdotal at best, and insufficient to render the plan remedial.¹³⁸ Regardless, the court indicated, the policy would fail to survive the narrow tailoring inquiry given its failure to address the asserted problem,¹³⁹ and its inherent over- and under-inclusiveness.¹⁴⁰

Thus, before the Supreme Court’s examination of racial preferences in higher education, the circuits were generally reluctant to find diversity compelling.¹⁴¹ Moreover, where the courts conducted narrow tailoring inquiries, the plans uniformly failed. Indeed, for these programs, strict scrutiny has proven “fatal in fact.”¹⁴²

2. *Post-Grutter and Gratz*

Following the Supreme Court’s pronouncements in *Grutter* and *Gratz*, the analysis of K-12 integration plans changed, along with the outcome of Equal Protection challenges to those

¹³⁴ *Id.* at 799.

¹³⁵ *Id.* at 800.

¹³⁶ *Id.* at 800, 801.

¹³⁷ *Id.* at 804.

¹³⁸ *Id.* at 807. The testimony was based on a study conducted in the Kansas City school systems, and analogies to Boston founded on statistical data. *Id.* at 804.

¹³⁹ *Id.* (“[W]e fail to see how the adoption of an admissions policy that espouses a brand of proportional representation is designed to ameliorate the harm that allegedly has occurred (a system-wide achievement gap *at the primary school level*).”)

¹⁴⁰ *Id.* at 808 (“[V]ictims of the achievement gap are public school students, and they are the ones who ought to be the focus of the remedy. . . . [Moreover,] the policy is not sufficiently particularized toward curing the harm done to the class of actual victims.”). “[G]iven the School Committee’s position that Asian students have not been victims of discrimination, we are unable to comprehend the remedial purpose of admitting Asian students over higher-ranking white students” *Id.*

¹⁴¹ The Second Circuit’s anomalous holding, that reducing racial isolation is compelling, may be explained by examining the context of the relied upon precedent. That precedent considered a plan of controlled intradistrict transfers designed to benefit minorities, which had been challenged by minorities adversely impacted in the plan’s operation. *Brewer*, 212 F.3d at 749.

¹⁴² *Cf. Adarand Constructors*, 515 U.S. at 237.

plans. In *Anderson v. Boston School Committee*, the First Circuit reviewed a facially-neutral school assignment policy that parents alleged had the effect of creating racial preferences for entry into chosen schools.¹⁴³ Following a finding of unitary status in the late 1980's, Boston Public Schools developed a 'Controlled Choice Student Assignment Plan' wherein students were able to apply to any school within their "zone" of attendance, or any citywide magnet school.¹⁴⁴ In assigning students, Boston Public Schools weighed several factors;¹⁴⁵ however, if the applicant would cause a significant deviation from the so-called "ideal racial percentage" for the school, another applicant would be admitted instead.¹⁴⁶

After the parents filed suit, the School Committee elected to eliminate the use of racial preferences.¹⁴⁷ Under the new plan, students continued to submit a list of preferred schools and were assigned random numbers.¹⁴⁸ Boston Public Schools then implemented a "walk zone preference" for 50% of the seats in each school, assigning those seats to the students within the walk zone with the lowest random numbers.¹⁴⁹ Thereafter, the school system gave priority to students residing in the walk zone with siblings already in attendance.¹⁵⁰ Although the new program did not facially classify on the basis of race, the plaintiffs argued that the School Board adopted the new plan with discriminatory intent to achieve a discriminatory effect.¹⁵¹

Because the new plan was facially-neutral, the court inquired into the School Board's intent in structuring the program to determine the appropriate level of review.¹⁵² The court applied the factors enunciated by the Supreme Court in *Village of Arlington Heights v.*

Metropolitan Housing Development Corp. to determine whether the school district acted with

¹⁴³ *Anderson v. Boston Sch. Comm.*, 375 F.3d 71 (1st Cir. 2004).

¹⁴⁴ *Boston's Children First v. Boston Sch. Comm.*, 260 F. Supp. 2d 318, 320 (D. Mass. 2003).

¹⁴⁵ These factors included the applicant's preference, sibling attendance, geographic proximity, previous 'temporary' enrollment in the school, and a random computer-assigned number. *Id.*

¹⁴⁶ *Id.* (noting "[t]he trump card . . . was race").

¹⁴⁷ *Id.* at 324-25.

¹⁴⁸ *Anderson v. Boston Sch. Comm.*, 375 F.3d 71, 77 (1st Cir. 2004).

¹⁴⁹ *Id.* Walk zones were established on the basis of the students' residence. *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 80. The Superintendent had "concluded that the 50% reduction was consistent with progress towards BPS's existing goals of excellence, equity, and diversity." *Id.* at 82. Plaintiffs based their claim of discriminatory intent on the school system's commitment to racial diversity, equating it with impermissible racial balancing. *Id.* at 85. They relied further on "isolated instances of students not receiving assignments of their first choice schools" to show discriminatory effect – a showing the First Circuit found insufficient. *Id.* at 89.

¹⁵² *Id.* at 82. Proof of racially discriminatory intent triggers strict scrutiny review of a facially-neutral provision. See, e.g., *id.* at 82 (citing *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886)).

discriminatory intent.¹⁵³ The court found it relevant that, in crafting the plan, the Superintendent and the School Board were mainly “concerned about equity of choice and access across the system, particularly for students who lived in neighborhoods with inadequate capacity or underperforming schools.”¹⁵⁴ The court found the school district’s efforts to preserve racial diversity under the new plan not a “subterfuge for ‘racial balancing,’” but rather an attempt to provide some measure of equity in access to the school system’s resources.¹⁵⁵ In finding no evidence of disproportionate effect, the court concluded there was no intent of racially disparate treatment and, thus, applied rational basis review.¹⁵⁶ The court found the school district’s interests in promoting “‘excellence, equity and diversity through access and educational opportunity’” to be legitimate, and upheld the new school assignment plan as rationally related to that end.¹⁵⁷

The significance of the First Circuit’s analysis in *Anderson* cannot be overstated. Although the School Board’s move to a race-neutral plan is in its infancy, early indications show that the plan avoids resegregation and continues to allow residents in underserved sectors of the city access to better schools.¹⁵⁸ BPS’s reforms may provide a beacon for school districts and programs like METCO which seek to foster diversity and ensure some measure of equity to all students, but whose programs would likely fail under strict scrutiny review in their current form.¹⁵⁹

Most recently, in *Comfort v. Lynn School Committee*, the First Circuit Court of Appeals considered a voluntary racial integration plan (the “Lynn Plan”) wherein K-12 students were assigned to neighborhood schools, but could request a transfer to a non-neighborhood school.¹⁶⁰ Under the plan, the school district considered transfer requests in light of the racial balance in

¹⁵³ *Id.* at 83 (citing *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-68 (1977)). The factors include: “the degree of disproportionate racial effect . . . of the policy; the justification . . . for any disproportionate racial effect that may exist; and the legislative or administrative historical background of the decision.” *Id.*

¹⁵⁴ *Id.* at 86.

¹⁵⁵ *Id.* at 87-88.

¹⁵⁶ *Id.* at 90.

¹⁵⁷ *Id.* at 91.

¹⁵⁸ *Id.* at 81.

¹⁵⁹ Notably, such reforms – as in *Anderson* – must not be motivated by considerations of race.

¹⁶⁰ *Comfort v. Lynn Sch. Comm.*, 2005 WL 1404464, at *2-3 (1st Cir. 2005).

both the assigned and the requested schools.¹⁶¹ A panel of the First Circuit initially agreed that racial diversity could serve as a compelling interest for the school district, but invalidated the plan as not narrowly tailored.¹⁶² The First Circuit subsequently reheard the case *en banc*. The *en banc* court applied the Supreme Court's decisions in *Grutter* and *Gratz* to uphold the Lynn Plan.¹⁶³

While the *Comfort* court accepted the diversity rationale, it did not do so unquestioningly. Rather, the court engaged in careful examination of the educational benefits sought by the University of Michigan Law School in *Grutter*, comparing them to the interest furthered by the Lynn Plan.¹⁶⁴ The court recognized the difference between K-12 and higher education: Where a university may aspire to diversity of viewpoints, primary and secondary schools may view diversity as a means to promote student safety and attendance.¹⁶⁵ Despite the different contexts, the court found it relevant that the Lynn Plan “uses race in pursuit of many of the same benefits that were cited approvingly by the *Grutter* court, including breaking down racial barriers, promoting cross-racial understanding, and preparing students for a world in which race unfortunately still matters.”¹⁶⁶ Notwithstanding the initial decision of a First Circuit panel, the *en banc* court upheld the Lynn Plan as narrowly tailored.¹⁶⁷

The *en banc* panel began its narrow tailoring inquiry by reviewing the Supreme Court's analysis in *Grutter* and *Gratz*, but carefully noted “[i]t is a context-specific inquiry.”¹⁶⁸ In the context of the Lynn Plan, the School Board aimed to foster racial diversity, not viewpoint diversity.¹⁶⁹ Moreover, the Lynn Plan did not involve competitive admissions or consideration of merit.¹⁷⁰ Thus, the court concluded that the Lynn Plan accounted for students' race in a way devoid of “stigmatic harm” likely to “fuel[] the stereotype that ‘certain groups are unable to achieve

¹⁶¹ *Id.*

¹⁶² *Comfort v. Lynn Sch. Comm.*, 2004 U.S. App. LEXIS 21791, at *5, *vacated & rev'd on reh'g*, 2005 WL 1404464, at *1 (1st Cir. 2005).

¹⁶³ *Comfort*, 2005 WL 1404464, at *1.

¹⁶⁴ *Id.* at *9.

¹⁶⁵ *Id.* at *11.

¹⁶⁶ *Id.* at *11 (internal citations omitted).

¹⁶⁷ *Id.* at *17.

¹⁶⁸ *Id.* at *12.

¹⁶⁹ *Id.* at *13.

¹⁷⁰ *Id.*

success without special protection.”¹⁷¹ In the court’s view, the Supreme Court’s focus on individualized review of applicants in both *Grutter* and *Gratz* followed from a desire to avoid such stigmatic harm and, as a result, non-competitive optional transfer plans need not provide individualized consideration.¹⁷²

The court next examined the breadth of the Lynn Plan, finding it applied only to voluntary transfers, did not unduly deprive any child of a comparable quality education, and sensibly achieved its goal of improving the racial balance of schools district-wide.¹⁷³ For the court, the district’s use of a white – non-white distinction was not fatal to the program given the Plan’s success in ameliorating racial tension and its attendant educational benefits.¹⁷⁴ Further, the Plan incorporated periodic reviews of the racial balance of schools to ensure students were not unnecessarily denied transfers.¹⁷⁵ The court then looked to the school district’s consideration of alternative race-neutral plans, satisfied that the Lynn school district had rejected the alternatives for plausible reasons.¹⁷⁶

The Ninth Circuit examined a school district’s use of a racial ‘tie-breaker’ in admitting students to over-subscribed charter high schools in *Parents Involved in Community Schools v. Seattle School District No. 1*.¹⁷⁷ While the school district at no time operated under a system of *de jure* segregation, racially imbalanced housing patterns had developed and the district began to use race as a ‘tie-breaker’ to avoid replicating that imbalance in the make-up of its schools.¹⁷⁸ Because the district’s schools differ significantly in quality,¹⁷⁹ a student’s ability to attend one school over another directly impacts their educational opportunity.

¹⁷¹ *Id.*

¹⁷² *Id.* at *13-14.

¹⁷³ *Id.* at *14-16.

¹⁷⁴ *Id.* at *16.

¹⁷⁵ *Id.* at *16.

¹⁷⁶ *Id.* at *17.

¹⁷⁷ 377 F.3d 949 (9th Cir. 2004), *reh’g en banc granted*, 395 F.3d 1168 (9th Cir. 2005). The school district employs four ‘tie-breakers’ in all, including a sibling preference, a racial preference, geographical proximity to the school, and, if all else fails, a random lottery. *Id.* at 955-56. The racial preference operates to “balance the racial makeup of the city’s public high schools” by moving the integration of the school toward a preferred racial ratio. *Id.*

¹⁷⁸ *Id.* at 954-55.

¹⁷⁹ *Id.* at 954.

The Ninth Circuit applied the Supreme Court's *Grutter* rationale and concluded that diversity is a compelling state interest in the high school setting.¹⁸⁰ The majority acknowledged that the Court's academic freedom jurisprudence makes different degrees of deference to high school and university administrators appropriate.¹⁸¹ The court further observed "a crucial difference between a school's pursuit of the *internal academic benefits* of diversity and its pursuit of diversity's *external social benefits*."¹⁸² Nevertheless, the court notably rejected the notion that *Grutter's* analysis applied only to the university setting.¹⁸³ While the Court did not extend the rationale to the context of primary school, it did not foreclose the possibility.¹⁸⁴

Ultimately, however, the court invalidated the plan as not narrowly tailored.¹⁸⁵ The court prefaced its narrow tailoring inquiry with an overview of the Supreme Court's analysis in both *Grutter* and *Gratz*.¹⁸⁶ From a careful synthesis of those two opinions, the 9th Circuit set forth six "governing constraints" for the inquiry: (1) in a non-remedial plan, racial quotas may not be employed;¹⁸⁷ (2) non-remedial programs taking race into account must do so flexibly, allowing for ample individualized consideration;¹⁸⁸ (3) any use of race must not be 'mechanical' or 'conclusive';¹⁸⁹ (4) at some level, the institution must seriously consider race-neutral alternatives;¹⁹⁰ (5) the entity must have taken steps to "*minimize the adverse impact . . . on non-preferred group members*";¹⁹¹ and finally (6) the program must have a definitive end date.¹⁹²

The Ninth Circuit concluded that the school district's plan failed to satisfy each of the governing constraints.¹⁹³ The court took pains to illustrate that efforts to focus on true diversity,

¹⁸⁰ *Id.* at 962-64.

¹⁸¹ *Id.* at 981 (noting that "secondary schools do not occupy the same 'special niche in our constitutional tradition' as higher education, and [that] the Court has never held they possess a similar First Amendment right of academic freedom").

¹⁸² *Id.* at 982 (emphasis added).

¹⁸³ *Id.* at 964.

¹⁸⁴ *Id.* at 964 n.18. Because this issue was not before the court, it is not surprising that it did not reach the question of diversity as a compelling interest in the primary school setting.

¹⁸⁵ *Id.* at 969.

¹⁸⁶ *Id.* at 965-67.

¹⁸⁷ *Id.* at 968.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 968.

¹⁹⁰ *Id.* at 969.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

of which race is only one factor, “*subsumes* the District’s interest in achieving racial diversity: It does not *supplant* it.”¹⁹⁴ For example, the court noted that socioeconomic status could serve as a race-neutral alternative to attain a diverse student body at the charter schools.¹⁹⁵ The Ninth Circuit recently reheard this case *en banc*. Given the First Circuit’s about-face in *Comfort*, it is uncertain whether the Ninth Circuit panel’s initial conclusion on narrow tailoring will remain intact.

Comfort and *Parents Involved* alike mark a significant departure from many cases in the federal district and appellate courts examining similar race-conscious plans in the context of K-12 education: Both courts ultimately accepted diversity as a compelling interest in primary and secondary school. Moreover, the *Comfort* court set aside the requirement of individualized consideration and upheld the program as narrowly tailored to creating racial diversity. It remains to be seen whether the Ninth Circuit will follow suit in an *en banc* decision in *Parents Involved*. It takes no great logical leap to conclude that the Supreme Court’s disposition of *Grutter* and *Gratz* influenced the circuits to take these bold steps. Given the direction of the many circuit courts that have reviewed such plans, and the overwhelming difficulty of surviving strict scrutiny, voluntary integration programs seem to be an endangered breed.¹⁹⁶ This is particularly troublesome in light of the positive outcomes attributable to existing voluntary integration programs and diversity in the K-12 context.

IV. APPLICATION

A. Generally

With rising litigation in the lower courts over the constitutionality of voluntary integration programs, as well as uncertainty over the appropriate framework for resolving such challenges,

¹⁹⁴ *Id.* at 972.

¹⁹⁵ *Id.* at 972 (noting that “accounting for factors other than race – like socioeconomic status – would bolster the District’s ‘democratic’ mission by fostering . . . cross-class (and not just cross-racial) interaction”). Indeed, a working group spearheaded by the Seattle Urban League presented an alternative plan with a proposed “primary tiebreaker based on pairing neighborhoods with particular schools” and giving preference to students selecting their paired schools. *Id.* at 973. The School Board had, however, cursorily rejected that alternative. *Id.* at 974.

¹⁹⁶ In actuality, such programs have come under attack on two fronts. First, through a barrage of lawsuits challenging their constitutionality, as previously discussed. Secondly, it would be rare during the new era of accountability and sanctions ushered in by the No Child Left Behind Act for a school district to voluntarily initiate a racial or socioeconomic integration program where traditionally lower test scores among minority and disadvantaged students could earn the school the label of ‘failing.’ See, e.g., James E. Ryan, *The Perverse Incentives of The No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 934, 963 (2004).

the Supreme Court will likely be called upon to resolve the issue in the near future.¹⁹⁷ Should the Court follow the path laid forth by its recent decisions in *Grutter* and *Gratz*, the eventual and unfortunate result could well be invalidation of voluntary integration programs like METCO, if challenged in their current forms. To prevail against a challenge to race-based student assignment and transfer policies, a school district must show that its program is narrowly tailored to serve a compelling state interest.

To date, diversity has been the only compelling state interest recognized by the Supreme Court in the context of preferential treatment programs in education,¹⁹⁸ and the Court has invalidated programs designed to redress generalized societal discrimination.¹⁹⁹ The circuit courts considering voluntary integration plans have largely avoided pronouncements on whether diversity is compelling in the context of K-12 education, resolving the cases instead by virtue of the narrow tailoring prong.²⁰⁰ A few courts have, however, gone out on a judicial limb of sorts, finding diversity sufficiently compelling in the context of primary and secondary education.²⁰¹ Yet another circuit found a compelling interest in reducing “racial isolation and what appears to be de facto segregation.”²⁰²

Given the Court’s rationale in *Grutter* and *Gratz*, straightforward and unquestioning application of the higher education jurisprudence to race-conscious elementary and secondary school assignment plans would be most illogical. First, the *Grutter* Court relied heavily on notions

¹⁹⁷ Although the Supreme Court has never squarely faced the constitutionality of voluntary integration programs in school districts where de facto segregation resulted in racial imbalance, the Court has upheld a voluntary student assignment plan instituted by a school board that previously operated *de jure* segregated schools. See *McDaniel v. Barresi*, 402 U.S. 39, 41 (1971).

¹⁹⁸ *Grutter*, 539 U.S. at 327-28; *Gratz*, 539 U.S. at 268.

¹⁹⁹ *Croson*, 488 U.S. at 505; *but see Bakke*, 438 U.S. at 307 (suggesting that redressing discrimination may be compelling given “judicial, legislative, or administrative findings of constitutional or statutory violations”).

²⁰⁰ See, e.g., *Tito v. Arlington County Sch. Bd.*, 1997 WL 33164931 (4th Cir. 1997); *Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698 (4th Cir. 1999); *Eisenberg v. Montgomery County Pub. Schs.*, 197 F.3d 123 (4th Cir. 1999); *Wessmann v. Gittens*, 160 F.3d 790 (1st Cir. 1998).

²⁰¹ See, e.g., *Comfort v. Lynn Sch. Comm.*, 2005 WL 1404464, at *1 (1st Cir. 2005) (holding racial diversity is compelling at both the primary and secondary education level); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 377 F.3d 949 (9th Cir. 2004), *reh’g en banc granted*, 395 F.3d 1168 (9th Cir. 2005) (finding diversity compelling in the high school setting, but declining to express an opinion as to the primary school context). See also, e.g., *McFarland v. Jefferson County Pub. Schs.*, 330 F.Supp.2d 834 (W.D. Ky. 2004) (finding “the benefits of racial tolerance and understanding are equally as ‘important and laudable’ in public elementary and secondary education as in higher education”).

²⁰² *Brewer v. West Irondequoit Cent. Sch. Dist.*, 212 F.3d 738, 752 (2nd Cir. 2000).

of academic freedom in upholding diversity as a compelling state interest.²⁰³ The Court's treatment of academic freedom in university settings differs from its approach to primary and secondary schools, and this difference undermines a clear-cut application of the diversity rationale to K-12 education.²⁰⁴ Second, in concluding that diversity constitutes a compelling state interest in higher education, the Court examined the benefits of admitting a diverse student body. To be sure, the scope and purpose of primary and secondary education fundamentally diverge from the educational mission of institutions of higher learning. The application of *Grutter* and *Gratz* to the primary and secondary school context may depend on the Court's understanding of the "proper institutional mission" of such schools.²⁰⁵ Moreover, diverse environs benefit children and adults in varying ways. Thus, it is necessary to independently examine the benefits sought in assembling a racially diverse group of children in the K-12 context. I will examine each element in turn, and ultimately conclude that the Supreme Court would find diversity even *more* compelling in the context of K-12 education than in the realm of higher learning.²⁰⁶

The Supreme Court has recognized on many occasions the importance of facilitating the free exchange of ideas in the university setting.²⁰⁷ For Justice Powell in *Bakke*, a university's academic freedom extends to decisions to shape the student body.²⁰⁸ He largely grounded his conclusion in the importance of fostering the type of "robust exchange of ideas" that challenges individuals' preconceived notions and pushes them to new intellectual discoveries.²⁰⁹ The importance of academic freedom in the context of higher education provided Justice Powell's sole

²⁰³ *Grutter*, 539 U.S. at 328-29.

²⁰⁴ See *Parents Involved*, 377 F.3d at 981.

²⁰⁵ See *Grutter*, 539 U.S. at 330 (noting that "attaining a diverse student body is at the heart of the Law School's proper institutional mission"); see also *Comfort*, 2005 WL 1404464, at *11 (acknowledging the different contexts and goals of K-12 education).

²⁰⁶ The *en banc* opinion in *Comfort* reached a similar conclusion. See *Comfort*, 2005 WL 1404464, at *11 ("[T]here is significant evidence in the record that the benefits of a racially diverse school are more compelling at younger ages.").

²⁰⁷ See, e.g., *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 231 (2000) ("[R]ecognition must be given . . . to the important and substantial purposes of the University, which seeks to facilitate a wide range of speech."); *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., Concurring) ("It is the business of a university to provide . . . an atmosphere in which there prevail the four essential freedoms of a university – to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.") (internal quotations omitted); but see Jay P. Lechner, *Learning From Experience: Why Racial Diversity Cannot Be A Legally Compelling Interest in Elementary and Secondary Education*, 32 Sw. U. L. REV. 201, 223 (2003) (noting that "use of race as a proxy for viewpoints or characteristics inherently relies on the application of racial stereotypes").

²⁰⁸ *Bakke*, 438 U.S. at 311-12.

²⁰⁹ *Id.* at 312.

support for the conclusion that diversity constitutes a compelling state interest in academic racial-preference policies.²¹⁰

Primary and secondary schools have not been accorded the same level of deference under the Court's academic freedom jurisprudence. To be sure, in elementary and high school, "students and their schools' relation to them are different and at least arguably distinguishable from their counterparts in college education."²¹¹ Notwithstanding the more narrow scope of academic freedom in K-12 settings, the Court has largely deferred to local school authorities in their role of shaping educational policy, and has lauded the importance of local control.²¹² This deference has been especially great during the tenure of the Rehnquist Court.²¹³ However "conceptually different" this deference to local school boards is from the deference accorded institutions of higher education in *Grutter*, it may be equally great in scope and application.²¹⁴ Thus, were the Supreme Court faced with the asserted goal of diversity in K-12 education, it might accept the asserted rationale with equal deference where the local school authorities have made an explicit educational policy decision.

Irrespective of the Court's deference to educational decision-making, it would likely engage in a comparison between the scope and purpose of education, as well as the expected benefits of diversity, in each setting.²¹⁵ The scope and purpose of the university setting is to

²¹⁰ Although Justice Powell's opinion in *Bakke* did not bind the Court, Justice O'Connor's adoption of the academic freedom rationale in the *Grutter* majority opinion does have precedential effect, and significantly broadened the reach of the Court's academic freedom jurisprudence. See Robert A. Caplen, Comment, *Constitutional Law: Forecasting the Sunset of Racial Preferences in Higher Education While Broadening their Horizons*, 56 FLA. L. REV. 853, 863-64 (2004).

²¹¹ *Southworth*, 529 U.S. at 238 n.4 (Souter, J., Concurring).

²¹² *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971); see also *N.C. State Bd. of Educ. v. Swann*, 402 U.S. 43, 45 (1971) ("[S]chool authorities have wide discretion in formulating school policy, and . . . as a matter of educational policy [they] may well conclude that some kind of racial balance in the schools is desirable quite apart from any constitutional requirements."); *Freeman v. Pitts*, 503 U.S. 467, 490 (1992) ("As we have long observed, 'local autonomy of school districts is a vital national tradition.'"); *Bd. of Educ. of Okla. City Pub. Schs. v. Dowell*, 498 U.S. 237, 248 (1991) ("Local control over the education of children . . . allows innovation so that school programs can fit local needs."); *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 481 (noting that "no single tradition in public education is more deeply rooted than local control over the operation of schools").

²¹³ John Charles Boger, *Racial Resegregation, High-Stakes Testing, and School Resource Inequities: The Case of North Carolina*, 81 N.C. L. REV. 1375, 1379 (2003) (noting, as well, that circuit court decisions that "forbid school boards from directly considering the races of students as they make school assignment decisions" have jeopardized the boards' ability to maintain racially integrated schools).

²¹⁴ *McFarland v. Jefferson County Pub. Schs.*, 330 F.Supp.2d 834, 850 (W.D. Ky. 2004).

²¹⁵ See *Grutter*, 539 U.S. at 327 (citing *Gomillion v. Lightfoot*, 364 U.S. 339, 343-344 (1960)) ("Context matters when reviewing race-based governmental action under the Equal Protection Clause."); see also *id.* ("Not every decision influenced by race is equally objectionable and strict scrutiny is designed to provide a framework for carefully examining

challenge one's mind with new ideas and notions, as Justice Powell observed.²¹⁶ Moreover, universities strive to educate and prepare students for careers in various fields, and for life in a diverse society. Diversity in the classroom helps universities to fulfill their scope and purpose in various ways. First, diversity may help foster a 'robust exchange of ideas' to the extent that one's background and experiences correlate with divergent perspectives. These perspectives carry special value in the context of higher education, where courses necessarily stray from factually-based notions of the way the world operates to opinions on why it should or should not operate in that manner. The added value of diverse perspectives in classrooms means that students will learn to view or examine an issue from a different lens than the one to which they are accustomed. However, diversity of the overall student body will not ensure robust dialogue in practice, even in institutions of higher education. The lower court in *Grutter* acknowledged this very point, urging caution to avoid conflating race with viewpoint.²¹⁷

Diversity also furthers the university's goal in educating. Sociological studies have shown direct correlations between racially diverse experiences and various positive educational outcomes in higher education. Such outcomes include increased minority student retention, superior cognitive development, and "positive academic and social self-concepts."²¹⁸ Moreover, diversity within the classroom has been shown to positively impact students' reported gains in group skills and problem-solving.²¹⁹ Finally, racial diversity promotes openness and understanding in a way likely to prepare students for employment and participation in an increasingly diverse world.²²⁰

the importance and the sincerity of the reasons advanced by the governmental decision maker for the use of race in that particular context.").

²¹⁶ See *Bakke*, 438 U.S. at 312.

²¹⁷ *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 849 (E.D. Mich. 2001), *rev'd*, 288 F.3d 732 (6th Cir. 2002), *aff'd*, 539 U.S. 306 (2003) ("[A] distinction should be drawn between viewpoint diversity and racial diversity. While the educational benefits of the former are clear, those of the latter are less so. . . . The connection between race and viewpoint is tenuous, at best.").

²¹⁸ Patrick T. Terenzini et al., *Racial and Ethnic Diversity in the Classroom: Does It Promote Student Learning?*, 72 J. OF HIGHER EDUC. 509, 511 (2001).

²¹⁹ Terenzini et al., *supra* note 218, at 527.

²²⁰ Terenzini et al., *supra* note 218, at 527; see also *Grutter*, 539 U.S. at 330 (recognizing that "major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints").

Primary and secondary school programs differ markedly both in scope and purpose from universities and professional schools. The primary goal of K-12 education has been, and always will be, to provide students with a solid foundation of knowledge, and to foster mastery of various subject-matters.²²¹ It has long been acknowledged that students should gain “improvement in manners, habits of promptness, order, and industry” as corollaries to that foundational knowledge.²²² To the extent that diversity – in and of itself – promotes better educational outcomes, diverse enrollment serves a similar purpose in all educational settings.²²³ Indeed, diverse experiences at a younger age may produce even greater educational benefits over the long-term.²²⁴ It should be noted, however, that the link between racial diversity and vibrant classroom discussions, while attenuated at the university level, is virtually non-existent in primary and secondary school.²²⁵ However, for many other reasons, the benefits attendant diversity in the K-12 educational setting far outweigh those in higher education.²²⁶

Recently, educational sociologists have begun to reexamine the purpose of K-12 education, emphasizing the importance of the school environment in shaping student self-confidence, perceptions of school and incentives to learn, and students’ “social, ethical, and civic dispositions.”²²⁷ In primary and secondary school, diversity prepares students for a life of interacting with their peers of all races, ethnicities, and socioeconomic backgrounds.²²⁸ K-12

²²¹ Thomas L. Good, *The Purposes of Schooling in America*, 99 THE ELEMENTARY SCHOOL J. 383, 383 (1999); see also Victor Battistich et al., *Beyond the Three R's: A Broader Agenda for School Reform*, 99 THE ELEMENTARY SCHOOL J. 415 (1999).

²²² Good, *supra* note 221, at 384 (citing JOHN DEWEY, *The School and Society*, in JOHN DEWEY: THE MIDDLE WORKS, 1899-1924 (J.A. Boydston ed. 1985) (1899)).

²²³ Boger, *supra* note 213, at 1412-14 (“[A] convincing body of evidence suggests that racially segregated schools are educationally detrimental to many individual students who attend them. . . . [T]he justification draws its power from the substantial body of evidence that students of all races who attend schools with high percentages of low-income students (“high-poverty schools”) have significantly lower academic performances, on average, even after their own socioeconomic status and family background have been taken into account.”).

²²⁴ See, e.g., Terenzini et al., *supra* note 218, at 525 (noting that *cumulative* changes in problem-solving and group skills attributable to racial diversity in the classroom may be greater than after merely one course).

²²⁵ See, e.g., EATON, *supra* note 3, at 49-50 (describing the frustration of one METCO student whom white children would stare at during discussions of black history and conveying the student’s recollection: “. . . it was really strange: whenever it came to any kind of black history, it was like they thought I was there on the plantation, picking cotton. They seem[ed] to be looking at me for some kind of answer about what was it like. I’m full of questions, too”).

²²⁶ Cf. Lechner, *supra* note 207, at 215 (arguing that “educational benefits from diversity, if any, are much greater at the higher educational level because such benefits are ‘greatly magnified by the learning that takes place outside the classroom – in dormitories, social settings, and extracurricular activities’”).

²²⁷ Good, *supra* note 221, at 384.

²²⁸ Boger, *supra* note 213, at 1411 (“Schools do more than teach academic skills; they also socialize the young for membership in adult society.”); see also EATON, *supra* note 3, at 47 (noting that “the post-METCO adults explain that the

classrooms often expose children and adolescents to their first truly diverse experiences and may impress upon them lessons in responding appropriately to diversity, consciously or not.²²⁹ To that end, primary and secondary schools convey to students lessons in life.²³⁰ Where children are educated in racially isolated environs and communities, however, they never learn this basic lesson about how to respond to diversity.²³¹

Integrated experiences in public schools cultivate social cohesion²³² and understanding. At its most basic level, aesthetic diversity in elementary and secondary school classrooms will raise the comfort level of students – white and black alike – in racially divergent settings.²³³ Educational sociologists recognize that, aside from reading, writing, and arithmetic, schools provide so-called “informal curriculum” in the form of positive and negative messages to students regarding “their competence and ability, and differential opportunity.”²³⁴ Conveyed through social networks, teacher expectations, and other ‘hidden variables,’ informal curriculum may inculcate values of tolerance, inclusiveness, and cross-racial understanding, or conversely, foster feelings of inadequacy and perpetuate stereotypes.²³⁵ Perhaps less subtly, aesthetic diversity in primary

differences they confronted and learned to live with in METCO are similar to the ones they encountered in predominantly white colleges, workplaces, and social situations”).

²²⁹ Sharon L. Nichols, *Gay, Lesbian, and Bisexual Youth: Understanding Diversity and Promoting Tolerance in Schools*, 99 *ELEMENTARY SCH. J.* 505, 506 (1999) (observing that “[a]dolescents must negotiate the complex societal messages that are filtered through” both school and the media).

²³⁰ As Justice Scalia poignantly observed in his *Grutter* dissent, the law school constructs a diverse student body in an attempt to teach “a lesson of life rather than law – essentially the same lesson taught to . . . people three feet shorter and twenty years younger . . . in institutions ranging from Boy Scout troops to public-school kindergarten.” *Grutter*, 539 U.S. at 396 (Scalia, J., Dissenting).

²³¹ This lesson is equally important for white and minority children. See, e.g., EATON, *supra* note 3, at 49 (conveying one METCO participant’s experience with the racial isolation of white suburban students, one of whom “picked up the eraser off the board, and . . . started to put chalk all over” the METCO student’s face).

²³² Richard D. Kahlenberg, *Socioeconomic School Integration Through Public School Choice: A Progressive Alternative to Vouchers*, 45 *HOW. L.J.* 247, 272 (2002) (noting that public schools, generally, serve a vital role in our society to the extent that they “foster[] social cohesion and promot[e] citizenship”).

²³³ During one stage of the litigation in *Comfort*, the U.S. District Court observed that the diversity interest asserted in K-12 education “reflects a concern that elementary school children simply get used to being in classrooms with people different from themselves.” *Comfort v. Lynn Sch. Comm.*, 100 F.Supp.2d 57, 65 n. 12 (D. Mass. 2000).

²³⁴ Nichols, *supra* note 229, at 507; see also Zahler, *supra* note 9, at 1037 (“[A] classroom devoid of diversity may intentionally or unintentionally give white children a false sense of superiority which later may lead to prejudice or racism.”).

²³⁵ Nichols, *supra* note 229, at 508, 514; see also Battistich et al., *supra* note 221, at 416 (“[F]or some outcomes . . . , failing to explicitly attend to their development in school (and thereby relegating them to the realm of the ‘hidden curriculum’) may result in students’ developing attitudes, skills, and orientations that are antithetical to those society wants to promote.”); see also 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, 140 (2002) (“[S]tudents may draw incorrect negative inferences about race based on the presence or absence of students in the learning environment. Even facial diversity (what children see when they look around the classroom) plays a role in how children learn.”); but see Lechner, *supra* note 207, at 230 (arguing that proffered benefits of a diverse student body – including improvements in minority academic performance, intergroup harmony, and cultural awareness – may be

and secondary classrooms also serves important functions of socialization. Students who attend racially varied schools “exhibit less prejudice and more interracial sociability” than those in more racially-isolated environments.²³⁶ They tend to view diversity as a positive good.²³⁷

While not a benefit of diverse primary and secondary school experiences *per se*, voluntary integration programs may permit urban minority students access to networks of opportunity more traditionally found in suburban schools.²³⁸ Some commentators have observed that such access counteracts tendencies toward racial isolation.²³⁹ Taken together with the intercultural preparation the programs provide, it is likely that voluntary integration programs lay the foundation for naturally integrated schools some time in the future. Therefore, it is *because of* the differences that inhere in the two educational settings – primarily the fundamental role of K-12 education in socializing children – that diversity is *more* compelling in primary and secondary schools.

If the Court upholds diversity as compelling in K-12 voluntary integration programs, many programs currently in existence would unfortunately still fail on the narrow tailoring prong. The Court has unequivocally stated that non-remedial racial balancing impermissibly violates the narrow tailoring requirement of 14th Amendment Equal Protection.²⁴⁰ Taken together, *Grutter* and *Gratz* likely set forth the standards that the Supreme Court would use to evaluate a K-12 plan. First, consideration of candidates must be individualized, with flexible consideration of a wide range of diversity factors, of which race may be one.²⁴¹ Second, the educational institution must

“adequately accomplished through a multicultural curriculum that does not . . . discriminate between students based on race”); *id.* (concluding that use of race-based school assignments “ignores the predominant role that law has historically played in perpetuating and reinforcing widely held values such as race”).

²³⁶ Maureen T. Hallinan, *Sociological Perspectives on Black-White Inequalities in American Schooling*, 74 SOCIOLOGY OF EDUC. 50, 59 (2001); see also Mead, *supra* note 235, at 94 (“Diversity . . . fosters racial and cultural understanding, which is particularly important in a racially and culturally diverse society such as ours.”).

²³⁷ Hallinan, *supra* note 236, (citing Gary Orfield, *Public Opinion and School Desegregation*, 96 TEACHERS COLL. RECORD 654, 670 (1995)).

²³⁸ Zahler, *supra* note 9, at 1035; EATON, *supra* note 3, at 225.

²³⁹ Zahler, *supra* note 9, at 1035.

²⁴⁰ *Freeman*, 503 U.S. at 494; see also *Parents Involved*, 377 F.3d at 968; see also *Tuttle*, 195 F.3d at 705 (observing that “nonremedial racial balancing is unconstitutional”); *Eisenberg*, 197 F.3d at 131 (invalidating plan as “mere racial balancing in pure form”).

²⁴¹ *Grutter*, 539 U.S. at 336-37; *Gratz*, 539 U.S. at 271-74 (finding insufficient individualized consideration where points awarded on the basis of race were near-determinative of the admissions decision); see also *Parents Involved*, 377 F.3d at 968; see also *Tito*, 1997 WL 33164931, at *4 (admissions program failed narrow tailoring, in part, because it made race decisive as to many applicants); *Tuttle*, 195 F.3d at 706 (looking at “the flexibility of the policy”); *Wessmann*, 160 F.3d at

have considered alternative, race-neutral plans to achieve the desired diversity.²⁴² Third, the plan must not harm members of any identifiable racial group.²⁴³ Finally, the program must be finite in duration.²⁴⁴ For many school districts, it will be next to impossible to satisfy all aspects of the narrow tailoring inquiry where race is considered in assigning or admitting students.²⁴⁵

School districts left wondering what *Grutter* and *Gratz* will mean for voluntary K-12 integration programs would do well to begin crafting alternatives, as many will fail as strict racial balancing programs. The impact of a Supreme Court ruling on the constitutionality of race-based assignments in voluntary integration programs could potentially be devastating for programs like METCO. To ensure the continuity of such programs, and their positive outcomes for minority youth, school districts should begin considering alternatives.

One race-neutral alternative advanced by a number of commentators would assign students on the basis of socioeconomic status.²⁴⁶ At least two circuit courts considering challenges to race-conscious voluntary integration programs have impliedly approved of the use of socioeconomic status in school assignments.²⁴⁷ While a program of socioeconomic integration

800 (taking issue with the plan's "foreclos[ure] [of] some candidates from all consideration . . . simply because of the racial or ethnic category in which they fall"). *But see Comfort*, 2005 WL 1404464, at *13 (eschewing the requirement of individualized consideration in non-competitive transfer policies because no stigmatic harm would result).

²⁴² *Grutter*, 539 U.S. at 339; *see also Parents Involved*, 377 F.3d at 969; *Comfort*, 2005 WL 1404464, at *17; *see also Tuttle*, 195 F.3d at 706 (taking into consideration the "efficacy of alternative race-neutral policies"); *Wessmann*, 160 F.3d at 808 (noting concerns about the plan's over- and under-inclusiveness).

²⁴³ *Grutter*, 539 U.S. at 341; *see also Parents Involved*, 377 F.3d at 969 (the plan must have, at most, a minimal adverse impact on non-preferred individuals); *Comfort*, 2005 WL 1404464, at *14 (observing the diminished harm resulting where every student receives a comparable education, irrespective of ability to transfer); *see also Tuttle*, 195 F.3d at 706 (finding relevant "the burden of the policy on innocent third parties").

²⁴⁴ *Grutter*, 539 U.S. at 342; *see also Parents Involved*, 377 F.3d at 969; *Comfort*, 2005 WL 1404464, at *16; *see also Tuttle*, 195 F.3d at 706 (taking account of "the planned duration of the policy").

²⁴⁵ While the First Circuit in *Comfort* found the Lynn Plan narrowly tailored notwithstanding the absence of individualized consideration, the Supreme Court has made individualized treatment a touchstone of its narrow tailoring inquiry. *See infra* Part III.A. Thus, although the Lynn Plan survived review before the First Circuit, the Supreme Court would likely apply a more rigorous inquiry to race-conscious school assignment plans, "competitive" and "non-competitive" alike.

²⁴⁶ One voluntary socioeconomic program currently in place – adopted by the Wake County, North Carolina school board – makes student assignments by accounting for diversity both in student achievement and socioeconomic status. Boger, *supra* note 213, at 1397.

Because the average socioeconomic condition of African-American and Latino families in Wake County and elsewhere in the South and nation is lower than that of average white Anglo families, and because their children perform less well on statewide tests, Wake County's student assignment criteria will have the incidental effect of creating a substantial degree of racial and ethnic desegregation, as well. Wake County's twin emphasis on the socioeconomic composition and the academic performance would not appear to raise any significant Equal Protection Clause issues, unless shown to have been adopted as a mere pretext for continuing racial assignments.

Id. at 1397-98.

²⁴⁷ *See Tuttle*, 195 F.3d at 705 (declining to strike down ATS's use of socioeconomic status in admitting students); *see also Parents Involved*, 377 F.3d at 972 n.26.

would not be subject to strict scrutiny under an Equal Protection challenge, a school district choosing socioeconomic status as a surrogate for race might face claims that its facially neutral policy is merely a pretext for intent to classify on the basis of race.²⁴⁸ Nevertheless, such plans may be justified by the benefits of predominantly middle-class schools lauded by many in the field of education.²⁴⁹

Another commentator has argued that schools pursuing goals of multi-cultural education may wish to develop a solid record of their decision-making process, carefully tying the importance of student body diversity into their curricular goals.²⁵⁰ Well-defined goals of multicultural education may help the program survive the narrow tailoring inquiry.²⁵¹ A clear record of decision-making might also encourage greater deference to the policy, given the Court's general reluctance to invade the province of local educational control.²⁵²

However, another alternative may be possible should the Supreme Court find diversity a compelling state interest in K-12 education. Interdistrict and intradistrict school choice programs alike should tailor their school assignment policies toward achieving the goal of so-called *true* diversity by considering a breadth of factors in assigning students.²⁵³ Whether the district's schools are selective – like many magnet and examination schools – or not, districts operating

[I]t is beyond dispute that despite remarkable racial progress during the past century . . . race and socioeconomic status remain correlated, so that the latter *might* serve as a workable race-neutral alternative satisfying the District's interest in obtaining the benefits of enrolling an otherwise diverse student population. . . . Likewise, it is beyond dispute that any insult generated by recognizing the opportunity presented by this sad reality pales in comparison to the insult of rejecting an applicant solely because of the color of her skin

Id. at 972 n.26.

²⁴⁸ *Boger, supra* note 213, at 1397 (citing *Washington v. Davis*, 426 U.S. 229, 241 (1976); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977)) (noting that “[t]he Supreme Court has long forbidden state actors to adopt ostensibly race-neutral criteria with the underlying intent to draw racial distinctions”).

²⁴⁹ *See, e.g., Kahlenberg, supra* note 232, at 260-61 (arguing for public school choice programs to integrate students of varying socioeconomic status “because creating middle-class environments will raise overall achievement levels” and noting the importance socioeconomic status can play in creating integrated learning environments in an era when “court-ordered racial school desegregation is dead, and even voluntary integration efforts are difficult to sustain legally”); *Ryan, supra* note 196, at 968 (“[E]ven if our only goals are to increase academic performance and to close the achievement gap, socioeconomic integration can be an effective means to achieve those ends.”); *but see* ABIGAIL THERNSTROM AND STEPHAN THERNSTROM, *NO EXCUSES: CLOSING THE RACIAL GAP IN LEARNING* 124 (2003) (commenting that class and race do not perfectly correlate to explain poor performance).

²⁵⁰ *See Mead, supra* note 235, at 96 (observing “[t]here was no attempt to directly tie race-conscious student selection to the fulfillment of specific curricular goals, such as social studies or multicultural curriculum”).

²⁵¹ *Mead, supra* note 235, at 96.

²⁵² *See* discussion *infra* notes 211-214 and accompanying text.

²⁵³ *See Comfort*, 2005 WL 1404464, at *11 (emphasizing the importance of broad notions of diversity); *see also Grutter*, 539 U.S. at 338 (noting the broad range of diversity factors taken into account by the Law School's plan, including “an unusual intellectual achievement, employment experience, nonacademic performance, or personal background”).

school choice programs should initiate individualized review of all applicants.²⁵⁴ In the context of such review, the district may consider the student's residential location,²⁵⁵ socioeconomic status,²⁵⁶ their parents' educational background, participation in community activities, letters of recommendation from individuals close to the child, as well as the child's race. Race, however, cannot be determinative – it must only be considered as a 'plus' factor, as the *Grutter* court prescribed.²⁵⁷

Magnet school placement at the high school level may also include consideration of a student's demonstrated interest toward a particular subject offered at the school. For example, if the school district has established an Arts academy, the applicant's participation in band or community theater productions might tip the scales in his favor. In addition, placement at examination schools may include consideration of an applicant's demonstrated aptitude or proven performance in any previous educational setting.²⁵⁸ The obvious downsides of such a program include an increase in bureaucracy and a severe blow to administrative efficiency. However, as the Court itself has noted, administrative efficiency is an insufficient justification for maintaining programs that resemble strict racial balancing or racial quotas.²⁵⁹

Importantly, the true purpose of all of these programs – and the goal of many participants²⁶⁰ – is to secure a better quality of education and, correspondingly, a brighter future. If faced with an order to end a race-conscious program, school boards need not return to a strict policy of neighborhood school assignment, effectively acquiescing in resegregation of its schools. Local school boards should tailor their school assignment policies, and interdistrict programs should admit participants, to facilitate more equitable access to education and opportunity. As with the Boston Public Schools' new race-neutral plan examined in *Anderson*, policies designed

²⁵⁴ See *Grutter*, 539 U.S. at 334; but see *Comfort*, 2005 WL 1404464, at *13-14.

²⁵⁵ See *Anderson*, 375 F.3d at 86.

²⁵⁶ See *Parents Involved*, 377 F.3d at 972; *Tuttle*, 195 F.3d at 705.

²⁵⁷ *Grutter*, 539 U.S. at 334.

²⁵⁸ See *Wessmann*, 160 F.3d at 793; *Eisenberg*, 197 F.3d at 134.

²⁵⁹ *Croson*, 488 U.S. at 508.

²⁶⁰ Recall the response of applicants to the METCO program in 1966 who, by and large, desired to participate not to attend an integrated school, but to receive a better education than that available in Boston Public Schools. EATON, *supra* note 3, at 6.

to achieve equity may perpetuate diversity in the classroom, as well as its attendant benefits.²⁶¹ In that way, where the correlation between residential segregation and neighborhood schools previously trapped minorities in frequently poor-performing schools, their residential status may enable them to attend better schools in other parts of their district, or in the surrounding area.

B. METCO

The METCO program has, to date, not been subject to a legal challenge. However, the program is certainly susceptible to challenge given its use of race in placing applicants at suburban schools, and its efforts to admit minority applicants in proportion to the breakdown of the minority population in Boston Public Schools.²⁶² Moreover, recent figures show that less than three percent of METCO students are white.²⁶³ Because the program openly employs race as one of a number of considerations, in a 14th Amendment Equal Protection challenge to METCO, any court would apply strict scrutiny.

The first hurdle in such litigation would be to convince the court that diversity constitutes a compelling interest in K-12 education. METCO is uniquely suited to advance evidence of the benefits of diversity in primary and secondary school, since the program has been in operation for thirty-eight years and can draw from the experience of its many graduates. The discussion above lays forth a number of arguments METCO, or programs like it, might advance before a court in support of the compelling nature of diversity in primary and secondary school classrooms.

The narrow tailoring inquiry, as with most voluntary integration programs, will be much more difficult to satisfy. Because participation in METCO has historically been limited to African-American students, and only recently opened up to Hispanics, Asians, and a very small number of whites, the courts will likely view the program as an attempt at outright racial balancing in largely-white suburban schools – an impermissible end under the 14th Amendment.²⁶⁴ Given the apparent significance attributed to race in admitting applicants under the program, METCO will

²⁶¹ *Anderson*, 375 F.3d at 82.

²⁶² Massachusetts Department of Education, METCO Program FAQ, at <http://www.doe.mass.edu/metco/faq.asp> (last viewed on August 26, 2005).

²⁶³ Massachusetts Department of Education, METCO Program: FY03 Distribution of METCO Students by Race, Gender, Income, and Grade Level, at http://www.doe.mass.edu/metco/fy03enroll_data.html (last viewed on August 26, 2005).

²⁶⁴ *Freeman*, 503 U.S. at 494.

likely be found to foreclose individualized consideration of all relevant diversity factors, thereby contravening the long-established and most firmly held principle of Equal Protection jurisprudence.²⁶⁵

Moreover, it seems evident that the Greater Boston metropolitan area could pursue race-neutral options to achieve substantially the same goals – for example, allowing disadvantaged students (including low-income whites) currently enrolled in Boston Public Schools to participate, or permitting participation on the basis of residence and assignment to a poor performing city school.²⁶⁶ Finally, the program fails in that it is set to continue for a potentially unlimited duration of time, thus directly violating the Court’s statement in *Grutter* that race-conscious preference programs must be limited in time.²⁶⁷ Programs like METCO must, therefore, begin to examine race-neutral alternatives. In implementing race-neutral programs to genuinely promote equity in educational opportunity, and attaining the corollary benefits of diversity in the classroom, the plans may ultimately avoid strict scrutiny and, thereby, keep the doors to opportunity open for generations to come.

V. CONCLUSION

It seems, then, that the NAACP has been right to discourage proponents of voluntary integration programs from appealing lower court decisions to the Supreme Court. The use of race to determine school assignments and admissions will merit strict scrutiny, and litigation on the nature of diversity in K-12 education will take the Court into uncharted waters. While it seems likely that the Court would find diversity to be even more compelling in the context of primary and secondary education, few – if any – voluntary integration programs will be deemed sufficiently

²⁶⁵ *Grutter*, 539 U.S. at 336-37; *Gratz*, 539 U.S. at 271-74 (finding insufficient individualized consideration where points awarded on the basis of race were near-determinative of the admissions decision); see also *Parents Involved*, 377 F.3d at 968; see also *Tito*, 1997 WL 33164931, at *4 (admissions program failed narrow tailoring, in part, because it made race decisive as to many applicants); *Tuttle*, 195 F.3d at 706 (looking at “the flexibility of the policy”); *Wessmann*, 160 F.3d at 800 (taking issue with the plan’s “foreclos[ure] [of] some candidates from all consideration . . . simply because of the racial or ethnic category in which they fall”). But see *Comfort*, 2005 WL 1404464, at *13-14.

²⁶⁶ *Grutter*, 539 U.S. at 339; see also *Parents Involved*, 377 F.3d at 969; see also *Tuttle*, 195 F.3d at 706 (taking into consideration the “efficacy of alternative race-neutral policies”); *Wessmann*, 160 F.3d at 808 (noting concerns about the plan’s over- and under-inclusiveness).

²⁶⁷ *Grutter*, 539 U.S. at 342; see also *Parents Involved*, 377 F.3d at 969; *Comfort*, 2005 WL 1404464, at *16; see also *Tuttle*, 195 F.3d at 706 (taking account of “the planned duration of the policy”).

narrowly tailored. A decision by the Supreme Court would bring with it nationwide implications, and for that reason, the long-standing success of programs like METCO – in fostering diverse educational settings and placing inner-city minority youth on the path to educational opportunity – hangs in the balance.