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THE CONSTITUTIONALITY OF RACIAL CLASSIFICATIONS IN PUBLIC SCHOOL ADMISSIONS

Kevin Brown*

I. INTRODUCTION

Driven by federal court decrees, political beliefs that an integrated society was a better one, and educational policy decisions fostering multiculturalism, many public elementary and secondary schools instituted voluntary measures to produce integrated student bodies. State or local school officials take account of race and ethnicity in order to promote voluntary integration of their student bodies. A number of federal courts, however, have recently addressed equal protection challenges to the use of racial classifications of students to foster voluntary integration.¹ For purposes of the Equal Protection Clause,

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An earlier version of this Article was delivered in March 2000 as a speech at a Symposium at University of Akron School of Law. The Symposium is entitled Education and the Constitution: Shaping Each Other and the Next Century, and the Essay corresponding to the speech is published in the Akron Law Review. See Kevin Brown, Equal Protection Challenges to the Use of Racial Classifications to Promote Integrated Public Elementary and Secondary Student Enrollments, 34 AKRON L. REV. 37 (2000).

these courts could rely on Supreme Court school desegregation jurisprudence holding that school officials have broad powers to foster integration. These courts analyzed the constitutionality of using racial classifications by applying strict scrutiny. Yet, their analysis has seldom taken into account the special environment of public education. Thus, there is little difference between the way these courts have generally dealt with the use of racial classifications of students from governmental use of racial classifications outside of public education. Most of the court decisions concluded that the state or local school officials failed either to articulate a compelling state interest to justify their admissions policies or that the policies were not narrowly tailored. Since effective integration of student bodies probably requires the use of racial classifications, the decisions by these federal courts suggest that the ability of public schools to foster voluntary integration of student bodies is extremely limited.

A number of Supreme Court opinions have recognized that constitutional rights applied in the context of public education must be adapted to the special nature of public education. The recent decisions have pointed to the need to distinguish two different jurisprudential paths spawned by the Supreme Court’s opinion in *Brown v. Board of Education*\(^3\) and its school desegregation progeny. The Supreme Court’s decision in *Brown* dealt with the application of the Equal Protection Clause in the context of public education.\(^4\) The Supreme Court quickly followed its decision in *Brown* with a number of cases striking down segregation by government in other fields.\(^5\) Thus, *Brown* was the case

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4. *See id.* at 495.
that is generally credited with sparking the Supreme Court's equal protection jurisprudence. Over the past forty-five years, the Court's equal protection jurisprudence has developed considerably. The Court has gone on to resolve a number of major equal protection issues in cases such as *Washington v. Davis*, *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, *Regents of University of California v. Bakke*, *City of Richmond v. J. A. Croson Co.*, *Adarand Constructors, Inc. v. Pena*, and *Miller v. Johnson*.

But there was another road that led from the Supreme Court's opinion in *Brown*. For as the Court stated in *Brown*:

"Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. *Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.*"

This second path leading from *Brown* is the Court's jurisprudence in the field of public education. Since *Brown*, not only has the Supreme Court's equal protection jurisprudence developed, but so has its public education jurisprudence. Since *Brown*, the Supreme Court opinions have recognized that constitutional rights must be adapted to the special nature of public elementary and secondary education. The Supreme Court has articulated different tests to determine violations of students' free speech rights under the First Amendment and privacy rights under the Fourth Amendment from those that are applied outside of the context of public education. Even though the Court recognized that

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students possess a state-created property interest in public education which is protected by the Due Process Clause, the Court has interpreted the requirements for a due process hearing to be minimal when school officials seek to suspend students from public schools for less than ten days. The Supreme Court has often applied the test in *Lemon v. Kurtzman* 15 to resolve Establishment Clause challenges to governmental actions. The first three times that the Court struck down governmental actions relying solely on the purpose prong of the *Lemon* test were related to disputes about public education. 16 The Supreme Court has also determined that in light of the special characteristics of the public school environment, the right to receive information—which "is an inherent corollary of the rights of free speech and press"—is also applied differently. 17 Even the equal protection rights of resident aliens who seek employment as public school teachers are determined differently from how they are determined for most other governmental occupations. 18

While the students do not leave "their constitutional rights . . . at the schoolhouse gate," 19 they clearly change into a different set of constitutional clothing. The special environment of public education comes from the fact that the objectives of public education are the "inculcat[ion of] fundamental values necessary to the maintenance of a democratic political system." 20 Public education is the one governmental service for the selective conveyances of ideas to the young. The Supreme Court based its decision to vary constitutional rights on three overlapping concerns involving public elementary and secondary education that do not normally exist outside of the educational context. First, when addressing constitutional rights of students, the Court is dealing with the rights of minors. The Court has noted in a number of decisions that the rights of minors are different from adults. Second, the Supreme Court has recognized that for public schools to effectively teach the lessons that students must learn, it is necessary that they be able to maintain appropriate discipline. Third, the Court has recognized

that the primary purpose of public education is the inculcation of fundamental values necessary for the maintenance of our democratic society. Therefore, in determining the application of constitutional rights in public schools, the values being socialized are of utmost concern.

While the issue of the use of racial classifications in public schools’ admissions policies could be interpreted within the confines of the Supreme Court’s equal protection jurisprudence, that is not the only road that leads from Brown. The use of racial classifications could also be interpreted against the background of the Supreme Court’s public education jurisprudence. In this Article, I will argue that the recent lower federal court decisions addressing equal protection challenges to the use of racial classifications in public elementary and secondary education have not paid adequate attention to the Supreme Court cases in the field of education. It is a mistake to examine the use of racial classifications in public schools in the same way this issue would be analyzed outside the context of public education. When a court addresses equal protection challenges to the use of racial classifications of public school students, its application of strict scrutiny should focus on the messages conveyed by the use of such classifications. In other words, public schools have a compelling state interest in inculcating the values derived from the Equal Protection Clause. The basic value is the importance of treating everyone as an individual. As long as the use of racial classifications to bring about integrated student bodies furthers the internalization of the importance of treating all as individuals, then their use is narrowly tailored to that compelling interest. While it is true that the use of racial classifications sends a message that race does matter, integrated education is much more likely to facilitate students learning to treat everyone as an individual than racially neutral means that fail to produce integrated student bodies.

The Supreme Court has never directly addressed the issue of the power of states and local school officials to take account of race and ethnicity to further integrated public education in a context without an allegation of de jure segregation. This issue, however, was always in the background of the Supreme Court’s school desegregation jurisprudence. Part II revisits the Supreme Court’s school desegregation jurisprudence. The Supreme Court’s school desegregation jurisprudence assumed that state and local school officials could go further in terms of desegregating their public schools than the federal courts could order. The principle that limited the power of federal courts

enacting and approving school desegregation decrees was "that the scope of the remedy is determined by the nature and extent of the constitutional violation." But this limitation did not apply to state and local school officials. Part II concludes by focusing on earlier lower court decisions addressing equal protection challenges to the use of racial classifications. These cases involved situations where schools were trying to dismantle de facto—as opposed to de jure—segregation. These lower courts accepted the fact that school officials had broad powers to take account of race and ethnicity in order to foster integration of their student bodies as well as their faculties. Thus, they consistently rejected equal protection challenges by those affected by the use of racial classifications to these integration measures.

The First, Second, Fourth, and Ninth Circuits have recently addressed equal protection challenges to the use of racial classifications in admissions of students to public elementary and secondary schools. Part III discusses these cases to reveal the typical analysis applied to this issue by recent lower federal court decisions. This Part shows that these courts have generally neither recognized the broad power invested in school officials by the Supreme Court's school desegregation jurisprudence nor taken into account the socializing aspect of public education. These courts have consistently treated these cases the same as cases involving the use of racial classifications by government in a non-public education context.

Part IV discusses Supreme Court cases applying constitutional provisions to the public education context. From these cases it is clear that the Supreme Court has consistently interpreted the constitutional rights of public school students in light of the special environment of public schools.

Part V argues that the constitutional analysis of the use of racial classifications to further integrated student bodies should take account of the special environment of public schools. The special mission of public schools is value inculcation of the young. Thus, the central question invoked by the use of racial classifications to foster integrated student bodies is: What messages are being sent? The messages indicate the values being inculcated by public schools' use of racial classifications to promote integration.

Given recent Supreme Court decisions, the fundamental value derived from the Equal Protection Clause is the belief in treating people

23. See id.
as individuals and not as components of a racial or ethnic group. When public schools use racial classifications in order to foster an integrated student body, they send mixed messages. On the one hand, the classification itself sends the message that students should be considered members of racial and ethnic groups. On the other hand, the mixing of the students in the schools by racial and ethnic groups and other attendant circumstances can also send messages that the mixing is for the purpose of bringing them together, so that they come to see each other as individuals and not as components of racial or ethnic groups. As Justice Blackmun noted in his opinion in *Regents of University of California v. Bakke*, "[i]n order to get beyond racism, we must first take account of race." This applies with special force in public education because its primary purpose is "inculcating fundamental values" to the young. Considering all relevant circumstances, the use of racial classifications to further integrate student bodies is consistent with the Equal Protection Clause if the message conveyed is that people should be treated as individuals and not as members of racial or ethnic groups.

II. Opinions Indicating That States and School Officials Have Broad Powers to Take Account of Race and Ethnicity to Maintain Integrated Schools

The Supreme Court has not directly confronted the questions of whether and to what extent public schools can take account of race and ethnicity to foster an integrated student body in a context lacking an allegation of de jure segregation. Nevertheless, the issue was always in the background of the Supreme Court’s school desegregation jurisprudence. The Court’s school desegregation jurisprudence assumed that state and local school officials could go further in terms of desegregating their public schools than federal courts could order in response to an equal protection violation. The following principle limited the power of federal courts enacting and approving school desegregation decrees. "[T]he scope of the [remedy] was determined by the nature and extent of the constitutional violation." But this limiting principle did not apply to state and local school officials.

25. *Id. at 407.*
27. *Milliken, 418 U.S. at 744.*
28. *See id.*
A. The Supreme Court's School Desegregation Jurisprudence

The 1971 landmark opinion, Swann v. Charlotte-Mecklenburg Board of Education,\(^2\) is the most direct statement from the Supreme Court recognizing that school officials had broad powers to maintain integrated student bodies, while the remedial power of the federal courts was limited.\(^3\) Chief Justice Burger's unanimous opinion for the Court set out the guidelines for integrating schools, including approving busing as a tool to further that end.\(^4\) Burger noted that a low percentage of minority students in a particular school does not necessarily betoken unconstitutional conduct, but may result from innocent causes---for example, the population distribution of a given district. He warned federal courts that, unless a skewed enrollment pattern is caused by unconstitutional student assignment practices, federal courts must defer to school officials' discretion and refrain from imposing remedies.\(^5\)

Burger noted that the remedial power of federal courts extends only on the basis of a constitutional violation.\(^6\) This authority, however, "does not put judges automatically in the shoes of school authorities whose powers are plenary."\(^7\) He continued:

School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities . . . .\(^8\)

The Supreme Court's opinion in Washington v. Seattle School District No. 1\(^9\) also assumed that the power of states and local school boards to use racial classifications to foster integrated student bodies is broad.\(^10\) The Seattle School District adopted a resolution intended to eliminate racially imbalanced schools.\(^11\) There was no allegation of de

\(^{29}\) 402 U.S. 1 (1971).
\(^{30}\) See id. at 16.
\(^{31}\) See id. at 29-31.
\(^{32}\) See id. at 26.
\(^{33}\) See id. at 16.
\(^{34}\) See id.
\(^{35}\) Id.
\(^{36}\) Id.
\(^{38}\) See id. at 479-80.
\(^{39}\) See id. at 460.
jure segregation. At the time "[a]bout 37% of the[] children [attending Seattle public schools] [we]re of Negro, Asian, American Indian, or Hispanic ancestry." According to the resolution, schools were considered to be racially imbalanced if "the combined minority student enrollment in a school exceeds the districtwide combined average by 20 percentage points." No school, however, was to have a majority of members from a single minority group. To eliminate racially imbalanced schools, the District concluded that it was necessary to engage in "mandatory reassignment of students." The desegregation plan adopted was first implemented for the 1978-79 academic year. The plan eliminated many neighborhood schools, however, its implementation did "substantially reduce[] the number of racially imbalanced schools in the district." It also "substantially reduced the percentage of minority students in those schools which remain[ed] racially imbalanced." Even if the school and state officials had intentionally caused the segregation, the plan went "substantially beyond" the remedial requirements under the Equal Protection Clause.

In late 1977, opponents of desegregation drafted a statewide ballot initiative, known as Initiative 350. Initiative 350 was "designed to terminate the use of mandatory busing for purposes of racial integration." Absent certain special exceptions enumerated therein, it generally required "[s]tudent[s] to attend a school ... geographically nearest or next nearest the student's place of residence." Two months after the District's desegregation plan went into effect, almost sixty-six percent of the voters approved Initiative 350 on November 8, 1978. Within a month, the District, along with two other school districts that had implemented desegregation plans, filed suit "challenging the

40. Id. at 459-60.
41. Id. at 460 (quoting Seattle Sch. Dist. No. 1 v. Washington, 473 F. Supp. 996, 1005 (W.D. Wash. 1979)).
42. See id.
43. Id. at 461.
44. See id.
45. Id. (quoting Seattle Sch. Dist. No. 1, 473 F. Supp. at 1007).
46. Id. (quoting Seattle Sch. Dist. No. 1, 473 F. Supp. at 1007).
49. Id. (footnote omitted).
50. Id. (quoting WASH. REV. CODE § 28A.26.010 (1981)).
51. See id. at 463.
constitutionality of Initiative 350 under the Equal Protection Clause of the Fourteenth Amendment.\footnote{52}

The Supreme Court held that Initiative 350 violated the Equal Protection Clause.\footnote{53} The Court noted that Initiative 350 removed from the local school board only the power to assign students to schools based on race, stating:

[T]he power to determine what programs would most appropriately fill a school district’s educational needs—including programs involving student assignment and desegregation—was firmly committed to the local board’s discretion. The question whether to provide an integrated learning environment rather than a system of neighborhood schools surely involved a decision of that sort.\footnote{54}

Thus, the Court left Seattle with a school desegregation program that exceeded that which could be ordered by federal district courts, even if it was necessary to remedy an equal protection violation.\footnote{55}

Two other opinions by individual members of the Supreme Court are also worth mentioning. Justice Powell dissented from the Supreme Court’s opinion in two companion cases decided in 1979, \textit{Columbus Board of Education v. Penick}\footnote{56} and \textit{Dayton Board of Education v. Brinkman}.\footnote{57} These opinions were written the following year after his

\footnote{52. \textit{Id.} at 464.}
\footnote{53. \textit{See id.} at 470.}
\footnote{54. \textit{Id.} at 479-80.}
\footnote{55. \textit{See Morris, supra note 47, at 435.} In other cases, the Supreme Court made it clear that the powers of the federal courts to construct a remedy for a de jure segregation violation limited the scope of the remedy. For example, in \textit{Milliken v. Bradley}, 418 U.S. 717 (1974), the Supreme Court rejected a multi-district desegregation plan imposed on the City of Detroit and fifty-three of its surrounding suburbs. \textit{See id.} at 752-53. The district court ruled that it was necessary to include the predominantly white suburban school systems in order for any desegregation to occur. \textit{See id.} at 732-33. The district court based this plan on Michigan’s general responsibility and authority to supervise public education in both the City of Detroit and the suburbs, stating that “Michigan had committed several constitutional violations with respect to” school desegregation. \textit{Id.} at 726. The Supreme Court reversed the district court and rejected the inclusion of the suburban school districts in the desegregation plan, holding that absent a showing that a constitutional violation in one district produced a significant segregative effect in another, there was no justification for cross-district remedies. \textit{See id.} at 745. The Court stated that the remedy must be limited to Detroit itself because the record in this case showed that only one city, not the suburban school districts, committed significant constitutional violations. \textit{See id.; see also Bd. of Educ. v. Dowell}, 498 U.S. 237, 248 (1991) (noting that desegregation orders were intended as temporary measures that remedy past discrimination); \textit{Pasadena City Bd. of Educ. v. Spangler}, 427 U.S. 424, 434-35 (1976) (limiting the ability of federal courts to order annual adjustment to school desegregation decree in order to ensure that no school ever had a majority of minority students, because such a remedial order was not responding to the constitutional violation).}

\footnote{56. 443 U.S. 449 (1979).}
\footnote{57. 443 U.S. 526 (1979).}
opinion applying strict scrutiny to medical school admissions in *Regents of University of California v. Bakke.* Powell primarily criticized what he saw as an unwarranted expansion of federal judicial involvement in the operation of public schools some twenty-five years after the Court’s opinion in *Brown.* He took this opportunity to criticize federal courts for prescribing mandatory measures to desegregate student bodies as the constitutionally required remedy. Justice Powell stated that the mandatory desegregation measures were problematic because experience in city after city showed that resegregation was stimulated by the resentment of both parents and students of the judicial concern embodied in desegregation decrees. Powell went on to note:

The ultimate goal is to have quality school systems in which racial discrimination is neither practiced nor tolerated. It has been thought that ethnic and racial diversity in the classroom is a desirable component of sound education in our country of diverse populations, a


59. Part of Justice Powell’s criticism was aimed at the belief that there was inadequate evidence that the segregation in these cases was the result of discriminatory purposes by state officials. See *Penick,* 443 U.S. at 480 (Powell, J., dissenting). Powell noted that the condition of segregated schools in these cities “results primarily from familiar segregated housing patterns, which—in turn—are caused by social, economic, and demographic forces for which no school board is responsible.” *Id.* (Powell, J., dissenting). Powell criticized holding the school boards of these two cities responsible for all of the segregation that had occurred in each of the cities’ schools, as opposed to attributing it to factors that were beyond the control of the school officials. See *id.* at 480-81 (Powell, J., dissenting).

60. See *id.* at 487 (Powell, J., dissenting) (stating that “restructuring and overseeing the operation of major public school systems—as ordered in these cases—fairly can be viewed as social engineering that hardly is appropriate for the federal judiciary”). Justice Powell also joined the separate dissenting opinion of Justice Rehnquist, who noted that:

The school desegregation remedy imposed on the Columbus school system by this Court’s affirmance of the Court of Appeals is as complete and dramatic a displacement of local authority by the federal judiciary as is possible in our federal system. . . . 42,000 of the system’s 96,000 students are [being] reassigned to new schools.

*Id.* at 489 (Rehnquist, J., dissenting).

61. In his dissent, Justice Powell stated:

This wholesale substitution of judicial legislation for the judgments of elected officials and professional educators derogates the entire process of public education. Moreover, it constitutes a serious interference with the private decisions of parents as to how their children will be educated. These harmful consequences are the inevitable byproducts of a judicial approach that ignores other relevant factors in favor of an exclusive focus on racial balance in every school.

These harmful consequences, moreover, in all likelihood will provoke responses that will defeat the integrative purpose of the courts’ orders. Parents, unlike school officials, are not bound by these decrees and may frustrate them through the simple expedient of withdrawing their children from a public school system in which they have lost confidence.

*Id.* at 483-84 (Powell, J., dissenting) (footnote omitted).
view to which I subscribe. The question that courts in their single-minded pursuit of racial balance seem to ignore is how best to move toward this goal.\(^6\)

Powell then praised voluntary majority to minority transfer programs, and specifically noted a Wisconsin statute that implemented such a program.\(^6\)

Wisconsin ha[d] implemented a system of subsidized, voluntary, intra- and inter-district majority-to-minority transfers. It is too early to determine whether this experiment will attain its objective of encouraging substantial integration. But it is the sort of effort that should be considered by state and local officials and elected bodies. The contrast between the underlying philosophy of the Wisconsin plan and the massive coercion undertaken by the courts below is striking.\(^6\)

Even Justice Rehnquist, in a 1978 opinion, accepted the fact that states could engage in broad measures to integrate student bodies. In \textit{Bustop, Inc. v. Board of Education}, Rehnquist denied an application for a stay, filed by Bustop, Inc., of an order issued by the California Supreme Court.\(^6\) Bustop, Inc., supported by the Attorney General of California, sought to delay the implementation of the order pending the filing of a petition for certiorari or an appeal to the United States Supreme Court.\(^6\) The California Supreme Court's "order vacated a . . . stay issued by the California Court of Appeal, which had in turn stayed the enforcement of a school desegregation order issued by the Superior Court of Los Angeles County."\(^6\) The desegregation order issued by the Superior Court required the reassignment of over 60,000 students in Los Angeles public schools.\(^6\) The goal of the desegregation order was "to insure that all schools in the Los Angeles Unified School District ha[d] Anglo and minority percentages between 70\% and 30\%."\(^7\) The plan thus required extensive reassignment and transportation of students.\(^7\)

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\(^{62}\) Id. at 486 (Powell, J., dissenting).
\(^{63}\) See id. at 488, 488 n.7 (Powell, J., dissenting).
\(^{64}\) Id. at 488 n.7 (Powell, J., dissenting) (citations omitted); see also Willan v. Menomonee Falls Sch. Bd., 658 F. Supp. 1416, 1424 (E.D. Wis. 1987) (applying Powell's dissent in \textit{Penick} to uphold a challenge to the application of Wisconsin law).
\(^{65}\) 439 U.S. 1380 (1978).
\(^{66}\) See id. at 1383.
\(^{67}\) See id. at 1380.
\(^{68}\) Id.
\(^{69}\) See id.
\(^{70}\) Id. at 1381.
\(^{71}\) See id. at 1380.
Bustop, Inc. argued on behalf of students to be transported that the desegregation order was at odds with the Supreme Court's school desegregation jurisprudence. In rejecting the application for the stay, Rehnquist noted that if the desegregation plan had been premised on a violation of the Fourteenth Amendment, then he would be inclined to agree with Bustop, Inc. that the remedial order was inconsistent with the Supreme Court's school desegregation decisions. But Rehnquist noted that the earlier opinions of the California Supreme Court in this case, rested on their interpretation of the California State Constitution. Those opinions concluded that proponents seeking a court-ordered busing decree were required to show less than the United States Supreme Court has required for those "seek[ing] similar relief under the United States Constitution."

Rehnquist went on to distinguish this case from his recent decision to stay the judgment and order of the Court of Appeals for the Sixth Circuit in another case. He noted:

[T]he only authority that a federal court has to order desegregation or busing in a local school district arises from the United States Constitution. But the same is not true of state courts. So far as [the United States Supreme] Court is concerned, [state courts] are free to interpret the Constitution of the State to impose more stringent restrictions on the operation of a local school board.

In conclusion, Rehnquist stated that Bustop, Inc. phrased its contention in the following way:

"Unlike desegregation cases coming to this Court through the lower federal courts, of which there must be hundreds, if not thousands, here the issue is novel. The issue: May California in an attempt to racially balance schools use its doctrine of independent state grounds to ignore the federal rights of its citizens to be free from racial quotas and to be free from extensive pupil transportation that destroys fundamental rights of liberty and privacy."

72. See id. at 1381.
73. See id.
75. See Bustop, Inc., 439 U.S. at 1381.
76. Id.
77. See id. at 1382 (citing Columbus Bd. of Educ. v. Penick, 439 U.S. 1348 (1978)).
78. Id.
79. Id. (quoting Application for Stay 16.11).
In response, Rehnquist pointed out that the novel aspect of Bustop, Inc.'s contention is the following argument:

[E]ach citizen of a State who is either a parent or a schoolchild has a "federal right" to be "free from racial quotas and to be free from extensive pupil transportation that destroys fundamental rights of liberty and privacy." While I have the gravest doubts that the Supreme Court of California was required by the United States Constitution to take the action that it has taken in this case, I have very little doubt that it was permitted by that Constitution to take such action.80

As the above discussion shows, the Supreme Court's school desegregation jurisprudence made it clear that the power of federal courts to order racial balancing was limited to the requirement to respond to a constitutional violation.81 State and local school officials, however, appear to have broader powers to engage in efforts to integrate their student bodies than the federal courts.82 Thus, the Court accepted that state and local school officials could use racial classifications in order to foster integrated student bodies.83 The Court's school desegregation cases would approve of the use of racial classifications to

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80. Id. at 1383 (quoting Application for Stay 16.11).
81. In United States v. City of Yonkers, 197 F.3d 41 (2d Cir. 1999), cert. denied, 120 S. Ct. 2005 (U.S. 2000), the Second Circuit summarized the three principles guiding the Supreme Court's school desegregation jurisprudence. See id. at 55.
   First, "the nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation." Second, the desegregation decree "must indeed be remedial in nature, that is, it must be designed as nearly as possible to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." Finally, the court "must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution."

Id. (quoting Milliken v. Bradley, 433 U.S. 267, 280-81 (1977)) (citations omitted). Other Supreme Court cases have also "firmly recognized that local autonomy of school districts is a vital national tradition." Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 410 (1977); see, e.g., Bd. of Educ. v. Dowell, 498 U.S. 237, 248 (1991) (noting that desegregation orders were intended as temporary measures to remedy past discrimination); Milliken v. Bradley, 433 U.S. 267, 282 (1977) (noting that "federal-court decrees must directly address and relate the constitutional violation itself"); Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 435 (1976) (limiting the ability of federal courts to order annual adjustment to school desegregation decree in order to ensure that no school ever had a majority of minority students, because such a remedial order was not responding to the constitutional violation); Milliken v. Bradley, 418 U.S. 717, 741-42 (1974) (noting the deeply rooted tradition of local autonomy in public education); San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1, 50 (1973) (noting that "[n]o area of social concern stands to profit more from a multiplicity of viewpoints and from a diversity of approaches than does public education"); Wright v. Council of Emporia, 407 U.S. 451, 469 (1972) (describing local, direct control over education in Emporia, Virginia).
82. See Bustop, Inc., 439 U.S. at 1382.
83. See id. at 1383.
foster racially and ethnically diverse student bodies to eliminate racial isolation or to alleviate de facto segregation.

B. Decisions by Federal and State Courts Recognizing Broad Discretion of School Officials to Use Racial Classifications to Maintain Integrated Student Bodies

Until recently, federal and state courts that addressed the issue of using racial classifications to foster an integrated student body took their lead from the Supreme Court’s school desegregation jurisprudence. These courts recognized that school districts possessed broad powers to implement measures to integrate their student bodies and faculties. They viewed the desire to end de facto segregation to provide an adequate justification for integration.

In Parent Ass’n of Andrew Jackson High School v. Ambach, the Second Circuit addressed a challenge raised by minority students to a desegregation plan for Andrew Jackson High School in Queens, New York. Jackson High School had gone in 1957 from a school that was 82% white to one that was less than 1% white in 1976. During the 1960s, the Board of Education of the City of New York adopted a succession of plans to stem the acceleration of Jackson High School to “an exclusively minority student” population.

In 1973, the Board finally abandoned the hope of maintaining integration at Jackson High School and instead adopted a “Choice of Admissions” scheme. By late 1977, the high school student population in the borough of Queens had fallen to only 48% white and was predicted to decline to only about 36% white in 1981. Under the plan, “minority students in the Jackson [High School attendance] zone had the choice of attending any of a number of receiving [high] schools at which the minority population was lower than at Jackson, and the influx of additional minority students would not destroy whatever racial balance

85. 598 F.2d 705 (2d Cir. 1979) [hereinafter Andrew Jackson I].
86. See id. at 708.
87. See Parent Ass’n of Andrew Jackson High Sch. v. Ambach, 738 F.2d 574, 576 (2d Cir. 1984) [hereinafter Andrew Jackson II].
88. Andrew Jackson I, 598 F.2d at 710.
89. Andrew Jackson II, 738 F.2d at 576.
90. See Andrew Jackson I, 598 F.2d at 710.
currently existed" in the receiving schools. Revisions were made to the plan in 1975 and 1976, which led to the adoption of the scheme known as the "1976 Controlled Rate of Change Plan," which sought:

to balance the goal of placing Jackson’s minority students in integrated schools of their choice, against the perceived reality that if the minority enrollment in an individual receiving school [either] increased too rapidly or reached a critical absolute level . . ., white students would leave the receiving school at an increasing rate.

The Board determined that the "tipping point" occurred when the percentage of white students dropped below 50%. "By controlling both the rate and extent of change in racial composition in the receiving schools, the Board hoped gradually to transfer most or all of the student population out of segregated Jackson [attendance zone area], without at the same time triggering resegregation of currently integrated receiving schools." Thus, the Board sought to provide the maximum amount of integrated education over the longest period of time for the largest number of students.

White enrollment in the system as a whole was inadequate to keep all schools above the tipping point. Thus, the impact of the limitations on student choice placed on the ability of students in the Jackson High School attendance zone to transfer to other schools meant that some minority children would not be able to attend integrated schools only by requiring another group of minority students—those in

91. Andrew Jackson II, 738 F.2d at 576.
92. Id.
93. Id.
94. See id. at 576-77. Under the plan:
Black and Hispanic students . . . could elect to attend any New York City high school not already overenrolled, in which (1) the percentage of white students in the school exceeds either 50% of the school population or the borough-wide average in the borough in which the receiving school is located (whichever is higher); provided further that (2) the admission of such students, coupled with the admission of minority students from other integration programs and/or through demographic changes in the attendance area servicing the school, will not (a) decrease the receiving facility's white/minority ethnic balance by 4% or more in any one school year, or (b) produce a rate of change in any one year that exceeds one-fourth of the difference between the school's current white enrollment and a 50% white enrollment, whichever is less.

95. Id. at 576.
96. See id.
97. See id. at 577.
98. See Andrew Jackson I, 598 F.2d 705, 718 (2d Cir. 1979).
the Jackson High School attendance zone—to remain in predominantly minority schools.99

In June, 1976, a class action was filed on behalf of students and parents in the Jackson attendance school zone.100 They sought to challenge the constitutionality of the Plan arguing that the “imposition of a racial quota against the admission of minority students to potential receiving schools violated the [E]qual [P]rotection [C]lause.”101 The district court found that the segregation in Jackson High School attendance zone was de facto segregation, resulting from changes in population, and not de jure segregation.102 Nevertheless, it agreed with the plaintiffs that the Plan violated the Equal Protection Clause.103 In striking down the Plan, the district court “acknowledg[ed] that the Board’s goals in adopting the Plan were benign.”104 The district court concluded, however, “that by ‘limit[ing] minority pupils’ access to schools because of their minority status in order to provide integrated schooling for as long as possible to a progressively limited number of minority and other students,’ . . . impermissibly recreated ‘a dual school system’ of integrated and segregated schools.”105

On appeal, the Second Circuit affirmed the district court finding that the segregation in the Jackson High School attendance zone resulted from changes in population and not the result of governmental action.106 Given the absence of de jure segregation there was no constitutionally required obligation to order desegregation.107 The Second Circuit then went on to address the equal protection challenge to the Plan.108 Applying strict scrutiny, the Second Circuit found that the Plan’s aim to promote a more lasting integration to be “a sufficiently compelling purpose to justify [as a matter of law] excluding some minority students from schools of their choice under the obviously race-conscious . . . Plan.”109 The Court remanded the case to the district court for several factual determinations concerning specific provisions of the Plan.110

99. See id.
100. See Andrew Jackson II, 738 F.2d at 577.
101. Id.
102. See Andrew Jackson I, 598 F.2d at 709.
103. See Andrew Jackson II, 738 F.2d at 577.
104. Id.
106. See Andrew Jackson I, 598 F.2d at 709.
107. See id.
108. See id. at 717.
109. Id. at 719.
110. On remand, the district court was to address:
In *Willan v. Menomonee Falls School Board*, a minority pupil and his parents brought suit challenging the constitutionality of a 1975 Wisconsin statute. Wisconsin enacted Chapter 220, which "authorize[d] school districts to enter into voluntary agreements providing for interdistrict transfers of pupils to promote racial integration." A Chapter 220 agreement was executed by the Menomonee Falls school district, a predominantly white suburban school system, and the Milwaukee school district. Under this agreement, minority students living in Milwaukee could transfer to programs at Menomonee Falls schools with the state subsidizing the cost of their tuition. Similarly, white students living in Menomonee Falls could transfer to programs at Milwaukee public schools and receive similar state support.

In the spring of 1986, Jason Willan, a minority student in Menomonee Falls, "applied to a summer school program at a Milwaukee high school." Menomonee Falls did not offer a comparable program. Willan was classified as a minority student by the Wisconsin interdistrict transfer statute because he was at least one-half Oneida Indian. Since his transfer did not promote racial integration, he did not qualify for state subsidization of his tuition and transportation costs. Willan's parents were notified three days prior to the opening of summer school that he

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(1) whether the Board had shown a factual justification for its choice of a 50% tipping point; and (2) whether demographic projections supported the Board's determination that the maximum allowable rate of change in racial composition of a school should be set at the lesser of 4% or 1/4 of the difference between the current white enrollment and 50% white enrollment.

*Andrew Jackson II*, 738 F.2d at 577. On remand Judge Constantino issued a decision in which he found "that the Board had failed to provide factual justification for its choice of a 50% tipping point." *Id.* at 579. Thus, he found the plan invalid under the terms of the Second Circuit's remand. See *id.* Since the district court found the plan invalid, it did not address the Board's limitation based on the rate of change. See *id.* The Second Circuit in *Andrew Jackson II* disagreed with the district court's conclusion that the Board failed to justify the 50% tipping point. *See id.* at 579. It remanded the case to have the district court once again look at the evidence submitted on the issue of the 50% tipping point and to look at the evidence on the limitation on the rate of change. See *id.* at 580-81.

111. 658 F. Supp. 1416 (E.D. Wis. 1987).
112. *See id.* at 1418.
113. *Id.*
114. *See id.*
115. *See id.*
116. *See id.*
117. *Id.*
118. *See id.*
119. *See id.*
120. *See id.*
did not qualify for state subsidization of his tuition and transportation. Since the unsubsidized cost of the program at the Milwaukee high school was higher than the cost of other programs, his parents sent him to another program in a different school district and paid $447.60. Thereafter, the Willans made a claim for the tuition to the Menomonee Falls School Board, which was denied and followed by a lawsuit against Menomonee Falls School Board and the Milwaukee Board of School Directors. On December 16, 1986, the Willans reached a settlement with Menomonee Falls School Board, and a stipulation and order of dismissal of the Menomonee Falls School Board and its individual members was entered.

The Milwaukee Board of School Directors and individual members then filed for a dismissal of this cause of action, arguing that the Willans’ complaint failed to state a claim upon which relief could be granted. In addressing this issue, the district court noted that “[i]t is well-settled in federal law that state and local school authorities may voluntarily adopt plans to promote integration even in the absence of a specific finding of past discrimination.” The district court specifically noted that Justice Powell had lauded the Wisconsin statute at the center of the controversy in this case in his dissenting opinion in Penick. “This implicit endorsement of the constitutionality of [C]hapter 220 persuades me that the plaintiffs’ extant collateral attack on an individual aspect of the plan must fail.”

In Martin ex rel. Lauren v. School District, the plaintiffs filed a complaint on September 6, 1995 on behalf of their children. The complaint alleged that the School District of Philadelphia violated the

121. See id.
122. See id.
123. See id. at 1418-19.
124. See id. at 1419.
125. See id. at 1422.
126. Id.
127. See id. at 1424; see also supra notes 62-65 and accompanying text (discussing Justice Powell’s dissenting opinion in Columbus Board of Education v. Penick, 443 U.S. 449 (1979)).
128. Willan, 658 F. Supp. at 1424; see also Lee v. Nyquist, 318 F. Supp. 710, 714 (W.D.N.Y 1970) (noting that it is well recognized that children that attend ethnically isolated schools do not enjoy the opportunity to know or embrace those of other races, and the elimination of such educational isolation may well be the key—or at least a large step—to racial harmony in this country), aff’d sub nom. 402 U.S. 935 (1971); Jenkins v. Township of Morris Sch. Dist., 279 A.2d 619, 633 (N.J. 1971) (granting power to the Commissioner to merge Morris Township and Morristown school systems if he finds it necessary to fulfill the state’s educational and desegregation policies).
130. See id. at *1.
Equal Protection Clause by employing a student transfer policy sensitive to the race or ethnicity of student transfer applicants. These parents sought to have their children transferred from the school to which their children were initially assigned to a school outside of their neighborhood. The transfers "were denied either because the schools to which their children wanted to transfer contained 65% or more students of the same race as their children, or because the schools to which their children were currently assigned contained 35% or less students of the same race as their children." The plaintiffs sought a preliminary injunction against the operation of the 35%/65% student transfer policy.

The 35%/65% student transfer policy was a provision in a plan adopted in 1976 in response to state court desegregation litigation. That desegregation plan required "the School District [to] establish system-wide procedures to encourage pupils of one race to transfer voluntarily to schools where enrollments are predominantly of another race." The Commonwealth Court approved the plan. In 1994, the Commonwealth Court addressed the need for continuing measures, including the 35%/65% student transfer policy, "to remedy the de facto segregation of the Philadelphia public schools."

The Commonwealth Court ... found that "the School District [of Philadelphia] has failed to desegregate the public schools by all feasible means and continues to maintain a racially segregated school environment where all of the students do not receive equal educational opportunities or a quality education mandated by the laws of this Commonwealth."

In addressing the plaintiffs' equal protection challenge to the 35%/65% student transfer policy, the district court concluded that it "is not bound by the factual findings of the Commonwealth Court."

Nevertheless, the "plaintiffs ... failed to demonstrate that they will be able to contradict these findings which were the result of lengthy and
apparently contentious proceedings.\textsuperscript{141} The district court applied strict scrutiny to this use of racial classifications.\textsuperscript{142} It found that the compelling interest served by the 35%/65% transfer policy was remedying de facto segregation in order to insure that equal education opportunities are provided "across racial lines."\textsuperscript{143} The district court stated that "there can be little doubt that the state's interest in ensuring equal educational opportunities across racial lines is a compelling one."\textsuperscript{144} In concluding that the policy was narrowly tailored, the district court noted "that the School District [was] acting under the supervision of both the Pennsylvania Human Relations Commission ('PHRC') and the Commonwealth Court."\textsuperscript{145} The district court noted that "the burdens on students who are denied transfers... is relatively light" because they are not subject to mandatory assignments.\textsuperscript{146} In conclusion, the district court stated that "the use of a race-based student transfer policy was accepted by the School District, the PHRC and the state courts only after race-neutral measures were considered and only after broader and more burdensome methods of achieving desegregation, such as involuntary student transfers, were rejected."\textsuperscript{147}

C. \textit{Decisions by Federal Courts Recognizing Broad Discretion of School Officials to Use Racial Classifications to Maintain Integrated Faculties}

Efforts by public schools to integrate their faculties raises issues similar to those raised by efforts to promote integrated student bodies. A number of federal court cases arose in situations where, absent a finding of intentional segregation, a school system sought to reassign its public school teachers to produce integrated faculties. Affected teachers challenged these programs as violations of the Equal Protection Clause. In rejecting these kinds of challenges, the Third Circuit and the Sixth Circuit applied a standard lower than strict scrutiny to the teachers' challenges.\textsuperscript{148}

\textsuperscript{141} Id.
\textsuperscript{142} See id. at *8-*9.
\textsuperscript{143} See id. at *10-*11.
\textsuperscript{144} Id. at *8.
\textsuperscript{145} Id. at *9.
\textsuperscript{146} Id. at *9-*10.
\textsuperscript{147} Id. at *10.
\textsuperscript{148} See Jacobson v. Cincinnati Bd. of Educ., 961 F.2d 100, 103 (6th Cir. 1992); Kromnick v. Sch. Dist., 739 F.2d 894, 903 (3d Cir. 1984).
In *Kromnick v. School District*, the Third Circuit drew on the opinion of Justice Brennan in *Regents of University of California v. Bakke*, which articulated a standard “that ‘racial classifications designed to further remedial purposes must serve important governmental objectives and must be substantially related to achievement of those objectives,’” and on Chief Justice Burger’s opinion in *Fullilove v. Klutznick*. The Third Circuit determined that “[t]he relevant factors that emerge from the Supreme Court opinions are (1) the importance and validity of the remedial aim, (2) the competence of the agency to choose such a remedy, and (3) the tailoring of the remedy so as to limit the burden suffered by others.”

In a case decided after the Supreme Court’s opinion in *City of Richmond v. J. A. Croson Co.*, the Sixth Circuit, in *Jacobson v. Cincinnati Board of Education*, affirmed a transfer policy adopted by the Cincinnati Board of Education to foster an integrated faculty absent a finding of intentional segregation. The court cited to the language from *Swann v. Charlotte-Mecklenburg Board of Education*, granting schools broad discretion in their ability to maintain a racially and ethnically balanced student body, and determined that the policy merely had to be substantially related to an important governmental interest (the intermediate test articulated by Justice Brennan in *Bakke*). The Sixth Circuit held that the policy, which was implemented to achieve a racially integrated faculty throughout the Cincinnati public school system, met that test.

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149. 739 F.2d 894 (3d Cir. 1984).
150. See *id.* at 902. Justice Brennan’s opinion was joined by Justices White, Marshall, and Blackmun. See *id.*
153. See *id.* Justice Burger’s opinion was joined by Justices White and Powell. See *id.*
155. *Kromnick*, 739 F.2d at 904.
157. 961 F.2d 100 (6th Cir. 1992).
158. See *id.* at 103.
159. 402 U.S. 1 (1971).
160. See *Jacobson*, 961 F.3d at 102, 103.
161. See *id.* at 103; see also Zaslawsky v. Bd. of Educ., 610 F.2d 661, 663, 664 (9th Cir. 1979) (holding that neither the Fourteenth Amendment nor Title VI precluded a school system “from taking voluntary action to obtain better racial balance in its teaching faculty”); Vaughns v. Bd. of Educ., 742 F. Supp. 1275, 1287 (D. Md. 1990) (justifying the efforts to maintain integrated faculty assignments). It is well settled in federal law that state and local school authorities may voluntarily adopt plans to promote integration even in the absence of a specific finding of past discrimination. See Arval A. Morris, *New Light on Racial Affirmative Action*, 20 U.C. DAVIS L. REV. 219, 221-24
D. Conclusion

The concern of the Supreme Court's school desegregation jurisprudence was that federal courts' remedial orders for intentional segregation not exceed what was necessary to cure an equal protection violation. This jurisprudence did not contemplate severe limits on the ability of state and local education officials' use of racial classifications of students in order to integrate their public schools. From *Brown v. Board of Education*, racial isolation known by the term de facto segregation was always considered by the Supreme Court to be harmful to the education process. It was only when this racial isolation, however, was the product of intentional governmental conduct that it violated the Equal Protection Clause. Thus, the Supreme Court's school desegregation jurisprudence felt that if state or local school officials decided for educational reasons that students would receive a better education in an integrated school setting, such a decision was not contrary to the Equal Protection Clause. Until recently, lower federal and state court decisions followed the lead of the Supreme Court's school desegregation jurisprudence. They upheld the use of racial classifications to foster integrated student bodies and faculties. This Article asserts that there was an unspoken assumption behind the Supreme Court, the lower federal courts, and state courts accepting broad powers of school officials to foster integration. Integrated education furthered the internalization of a respect for individuality by all students. Even though taking account of race could be viewed as teaching students that race matters, nevertheless integrated education is much more likely to further students internalizing the belief of the importance of individuality than racially neutral admissions procedures that fail to produce integrated student bodies.


163. See id. at 495. In one of the most quoted phrases in *Brown*, the Court noted that "[t]o separate [African American youth] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." Id. at 494. The Court went on to quote approvingly from the district court in Kansas: "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law ...." Id. (quoting a finding in the Kansas case).

164. See generally Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 208 (1973) (holding "that a finding of intentionally segregative school board actions ... establishes ... a prima facie case of unlawful segregative design").
III. RECENT COURT OF APPEALS CASES ADDRESSING EQUAL PROTECTION CHALLENGES TO THE USE OF RACIAL CLASSIFICATIONS BY PUBLIC ELEMENTARY AND SECONDARY SCHOOLS

Until the last few years, lower courts accepted that public school authorities possess broad powers to take steps to promote integrated public schools. These courts did not require the use of racial classifications to promote integration to be justified by a need to remedy de jure segregation. In a complete reversal to the deference that had been accorded state and local public school authorities, more recent decisions have severely limited this power. The First, Second, Fourth, and Ninth Circuits have recently addressed equal protection challenges to the use of racial classifications in the admissions process of public elementary and secondary schools. The Second and Ninth Circuit upheld actions of school officials in the cases they addressed. In both cases, however, the court's ratification of the school officials' use of racial classifications was qualified.

A. First Circuit Case of Wessmann v. Gittens

In 1998, the First Circuit became the first federal appellate court to reject the use of racial classifications in the admissions policies of public elementary and secondary schools in the absence of an equal protection violation as a predicate for such polices. In Wessmann v. Gittens, the First Circuit addressed a challenge to the student assignment policy adopted by the Boston School Committee that governed its three examination high schools. Prior to litigation, admissions to Boston Latin School ("BLS"), Boston Latin Academy, and O'Bryant were generally determined based upon performance by applicants on a


166. 160 F.3d 790 (1st Cir. 1998). The Boston School Committee decided against appealing the decision by the First Circuit. See Beth Daley & Andy Dabilis, In Switch, City Won't Appeal the Latin Case: Wary of Hurting Efforts Nationally, BOSTON GLOBE, Feb. 4, 1999, at A1. Several groups, including the National Association for the Advancement of Colored People and the United States Department of Education, exerted pressure on the Committee. See id. They feared that this case could provide a majority of members of the Supreme Court with the opportunity to render a decision that would have disastrous consequences for affirmative action nationwide. See id.

167. See Wessmann, 160 F.3d at 791-92.
standardized examination. However, the School Committee sought to maintain a 35% enrollment of black and Hispanic students.

In the 1970s, Boston was subject to a federal desegregation decree. While there was no specific evidence of discrimination at BLS, it was included in the desegregation plan. BLS was required to ensure that at least 35% of its enrollment would be black and Hispanic. In 1987, the federal court released supervision over the student assignment policies for Boston public schools. Nevertheless, the School Committee continued to maintain the student assignment policy that existed under the desegregation plan for its three examination high schools. In 1995, a disappointed white applicant challenged this policy. The district court granted the white student injunctive relief and ordered that the applicant be admitted to BLS. "The School Committee then discontinued the 35% set-aside."

The school officials "research[ed] alternative admissions policies in hopes of finding one that might prevent" a precipitous drop of black and Hispanic students. These efforts can only adequately be understood with the realization that over 70% of Boston's public school students are African American or Hispanic. The superintendent of Boston public schools "commissioned ... a consulting firm[] to review an array of admissions options ranging from lotteries to strict merit-selection plans and to report on how each option might affect the racial and ethnic composition of the examination schools' entering classes." After the consulting firm made its preliminary findings, a task force was appointed to study the matter. "The task force held meetings, hosted public hearings, and ultimately recommended the adoption of ... 'Option N50.'" The School Committee accepted Option N50, because

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168. See id. at 792.
169. See id.
170. See id.
171. See id.
172. See id.
173. See id.
174. See id.
175. See id.
176. See id.
177. Id. at 792-93.
178. Id. at 793.
179. See id. at 798 n.4. "Over the past decade, the relevant proportions have been more or less as follows: 48% black, 25% Hispanic, 8% Asian, and 17% white." Id.
180. Id. at 793.
181. See id.
182. Id.
this plan "minimize[d] the diminution of black and Hispanic students." The plan was to go into effect for the 1997-98 school year.

Under the plan, all students took a standardized test. They were then ranked "[b]ased on a mathematical formula that purports to predict academic performance." The applicants' test score was then combined with the applicants' grade point average to derive a composite score.

Students are then numerically ranked based on their composite score. Half of the available seats were determined based on strict application of the rankings from the composite score. "The other half are allocated on the basis of 'flexible racial/ethnic guidelines.'" This was done by "determin[ing] the relative proportions of five different racial/ethnic [groups]—white, black, Hispanic, Asian, and Native American—in the remaining pool of qualified applicants (RQAP)," which is the top 50% of the applicant pool less the ones already admitted. "[T]he racial/ethnic distribution of the second group of successful applicants must mirror" their corresponding percentages in the RQAP. Once each group's percentage was determined, then the top students in rank order of a particular group were admitted accordingly. Therefore, "a member of a designated racial/ethnic group may be passed over in favor of a lower-ranking applicant from another group."

The selection of the class for the 1997 school year can be used to demonstrate how the plan operated. In 1997, there were ninety available seats in BLS. The first forty-five were awarded based on the composite score. In order to get forty-five, forty-seven students were actually admitted. The percentage of the different racial/ethnic groups in "the RQAP was 27.83% black, 40.41% white, 19.21% Asian, 11.64% Hispanic, and 0.31% Native American." Accordingly, of the remaining forty-five students admitted, there were "13 blacks, 18 whites, 9 Asians, 185. See id.
186. See id.
187. See id.
188. See id.
189. See id.
190. Id. (quoting the Policy).
191. Id.
192. Id.
193. See id.
194. Id.
195. See id.
196. See id.
197. See id.
198. Id.
and 5 Hispanics” admitted. Sarah Wessmann was ranked ninety-first. The application of Option N50 allowed blacks and Hispanics who ranked between ninety-five and 150 to be admitted ahead of her.

Acting on Sarah’s behalf, her father sued the School Committee challenging the constitutionality of the policy. The district court entered judgment for the school officials, and the First Circuit reversed. While agreeing that the admissions “[p]olicy does not constitute a quota,” the First Circuit noted that “[a]t a certain point in [the] application process . . . the [p]olicy relies on race and ethnicity, and nothing else, to select a subset of entrants.” Citing the Supreme Court’s opinion in Adarand Constructors, Inc. v. Pena, the First Circuit applied strict scrutiny to the policy. Thus, “the [p]olicy must be . . . justified by a compelling governmental interest and [be] narrowly tailored” in order to advance that compelling state interest.

In addressing the issue of a compelling state interest, the First Circuit mentioned two such interests. First, it noted that the Supreme Court has held that state action is acceptable upon a showing that it is needed to undo the continuing effects of an institution’s past discrimination. Second, the First Circuit observed that beyond the need to remedy the vestiges of past discrimination, courts occasionally mention “diversity” as a compelling state interest. Both the D.C. Circuit, in Lutheran Church-Missouri Synod v. FCC, and the Fifth

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199. Id.
200. See id.
201. See id.
202. See id. at 794.
203. See id.
204. See id. at 809.
205. Id. at 794.
207. See Wessmann, 160 F.3d at 794.
208. Id. Before actually applying strict scrutiny to the admissions policy, the First Circuit addressed the argument advanced by the School Committee’s reliance on the language from Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971). See Wessmann, 160 F.3d at 796-97. The School Committee argued that under the Supreme Court’s opinion in Swann, they “h[a]d ‘broad power to formulate and implement educational policy’” that allowed them to “prescrib[e] a specific percentage of minority students to attend each school ‘in order to prepare [them] to live in a pluralistic society.’” Id. at 796 (quoting Swann, 402 U.S. at 16). The First Circuit rejected this argument by stating that the central holding of Swann was that in order for federal courts to issue remedial plans, there must be a finding of a constitutional violation. See id. at 797. The language in Swann pointing to the broad power of school authorities to take account of race in order to produce integrated schools was merely non-binding dicta. See id.
209. See id. at 795.
210. See id.
211. 141 F.3d 344 (D.C. Cir. 1998).
Circuit, in *Hopwood v. Texas*, have concluded that only remediating vestiges of past discrimination can justify race-based initiatives. Nevertheless, the First Circuit concluded that absent a clear signal from the Supreme Court, it was not prepared to conclude that diversity could not be a compelling state interest. The First Circuit "assum[ed] arguendo . . . that . . . 'diversity' might be sufficiently compelling" and that Justice Powell's opinion in *Bakke* remains good law.

The School Committee asserted different aspects of diversity to justify its admissions policy. First, the School Committee argued that a diverse student body helps to prepare students for living in a pluralistic society. Drawing testimony from school administrators, experts, and alumni, the School Committee argued "that, because [American] society is racially and ethnically heterogeneous, future leaders must learn to converse with and persuade those who do not share their outlook or experience." This is even more imperative in light of technological advances that now require more and more communication and cooperation with those from "heretofore estranged nations and cultures." Given these developments, "diversity is essential to the modern learning experience." Second, the School Committee also asserted that diversity improves the academic environment by creating an atmosphere for the robust exchange of ideas. Unless there are adequate numbers of members of a given racial or ethnic group, they will find it difficult, if not impossible, to express themselves. As a result, the robust exchange of ideas, which is the goal of diversity, will not occur.

The First Circuit rejected the School Committee's argument that a threshold level of black and Hispanic students was necessary in order to produce a robust exchange of ideas. The First Circuit noted that the School Committee had not provided a strong showing of necessity for the requirement of a minimum number of minorities in order to create such an atmosphere. But even more importantly, the First Circuit noted

212. 78 F.3d 932 (5th Cir.), vacated by 95 F.3d 53 (5th Cir. 1996).
213. *See Lutheran Church-Missouri Synod*, 141 F.3d at 354; *Hopwood*, 78 F.3d at 948.
214. *See Wessmann*, 160 F.3d at 796.
215. *Id.*
216. *See id.* at 797.
217. *See id.* at 796.
218. *Id.* at 797.
219. *Id.*
220. *Id.*
221. *See id.*
222. *See id.* at 799.
223. *See id.*
that the diversity, which Justice Powell alluded to, was one that "encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." Powell's concept of diversity, therefore, focused on individuals and not on racial and ethnic groups. To the extent the policy promotes racial and ethnic diversity over individual diversity, it is at variance with Justice Powell's opinion in Bakke. When this point was raised at oral argument, counsel for the School Committee responded that "BLS historically has been diverse with respect to everything but race and ethnicity." The School Committee pointed to the work of its consultant who stated "that all [admissions] options [under consideration] would result in substantial gender, neighborhood, and socioeconomic diversity, but that, unless race and ethnicity were explicitly factored into the admissions calculus, attainment of racial and ethnic diversity might be jeopardized." The First Circuit rejected this argument. It reasoned that "strict merit-selection" would produce a combined percentage of black and Hispanic students that would be between 15% and 20%.

Even on the assumption that the need for racial and ethnic diversity alone might sometimes constitute a compelling interest sufficient to warrant some type of corrective governmental action, it is perfectly clear that the need would have to be acute—much more acute than the relatively modest deviations that attend the instant case.

The First Circuit concluded that what the School Committee sought was not diversity, but racial balancing.

The Policy is, at bottom, a mechanism for racial balancing—and placing our imprimatur on racial balancing risks setting a precedent that is both dangerous to our democratic ideals and almost always constitutionally forbidden. It cannot be said that racial balancing is either a legitimate or necessary means of advancing the lofty principles recited in the Policy.

224. Id. at 798 (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 315 (1978)).
225. Id.
226. Id.
227. See id.
228. See id. "Over the past decade, the relevant proportions have been more or less as follows: 48% black, 25% Hispanic, 8% Asian, and 17% white." Id. at 798 n.4.
229. Id. at 798.
230. See id.
231. Id. at 799.
After rejecting the arguments for diversity, the First Circuit then went on to address the arguments advanced by the School Committee for the other asserted compelling state interest remedying vestiges of past discrimination. The First Circuit noted that for this to be a compelling state interest, "government actors must be able to muster a 'strong basis in evidence' showing that a current social ill in fact has been caused by such" past discrimination.

The School Committee argued that a provision in a decree issued in its desegregation litigation required it "to remedy any racial imbalance occurring in the school system." Judge Garrity issued the provision in question in a 1994 decree. The provision "enjoin[ed] the School Committee 'from discriminating on the basis of race in the operation of the public schools of the City of Boston and from creating, promoting or maintaining racial segregation in any school or other facility in the Boston public school system.'" The First Circuit rejected this argument. It noted that over ten years ago there had been a finding that Boston public schools had obtained unitariness with regard to student assignments.

Once there [was such] a finding of unitariness and the "affirmative duty to desegregate ha[d] been accomplished," school authorities [were] not expected to make "year-by-year adjustments of the racial composition of student bodies" absent a "showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools."

Thus, the provision contained in the decree did not require the school officials to take affirmative action. It was "a negative injunction, forbidding the [School Committee] from engaging in the acts that supported the original cause of action" to prevent resegregation. As long as school officials do not engage in discrimination against minorities, they would not violate this negative injunction.

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232. See id. at 800.
233. Id. (quoting City of Richmond v. J. A. Croson Co., 488 U.S. 469, 500 (1989)).
234. Id.
235. See id.
236. Id. at 801 (quoting “Permanent Injunction” provision of Judge Garrity’s decree).
237. See id.
238. See id.
239. Id. (quoting Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 32 (1971)).
240. See id.
241. Id.
242. See id.
The School Committee also argued that the "achievement gap between black and Hispanic students, on the one hand, and white and Asian students, on the other," are rooted in "the discriminatory regime of the 1970s and before." The School Committee pointed to the statistical evidence demonstrating "a persistent achievement gap" in terms of relative performance on standardized tests "at the primary school level between white and Asian students, on the one hand, and black and Hispanic students, on the other."

The First Circuit accepted arguendo, that a documented achievement gap may be a vestige of past discrimination. It asserted, however, that there must be satisfactory evidence of a causal connection between the achievement gap and discriminatory state conduct. The First Circuit noted that "achievement gap statistics, by themselves, do not ... eliminate the possibility that they are caused by ... 'societal discrimination.'" "The ... fact that an institution once was found to have practiced discrimination is insufficient, in and of itself, to satisfy a state actor's burden of producing the reliable evidence" linking the achievement gap to discriminatory state conduct.

In order to satisfy this causal connection, the School Committee argued that the chief reason for the achievement gap is "low teacher expectations" for black and Hispanic students. But the First Circuit rejected the testimony provided by the School Committee for this causal connection as inadequate. The one expert who testified about the link between low teacher expectation and low student achievement had not conducted a systematic study of Boston school teachers. Rather, he drew an analogy from his work in the Kansas City public schools to the Boston public schools. The First Circuit concluded that the other evidence introduced by the School Committee to support the connection between low teacher expectation and the achievement gap on standardized tests was anecdotal and therefore, not persuasive in light of the absence of a systematic pattern of discrimination.

243. Id.
244. Id. at 802-03.
245. See id. at 803.
246. See id. at 804.
247. Id. at 803 (quoting Shaw v. Hunt, 517 U.S. 899, 909-10 (1996)).
248. Id. at 802.
249. Id. at 804 (quoting the testimony of Doctor William Trent).
250. See id. at 805.
251. See id.
252. See id. at 804.
253. See id. at 805.
Even though the First Circuit concluded that the School Committee failed to establish a remedial purpose as a compelling state interest, it went on to address the narrowly tailored aspect of this interest as well.\textsuperscript{254} Even if there was a system-wide achievement gap due to low teacher expectation, the First Circuit noted that Option N50 does not address those low teacher expectations.\textsuperscript{255} The court noted that it could be argued that Option N50 is intended to be "partial compensation for injustices done at the [elementary] school level."\textsuperscript{256} Given the minority students who benefit from Option N50, however, this argument did not logically follow.\textsuperscript{257} Option N50 was not limited to black and Hispanic students who attended Boston's public elementary schools.\textsuperscript{258} "[M]any of the black and Hispanic students [who would be] admitted under [Option N50] come from private or parochial [elementary] schools."\textsuperscript{259} Since they were not harmed by lower teacher expectations in Boston's public elementary schools, Option N50 was not narrowly tailored "toward curing the harm done to the class of actual victims."\textsuperscript{260} The court also noted that the inclusion of Asians who were admitted over Sarah Wessmann was problematic.\textsuperscript{261} Since there was no evidence of low teacher expectations regarding Asian students, their inclusion in Option N50 could not be justified.\textsuperscript{262} Finally, the First Circuit noted that the policy could lead to the exclusion of Hispanic students in favor of whites or Asians in certain anomalous situations.\textsuperscript{263} This in fact happened in 1997 when two Hispanics were excluded in favor of a white student.\textsuperscript{264}

B. Fourth Circuit Cases of Tuttle v. Arlington County School Board and Eisenberg v. Montgomery County Public Schools

There are two cases from the Fourth Circuit that have recently rejected the use of racial classifications in determining admissions to public schools: Tuttle v. Arlington County School Board\textsuperscript{265} and Eisenberg

\textsuperscript{254} See id. at 807.
\textsuperscript{255} See id.
\textsuperscript{256} Id. at 808.
\textsuperscript{257} See id.
\textsuperscript{258} See id.
\textsuperscript{259} Id.
\textsuperscript{260} Id.
\textsuperscript{261} See id.
\textsuperscript{262} See id.
\textsuperscript{263} See id.
\textsuperscript{264} See id.
\textsuperscript{265} 195 F.3d 698 (4th Cir. 1999), cert. denied sub nom. 120 S. Ct. 1552 (U.S. 2000).
The Supreme Court recently denied certiorari in both of these cases.\textsuperscript{267}

In \textit{Tuttle}, the Fourth Circuit addressed a challenge to the use of racial classifications in the kindergarten admissions policy ("Policy") of Arlington Traditional School ("ATS").\textsuperscript{273} ATS accepted applications for kindergarten throughout the school district.\textsuperscript{279} It "sought to obtain a student body 'in proportions that approximate the distribution of students from [three different] groups in the district's overall student population.'"\textsuperscript{270} Thus the Policy focused on three different characteristics of applicants: "(1) whether the applicant was from a low-income or special family background, (2) whether English was the applicant's first or second language, and (3) the racial or ethnic group to which the applicant belonged."\textsuperscript{271} The stated goals of the Policy were as follows:

(1) "to prepare and educate students to live in a diverse, global society" by "reflect[ing] the diversity of the community" and (2) to help the School Board "serve the diverse groups of students in the district, including those from backgrounds that suggest they may come to school with educational needs that are different from or greater than others."\textsuperscript{272}

In 1998, the year the Policy went into effect, there were 185 applications for sixty-nine available positions.\textsuperscript{273} ATS first offered admissions to twenty-three "applicants who were the siblings of older students already attending ATS."\textsuperscript{274} For the remaining forty-six spaces, ATS conducted a "weighted random lottery."\textsuperscript{275} The probabilities that a given applicant would be selected in the lottery were weighted so that those from underrepresented groups in the applicant pool had an increased chance of selection.\textsuperscript{276} The plaintiffs neither had siblings attending ATS, nor was their probability of selection enhanced based on

\begin{itemize}
  \item \textsuperscript{266} 197 F.3d 123 (4th Cir. 1999), \textit{cert. denied sub nom.} 120 S. Ct. 1420 (U.S. 2000).
  \item \textsuperscript{267} \textit{See} Arlington County Sch. Bd. v. Tuttle, 120 S. Ct. 1552 (U.S. 2000); Montgomery County Pub. Sch. v. Eisenberg, 120 S. Ct. 1420 (U.S. 2000).
  \item \textsuperscript{268} \textit{See Tuttle}, 195 F.3d at 700. The challenged Policy was created in response to prior litigation that had attacked an earlier admissions policy. \textit{See} Tito v. Arlington County Sch. Bd., No. 97-540-A, 1997 U.S. Dist. LEXIS 7932, at *3 (E.D. Va. May 13, 1997).
  \item \textsuperscript{269} \textit{See Tuttle}, 195 F.3d at 701.
  \item \textsuperscript{270} \textit{Id.} (quoting the February 1998 Policy).
  \item \textsuperscript{271} \textit{Id.}
  \item \textsuperscript{272} \textit{Id.} (quoting the February 1998 Policy) (alteration in original).
  \item \textsuperscript{273} \textit{See id.}
  \item \textsuperscript{274} \textit{Id.} at 702.
  \item \textsuperscript{275} \textit{Id.}
  \item \textsuperscript{276} \textit{See id.}
\end{itemize}
diversity factors because they were not members of any of the underrepresented groups.277

After not being selected in the lottery the applicants, "by and through" their parents, filed a complaint and a motion for preliminary injunction against the School Board to bar ATS's continued use of the weighted admission policy.278 Stating that "as a matter of law, 'diversity was not a compelling governmental interest,'"279 the district court ruled in favor of the applicants.280 The district court ordered the School Board "to institute a 'double-blind random lottery without the use of any preferences' to admit students to ATS."281 The court's order also included a provision that "permanently enjoined [the School Board] from not only using race, color, and national origin, but also family income and first language in admitting students to ATS."282 The School Board appealed asserting, among other arguments, that the Policy did not violate the Equal Protection Clause and that the permanent injunction issued by the district court was overbroad.283

Even though the Policy included three different characteristics of applicants, the Fourth Circuit's opinion focused only on the aspect of race and ethnicity.284 For that aspect of the Policy, the Fourth Circuit noted that "the Policy involves a racial classification."285 Citing Adarand Constructors, Inc. v. Pena,286 the Court concluded that "[a]ll racial classifications are subject to strict scrutiny."287 The school officials did not contend that the Policy it adopted was to remedy past discrimination.288 Thus, it relied on diversity as the compelling state interest to justify the Policy.289 Like the First Circuit in Wessmann, the Fourth Circuit accepted that diversity may have been a compelling state interest,290 but found that the Policy was not narrowly tailored to advance that interest.291

277. See id.
278. See id.
279. Id. at 703 (quoting the district court's order).
280. See id. at 702-03.
281. Id. at 703 (quoting the district court's order).
282. Id.
283. See id.
284. See id. at 705.
285. Id. at 704.
287. Tuttle, 195 F.3d at 704.
288. See id. at 700.
289. See id. at 704.
290. See id.
291. See id. at 707.
The Fourth Circuit drawing on one of its earlier cases in the employment context stated:

When reviewing whether a state racial classification is narrowly tailored, we consider factors such as: "(1) the efficacy of alternative race-neutral policies, (2) the planned duration of the policy, (3) the relationship between the numerical goal and the percentage of minority group members in the relevant population or work force, (4) the flexibility of the policy, including the provision of waivers if the goal cannot be met, and (5) the burden of the policy on innocent third parties."292

In applying these factors, the Fourth Circuit noted a number of problems with the use of racial classifications by the Policy.271 First, there are "alternative race-neutral" methods that could be used to promote diversity.274 Second, the Court criticized the Policy for the lack of a terminating point.279 The third criticism raised by the Fourth Circuit is the most fundamental one. The Court noted that "the Policy seeks to achieve racial and ethnic diversity in its classes 'in proportions that approximate the distribution of students from [racial] groups in the district's overall student population.' The means employed by the Policy

292. _Id._ at 706 (quoting Hayes v. N. State Law Enforcement Officers Ass'n, 10 F.3d 207, 216 (4th Cir. 1993)). One can quickly see that the factors that the Fourth Circuit cites are not all applicable in the context of public education, especially where the compelling state interest is diversity as opposed to remedying the effects of identified discrimination. The Fourth Circuit did acknowledge "that these factors are particularly difficult to assess where, as here, the policies are not tied to identified past discrimination." _Hayes_, 10 F.3d at 216 n.8.

293. _See Tuttle_, 195 F.3d at 706-07.

294. _See id._ at 706. The court noted that the Study Committee had suggested three such alternatives:

1. Assign a small geographic area to identified alternative schools as the home school for that area, and fill the remaining spaces in the entering class by means of an unweighted random lottery from a self-selected applicant pool. The geographic area would presumably be selected so that its residents would positively affect the diversity of the school.

2. An additional option was to have all names of an entering class in the county automatically put into the lottery. All students are then selected at random and offered admission until the class is full. Another method would be to offer randomly selected families the opportunity to have their child's name placed in a second lottery from which those students selected would be offered admission. This method would require all families, even those not interested in alternative schools, to make an active choice.

3. Each neighborhood school would be allotted a certain number of slots at each alternative school. The number of slots per school would be determined either by the percentage of that school's population relative to ATS student population or by the extent of overcrowding at the school .... _Id._ at 706 n.11 (alteration in original).

295. _See id._ at 706.
to achieve such numerical racial and ethnic diversity is racial balancing.\textsuperscript{296}

The School Board attempted to counter by arguing that even though members of underrepresented groups had a greater chance of being selected, every applicant, regardless of race, is able to compete for every available spot.\textsuperscript{297} Thus, the Policy was not "straight racial balancing."\textsuperscript{298} The Fourth Circuit rejected this argument, concluding that these were "distinctions without differences."\textsuperscript{299} The Fourth Circuit went on to state that "[t]he Policy's two goals, to provide students with the educational benefits of diversity and to help the School Board better serve the diverse groups of students in its district, do not require racial balancing."\textsuperscript{300} Fourth, the court argued that since the Policy did not consider each applicant on an individual basis to determine whether his or her inclusion promoted diversity, the Policy was not flexible.\textsuperscript{301} Finally, the court stated that "[t]he innocent third parties in this case are young kindergarten-age children."\textsuperscript{302} The court noted the irony of a policy that is intended "to teach young children to view people as individuals rather than members of certain racial and ethnic groups classifies those same children as members of . . . racial and ethnic groups."\textsuperscript{303}

Two weeks after issuing its opinion in \textit{Tuttle}, the Fourth Circuit followed it with \textit{Eisenberg v. Montgomery County Public Schools}.\textsuperscript{304} In the \textit{Eisenberg} opinion, the Fourth Circuit noted that this case was practically indistinguishable from \textit{Tuttle}.\textsuperscript{305} Jacob Eisenberg applied as a first grader for a transfer to the Rosemary Hills Elementary School, a math and science magnet school, for the 1998-99 school year.\textsuperscript{306} Montgomery County denied his request due to the negative impact it

\begin{itemize}
\item \textsuperscript{296} Id. at 707 (quoting the February 1998 policy) (second alteration in original).
\item \textsuperscript{297} See id.
\item \textsuperscript{298} Id.
\item \textsuperscript{299} Id.
\item \textsuperscript{300} Id.
\item \textsuperscript{301} See id.
\item \textsuperscript{302} Id.
\item \textsuperscript{303} Id. The Fourth Circuit concluded by affirming the district court's holding that the Policy was unconstitutional, but vacated the permanent injunction and remanded for an evidentiary hearing. See id. at 708. "[T]he Applicants were entitled to an injunction," but not to a permanent one "ordering the School Board to adopt a particular admissions policy." Id. The Fourth Circuit decided that "[t]he district court should have taken the less intrusive step of continuing to monitor and review alternative programs proposed by the School Board." Id.
\item \textsuperscript{304} 197 F.3d 123 (4th Cir. 1999), cert. denied sub nom. 120 S. Ct. 1420 (U.S. 2000).
\item \textsuperscript{305} See id. at 130.
\item \textsuperscript{306} See id. at 125.
\end{itemize}
would have on diversity.\textsuperscript{307} The issue presented in \textit{Eisenberg} was "whether . . . Montgomery County . . . [could] deny a student's request to transfer to a magnet school because of his race."\textsuperscript{308}

Montgomery County is a large school district with over 125,000 students and over 180 schools.\textsuperscript{309} The County was never subject to a school desegregation order, but adopted a number of steps voluntarily to "dismantle[] the former segregated school system."\textsuperscript{310} One part of their desegregation efforts was "the implementation of magnet school programs."\textsuperscript{311} These programs sought to "attract and retain [a] diverse student enrollment on a voluntary basis to schools outside the area in which the student lives."\textsuperscript{312} School stability and utilization were the first factors considered in determining whether to grant a request to attend a magnet school.\textsuperscript{313} According to the transfer policy, "[t]ransfers that negatively affect diversity are usually denied."\textsuperscript{314} Despite the negative impact on diversity, students whose transfer would alleviate a personal hardship were sometimes approved.\textsuperscript{315}

In the case of Jacob Eisenberg, he was assigned to Glen Haven Elementary School, where the enrollment of white students was below the 53.4\% of whites for the entire school district.\textsuperscript{316} The percentage of white students at Glen Haven had declined in the three years from 38.9\% to 24.1\%.\textsuperscript{317} The school that Jacob wanted to transfer into was Rosemary Hills Elementary School,\textsuperscript{318} but Jacob did not have a personal hardship reason to justify his request for transfer.\textsuperscript{319} Montgomery County denied Jacob's transfer because it would have negatively impacted diversity.\textsuperscript{320}

After their appeals to the Superintendent and the Board of Education were denied, Jacob's parents filed suit claiming an equal

\begin{itemize}
\item \textsuperscript{307} \textit{See id.}
\item \textsuperscript{308} \textit{Id. at 124.}
\item \textsuperscript{309} \textit{See id. at 125.}
\item \textsuperscript{310} \textit{Id.}
\item \textsuperscript{311} \textit{Id.}
\item \textsuperscript{312} \textit{Id.}
\item \textsuperscript{313} \textit{See id. at 125-26.}
\item \textsuperscript{314} \textit{Id. at 126 (quoting the Transfer Booklet) (alteration in original). Students are classified by their racial/ethnic group as African American, Asian, Hispanic, or white. See id.}
\item \textsuperscript{315} \textit{See id. at 127 n.10.}
\item \textsuperscript{316} \textit{See id. at 127.}
\item \textsuperscript{317} \textit{See id.}
\item \textsuperscript{318} \textit{See id.}
\item \textsuperscript{319} \textit{See id.} "Five white students, out of 19 who applied, were permitted to transfer out of Glen Haven for the 1998-99 school year on a personal hardship basis. Four of these transfers were permitted because the transferring student had a sibling already attending the requested school." \textit{Id.} at 127 n.10.
\item \textsuperscript{320} \textit{See id. at 127.}
\end{itemize}
protection violation. Applying strict scrutiny, "[t]he district court denied the Eisenbergs' motion for a preliminary injunction," reasoning that Montgomery County's asserted interests in avoiding the creation of segregative enrollment by racial isolation and in promoting a diverse student population "were each sufficiently compelling ... to justify the transfer policy's race based classifications under ... 'strict scrutiny.'" The Eisenbergs appealed.

The Fourth Circuit concluded "that, despite the different nomenclature," the two asserted compelling interests were actually the same. "[T]he avoidance of racial isolation [w]as 'a negatively-phrased expression for attaining the opposite of racial isolation which is racial diversity.'" As it did in Tuttle, the Fourth Circuit assumed that diversity was a compelling state interest and then analyzed the transfer policy to see if it was narrowly tailored. The court concluded that the "use of racial classifications in its transfer decisions [wa]s [not] narrowly tailored to the interest of obtaining diversity." The plan was one of mere racial balancing in a pure form and "[s]uch nonremedial racial balancing is unconstitutional."

C. Ninth Circuit Case of Hunter ex rel. Brandt v. Regents of University of California

Over the dissent of Judge Beezer, the Ninth Circuit in Hunter ex rel. Brandt v. Regents of University of California upheld the use of racial classifications was remedial. See Hunter ex rel. Brandt v. Regents of Univ. of Cal., 190 F.3d 1061, 1071 (9th Cir. 1999) (Beezer, J., dissenting). Beezer also found that the consideration of race was not narrowly tailored. See id. at 1076 (Beezer, J., dissenting). Beezer argued that the University based its use of race and ethnicity on the belief "that 'children with different ethnic backgrounds often have different learning styles.'" Id. at 1077 (Beezer, J., dissenting) (quoting testimony of Professor Deborah Stipek). The University had not, however, established that these particular children, from their particular racial or ethnic backgrounds, had different learning styles. See id. at 1078 (Beezer, J., dissenting). In addition, the University had failed to consider race neutral-ways of accomplishing its objective, specifically, "the establishment of one or more additional laboratory elementary schools in areas of California where the demographic diversity would naturally produce
racial classifications in determining the student make up at Corinne A. Seeds University Elementary School ("UES"). UES is "an elementary school operated as a research laboratory by UCLA's Graduate School of Education and Information Studies." Its research and training mission is to help the State of California meet the needs of a dramatically changing public school population. To this end, UES identifies issues relevant to the education and social development of children in multicultural, urban communities, conducts research on these issues, and develops innovations in teaching based on this research. UES shares its research results with public school teachers throughout the State of California through seminars, workshops, teacher training programs, and published articles.

Under the direction of the Dean of the Graduate School of Education and Information Studies and the Director of UES, UES's Admissions Committee decided "what characteristics are needed in [its] 460-student [body] to fulfill its research and training [agenda]." Gender, race/ethnicity, and family income are specifically considered in the admissions process. Other factors that might affect the suitability of a given student as a research subject, such as "dominant language, permanence of residence, and parents' willingness to comply with UES's mandatory involvement requirement[,]" were also considered.

Keeley Hunter was denied admission to UES, and her parents brought suit challenging the constitutionality of the admissions process. The district court upheld the admissions process and the Ninth Circuit affirmed. In applying strict scrutiny to UES's use of race/ethnicity as a factor in the admissions process, the Ninth Circuit concluded that "California's interest in the operation of a research-oriented elementary school dedicated to improving the quality of applicant pools with any desired racial/ethnic mix." (Beezer, J., dissenting). Finally, he criticized the inclusion of a category for mixed-race children. See id. at 1080 (Beezer, J., dissenting). Noting that if what the University was trying to define were the learning styles of different racial and ethnic groups, the inclusion of a mixed race group of students was "incomprehensible." See id. (Beezer, J., dissenting).

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330. 190 F.3d 1061 (9th Cir. 1999).
331. See id. at 1062, 1067.
332. Id. at 1062.
333. Id.
334. Id.
335. See id.
336. Id.
337. See id. at 1063.
338. See id. at 1067.
339. See id.
education in urban public schools is a compelling state interest. The court noted "[t]he challenges posed by California's increasingly diverse population. Cultural and economic differences in the classroom pose special problems for public school teachers." Among these challenges are "limited language proficiency, different learning styles, involvement of parents from diverse cultures with different expectations and values, and racial and ethnic conflict among families and children." The Ninth Circuit, however, noted that its decision was based on the fact that UES is "a laboratory school with a research mission. This research mission "make[s] UES an exceptional school and a valuable resource to California's public education system." In determining that the use of racial classifications in the admissions process was narrowly tailored, the Ninth Circuit relied heavily upon the judgement of the academic researchers. The Ninth Circuit noted that the Supreme Court "ha[s] stressed the importance of avoiding second-guessing of legitimate academic judgments."

D. Second Circuit Case of Brewer v. West Irondequoit Central School District

The only recent decision by a court of appeals upholding a broad power of public elementary and secondary schools to use racial classifications for the purpose of integrating schools is the Second Circuit opinion in Brewer v. West Irondequoit Central School District. 340. 341. 342. 343. 344. 345. 346. 347. 348.

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340. Id. at 1063.
341. Id. at 1064.
342. Id.
343. Id. (quoting Judge Kenyon's district court opinion).
344. Id. at 1065. "UES's research is funded in part through federal and private grants and its students are protected by all federal, state, and university guidelines, rules, and policies pertaining to research involving human subjects." Id. The research produced at UES is also "shared through a variety of publications, the television and film industries, computer technologies, and other media," as well as through "seminars, workshops, observation opportunities, and conferences" offered to teachers, administrators, researchers, and educational policy makers." Id. (quoting UES's research mission).
345. Id.
346. See id. 1066.
347. Id. at 1067 (quoting Univ. of Pa. v. EEOC, 493 U.S. 182, 199 (1990)). "This Court itself has cautioned that judges . . . asked to review the substance of a genuinely academic decision . . . should show great respect for the faculty's professional judgment." Id. (quoting Univ. of Pa., 493 U.S. at 199) (alteration in original) (internal quotation marks omitted).
348. 212 F.3d 738 (2d Cir. 2000). One other recent district court case deserves to be mentioned. In Hampton v. Jefferson County Board of Education, 102 F. Supp. 2d 358 (W.D. Ky. 2000), parents of students brought an action seeking to dissolve the school desegregation decree covering Jefferson County, Kentucky. See id. at 359-60. The court held that the school district's
The opinion for the divided Second Circuit was written by Justice Straub. While Justice Parker signed the opinion, he also wrote a separate concurring opinion. Judge Miner dissented. Parents of Jessica Haak, a white fourth grader residing in the Rochester City School District ("RCSD"), challenged the operation of the Urban-Suburban Interdistrict Transfer Program ("Program"). The Program currently had several stated objectives, including enhancing and enriching the participating schools and their communities by "Reducing Minority Group Isolation[,] Encouraging Intercultural Learning[,] Promoting Academic Excellence[,] and] Fostering good faith compliance with a desegregation decree for twenty-five years warranted dissolution. See id. at 377. After the court determined that the school district had eradicated the vestiges of its prior de jure conduct, the court then addressed the continued use of racial classifications by the Jefferson County Public Schools to determine admissions to its various schools. See id. at 360. The district court concluded that the "voluntary maintenance of the desegregated school system should be considered a compelling state interest." Id. at 379. The court noted that "it [was] incongruous [for] a federal court . . . at one moment [to] require a school board to use race to prevent resegregation of the system, and at the very next moment prohibit that same policy." Id. The court determined that "[a]s among basically equal schools, the use of race would not be a 'preference.'" Id. at 380. Thus, the School Board "would not be prohibited from using race in its general student assignments to maintain its desegregated school system, even to the extent of some racial guidelines." Id. But with respect to the school district's magnet programs, the situation was different. See id. They offered educational "programs that are not available at other high schools." Id. Thus, this is not a situation where the education was fungible. See id. at 380-81. As a consequence, the court required the School Board to revise its admissions policies at its magnet schools. See id. at 381.

349. See Brewer, 212 F.3d at 740.
350. See id. at 740, 753 (Parker, J., concurring).
351. See id. at 740, 754 (Miner, J., dissenting). Judge Miner agreed that the court was bound by its decisions in the Andrew Jackson cases. See id. at 756 (Miner, J., dissenting). Thus, he accepted that promoting "more lasting integration in the face of de facto segregation, . . . promoting racial diversity, or . . . reducing racial isolation" were all similarly compelling state interests. Id. (Miner, J., dissenting). Miner, however, did not believe that the narrowly tailored prong was satisfied. See id. at 757 (Miner, J., dissenting). He noted that:

The Supreme Court has enumerated the factors to be considered in assessing the appropriateness of race-conscious remedies: "the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant [student population]; and the impact of the relief on the rights of third parties."

Id. at 756-57 (Miner, J., dissenting) (quoting United States v. Paradise, 480 U.S. 149, 171 (1987)) (plurality opinion) (alteration in original). In considering those factors, Judge Miner noted that "[t]here was absolutely no effort of any kind to assess any of these factors in establishing the Program." Id. at 757 (Miner, J., dissenting). In applying the Paradise factors, he noted that there was "no consideration . . . given to the length of time the Program has[been in effect]. . . . without any apparent success in reducing racial isolation." Id. (Miner, J., dissenting). "There [was] no showing that any alternate remedies, such as magnet schools, vouchers, open enrollment, or redrawing boundaries," were examined. Id. (Miner, J., dissenting). "The relationship of [the] numerical goals to the total student population [were] not . . . examined." Id. (Miner, J., dissenting). The impact on the rights of third parties was not considered. See id. (Miner, J., dissenting).

352. See id. at 740-41.
Although the plaintiffs emphasized the differing stated goals, the district court found "that it is clear that the main purpose of the Program is to reduce what is described as "racial isolation" within the population of the participating school districts."354 "In other words, the [P]rogram is designed to reduce the percentage of minority students in predominately minority city schools, and to increase the percentage of minority students in predominately white suburban schools."355

"The Program [is] one of the oldest voluntary desegregation efforts in the nation, . . . the only one of its kind in New York, and one of only two or three such voluntary programs in the United States."356 It had its genesis in a 1965 agreement between the RCSD and the West Irondequoit School District.357 The agreement provided for voluntary student transfers between their respective school districts in order "to reduce, prevent and eliminate minority group isolation in the schools of Rochester and Monroe County through voluntary desegregation."358 "Over the years, several other suburban districts . . . voluntarily joined the Program; currently seven school districts—Rochester, West Irondequoit, Brighton, Brockport, Penfield, Pittsford and Wheatland-Chili—participate in the Program."359

For a number of years, funding for the Program came from the federal government pursuant to the Emergency School Aid Act of 1972.360 Congress enacted the Act "to further 'the process of eliminating or preventing minority group isolation.'"361 But this statute was repealed in 1982.362 After that, "New York State began providing funding for the Program."363 The New York "statute provides that 'a school district which accepts pupils from another school district in accordance with a voluntary interdistrict urban-suburban transfer program designed to reduce racial isolation . . . shall be eligible for aid.'"364 "The State provides aid to the receiving school district and provides reimbursement

353. Id. at 742 (quoting the Program’s Mission Statement).
355. Id. (quoting Brewer, 32 F. Supp. 2d at 619).
356. Id. at 741-42.
357. See id. at 742.
358. Id. (quoting the Program’s Mission Statement).
359. Brewer, 32 F. Supp. 2d at 621, vacated by 212 F.3d 738 (2d Cir. 2000).
360. See id.
361. Id. (quoting a repealed federal statute).
362. See id.
363. Id.
364. Id. (quoting the statute that provided funding for the Program).
for some costs associated with the attendance of the transferring student.\textsuperscript{365} The funding for the Program allowed a "student to matriculate as a non-resident student without being required to pay tuition, which would normally be required."\textsuperscript{366} "The Program, in effect, allows a student to transfer to another district without any financial consequence to the student."\textsuperscript{367}

"The participating districts' joint application to the Commissioner of Education for the 1996-97 school year indicates that overall, the suburban districts reported a minority student population of less than ten percent, while the RCSD reported a minority student population of about eighty percent.\textsuperscript{368} As of July 1997, RCSD had 37,153 pupils, of which roughly 29,700 were minorities.\textsuperscript{369} "The Program is very popular and it appears that the number of applicants far exceeds the space available in the six suburban districts."\textsuperscript{370}

"As the Program is ... administered, only minority pupils are allowed to transfer from city schools to suburban schools. White students may be transferred from suburban schools to the city, [if] the transfer 'do[es] not negatively affect the racial balance of the receiving school.'"\textsuperscript{371} RCSD reported that 591 minority pupils had been transferred during the 1996-97 school year to the suburban schools, and twenty-nine white students were accepted into RCSD.\textsuperscript{372}

In 1996, the parents of Jessica L. Haak sought to have her transferred from her resident school district in Rochester to a suburban school.\textsuperscript{373} In 1998, Jessica was accepted for placement at the Iroquois Elementary School for the 1998-99 school year.\textsuperscript{374} However, upon discovering that Jessica was white, the director of the Program denied her transfer.\textsuperscript{375} After Jessica was denied admission, her parents filed suit claiming that Jessica's exclusion from the Program violated the Equal

\begin{itemize}
\item 365. \textit{Id.} at 622.
\item 366. \textit{Id.} at 621.
\item 367. \textit{Id.} at 622.
\item 368. \textit{Id.}
\item 369. \textit{See id.}
\item 370. \textit{Id.}
\item 371. \textit{Id.} (quoting Rochester City School District Directory 1997-98 (Cozman Aff. (Ex. G) at 19)) (third alteration in original). "[M]inority pupil" is defined as ""a pupil who is of Black or Hispanic origin or is a member of another racial minority group that historically has been the subject of discrimination." \textit{Id.} (quoting 8 N.Y.C.R.R. § 175.24(a1)) (emphasis added). But "students of Asian or American Indian origin are also considered to be minority pupils eligible for transfer to suburban schools." \textit{Id.}
\item 372. \textit{See id.}
\item 373. \textit{See id.} at 623.
\item 374. \textit{See id.}
\item 375. \textit{See id.} at 624.
\end{itemize}
Protection Clause.\textsuperscript{376} The district court granted the plaintiff's motion for a preliminary injunction on the ground that the denial of Haak's request to transfer to the participating suburban district under the Program violated the Equal Protection Clause.\textsuperscript{377}

The Second Circuit, relying heavily on both of its earlier opinions in \textit{Andrew Jackson I}\textsuperscript{378} and II,\textsuperscript{379} overturned the district court opinion.\textsuperscript{380} The court noted that the "precise issue [being addressed in this case] was not addressed explicitly in the \textit{Andrew Jackson} cases."\textsuperscript{381} But the Second Circuit went on to say that from the \textit{Andrew Jackson} cases:

\begin{quote}
\hspace{1em}it is clear that in order to conclude that "[i]t is permissible . . . for local officials to attempt voluntarily to correct or combat such . . . [racial] imbalance at a slower pace than would be satisfactory for a school or district under a court order to dismantle a dual system," the panels in the \textit{Andrew Jackson} cases necessarily must have considered whether the school district could constitutionally act at all.\textsuperscript{382}
\end{quote}

In fact the Second Circuit noted that "\textit{Andrew Jackson I} held, in the words of \textit{Andrew Jackson II}, that the Plan's aim 'to promote a more lasting integration is a sufficiently compelling purpose to justify as a matter of law excluding some minority students from schools of their choice under the obviously race-conscious Rate of Change Plan.'"\textsuperscript{383} The court cited \textit{Wygant v. Jackson Board of Education}\textsuperscript{384} and \textit{City of Richmond v. J. A. Croson Co.}\textsuperscript{385} as the only Supreme Court cases decided since the \textit{Andrew Jackson} cases that were relevant to the \textit{Andrew Jackson} holdings, even though neither \textit{Wygant} or \textit{Croson} involved public school desegregation.\textsuperscript{386} However, the court concluded that based on the advanced stage of the proceedings, it was reasonable to assume that "desegregation of a student population in the public school system . . . is more compelling than reduction of racial isolation . . . in the commercial context—teacher's jobs and the construction industry."\textsuperscript{387} The court went on to note that while \textit{Wygant} and \textit{Croson} "may raise

\textsuperscript{376} See id.
\textsuperscript{377} See id. at 635.
\textsuperscript{378} 598 F.2d 705 (2d Cir. 1979).
\textsuperscript{379} 738 F.2d 574 (2d Cir. 1984).
\textsuperscript{380} See Brewer v. W. Irondequoit Cent. Sch. Dist., 212 F.3d 738, 753 (2d Cir. 2000).
\textsuperscript{381} Id. at 750.
\textsuperscript{382} Id. (quoting \textit{Andrew Jackson I}, 598 F.2d at 713) (citation omitted) (alterations in original).
\textsuperscript{383} Id. (quoting \textit{Andrew Jackson II}, 738 F.2d at 577).
\textsuperscript{384} 476 U.S. 267 (1986).
\textsuperscript{385} 488 U.S. 469 (1989).
\textsuperscript{386} See Brewer, 212 F.3d at 751.
\textsuperscript{387} Id.
questions as to the vitality of Andrew Jackson I & II’s holdings, [the court could not] conclude that the law has been sufficiently altered" to overrule those holdings.\textsuperscript{388}

The Second Circuit concluded that it was bound by its prior determination in the Andrew Jackson cases and "that a compelling interest can be found in a program that has as its object the reduction of racial isolation and what appears to be de facto segregation."\textsuperscript{389} When the court turned to the narrow tailoring aspect, it concluded that "[i]f reducing racial isolation is—standing alone—a constitutionally permissible goal, as we have held it is under the Andrew Jackson cases, then there is no more effective means of achieving that goal than to base decisions on race."\textsuperscript{390}

While the majority opinion in Brewer suggested a broad endorsement of the power of school boards to take account of race and ethnicity in order to promote integrated student bodies, Justice Parker's concurring opinion places a major potential obstacle to such endorsement. Parker agreed that the Second Circuit's jurisprudence in the Andrew Jackson cases "permits a school board to employ racial classifications in programs designed to remedy de facto segregation."\textsuperscript{391} But Parker went on to note that the program referred to in Brewer had been in existence for thirty-five years.\textsuperscript{392} In that time, the percentage of minorities in RCSD increased from 25.6% to 80%, and that the current percentage of white students in the suburban schools ranged from 85% to 92%.\textsuperscript{393} While there were 36,000 students in Rochester, only 580 participated in the program during the 1998-99 school year.\textsuperscript{394} Parker stated:

If those statistics are accurate, it is extremely difficult to see how this program has had any meaningful impact upon the existence of schools or school districts with "a predominant number or percentage of students of a particular racial/ethnic group."

Therefore, even though the defendants may have had a sufficiently compelling interest to justify the program at its inception, it is difficult

\textsuperscript{388} Id. The Second Circuit rejected the holding of Wessmann stating: "Wessmann relies, we think wrongly, on Supreme Court precedent which holds merely that absent a finding of a constitutional violation, a school district is under no obligation, enforceable by a federal court, to remedy the imbalance." Id.

\textsuperscript{389} Id. at 752.

\textsuperscript{390} Id.

\textsuperscript{391} Id. at 753 (Parker, J., concurring).

\textsuperscript{392} See id. (Parker, J., concurring).

\textsuperscript{393} See id. at 753-54 (Parker, J., concurring).

\textsuperscript{394} See id. (Parker, J., concurring).
to see how the interest continues, given the program’s limited impact. If a compelling interest no longer exists, it seems to me that the entire program may fail as being unconstitutional, and the plaintiffs would have no remedy. This aspect of the appeal is one which apparently was not explored by the court below because the plaintiffs made no facial challenge to the program as a whole. Given the very limited development of this issue on the record before us, I believe that a remand for further consideration is the appropriate disposition.395

Thus, Parker’s concurring opinion suggests that given the limited impact of the plan, it may not advance the compelling interest of reducing racial isolation.

E. Conclusion

None of the recent court of appeals cases addressing the use of racial classifications to promote integrated student bodies viewed the Supreme Court’s school desegregation jurisprudence as applicable. Only the First Circuit in its opinion in Wessmann v. Gittens396 specifically discussed the apparent recognition of broad powers of state and local school authorities mentioned by the Supreme Court.397 It dismissed this language by concluding that those statements were mere dicta.398

With the possible exception of the Second Circuit opinion in Brewer, these later courts have eviscerated the broad powers of state and local school officials to use racial classifications to foster integrated students bodies. Most of these courts of appeals cases demonstrate that lower federal courts have consistently treated the application of racial classifications by public schools attempting to promote integrated classrooms the same way that they would treat the use of racial classifications by government to a non-public elementary and secondary education context.399 The primary criticism this Article raises about the

395. Id. at 754 (Parker, J., concurring).
396. 160 F.3d 790 (1st Cir. 1998).
397. See id. at 796-97.
398. See id. at 797.
399. See Wessmann v. Boston Sch. Comm., 996 F. Supp. 120, 127-28 (D. Mass. 1998) (upholding the racial classification contained in the admissions policy). The district court specifically noted that it was dealing with government’s compelling interest in achieving diversity within the unique context of public intermediate and secondary school education. This litigation is not about the place of diversity in the work place, the market place, or in graduate education. Here, we are focusing on the obligation of a school district to determine what policies and practices will best prepare its children to succeed in a competitive and diverse society.

Id.
courts of appeals decisions is their failure to interpret the use of racial classifications in light of the special environment of public elementary and secondary schools.\textsuperscript{403}

IV. SUPREME COURT'S PUBLIC ELEMENTARY AND SECONDARY EDUCATION JURISPRUDENCE

The Supreme Court's opinion in \textit{Brown v. Board of Education}\textsuperscript{401} struck down state statutes that segregated students in public schools.\textsuperscript{402} This opinion was just the first of what became a developing jurisprudence regarding the application of the Equal Protection Clause to public elementary and secondary schools. The Court's developing jurisprudence in the field of public school segregation is well chronicled. Only a brief survey is necessary here.

While the Court addressed issues springing from their opinion in \textit{Brown} in a number of cases,\textsuperscript{403} the Court's next major decision in its school desegregation jurisprudence was the 1968 opinion in \textit{Green v. County School Board}.\textsuperscript{404} In this opinion, the Court concluded that public schools were under an obligation to take account of race and ethnicity in order to integrate their schools.\textsuperscript{405} Thus, the Court moved beyond \textit{Brown} and required that public schools actually take account of race and ethnicity in order to integrate their schools. In the 1971 opinion in \textit{Swann v. Charlotte-Mecklenburg Board of Education},\textsuperscript{406} the Court placed upon school systems an obligation to obtain the maximum degree

\textsuperscript{400} See \textit{Wessmann}, 160 F.3d at 804, 807-09. I want to draw particular attention to the discussion by the First Circuit in \textit{Wessmann} addressing the narrowly tailored aspect of the remedial justification offered by the Boston School Committee. \textit{See id.} at 807. The First Circuit noted that the use of racial classifications as compensation for the harm inflicted on African American and Hispanic students by low teacher expectations was not narrowly tailored enough because a number of these students had attended private and parochial schools. \textit{See id.} at 808. As a result, they could not be said to be victimized by the low teacher expectations that might exist with black and Latino students in Boston's elementary schools. This position appears to reject even the broad powers that the Supreme Court granted to federal courts to remedy the effects of de jure segregation. School desegregation decrees often involved the rights of students who were not in public schools during the time that the official misconduct occurred. Thus, many of the blacks and Latinos who were used to remedy de jure segregation were not victims of the state and school officials' prior unconstitutional conduct. If the Supreme Court had so narrowly construed the remedial powers of federal courts responding to de jure segregation, then much of the public school integration that occurred in America as a result of federal court mandate would not have happened.

\textsuperscript{401} 347 U.S. 483 (1954).
\textsuperscript{402} See \textit{id.} at 493-96.
\textsuperscript{404} 391 U.S. 430 (1968).
\textsuperscript{405} See \textit{id.} at 437-48.
\textsuperscript{406} 402 U.S. 1 (1971).
of integration possible. In doing so, the Court approved busing as a means to further integrated schools. The Court then drew its distinction between de jure segregation and de facto segregation in the 1973 case of Keyes v. School District No. 1. In 1974, the Court then limited the scope of school desegregation decrees in Milliken v. Bradley, and in 1976 the Court made it clear that once a school system had desegregated it was not under an obligation to continue year-to-year adjustments in public schools. The Court has also addressed issues regarding the termination of school desegregation decrees in Board of Education v. Dowell, Freeman v. Pitts, and Missouri v. Jenkins.

In none of the school desegregation cases did the Court ever reject the grant of broad powers to school officials it first discussed in Swann. The only Supreme Court opinion since City of Richmond v. J. A. Croson Co. that addressed the use of racial classifications in public elementary and secondary education absent a need to remedy an allegation of de jure segregation was Wygant v. Jackson Board of Education. The Supreme Court rejected the use of race as the determinative factor in the layoff of a white teacher. This decision appears to be one limited to the substantial rights that an individual possesses in their employment, rather than a rejection of the use of racial classifications to promote integration. The use of racial classifications to terminate a particular public school teacher involves far more vested and important rights of an individual than using racial classifications to determine admissions of students to particular schools.

407. See id. at 15-16.
408. See id. at 29-31.
411. See Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 434-35 (1976). I have argued on another occasion that the Supreme Court’s school desegregation jurisprudence is consistent with the view that the harm of school segregation was the impact on the socializing process of public schools. That the harm that seemed to animate the line drawing process of what constituted a violation of the Equal Protection Clause and what did not was a belief that segregation of public schools inculturated an invidious value that African Americans were inferior. For a further discussion, see Kevin Brown, Termination of Public School Desegregation: Determination of Unitary Status Based on the Elimination of Invidious Value Inculcation, 58 GEO. WASH. L. REV. 1105 (1990).
417. See id. at 283-84.
Understanding Wygant as a case speaking more to the issue of vested rights that a public school teacher has in his or her continued employment—as opposed to the use of racial classifications to encourage integrated education—is consistent with the case law. The Sixth Circuit rejected equal protection challenges by public school teachers who were reassigned to different public schools in order to foster integrated faculties after the Supreme Court’s decision in Wygant.419 The transfers were not dictated by a need to remedy de jure segregation. The lower federal courts have found that despite Wygant, public school officials still maintain broad powers to foster integrated faculties.

As noted above, despite the Supreme Court’s silence, many recent lower federal courts have rejected the deference accorded state and local school officials in the use of racial classifications to foster integrated student bodies. The most obvious argument justifying the position of recent federal court decisions is that the Supreme Court’s interpretation of the Equal Protection Clause changed. Since the Court’s decision in Swann, almost thirty years ago, the Court’s equal protection jurisprudence has been developed and refined. The Court has moved beyond its willingness to embrace racial classifications in the application of the Equal Protection Clause outside the field of public education. A cursory reading of the Supreme Court’s equal protection decisions over the past thirty years demonstrates that a government’s ability to use racial classifications is extremely limited. This development culminated with the Court’s opinions in City of Richmond v. J. A. Croson Co.,423 Miller v. Johnson,421 and Adarand Constructors, Inc. v. Pena."422

A potent argument could be advanced that even if the Supreme Court of the 1950s, 1960s, and 1970s would have deferred to state and local school officials’ decisions to use racial classifications to avoid racial isolation, end de facto segregation, or to maintain racially and ethnically integrated schools, that deference no longer exists. The Supreme Court’s equal protection decisions in the 1980s and 1990s have rejected the apparent deference that it once granted school officials in its early school desegregation jurisprudence. In the 1950s, the Supreme Court’s equal protection jurisprudence changed and came to reject the doctrine of “separate but equal.” Now, that jurisprudence has changed

419. See Jacobson v. Cincinnati Bd. of Educ., 961 F.2d 100, 103 (6th Cir. 1992); see also supra note 84.
again. If the use of racial classifications for the purpose of fostering integrated student bodies does not offend the Equal Protection Clause, there must be something in the role of public education that differentiates it from other governmental services.

There were actually two different roads that led away from the Court's opinion in Brown. The opinion in Brown was not only a turning point for the Court's equal protection jurisprudence, it was also a turning point for the Court's public school jurisprudence.423

It is beyond dispute that since the Supreme Court's early school desegregation cases, its equal protection jurisprudence has developed. But the Court's jurisprudence regarding the role and purpose of public elementary and secondary education has also developed. Since Brown was decided, a number of Supreme Court opinions have recognized that constitutional rights must be adapted to the special nature of public elementary and secondary education. The Supreme Court has articulated different tests to determine violations of students' free speech rights under the First Amendment424 and privacy rights under the Fourth Amendment425 from those that are applied outside of the context of public education.

While recognizing that students have state created property and liberty interests in public education that is protected by the Due Process Clause, the court has interpreted the requirements for a due process hearing to be minimal when a school official seeks to invade those rights. The Supreme Court has often applied the Lemon test to resolve Establishment Clause challenges to governmental actions in both public education and outside of public education.426 It is only in the context of disputes about public education, however, that the Supreme Court has relied solely on the purpose prong of the Lemon test to strike down governmental actions.427 The Supreme Court has also determined that in light of the special characteristics of the public school environment the

423. See supra text accompanying note 12.
427. See, e.g., supra note 16.
right to receive information—which is a corollary of the rights of free speech and press—is also applied differently. Even the equal protection rights of resident aliens who seek employment as public school teachers are determined differently from how they are determined for most other governmental occupations.

The special nature of public elementary and secondary education that justifies the modification of constitutional rights when applied to public schools is derived from the fact that they are transmitters of societal values to the young. As the Supreme Court has stated, the primary objectives of public education is the "inculcation of fundamental values" for "the maintenance of a democratic political system." Thus, when government is acting as educator of the young it is performing a sui generis governmental service.

This Section discusses the Supreme Court's jurisprudence dealing with the application of constitutional rights in public elementary and secondary schools. The Supreme Court based its decision to vary constitutional rights on three overlapping concerns involving public elementary and secondary education that do not normally exist outside of the educational context. First, when addressing constitutional rights of students, the Court is dealing with the rights of minors. The Court has noted in a number of decisions that the rights of minors are different from adults. Second, the Supreme Court has recognized that for public schools to effectively teach the lessons that students must learn, it is necessary that they be able to maintain appropriate discipline. Third, the Court has recognized that the primary purpose of public education is the inculcation of fundamental values necessary for the maintenance of our democratic society. Therefore, in determining the application of constitutional rights in public schools, the values being socialized are of utmost concern.

A. Supreme Court Decisions Varying Students' Rights Based on the Distinction Between Adults and Minors

The Supreme Court has repeatedly noted that the constitutional rights of minors differ from those of adults. The reasons for this difference are obvious. Minors lack the experience, maturity,
judgment, and cognitive development of adults. Because of their infancy, they do not possess the same capacity for self-determination. The cognitive development of children makes value inculcation of them inevitable. Children must go through a maturation process during which they will have experiences and develop perspectives that will indelibly affect their view of themselves, their fellow citizens, their country, and their world.

In *Lee v. Weisman*433 the Supreme Court concluded that a non-sectarian prayer delivered by a rabbi at a public high school graduation ceremony violated the Establishment Clause.434 Nine years earlier, in *Marsh v. Chambers*,435 however, the Supreme Court approved the opening of a session of a state legislature with a prayer.436 In response to the argument that *Marsh* applied, the *Weisman* Court noted that Establishment Clause jurisprudence is “fact-sensitive.”437 Therefore, it could not accept the argument that the Court’s decision in *Marsh* applied in the public school context.438 The Court rested its decision on the assertion that even remaining silent during the religious ceremony carried the “risk of indirect coercion.”439 What to most believers may seem nothing more than a reasonable request that the nonbelievers respect the religious practices of others, in a school context may appear to be an attempt to employ the machinery of the state to enforce a religious orthodoxy.440 Students attending a high school graduation ceremony are subjected to both public and peer pressure “to stand as a group or, at least, maintain respectful silence during the invocation and benediction.”441 While it is true that this may only signify to some that they are simply being respectful of the religious beliefs of others, a student of high school age may have “a reasonable perception that [he or] she is being forced by the State to pray.”442 The Court concluded “that for many, if not most, of the students at the graduation, the act of

434. *See id.* at 599.
436. *See id.* at 786.
437. *See Weisman*, 505 U.S. at 597.
438. *See id.*
439. *See id.* at 592.
440. *See id.* at 593.
441. *Id.*
442. *Id.*
standing or remaining silent was an expression of participation in the rabbi’s prayer.  

In *Vernonia School District v. Acton*, the Court upheld a drug testing policy adopted by the Vernonia School Board that applied to all students participating in interscholastic athletics. While the Court had upheld drug testing of employees in certain industries, it had not gone so far as to uphold drug testing as a requirement for participating in any particular governmental program. In justifying the Court’s decision to uphold the drug testing policy, Justice Scalia, writing for the Court noted that:

Traditionally at common law, and still today, unemancipated minors lack some of the most fundamental rights of self-determination—including even the right of liberty in its narrow sense, *i.e.*, the right to come and go at will. They are subject, even as to their physical freedom, to the control of their parents or guardians.

Scalia went on to note that “Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere; the ‘reasonableness’ inquiry [of the Fourth Amendment] cannot disregard the schools’ custodial and tutelary responsibility for children.”

### B. Supreme Court Decisions Varying Students’ Rights Based on the Concern About the Requirements for Appropriate Discipline

The Court has focused on the need for public schools to maintain appropriate discipline as the principal justification for a number of its decisions defining the constitutional rights of students in public schools. This was the primary aspect of public education that the Supreme Court relied upon when it first defined the application of the Free Speech

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443. *Id.*

Students wishing to play sports must sign a form consenting to the testing and must obtain the written consent of their parents. Athletes are tested at the beginning of the season for their sport. In addition, once each week of the season the names of the athletes are placed in a “pool” from which a student, with the supervision of two adults, blindly draws the names of 10% of the athletes for random testing. Those selected are notified and tested that same day, if possible.

*Id.* at 650.
446. *See id.* at 653-54.
447. *Id.* at 654.
448. *Id.* at 656.
Clause, the Due Process Clause, and the Fourth Amendment's restrictions against unreasonable searches and seizures to public schools.

The Supreme Court first addressed the application of the Free Speech Clause of the First Amendment to public schools in its landmark case of Tinker v. Des Moines Independent Community School District.\(^{449}\) In Tinker, a group of adults and students in Des Moines, Iowa decided to "publicize their objections to the hostilities in Vietnam . . . by wearing black armbands."\(^{450}\) After becoming aware of this plan, principals of Des Moines' public schools adopted a regulation to prevent the wearing of the armbands.\(^{451}\) When the students wore the black armbands to their schools, they were suspended until they came back without the armbands.\(^{452}\) In addressing the students' freedom of speech challenge to the principals' policy, the Supreme Court noted that "[n]either students [n]or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."\(^{453}\) The Court noted, however, that it "has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools."\(^{454}\) Thus, those First Amendment rights must be applied in light of the special characteristics of the school environment.\(^{455}\) The Court then laid down a special rule to apply to the determination of infringements on the right of free speech in the context of public education. In order to suppress student speech, school officials must demonstrate that the speech would "'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.'"\(^{456}\)

In a 1975 opinion, Goss v. Lopez,\(^{457}\) the Supreme Court first addressed the issue of the application of the Due Process Clause to public education.\(^{458}\) The case involved suspensions of students from public schools for a period not exceeding ten days.\(^{459}\) The Court agreed that the students possessed a state created property interest in their right

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450. Id. at 504.
451. See id.
452. See id.
453. Id. at 506.
454. Id. at 507.
455. See id.
456. Id. at 509 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).
458. See id. at 572-73.
459. See id. at 567.
to receive public education, which could not be taken away absent their misconduct, and a liberty interest in their reputation that would be damaged by a suspension for less than ten days due to misconduct.\textsuperscript{459} The Court noted that these property and liberty deprivations were protected by the Due Process Clause.\textsuperscript{461}

In determining what process was due, the Court weighed the interest of the student with that of the school. The Court noted that "[s]ome modicum of discipline and order is essential if the educational function is to be performed. Events calling for discipline are frequent occurrences and sometimes require immediate, effective action. Suspension is considered not only to be a necessary tool to maintain order but a valuable educational device."\textsuperscript{462} The Court held that students facing suspensions of ten days or less "be given oral or written notice of the charges against [them] and, if [they] den[y] them, an explanation of the evidence the authorities have and an opportunity to present [their] side of the story."\textsuperscript{463} The Court, however, stopped short of requiring that students be given "the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call" witnesses on their own behalf.\textsuperscript{464} The Court noted that to do so would not only be too costly, but would also destroy suspensions as an effective part of the teaching process.\textsuperscript{465}

Two years after its decision in \textit{Goss}, the Supreme Court once again addressed the application of the Due Process Clause to discipline procedures by public schools. In \textit{Ingraham v. Wright}\textsuperscript{466} students argued that the Due Process Clause required that they be presented with notice and an opportunity to be heard before corporal punishment was inflicted.\textsuperscript{467} The Court refused to find a right to a pre-paddling hearing in the Due Process Clause.\textsuperscript{468} In justifying their decision, the Court pointed to the fact that granting such a hearing would interfere with the school

\textsuperscript{460}. \textit{See id. at 574.} \\
\textsuperscript{461}. \textit{See id.} \\
\textsuperscript{462}. \textit{Id. at 580.} \\
\textsuperscript{463}. \textit{Id. at 581.} \\
\textsuperscript{464}. \textit{Id. at 583.} \\
\textsuperscript{465}. \textit{See id.} The Court did suggest that longer suspensions might require extra procedural requirements. \textit{See id. at 584.} \\
\textsuperscript{466}. 430 U.S. 651 (1977). \\
\textsuperscript{467}. \textit{See id. at 653.} The students also argued that the Eighth Amendment's prohibition against cruel and inhumane punishment applied to school officials. \textit{See id. at 668.} Thus, corporal punishment violated the student's Eighth Amendment rights. \textit{See id. at 668-69.} The Court rejected this argument, stating that "[a]n examination of the history of the [Eighth] Amendment... [made it clear] that it was designed [only] to protect those convicted of crimes." \textit{Id. at 654.} \\
\textsuperscript{468}. \textit{See id. at 682.}
authorities' disciplinary measures.\textsuperscript{469} The disruption and procedural burden of a hearing might force school authorities to use less effective measures to maintain appropriate student discipline.\textsuperscript{470}

In the 1985 case of \textit{New Jersey v. T.L.O.},\textsuperscript{471} the Supreme Court first addressed the application of the Fourth Amendment's prohibition against unreasonable searches and seizures to public school students.\textsuperscript{472} State and lower federal courts had struggled with the proper resolution of privacy rights of students and the interest of the states in providing an appropriate environment conducive to education. In resolving this tension, some state courts held that school officials conducting in-school searches of students were acting \textit{in loco parentis}.\textsuperscript{473} Since school officials derived their power to discipline students from the students' parents or guardians, they were legally acting as private individuals. As a result, the Fourth Amendment did not apply to the conduct of school officials. On the other extreme, at least one court held that the Fourth Amendment fully applies to in-school searches.\textsuperscript{474} Thus, a search conducted by a school official without probable cause is unreasonable.

After rejecting the \textit{in loco parentis} argument and concluding that the Fourth Amendment applied to school officials, Justice White's opinion addressed the question of the standard that should govern school searches.\textsuperscript{475} Justice White noted that the standard of reasonableness governing any specific class of searches requires "'balancing the need to search against the invasion which the search entails.'"\textsuperscript{476} Due to the substantial interest of teachers and administrators in maintaining

\begin{itemize}
\item \textsuperscript{469} See id. at 680.
\item \textsuperscript{470} See id.
\item \textsuperscript{471} 469 U.S. 325 (1985).
\item \textsuperscript{472} See id. at 333.
\item \textsuperscript{474} See \textit{State v. Mora}, 307 So. 2d 317, 319 (La.), \textit{vacated} by 423 U.S. 809 (1975).
\item \textsuperscript{475} See \textit{T.L.O.}, 469 U.S. at 337, 341-42. In \textit{T.L.O.}, New Jersey argued that the Fourth Amendment was intended to regulate only searches and seizures carried out by law enforcement officers. See \textit{id.} at 334. Justice White rejected this argument, stating that the "Court has never limited the Fourth Amendment's prohibition on unreasonable searches and seizures to operations conducted by the police." \textit{Id.} at 335. Because "the Court has long spoken of the Fourth Amendment's strictures as restraints imposed upon 'governmental action'—that is, 'upon the activities of sovereign authority,'" he concluded that the Fourth Amendment applied to public school authorities as well. \textit{Id.} (quoting \textit{Berdau v. McDowell}, 256 U.S. 465, 475 (1921)).
\item \textsuperscript{476} \textit{Id.} at 337 (quoting \textit{Camara v. Municipal Court}, 387 U.S. 523, 536-37 (1967)).
\end{itemize}
discipline in the classroom and on school grounds, White stated "[i]t is evident that the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject." White went on to state:

We join the majority of courts that have examined this issue in concluding that the accommodation of the privacy interests of schoolchildren with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law. Rather, the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search.

C. The Supreme Court's Decisions Varying Students' Rights Based on Value Inculcation by Public Schools

The Supreme Court has repeatedly noted that an objective of public education is the inculcation of fundamental values necessary for the maintenance of a democratic political system. Viewing public

477. Id. at 340.
478. Id. at 341 (footnote omitted).
479. See Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272, 274-75 (1988) (noting the importance of public elementary and secondary schools in awakening children to cultural values); id. at 278 (Brennan, J., dissenting) (stating that public elementary and secondary schools "inculcate[] in tomorrow's leaders the 'fundamental values necessary to the maintenance of a democratic political system ...' All the while, the public educator nurtures students' social and moral development by transmitting to them an official dogma of "'community values'" (quoting Bd. of Educ. v. Pico ex rel. Pico, 457 U.S. 853, 864 (1982); Ambach v. Norwick, 441 U.S. 68, 77 (1979))) (citations omitted) (third alteration in original).

The role and purpose of the American public school system was well described by two historians, who stated: "[P]ublic education must prepare pupils for citizenship in the Republic. . . . It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation." In Ambach v. Norwick, we echoed the essence of this statement of the objectives of public education as the "inculcation of fundamental values necessary to the maintenance of a democratic political system." Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986) (quoting CHARLES A. BEARD & MARY R. BEARD, NEW BASIC HISTORY OF THE UNITED STATES 228 (1968)) (citations omitted) (alterations in original). See also Pico ex rel. Pico, 457 U.S. at 864 (stating that the Court "has[ ] . . . acknowledged that public [elementary and secondary] schools are vitally important . . . vehicles for 'inculcating fundamental values necessary to the maintenance of a democratic political system'"") (quoting Ambach, 441 U.S. at 76-77); id. at 876 (Blackmun, J., concurring) ("[T]he Court has acknowledged the importance of the public [elementary and secondary] schools 'in the . . . preservation of the values on which our society rests.' Because of the essential socializing function of schools, local education officials . . . 'awaken' the child to cultural values.'") (quoting Ambach,
education as a value inculcating institution for the young is reflected in a number of Supreme Court cases addressing the constitutional rights applied in the context of public education. The Court specifically referred to the socializing aspect of public education as the basis of its two decisions addressing the free speech rights of students in public schools after *Tinker.* In determining that an equal protection challenge by an alien should be analyzed by applying the rational relationship test instead of strict scrutiny, the Court also rested on the value inculcating function of public education. The Court’s concern about the values being inculcated to public school students also explains why it often focuses on the motives of school officials when determining the constitutionality of a given action. The best way to determine the message being conveyed by a given act, statute, or regulation by state or school officials, and therefore the values being inculcated, is to focus on the precipitating motives. Finally, the Supreme Court’s school desegregation termination cases have made the good faith of school officials a factor to be considered in terminating court decrees. The preoccupation with good faith suggests a concern about schools’ value inculcating mission.

1. Free Speech Cases

In *Bethel School District No. 403 v. Fraser,* the Court upheld a free speech challenge to the authority of school officials to discipline a student for delivering an address at a student assembly that made suggestive use of vulgar and offensive terms. Writing for the Court, Chief Justice Burger noted that the Court had previously “upheld the right to express an antidraft viewpoint in a public place . . . in terms

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480. See, e.g., *Hazelwood,* 484 U.S. at 272, 274-75.
481. See *Ambach,* 441 U.S. at 76-77.
482. See *Ambach,* 441 U.S. at 76-77.
483. See id. at 680.
highly offensive to most citizens." However, Burger stated that the degree of freedom the government grants to adults making political points does not have to be granted to public school children. Before a court can grant freedom to students to espouse controversial beliefs while at school, a court must consider the need to teach the children how to behave properly in society. Burger cited with approval the purposes of the American public school system set forth by Charles and Mary Beard. The Court had previously echoed the Beards' sentiments when it stated that "inculcat[ion of] fundamental values necessary to the maintenance of a democratic political system" was at root of the purposes of public education.

The role and purpose of the American public school system [was] well described by two historians, who stated: "Public education must prepare [students] for citizenship . . . . It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and nation" . . . . In Ambach v. Norwick, we echoed the essence of this statement of the objectives of public education as the "inculcat[ion of] fundamental values necessary to the maintenance of a democratic political system."

Burger stated that "fundamental values . . . essential to a democratic society must . . . include tolerance of divergent political and religious views, even when the views expressed may be unpopular." However, Burger went on to note that the right to express unpopular views in public schools "must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior." Burger continued:

Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse.

484. Id. at 682.
485. See id. (noting "that the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings").
486. See id. at 681.
487. See id. (noting the Beards' assertion that the public schools must ready students for citizenship by teaching the students the requirements of civility that are needed to ensure proper self-government) (citing CHARLES A. BEARD & MARY R. BEARD, NEW BASIC HISTORY OF THE UNITED STATES 228 (1968)).
490. Id.
491. Id.
Indeed, the “fundamental values necessary to the maintenance of a
democratic political system” disfavor the use of terms of debate highly
offensive or highly threatening to others. Nothing in the Constitution
prohibits the states from insisting that certain modes of expression are
inappropriate and subject to sanctions.492

The Chief Justice concluded that the job of teaching these values
belongs to the schools.493

In another free speech case, Hazelwood School District v. Kuhlmeier,494 the Court addressed content-based censorship by a school
principal of articles that were to appear in a student newspaper.495 In the
opinion for the Court, Justice White noted that the school newspaper
involved an activity that might reasonably be considered a part of the
school curriculum.496 Educators are entitled to control student expression
in these activities in order to ensure that students learn the lessons they
should derive from the activities.497 Thus, the

school must . . . retain the authority to refuse to sponsor student speech
that might reasonably be perceived to advocate drug or alcohol use,
irresponsible sex, or conduct otherwise inconsistent with “the shared
values of a civilized social order,” or to associate the school with any
position other than neutrality on matters of political controversy.498

In upholding the principal’s decision to censor the articles, the Court
articulated a test that was easier for school officials to meet than the one
it articulated in Tinker: “It is only when the decision to censor a school-
sponsored publication, theatrical production, or other vehicle of student
expression has no valid educational purpose that the First Amendment
. . . require[s] judicial intervention to protect students’ constitutional
rights.”499

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492. Id. at 683 (quoting Ambach, 441 U.S. at 76-77).
493. See id.
495. See id. at 262.
496. See id. at 271.
497. See id.
498. Id. at 272 (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986))
(citation omitted). The Court also rested its opinion on the fact that “school[s] must [also] be able to
take into account the emotional maturity of the intended audience in determining whether to
disseminate student speech on potentially sensitive topics.” Id.
499. Id. at 273 (citation omitted) (footnote omitted).
2. Equal Protection Case
In *Ambach v. Nonvick*, the Court addressed an equal protection challenge to a New York law that "forbade certification as a public school teacher [to] any person who [was] not a citizen of the United States, unless that person ... manifested an intention to apply." Although classifications based on alienage are normally inherently suspect, there are exceptions for state functions that are intimately tied to the operation of the state as a governmental entity. Resting on the importance of public education in socializing students, the Court determined that teaching in public schools was one of these state functions. As such, the challenge by resident aliens was not to be analyzed under strict scrutiny, but under the more relaxed rational relationship test.

3. Prevalence of the Use of Governmental Motive Analysis in Public Education
The Supreme Court has often used motive tests to determine the constitutionality of various governmental actions involving issues in public education. The reason that it makes sense for the Court to focus on motives of state and local school officials that generate a given rule, regulation, decision, or statute is because of public education's value inculcating function. Public schools have historically been the institution that inculcated local consensus community values to the young. The focus on the motivations of school officials that precipitate certain actions is an appropriate way to determine the messages being conveyed—and thus, the values being inculcated to public school students—by a given governmental action. Therefore, the prevalence of the use of motive tests to determine infringements on constitutional

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501. Id. at 69-70.
502. See id. at 73-74.
503. See id. at 76-80.
504. See id. at 80. The Court also noted the importance of the value inculcating function of public schools. See id. at 77. See generally Plyler v. Doe, 457 U.S. 202, 222 n.20 (1982) (stating that the "the significance of education to our society is not limited to its political and cultural fruits. The public schools are an important socializing institution, imparting those shared values through which social order and stability are maintained"); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 113 (1973) (Marshall, J., dissenting) (stating that "[e]ducation serves the essential function of instilling in our young an understanding of and appreciation for the principles and operation of our governmental processes").
506. See *Ambach*, 441 U.S. at 76.
507. See id. at 78-79.
rights in public education is also a recognition of the importance of public education’s value inculcating function.

The Supreme Court has long noted that governmental action can be struck down as violating the Establishment Clause when there is no secular motive.\textsuperscript{508} The first cases where the Supreme Court relied solely on the lack of a secular purpose to strike a given governmental action, however, all occurred in the context of disputes involving public education.\textsuperscript{509} In Epperson v. Arkansas,\textsuperscript{510} the Court struck down a 1928 state law that prohibited the teaching of the theory of evolution in its public schools and universities.\textsuperscript{511} The Court noted that the law “was a product of [an] upsurge of ‘fundamentalist’ religious fervor of the twenties.”\textsuperscript{512} In concluding that the law violated the Establishment Clause, the Court stated that “[t]he overriding fact is that Arkansas’ law selects from the body of knowledge a particular segment which it proscribes for the sole reason that it is deemed to conflict . . . with a particular interpretation of the Book of Genesis by a particular religious group.”\textsuperscript{513} In Stone v. Graham,\textsuperscript{514} the Court struck down a Kentucky statute providing for posting of the Ten Commandments, paid for by private funds, on the wall of each classroom in public schools.\textsuperscript{515} In determining that the statute violated the Establishment Clause,\textsuperscript{516} the Court stated: “We conclude that Kentucky’s statute requiring the posting of the Ten Commandments in public school rooms has no secular legislative purpose, and is therefore unconstitutional.”\textsuperscript{517} In Wallace v. Jaffree,\textsuperscript{518} the Court struck down an Alabama statute authorizing a moment of silence for meditation or voluntary prayer.\textsuperscript{519} In doing so, the Court noted that “the record . . . reveals that the enactment of [section] 16-1-20.1 [the statute under consideration] was not motivated by any clearly secular purpose—indeed, the statute had no secular purpose.”\textsuperscript{520}

\footnotesize{\textsuperscript{508} See Lemon, 403 U.S. at 612.  
\textsuperscript{509} See Laurence H. Tribe, American Constitutional Law § 14-9, at 1206 (2d ed. 1988).  
\textsuperscript{510} 393 U.S. 97 (1968).  
\textsuperscript{511} See id. at 103.  
\textsuperscript{512} Id. at 98.  
\textsuperscript{513} Id. at 103.  
\textsuperscript{514} 449 U.S. 39 (1980).  
\textsuperscript{515} See id. at 39-41.  
\textsuperscript{516} See id. at 40-41.  
\textsuperscript{517} Id. at 41.  
\textsuperscript{518} 472 U.S. 38 (1985).  
\textsuperscript{519} See id. at 40, 61.  
\textsuperscript{520} Id. at 56.}
In Edwards v. Aguillard, the Court struck down Louisiana’s “Balanced Treatment for Creation-Science and Evolution Science in Public School Instruction” Act. Aware of the Court’s decision in Epperson, the Louisiana legislature passed an Act requiring that anytime public schools presented the theory of evolution they must also present the scientific evidence that justified creationism. Those who implemented the Act indicated that its purpose was to protect academic freedom; a purpose the Court found to be a sham. In applying only the purpose prong of the Lemon test, the Court stated that in this case, the petitioners “have identified no clear secular purpose for the Louisiana Act.”

The Court’s latest school prayer decision of Sante Fe Independent School District v. Doe addressed a school board regulation which authorized student-led prayer at high school football games. The Court analyzed the regulation under the principles it enunciated in Weisman. Thus, the Court concluded that participation in a benediction at a high school football game amounts to coerced participation in a religious ceremony. The Court also noted, however, that given the history of prayer at sporting events in the Santa Fe School District, the adoption of the current version of the school board regulation was motivated by a religious purpose.

In Board of Education v. Pico ex rel. Pico, the Court addressed the removal of controversial books from a public school library by

522. See id. at 580-82.
523. See id. at 581.
524. See id.
525. See id. at 582.
527. Id. at 585.
528. 120 S. Ct. 2266 (U.S. 2000).
529. See id. 2275.
530. See id. at 2273.
531. See id. at 2274, 2275.
532. See id. at 2277. The Court also noted that “[t]he policy is invalid on its face because it establishes an improper majoritarian election on religion, and unquestionably has the purpose and creates the perception of encouraging the delivery of prayer at a series of important school events.” Id. at 2283. But the Court also noted in its analysis “in light of the school’s history of regular delivery of a student-led prayer at athletic events, it is reasonable to infer that the specific purpose of the policy was to preserve a popular ‘state-sponsored religious practice.’” Id. at 2279 (quoting Lee v. Weisman, 505 U.S. 577, 596 (1992)).
school officials. Justice Brennan, writing for a three-justice plurality, "acknowledged that public schools are vitally important... vehicles for 'inculcating fundamental values necessary to the maintenance of a democratic political system.' He went on to conclude that students possess a right to receive information. This right is violated when the school officials use their discretion to remove books from a school library in a narrowly partisan or political manner. If the school officials' decision to remove the books is because they conclude that the books are "pervasively vulgar" or because the books are determined not to be "educationally suitable," then the motives are not unconstitutional. In a concurring opinion, Justice Blackmun also adopted a similar motive test. Blackmun also noted "the importance of the [socializing function of] public schools 'in the... preservation of the values on which our society rests.'" To him, "certain forms of state discrimination between ideas are improper." Thus, "the State may not... deny access to an idea simply because state officials disapprove of [it] for partisan or political reasons." The primary difference between the student right recognized by Brennan and that recognized by Blackmun is that Brennan's right to receive information was limited to removal of books from the school library. Blackmun's would apply to decisions by school officials throughout the entire educational process.

534. See id. at 855-56.
535. Id. at 864 (quoting Ambach v. Norwick, 441 U.S. 68, 76-77 (1979)).
536. See id. at 867.
537. See id. at 871.
538. Id. (quoting Tr. of Oral Arg. 53).
539. See id. at 879-80 (Blackmun, J., concurring).
540. Id. at 876 (Blackmun, J., concurring) (quoting Ambach v. Norwick, 441 U.S. 68, 76 (1979)).
541. Id. at 878-79 (Blackmun, J., concurring).
542. Id. at 879 (Blackmun, J., concurring).
543. See id. at 879 n.2 (Blackmun, J., concurring).
544. See id. (Blackmun, J., concurring). Justice Rehnquist's dissent, joined by Chief Justice Burger and Justice Powell, also pointed to the importance of the socializing function of public schools. See id. at 913-14 (Rehnquist, J., dissenting). But for Rehnquist, the school officials did not engage in any unconstitutional behavior. See id. at 920 (Rehnquist, J., dissenting). In criticizing Justice Brennan's assertion that students have a right to read books that their school disapproves of, Justice Rehnquist wrote:

The idea that... students have a right of access, in the school, to information other than that thought by their educators to be necessary is contrary to the very nature of an inculcative education.

Education consists of the selective presentation and explanation of ideas.

... Thus, Justice Brennan cannot rely upon the nature of school libraries to escape the fact that the First Amendment right to receive information simply has no application
It is also worth noting that in *Keyes v. School District No. 1*,\(^{545}\) the Supreme Court drew the line between de facto school segregation that did not offend the constitution, and de jure segregation that did.\(^{546}\) The difference between de facto segregation and de jure segregation is that under the latter the current condition of segregation resulted from intentional state action directed specifically to segregate the schools.\(^{547}\)

4. School Desegregation Termination Cases

Even the Supreme Court's school desegregation termination jurisprudence suggests that the primary analysis in determining whether a school system has eradicated the vestiges of its prior de jure conduct is an analysis that focuses on value inculcation.\(^ {548}\) The Supreme Court has addressed the termination of school desegregation decrees in three cases.\(^{549}\) In *Board of Education v. Dowell*,\(^{550}\) the Supreme Court addressed the issues relating to the termination of school desegregation decrees.\(^{551}\) In the majority opinion, written by Chief Justice Rehnquist, the Supreme Court held that a school district "was being operated in compliance with the commands of the Equal Protection Clause of the Fourteenth Amendment, and that it was unlikely that the Board would return to its former ways, would be a finding that the purposes of the desegregation litigation had been fully achieved."\(^{552}\) The Court indicated that a desegregation decree is dissolved "after the local authorities have operated in compliance with it for a reasonable period of time."\(^{553}\) On remand, the Court stated, "[t]he District Court should address itself to whether the Board had complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination had been eliminated to the extent practicable."\(^{554}\) To provide further direction as to what factors lower courts should consider to the one public institution which, by its very nature, is a place for the selective conveyance of ideas.

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\(^{545}\) [Id. at 914–15 (Rehnquist, J., dissenting).]

\(^{546}\) [413 U.S. 189 (1973).]

\(^{547}\) [See id. at 208.]

\(^{548}\) [See id.]

\(^{549}\) [For a more extended discussion of this point, see Kevin Brown, *Has the Supreme Court Allowed the Cure for De Jure Segregation to Replicate the Disease?*, 78 CORNELL L. REV. 1, 20-35 (1992).]


\(^{551}\) [See id. at 244.]

\(^{552}\) [Id. at 247.]

\(^{553}\) [Id. at 248.]

\(^{554}\) [Id. at 249-50.]
in determining whether or not a school system has eliminated the vestiges of de jure segregation, the Supreme Court cited its 1968 opinion,555 Green v. County School Board.556

In Freeman v. Pitts,557 the Court addressed the termination of school desegregation decrees again. In Dowell, the district court had relinquished all remedial control over the Oklahoma City School System. By contrast, in Pitts, the district court had determined that control could be relinquished only over those aspects of the system in which the vestiges of the prior discriminatory conduct had been eradicated.558 The district court "retained supervisory authority ... [over] aspects of the school system ... not in full compliance."559 In a majority opinion, authored by Justice Kennedy, the Supreme Court agreed with the district court's conclusion that the Green factors could be considered separately and that partial relinquishment of supervision and control of a school system in an appropriate case does not offend the Constitution.560

The Court articulated a three-part test to be used in determining whether partial withdrawal is warranted:

[W]hether there has been full and satisfactory compliance with the [court] decree in those aspects of the system where supervision is to be withdrawn; whether retention of judicial control is necessary or practicable to achieve compliance with the decree in other facets of the school system; and whether the school district has demonstrated, to the public and to the parents and students of the once disfavored race, its good-faith commitment to the whole of the court's decree and to those provisions of the law and the Constitution that were the predicate for judicial intervention in the first instance.561

In Jenkins v. Missouri,562 the district court concluded that Missouri mandated racially segregated schools prior to 1954 in Kansas City, and that the Kansas City Metropolitan School District ("KCMSD") and the state had failed in their affirmative duty to eliminate the vestiges of the dual school system within KCMSD.563 Pursuant to this determination, the

555. See id. at 250.
558. See id. at 471.
559. Id.
560. See id. at 492-93. Justice Kennedy's opinion was joined by Chief Justice Rehnquist and by Justices White, Souter, and Scalia. See id. at 470. Justices Scalia and Souter wrote separate concurring opinions. See id.
561. Id. at 491.
563. See id. at 1488, 1504.
district court ordered massive increases in educational spending in Kansas City public schools. The district court's desegregation plan had been "described ... as the most ... expensive remedial program in the history of school desegregation." Since the Supreme Court found both KCMSD and the State of Missouri responsible for the constitutional violation, it held them "jointly and severally liable" for the cost of the educational improvements. The result was that the state "has borne the brunt of" the financial burden.

The state challenged the district court's requirement that it fund salary increases for KCMSD instructional and noninstructional staff for the 1992-93 school year and the district court's order requiring it to continue to fund the remedial quality education programs. "The State contended that ... it had achieved partial unitary status with respect to the quality education programs already in place." The district court rejected these challenges, grounding its ruling in the need to remedy vestiges of segregation by improving the desegregative attractiveness of KCMSD. Part of the district court's justification for making KCMSD an attractive school was to attract white students from suburban areas who would be willing to voluntarily enroll in KCMSD schools to take advantage of its incredible educational opportunities. The district court also rested its decision on the continuing need for massive educational expenditures because student achievement levels in Kansas City were still at or below the national norms at most grade levels.

The Supreme Court rejected these justifications. The Court noted that desegregative attractiveness was not related to the original constitutional violation because there was no finding of an interdistrict violation. Since the Court determined in Milliken that an interdistrict remedy was only justified by an interdistrict violation, the Court's justification, resting on an effort to attract white suburban students to KCMSD schools, exceeded its remedial scope. The Court went on to state that tying the remedial duty to the need to bring student

564. See id. at 1506.
567. Id. at 79.
568. See id. at 84.
569. Id. at 80 (citation omitted).
570. See id.
571. See id. at 76.
572. See id. at 83.
573. See id. at 102-03.
574. See id. at 90.
575. See id.
achievement levels in Kansas City to national norms was the wrong focus. The basic task ... is to decide whether the reduction in achievement by minority students attributable to the prior de jure segregation has been remedied to the extent practicable. On remand the Court indicated that the district court should apply the three-part test articulated in Freeman.

The Court's termination cases show that it is not the elimination of racial imbalance that is the determining factor in eradicating the vestiges of de jure segregation. Just as a school system could have de facto segregation and not be in violation of the Constitution, a school system can eliminate the vestiges of its prior discriminatory conduct, even though racial imbalance or the potential for a significant increase in racial imbalance exists at the time that the determination is made. In all three cases, the Court noted that, as a prerequisite to the termination of all or part of court supervision, school districts should comply in good faith with the court decree for a reasonable period of time. The Court also noted the importance of determining if a school system will return to engaging in intentionally discriminatory practices. Good faith compliance and assurances that the school system will not return to its former discriminatory ways are actually examinations that are directed towards interpreting the sincerity of the school district in eradicating de jure segregation. The Court is asking the school district to show that its attitude towards African Americans, and hence the meaning attached to its actions affecting them, has changed. In other words, the district must prove that it is no longer acting under an assumption that African Americans are inferior when it formulates its policies and programs.

D. Conclusion

The Supreme Court's education jurisprudence makes it clear that the Court has interpreted constitutional rights in light of the special environment of public education. This general view of education has shifted the emphasis in educational disputes "from a rights-based to a values-based ideology." Thus, the Court's determination of

576. See id. at 100, 101.
577. Id. at 101.
578. See id.
580. See Jenkins, 515 U.S. at 101; Freeman, 503 U.S. at 491-92; Dowell, 498 U.S. at 249.
CONSTITUTIONALITY OF RACIAL CLASSIFICATIONS

constitutional rights outside of the context of public education does not necessarily dictate their scope within the special environment of public education.

V. EXAMINATION OF THE USE OF RACIAL CLASSIFICATIONS TO PRODUCE INTEGRATED SCHOOLS GIVEN THE SPECIAL ENVIRONMENT OF PUBLIC EDUCATION

In Brown, the Supreme Court concluded that the use of racial classifications to segregate students violated the Equal Protection Clause. In addressing one of the companion cases of Brown on remand, a three-judge federal district court in South Carolina wrote:

[The Supreme Court] has not decided that the states must mix persons of different races in the schools or must require them to attend schools or must deprive them of the right of choosing the schools they attend. What it has decided, and all that it has decided, is that a state may not deny to any person on account of race the right to attend any school that it maintains. . . . The Constitution, in other words, does not require integration. It merely forbids discrimination. It does not forbid such segregation as occurs as the result of voluntary action. It merely forbids the use of governmental power to enforce segregation.

But, in Green v. County School Board, the Court put an “affirmative duty [on the public schools] to take whatever steps might be necessary” to eliminate the vestiges of its prior discriminatory conduct “root and branch.” The Court rejected the argument that non-racial means could be instituted to remedy the harm of de jure segregation if they did not produce integrated schools. Thus, the Supreme Court cases that have directly addressed the use of racial classification by public schools on students have found that their use to further segregation is unconstitutional, but that their use may be required in order to remedy an equal protection violation. From this it is clear that the use by public

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582. Briggs v. Elliott, 132 F. Supp. 776, 777 (E.D.S.C. 1955). The Supreme Court’s opinion in Brown required public schools “to effectuate a transition to a racially nondiscriminatory school system.” Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955). The precise parameters of what was meant by a racially nondiscriminatory school system were originally left to the discretion of school authorities who had “the primary responsibility for elucidating, assessing, and solving [this] problem.” Id. at 299. Many southern federal judges and school officials implementing this obligation relied upon the dictum in Briggs to fill the vacuum left by the Supreme Court. See, e.g., Aaron v. Cooper, 143 F. Supp. 855, 864 (E.D. Ark. 1956). Consequently, they do not pursue integration, but merely ban compelled segregation.


584. Id. at 437-38.

585. See id. at 440.
schools of racial classifications does not amount to a per se equal protection violation.

Reflecting the concern about the special environment of education changes the focus of the analysis of the use of racial classifications on students by public schools from what it would be in a non-public elementary and secondary educational context. The fundamental question becomes, are the messages being sent, and thereby the values being inculcated by the use of racial classifications, consistent with the values derived from the Equal Protection Clause? Consistent with strict scrutiny, public schools have a compelling state interest in inculcating the values derived from the Equal Protection Clause. The use of racial classifications to advance those values in the context of voluntary integration programs is narrowly tailored.

Two issues must be addressed in order to determine whether the use of racial classifications to further an integrated student body pursuant to a voluntary school desegregation program violates the Equal Protection Clause. First, we must understand the fundamental values derived from the Equal Protection Clause that should be inculcated by public schools. Second, we must determine if the messages being sent by the use of racial classifications to promote voluntarily integrated student bodies are consistent with those values.

A. Values Derived from the Equal Protection Clause

The Supreme Court’s equal protection jurisprudence has often focused on the harms associated with a violation of the Equal Protection Clause. By examining harms produced by equal protection violations, the values derived from the Equal Protection Clause can be ascertained.

Justice Powell, in his opinion in *Regents of University of California v. Bakke*, mentioned a number of potential harms generated by the use of racial classifications. He noted that the use of racial classifications may “validate burdens imposed upon individual members of a particular group in order to advance the group’s general interest.” Thus, a black person’s individual interest may be sacrificed for the benefit of his or her race or ethnicity. Powell also noted that racial classifications may “forc[e] innocent persons ... to bear the burdens of redressing grievances” they did not cause. As a result, an innocent white person may be excluded from a governmental program to address a societal ill.

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587. *Id.* at 298.
588. *Id.*
Another harm that Powell noted was that the use of racial classifications "may ... reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth." This has been a common harm mentioned by a number of Supreme Court Justices. Justice Thomas, in his concurring opinion in *Adarand Constructors, Inc. v. Pena*, called this "racial paternalism." According to Thomas, "racial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination. [It] ... teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence." Justice O'Connor's opinion, in *City of Richmond v. J. A. Croson Co.*, noted that "[c]lassifications based on race carry a danger of stigmatic harm. ... [T]hey may in fact promote notions of racial inferiority." Thus, the use of racial classifications can stamp minorities with a badge of inferiority.

A number of Supreme Court Justices have pointed to the harm of racial hostility that can be caused by the use of racial classifications. Justice O'Connor's opinion in *Croson* noted that classifications based on race "may in fact ... lead to a politics of racial hostility." In *Shaw v. Reno*, a majority of the Court stated that racial and ethnic classifications have a tendency to "stigmatize individuals," polarize society, and "incite racial hostilities."

The use of racial classifications can also create the abstract harm of a denial of individuality. In *Miller v. Johnson*, the Court addressed a challenge to the racially motivated Georgia congressional redistricting plan. Justice Kennedy, writing for the Court, responded to one argument made by the plan's defenders:

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589. *Id.*
591. *Id.* at 241 (Thomas, J., concurring).
592. *Id.* (Thomas, J., concurring).
594. *Id.* at 493.
595. *Id.*
597. *Id.* at 643.
598. 515 U.S. 900 (1995). The Court addressed the intentional creation of a third majority-minority congressional district by Georgia at the behest of the Department of Justice. See *id.* at 906-07. The Department of Justice had interpreted the Voting Rights Act to require that states under its supervision maximize the number of minority representatives. See *id.* at 907. Pursuant to demands by the Department of Justice, Georgia intentionally redrew its congressional districts to assure the creation of three majority-minority districts. See *id.*
599. See *id.* at 910.
the Equal Protection Clause’s general proscription on race-based decisionmaking does not obtain in the districting context because redistricting by definition involves racial considerations. Underlying their argument are the very stereotypical assumptions the Equal Protection Clause forbids. It is true that redistricting in most cases will implicate a political calculus in which various interests compete for recognition, but it does not follow from this that individuals of the same race share a single political interest. The view that they do is “based on the demeaning notion that members of the defined racial groups ascribe to certain ‘minority views’ that must be different from those of other citizens,” the precise use of race as a proxy the Constitution prohibits.600

Kennedy goes on to state that “[r]ace-based assignments ‘embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution.”601

Justice Scalia in his concurring opinion in Croson stated that:

The difficulty of overcoming the effects of past discrimination is as nothing compared with the difficulty of eradicating from our society the source of those effects, which is the tendency—fatal to a Nation such as ours—to classify and judge men and women on the basis of their country of origin or the color of their skin.602

In Adarand, Justice O’Connor, writing for the Court, stated that persons disadvantaged by such racial or ethnic categorizations necessarily suffer a cognizable injury.603

The harms derived from governmental use of racial classifications are that the interest of the individual is sacrificed for the benefit of their racial or ethnic group, innocent persons bear the burden of redressing grievances that they did not cause, individuals are stigmatized as being inflicted with the immutable generation of racial and ethnic hostility, and individuals are demeaned because their thoughts and efforts are evaluated as a product of their race or ethnicity. From these harms, it is apparent that the overriding value embedded in the Equal Protection Clause is the importance of treating people as individuals. All of the potential harms that occur from racial classifications occur because of government’s failure to respect a person’s individuality. The core value

600. _Id._ at 914 (citation omitted) (quoting Metro Broad. v. FCC, 497 U.S. 547, 636 (1990) (Kennedy, J., dissenting)).
601. _Id._ at 912 (quoting Metro Broad., 497 U.S. at 604 (O’Connor, J., dissenting)).
that comes from the Equal Protection Clause that should be inculcated by public elementary and secondary schools is the importance of respecting and recognizing everyone as an individual, rather than as a member of their racial or ethnic group.

B. The Value of Respecting Individuality that Should Be Inculcated by Public Elementary and Secondary Schools

The Supreme Court’s primary way of resolving racial and ethnic issues is by viewing American society as a collection of “Knowing Individuals” as distinguished from minors. Much of the Supreme Court’s rhetoric on the harm of governmental racial classifications contained in the controlling opinions in cases like Bakke, Wygant, Croson, [Shaw,] Miller and Adarand, rests upon the idea of furthering the self-determination of [K]nowing [I]ndividuals. Knowing [I]ndividuals are viewed as rational, autonomous, self-generating, and free-willed people who are capable of pursuing their self-formulated goals and objectives.

To maximize the ability of “Knowing Individuals” to be self-determined, they must also “exercise self-restraint over their inclinations that would, if satisfied, directly interfere or create a substantial risk of interference with [their fellow Knowing Individuals’] ability to pursue their goals and objectives.” Living in a society that provides people with the freedom to pursue their own goals and objectives, requires the imposition of a burden that restrains such freedom so as not to interfere with the right of others to do the same. Thus, “Knowing Individuals” have an interest in their fellow citizens developing the values that will allow them to be self-determining. Toleration . . . for those who . . . [pursue different goals and objectives] provides as fundamental a core set of values as does the right of self-determination.”

Respect for the right of the self-determination of “Knowing Individuals” does not lead to the abolition of racial and ethnic differences. “Even though [K]nowing [I]ndividuals should not be

606. Id. at 1024.
607. See id.
608. Id. at 1038.
compelled to view themselves as members of their racial and ethnic group, they must be allowed” the freedom “to choose to celebrate their racial or ethnic [connections and] heritage[s].” If a “Knowing Individual” is treated as a member of his or her race or ethnicity against his or her will, it is clear that their individuality is not being respected. “Knowing Individuals” will choose to make their racial or ethnic identity a salient part of their individuality and to celebrate their racial or ethnic heritage. In order to respect their individuality, it is necessary to respect their choices to celebrate their racial or ethnic heritage.

As contradictory as it sounds,” the notion of respecting the rights of individuals to be self-determining does not lead to an abolition of racial or ethnic distinctions. Rather, involuntary affiliations derived from race or ethnicity should be treated as matters of personal preference on the same level of voluntariness that we associate with political, associational, or other lifestyle choices.

When “Knowing Individuals” choose to make their race or ethnicity a salient part of their identity or celebrate their racial or ethnic heritage, recognizing them as a member of their racial or ethnic group does not deny their individuality. To deny the importance of their race or ethnicity at these times would be to disrespect their individual choice. If “Knowing Individuals” choose to sacrifice their individual interest for the interest of their racial or ethnic group, that does not deny their individuality either. Rather, that also respects the choice that this particular “Knowing Individual” has made.

A necessary aspect of respecting individuality regarding race and ethnicity is the need for others to tolerate their choices. Just as with chosen political affiliations, associational memberships, or other lifestyle choices, others do not have to condone or agree with the choice by a given person to celebrate their racial or ethnic heritage or make it an important aspect of their individuality. They simply have to respect that person’s choice enough not to unduly interfere with it.

609. Id. at 1022-23.
610. See id. at 1022.
611. See id. at 1024.
612. See id. at 1024-25.
613. See id. at 1023 (emphasis added).
614. See id.
615. See id. at 1024-25.
616. See id.
617. See id.
618. See id. at 1037-39.
C. How the Use of Racial and Ethnic Classifications to Promote Integrated Student Bodies Advances the Values Related to Respecting Individuality

“When government action affects the rights of adults, it is affecting the right of people who are generally presumed to be capable of exercising the capacity for free choice. . . . Children in public schools, however, are learners not choosers.”

Public education is the one place where government is supposed to be actively involved in the socialization of the next generation of adult citizens. In the institution of public education, government exerts a tremendous influence on learners in order to produce the kind of choosers that possess the values necessary for the maintenance of our democratic society.

The learner must acquire the knowledge of how to become a self-determining chooser. “But equally important is the need for learners to learn to constrain their choices in order to allow others the same right of self-determination. Thus, schools must strive to further the values of [independence] and toleration. They must both advance and constrain [self-determination] at the same time.” This process of socialization requires that government stress two inconsistent sets of belief. Education must increase the capacity of minors to determine and choose what is best for themselves. At the same time, education must constrain certain choices that individuals choose in order to allow others to pursue their own self-determined goals and objectives.

All arguments for integrated education start with the unproblematic assumption that race and ethnicity in American society still matters. If we were truly a color-blind society where the color of one’s skin was analogous to the color of one’s eyes, then there would be no possible justification for taking account of race and ethnicity in order to integrate public schools. Such a decision would clearly be as irrational as separating brown-eyed children from blue-eyed and green-eyed children—especially in the age of the colored contact lens.

A number of lower federal courts that have recently addressed the use of racial classifications for the purpose of obtaining an integrated student body have commented on the irony that, in an effort to teach students to see themselves and others as individuals, it is necessary to
classify them as members of racial and ethnic groups. But it is equally ironic and contradictory to expect that an Asian child going to school with only other Asians, a black child going to school with only other blacks, a Latino child going to school with only other Latinos, or a white child going to school with only other whites will come to see people from different racial or ethnic groups as individuals, rather than as members of their various racial or ethnic groups. In racially isolated schools, education officials face a situation where their ability to teach students the values of respecting everyone's individuality will be difficult, if not impossible. As Justice Blackmun noted in his opinion in Bakke, sometimes "[i]n order to get beyond racism, we must first take account of race." This is particularly true in public elementary and secondary education.

Justifications for the use of racial classifications to promote integrated education can be positive. In this sense, the justifications extol the ability of integrated education to increase the capacity and ability of minors to be able to choose what is best for themselves. Justifications can also be negative. In this sense, arguments for the use of racial classifications to promote integrated education point out their ability to constrain certain choices as to reduce undue interference with the choices of others.

"Exposing [students] to those from diverse racial and ethnic backgrounds" provides all of them with a broader and richer educational experience. Through interaction with students from different racial and ethnic backgrounds, all students are more likely to be exposed to different types of music, movies, television programs, dress, entertainment, and foods. A racially and ethnically diverse student body increases the atmosphere of speculation and experimentation for all students, which can help "to expand their knowledge, broaden their sensibilities, kindle their imagination, foster a spirit of free inquiry, and increase their human understanding." This broader and richer educational experience provides students with information from which to draw upon in order to determine what is best for themselves.

625. See Brown, supra note 605, at 1036.
626. See id. at 1037.
627. See id. at 1036.
628. See id. at 1037.
629. Id. at 1039.
Many people continue to judge others with reference to stereotypes attached to their skin color. When people act towards others based upon stereotypes, they deny that person his or her individuality and interfere with his or her ability to be self-determining. Rather than have his or her individual personality traits and characteristics recognized, they are presumed to correspond with those normally attached to his or her skin color. Integrated education can help to overcome racial and ethnic stereotyping. To move beyond attaching significance to skin color, it is necessary for children to come together at a time when their attitudes about people from diverse racial and ethnic backgrounds are in the process of forming. By getting to know people from different racial and ethnic groups, children can come to see others as individuals, rather than as members of racial and ethnic groups.

Some blacks, whites, Asians, and Latinos will—at least at certain times—choose to celebrate their racial or ethnic heritage, make it a salient part of their individual identity, or choose to associate primarily with others who share their racial or ethnic backgrounds. Others, however, will find none of this personally appealing. By exposing students to those from different racial and ethnic backgrounds, all students have an opportunity to see that individuals who do not share their racial or ethnic background make their own choice regarding whether to celebrate their racial or ethnic heritage, make that heritage an important part of their individual identity, or associate primarily with members of their own race or ethnicity. In other words, white students are provided the opportunity to observe that not all blacks attach a particular importance to being African American or associating primarily with other blacks. And black students will see that not all white students attach a particular importance to being Caucasians or associating primarily with other whites. Thus, the students have an opportunity to observe firsthand the fact that the importance of race and ethnic affiliation depends upon individual choices.

Integrated education also allows students to see that members of their own racial or ethnic group can choose to primarily associate with racial or ethnic group members or non-group members. Thus, African

631. See Brown, supra note 605, at 1036.
632. See id.
633. See id. at 1037, 1039.
634. See id.
635. See id. at 1023-24, 1038.
636. See id. at 1022, 1024.
637. See id. at 1022-23, 1038-39.
American students will see other black students choose to associate primarily with other blacks as well as black students who choose primarily to associate with non-blacks. White students will get to see other white students who associate primarily with other whites as well as white students who primarily associate with non-whites. This provides all students with an understanding that they have some control over whether they primarily associate with members of their own racial or ethnic group.

Integrated student bodies provide students with a better opportunity to learn tolerance for racial and ethnic differences. For those who choose to make their race and ethnicity a significant part of their individuality, they need to be able to make such choices without having their desires unduly infringed upon by others. Thus, integrated education exposes students to people from different racial and ethnic backgrounds who may choose to celebrate their racial or ethnic heritage, or make their race or ethnicity a salient part of their identity.

D. Conclusion

From the perspective of the special environment of public education, the use of racial classifications to segregate students, teachers, staff, and administrators along racial and ethnic lines clearly violated the Equal Protection Clause. The primary message of de jure segregation was the stigmatic message that blacks and other minorities were inferior to whites. Thus, the values being inculcated by public schools engaged in de jure segregation were a clear rejection of the importance of respecting and recognizing everyone as an individual.

The use of racial classifications to foster integration to remedy de jure segregation, however, advanced the values of respecting and recognizing everyone as an individual. For the federal courts, the reason to integrate schools was to teach racial and ethnic equality. Compelling public schools that believed in the inferiority of minorities to mix racial and ethnic groups carried the message of equality of all. Thus, using racial classifications to integrate public schools promoted respect for and recognition of everyone as an individual.

638. See id. at 1038.
639. For a detailed analysis of this, see Brown, supra note 411.
640. I believe that the federal courts employing desegregation remedies believed that they were advancing a belief in racial and ethnic equality. I have argued and continue to believe and assert that the Supreme Court opinions justifying desegregation carried a stigmatic message of black inferiority. See Brown, supra note 548, at 35-37.
While it is true that race and ethnicity matter less today than in earlier decades, the use of racial classifications to promote integration still carries a message of respecting and recognizing everyone as an individual. This is particularly true where the measures adopted by schools are voluntary. When public schools use racial classifications to foster voluntary integrated student bodies, the only people who are affected are individuals who choose to apply to schools where these classifications are being used. Thus, if the parents or the student prefer not to be affected by government use of racial classifications to promote integrated student bodies, they simply need not apply to the affected school.

VI. CONCLUSION

In a number of different contexts, Supreme Court opinions have recognized that constitutional rights must be adapted to the special nature of public education. Over the past few years a number of federal courts have addressed equal protection challenges to the use of racial classifications of students in the admissions policies of public elementary and secondary schools. The school officials take account of race and ethnicity in order to foster voluntary integration of their student bodies. These courts have analyzed the constitutionality of these policies by applying strict scrutiny. Most of these court decisions concluded that the school officials failed either to articulate a compelling state interest to justify their policies, or that their policies were not narrowly tailored. Their analysis, however, does not take into account the special environment of public education.

This Article has argued that the recent lower federal court decisions have not paid adequate attention to the Supreme Court cases in the field of public elementary and secondary education. It is a mistake to view the use of racial classifications in public schools the same way that their use would be viewed outside the context of public education. When courts address these challenges they should focus on whether the values being inculcated to the young by the use of racial classifications to foster integrated student bodies are consistent with those derived from the Equal Protection Clause. In terms of strict scrutiny, public schools have a compelling state interest in inculcating the values derived from the Equal Protection Clause, and using racial classifications in an effort to

641. I have, however, contended that mandatory measures would also be consistent with the Equal Protection Clause. See Brown, supra note 605, at 1041.
promote voluntary integration may be narrowly tailored to advance such an interest.

A number of different Supreme Court opinions have addressed harms derived by governmental use of racial classifications in a non-public education context. All of the potential harms that occur from the use of racial classifications occur because of government’s failure to respect individuality. The core values that come from the Equal Protection Clause that should be inculcated by public elementary and secondary schools is the importance of respecting and recognizing everyone as an individual, not as a member of their racial or ethnic group.

During the 1960s and 1970s, it is easy to see how using racial classifications to foster integrated schools would have furthered respect for individuality. The main question is, now that we are in the twenty-first century, have conditions in America changed to such an extent that the use of racial classifications to foster integrated education actually retards the appreciation and understanding that persons should be treated as individuals? Students are more likely to learn to treat members from racial and ethnic backgrounds different from their own as individuals if they attend integrated schools than if they attend racially isolated schools. If state and school officials make it very clear that their purpose of taking account of race and ethnicity to produce integrated student bodies is not for the purpose of cultural pluralism, but for the purpose of individual self-determination, then there should be no equal protection concern.