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# Conscious Use of Race as a Voluntary Means to Educational Ends in Elementary and Secondary Education: A Legal Argument Derived From Recent Judicial Decisions

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# CONSCIOUS USE OF RACE AS A VOLUNTARY MEANS TO EDUCATIONAL ENDS IN ELEMENTARY AND SECONDARY EDUCATION: A LEGAL ARGUMENT DERIVED FROM RECENT JUDICIAL DECISIONS

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## INTRODUCTION

Since the Supreme Court's landmark ruling in *Brown v. Board of Education*,[1] the nation has struggled, often against great resistance and with mixed results,[2] to rid itself of the scourge of segregation and its effects. Numerous lawsuits[3] ensued, as the progeny of *Brown*, in an effort to recognize and realize the maxim that "[s]eparate educational facilities are inherently unequal."[4] This article will address the use of parental school choice to create a more racially balanced environment.

In response to the problems of *de jure* segregation,[5] and often under the behest and supervision of district court judges, states and school districts across the nation created policies to racially balance schools' populations as a means to achieve equal educational opportunity. The concept of parental school choice was one mechanism introduced during this period to effect that change.[6] Through parental school choice programs, including magnet schools[7] and other intra-[8] and inter-district[9] transfer programs, schools attempted to entice parents to voluntarily enroll their children in targeted schools in order to create more racially balanced

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1. 347 U.S. 483 (1954) (holding that the "separate but equal" doctrine established in *Plessy v. Ferguson* had no place in the field of public education).

2. *See* RACE IN AMERICA: THE STRUGGLE FOR EQUALITY (Herbert Hill & James E. Jones, Jr. eds., 1993) (discussing *Brown*'s legacy).

3. *See, e.g.*, Milliken v. Bradley, 418 U.S. 717 (1974); Keyes v. Sch. Dist. No. 1, 413 U.S. 189 (1973); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Green v. County Sch. Bd., 391 U.S. 430 (1968); Griffin v. County Sch. Bd., 377 U.S. 218 (1964).

4. *Brown*, 347 U.S. at 495.

5. *De jure* segregation is "segregation that is permitted by law," while *de facto* segregation is "segregation that occurs without state authority." BLACK'S LAW DICTIONARY 1362 (7th ed. 1999).

6. MARY HAYWOOD METZ, DIFFERENT BY DESIGN: THE CONTEXT AND CHARACTER OF THREE MAGNET SCHOOLS (1986).

7. " '[M]agnet school' is defined as a public elementary or secondary school or public elementary or secondary education center that offers a special curriculum capable of attracting substantial numbers of students of different racial backgrounds." 20 U.S.C. § 7204 (1994).

8. Intra-district transfer plans allow students to attend any school within the school's district without regard to the relation between the location of the residence and of the school. Seattle, Boston, and Indianapolis are examples of districts employing such plans. *See* Julie F. Mead, *Including Students with Disabilities in Parental Choice Programs: The Challenge of Meaningful Choice*, 101 WEST'S EDUC. LAW REP. 463, 463–64 (1995).

9. Inter-district plans allow the transfer of a child from one district to another. *See id.* at 463.

educational environments.[10] As an alternative to compelled assignment plans,[11] these programs often formed the central mechanism for a district's desegregation efforts, the quest for a declaration of unitary status, and the end of court supervision of school operations that accompanies that status.[12]

Aside from attempting to create more racially balanced educational environments, school choice today often adds new purposes, such as parental choice for the exploration of innovation[13] and/or for competition created by choice, thus providing an impetus for school reform and improvement within the larger system of public schools.[14] As these new forms of school choice have been added, policy-makers have operated under the assumption that the same goals with respect to the racial composition of the student body not only could be honored as a matter of

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10. These parental choice options often arose in direct response to court supervision, and was either ordered or approved as a central component of several desegregation plans. *See* Missouri v. Jenkins, 515 U.S. 70 (1995); Freeman v. Pitts, 503 U.S. 467 (1992); Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982); Milliken v. Bradley, 433 U.S. 267 (1977); NAACP v. City of Yonkers, 251 F.3d 31 (2nd Cir. 2001); Lockett v. Bd. of Educ., 111 F.3d 839 (11th Cir. 1997); U.S. v. Charleston County Sch. Dist., 960 F.2d 1227 (4th Cir. 1992); Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist., 839 F.2d 1296 (8th Cir. 1988).

11. *See, e.g.*, Washington v. Seattle Sch. Dist. No. 1, 458 U.S. at 461.

12. As explained by the Supreme Court in *Green v. County School Board*, a unitary system of schools is the opposite of a dual segregated system. Accordingly, a unitary system of schools is the target at which all efforts of a formerly segregated educational system must be directed: "The transition to a unitary, nonracial system of public education was and is the ultimate end to be brought about" by court supervision. 391 U.S. 430, 436 (1968). The *Green* Court also established six factors for consideration to determine whether unitary status had been achieved: (1) student assignment, (2) faculty, (3) staff, (4) transportation, (5) extracurricular activities, and (6) facilities. *Id.* at 435. As will be explained in subsequent sections, a declaration of unitary status plays a large role in courts' analysis of any currently operating race-conscious student selection practice in any choice environment. While it is perfectly understandable why a district would want to have a court publicly declare that it has successfully desegregated its system and now offers a unitary system of education, one commentator has argued that school districts have moved too quickly toward a declaration of unitary status. Gary Orfield, *Conservative Activists and the Rush Toward Resegregation*, *in* LAW AND SCHOOL REFORM: SIX STRATEGIES FOR PROMOTING EDUCATIONAL EQUITY 39 (Jay P. Heubert, ed., 1999). Orfield further contends that courts have been too quick to grant such petitions, moving much more rapidly than courts had in earlier actions finding the existence of state ordered segregation. *Id.*

13. Charter school legislation often lists the fostering of educational innovation as its purpose. *See, e.g.*, ARK. CODE ANN. § 6-23-102(2) (1999); CAL. EDUC. CODE § 47601(c) (2002); COLO. REV. STAT. § 22-30.5-102(c) (2002); FLA. STAT. § 228.056(2)(c) (1998); and IDAHO CODE § 33-5202(3) (2001).

14. *See generally* MILTON FRIEDMAN, CAPITALISM AND FREEDOM (1962); JOHN COONS & STEPHEN SUGARMAN, EDUCATION BY CHOICE: THE CASE FOR FAMILY CONTROL (1978); JOHN CHUBB & TERRY MOE, POLITICS, MARKETS, AND AMERICA'S SCHOOLS (1990); WILLIAM H. CLUNE & JOHN F. WITTE, CHOICE AND CONTROL IN AMERICAN EDUCATION: VOLUME 1: THE THEORY OF CHOICE AND CONTROL IN EDUCATION (1990).

law, but also should be honored as a matter of public policy.[15] That assumption, however, has come under increasing attack in the form of lawsuits challenging race-conscious student selection processes in choice environments. In fact, since 1998 ten cases[16] have come before various federal courts to ask the question: Can schools use race in furtherance of education for a multi-cultural society consistent with the Equal Protection Clause of the Fourteenth Amendment[17] of the United States Constitution?

The answer is unclear. Courts have long held that race may only be used for governmental decision-making in very limited circumstances.[18] Anytime a governmental body employs a racial criterion, courts generally use the most exacting judicial scrutiny, termed "strict scrutiny,"[19] to determine whether it is constitutional under the Equal Protection Clause of the Fourteenth Amendment and complies with the non-discrimination mandate of Title VI of the Civil Rights Act of 1964.[20] Under the strict scrutiny standard, courts examine whether the use of the criterion is justified by the circumstances; in essence, whether the ends justify the means. As an ends-means analysis, the courts assess whether the governmental body (state or school district in this analysis) has articulated a "compelling state interest" and whether the means employed to achieve that goal are "necessary" and "narrowly tailored" to the purpose.[21] Stated another way,

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15. As an example, ten states with charter school legislation have adopted some sort of racial and ethnic balancing provision that requires charter schools and their sponsors to address the racial and ethnic representation of charter schools' student populations. CAL. EDUC. CODE § 47605(b)(5)(G) (2002); FLA. STAT. ch. 228.056(9)(a)(8) (2000); KAN. STAT. ANN. § 72-1906 (d)(2) (2001); MINN. STAT. § 124D.10(9)(3) (2001); NEV. REV. STAT. § 386.580(1) (2002); N.J. STAT. ANN. 18A:36A-8(e) (West 2002); N.C. GEN. STAT. § 115C-238.29F(g)(5) (2001); OHIO REV. CODE ANN. § 3314.06(G) (Anderson 2002); S.C. CODE ANN. § 59-40-50(B)(6) (2001); WIS. STAT. § 118.40(1m)(b)(9) (2001).

16. Belk v. Charlotte-Mecklenburg Bd. of Educ., 269 F.3d 305 (2001) [hereinafter *Belk II*]; Parents Involved v. Seattle Sch. Dist. No. 1, 137 F. Supp. 2d 1224 (W.D. Wash. 2001); Brewer v. West Irondequoit Cent. Sch. Dist., 212 F.3d 738 (2d Cir. 2000); Comfort *ex rel.* Neumyer v. Lynn Sch. Comm., 100 F. Supp. 2d 57 (D. Mass. 2000); Hampton v. Jefferson County Bd. of Educ., 102 F. Supp. 2d 358 (W.D. Ky. 2000); Tuttle v. Arlington County Sch. Bd., 195 F.3d 698 (4th Cir. 1999), *cert. dismissed*, 120 S. Ct. 1552 (2000); Eisenberg v. Montgomery County Pub. Sch., 197 F.3d 123 (4th Cir. 1999), *cert. denied*, 529 U.S. 1019 (2000); Hunter *ex rel.* Brandt v. Regents of the Univ. of Cal., 190 F.3d 1061 (9th Cir. 1999), *cert. denied*, 121 U.S. 186 (2000); Ho v. San Francisco Unified Sch. Dist., 147 F.3d 854 (9th Cir. 1998); Wessmann v. Gittens, 160 F.3d 790 (1st Cir. 1998).

17. The Equal Protection Clause of the Fourteenth Amendment reads: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

18. *See, e.g.*, Korematsu v. U.S., 323 U.S. 214 (1944); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986); Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

19. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 357–62 (1978).

20. 42 U.S.C. § 2000d (2000).

21. *Adarand*, 515 U.S. at 235–37.

the test requires the determination of whether: (1) the goal exceeds the ordinary interests of government and can be characterized as one of the most important tasks undertaken by the state; and (2) the use of a racial criterion is virtually the only method available to achieve success.[22]

As this article will demonstrate, the judicial panels applying strict scrutiny to modern school choice contexts have reached differing conclusions as to whether race-conscious student selection processes pass constitutional muster. It should be noted that the Supreme Court has not yet heard a case on this issue.[23] Therefore, one can only speculate that it would apply strict scrutiny as it has in non-school cases involving race-based classifications.[24] It is possible that the Court could determine that a different analytical test should frame the issue of student selection and assignment at the K-12 level.[25] In the absence of such a directive, nine of the ten cases described in this article employed strict scrutiny as the analytic framework for discerning the answer to the question of the propriety of race-conscious student selection processes.[26]

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22. Professor Peter Rubin of Georgetown University describes strict scrutiny as the process of first determining the importance of the government's goal and "incorporat[ing] the idea that the costs of using a particular type of classification are great enough that the achievement of even the most legitimate governmental purposes will not outweigh the harm wrought by use of the classification" and, second, "ensur[ing] that the states purpose was indeed the actual purpose," "check[ing] for stereotyped thinking," and ensuring that no race-neutral alternative would achieve the same goals. Peter J. Rubin, *Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny after Adarand and Shaw*, 149 U. OF PA. L. REV. 1, 13–15 (2000). In regards to the second prong of strict scrutiny, William Thro lists 4 factors attendant to the tailoring analysis: (1) "the efficacy of non-racial remedies must be fully explored"; (2) "the racial remedy must be flexible and temporary"; (3) "there must be a realistic numerical relationship between the racial remedy and the relevant population" and (4) "the racial remedy generally may not favor one group over another." William E. Thro, *The Constitutionality of Eliminating De Facto Segregation in the Public Schools*, 120 WEST'S EDUC. L. REP. 895, 906–07 (1997).

23. In 2000, the Supreme Court denied petitions for *certiorari* in Eisenberg v. Montgomery County School District, 197 F.3d 123 (4th Cir. 1999), *cert. denied*, 529 U.S. 1019 (2000), and Hunter *ex rel.* Brandt v. Regents of the University of California, 190 F.3d 1061 (9th Cir. 1999), *cert. denied*, 121 U.S. 186 (2000), and dismissed the petition for *certiorari* at the request of the parties in Tuttle v. Arlington County School Board, 195 F.3d 698 (4th Cir. 1999), *cert. dismissed*, 120 S. Ct. 1552 (2000).

24. *See Adarand*, 515 U.S. 200.

25. The Court was recently urged to "have a different standard" in school cases such as these by a group of educational organizations. The brief does not describe precisely what that standard should be, only that any analysis "consider the unique mission of public schools." Brief of Amici Curiae National School Boards Association et al. at 10, Montgomery County Pub. Sch. v. Eisenberg, 120 S. Ct. 1420 (2000) (No. 99-1069).

26. As will be discussed in upcoming sections, the tenth case did not apply strict scrutiny as the appellate court hearing the case determined that the district was still bound by a court-ordered desegregation decree to use race in assigning students to its schools. *See Belk II*, 269 F.3d 305.

This paper provides an in-depth examination of the ten recent court decisions concerning race-based student selection processes. As these cases will illustrate, school districts face increasing demands to justify any race-conscious selection process. The significance of meeting the demands and the implications for what appears to be an evolving legal theory is national in scope and broad in application. Some have even argued that some of these cases mark a departure away from the Court's thinking in *Brown v. the Board of Education*.[27] It should also be noted that each of the cases mentioned above occurred in the context of some form of school choice, which heightens the significance of the research and the implications of its findings.[28]

To that end, this paper is divided into 3 parts. Part I provides a brief description of each of the cases under scrutiny. Part II provides an examination of the patterns that can be discerned from an analysis of those ten cases. Finally, Part III presents a proposed legal argument to support the use of race-conscious student selection as a voluntary means to educational ends in public elementary and secondary schools. This prospective education-based argument employs five assertions: (1) No child is denied an education; (2) Choice is granted to parents as a means to a particular goal; (3) Education for success in a diverse society is a compelling and specific curricular goal within the discretion of the legitimate policy-making authority of state and local authorities; (4) That goal is at the center of the public elementary and secondary educational enterprise; and (5) In today's world, conscious use of race is necessary and narrowly tailored to that core educational goal.

Drawn from the analysis of the cases under study, these five assertions form the foundation of an argument that is grounded by and consistent with other rights-based decisions in education law.

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27. *See, e.g.*, John Charles Boger, *Willful Colorblindness: The New Racial Piety and the Resegregation of Public Schools*, 78 N.C. L. REV. 1719 (2000). *See also* Robert L. Carter, *Thirty-five Years Later: New Perspectives on Brown*, *in* RACE IN AMERICA: THE STRUGGLE FOR EQUALITY (Herbert Hill and James E. Jones, Jr. eds., 1993); Gary Orfield, *School Desegregation after Two Generations: Race, Schools, and Opportunity in Urban Society*, *in* RACE IN AMERICA: THE STRUGGLE FOR EQUALITY (Herbert Hill and James E. Jones, Jr. eds., 1993).

28. The significance of the fact that these cases occur in parental school choice contexts stems from the fact that parental choice enjoys bipartisan support. For example, in the 2000 presidential election, both George Bush and Al Gore supported some form of school choice. Accordingly, parental school choice is likely to expand not diminish in future years. Therefore, understanding the role race may or may not play in the implementation of such plans is crucial for educational policy-makers.

## I. TEN RECENT CASES ON RACE-CONSCIOUS STUDENT SELECTION

The ten cases that form the focus of this inquiry arose in a variety of contexts dealing with parental school choice.[29] Four cases involve inter- or intra-district transfer programs aimed at reducing the presence of racial isolation or imbalance in schools.[30] Five cases involve admission to magnet school programs.[31] One case involves a university laboratory school.[32]

Furthermore, these cases have arisen in different jurisdictions. Two cases hail from California, two from Massachusetts, and one each from Kentucky, Maryland, New York, North Carolina, Virginia, and Washington. All ten arise in urban/suburban contexts. United States District Courts decided three cases.[33] The First, Second, Fourth and Ninth United States Courts of Appeals rendered decisions in seven of the ten cases. Three of the cases have been appealed to the United States Supreme Court.[34] The Supreme Court has denied the petitions for review in two of the cases[35] and the parties withdrew the petition in the third case before the Justices determined whether to grant or deny hearing.[36] Each case is briefly described below in the order the decision was rendered. The nuances and particulars of the court's analysis in each case will receive greater and more specific attention in the analysis section that follows.

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29. Two related cases are not included in this group: Rosenfeld v. Montgomery County Pub. Sch., 41 F. Supp. 2d 581 (D. Md. 1999) (concerning issues of standing and Eleventh Amendment immunity for state officials and not reaching the merits of the Equal Protection challenge); Boston's Children First v. City of Boston, 62 F. Supp. 2d 247 (D. Mass. 1999) (determining an insufficient factual record precluded a determination on whether either party could prevail on the merits). This study also omits settlements reached prior to a court decision in cases filed on related issues. *See* Center for Individual Rights, *Settlement Reached in Pupil Assignment Case*, *available at* http://www.cir-usa.org/press_releases/jacob_v_ind_pr.htm (discussing Jacobs v. Indep. Sch. Dist., No. 625, No. 99-CV-542 (D. Minn. 1999)).

30. Parents Involved v. Seattle Sch. Dist. No. 1, 137 F. Supp. 2d 1224, 1226 (W.D. Wash. 2001); Brewer v. West Irondequoit Cent. Sch. Dist., 212 F.3d 738, 742 (2d Cir. 2000); Comfort *ex rel.* Neumyer v. Lynn Sch. Comm., 100 F. Supp. 2d 57, 61 (D. Mass. 2000); Ho v. San Francisco Unified Sch. Dist., 147 F.3d 854, 856–59 (9th Cir. 1998).

31. Wessmann v. Gittens, 160 F.3d 790 (1st Cir. 1998); Tuttle v. Arlington County Sch. Bd., 195 F.3d 698 (4th Cir. 1999); Eisenberg v. Montgomery County Pub. Sch., 197 F.3d 123 (4th Cir. 1999); Hampton v. Jefferson County Bd. of Educ., 102 F. Supp. 2d 358 (W.D. Ky. 2000); *Belk II*, 269 F.3d 305 (4th Cir. 2001).

32. Hunter *ex rel.* Brandt v. Regents of the Univ. of Cal., 190 F.3d 1061 (9th Cir. 1999).

33. *Comfort*, 100 F. Supp. 2d 57; *Hampton*, 102 F. Supp. 2d 358; *Parents Involved*, 137 F. Supp. 2d 1224.

34. *Eisenberg*, 197 F.3d 123; *Hunter*, 190 F.3d 1061; and *Tuttle*, 195 F.3d 698.

35. *Eisenberg*, 197 F.3d 123; *Hunter*, 190 F.3d 1061.

36. *Tuttle*, 195 F.3d 698.

### A. *Ho v. San Francisco Unified School District*[37]

This case arose due to San Francisco Unified School District's (SFUSD) continuance of the racial balancing provisions originally created by a consent decree entered in connection with earlier desegregation litigation.[38] The policy, which governed the SFUSD's intra-district transfer program, employed race as a consideration only when a single racial/ethnic group comprised 45% or more of the student enrollment in a regular school or 40% or more in an alternative school. In the instant case, the plaintiffs were children of Chinese descent denied requests to transfer from their assigned school to another district school. SFUSD granted transfers when space was available and the move did not negatively affect the racial make-up of the sending or receiving school. The Ninth Circuit Court of Appeals remanded the case for the trial court to answer the questions: "Do vestiges remain of the racism that justified ... the consent decree in 1983?"[39] And if so, whether the district's policy was "necessary to remove the vestiges if they do remain."[40]

The parties in this suit later reached a stipulated settlement modifying the existing consent decree on the issue of student assignment.[41] While acknowledging the school district's authority to consider the racial and ethnic diversity of its schools' student populations, the parties agreed that "race or ethnicity may not be the primary or predominant consideration in determining such [student] admission criteria."[42] Furthermore, the parties agreed that students would be asked but not required to self-identify their race on enrollment forms.[43] Still, the settlement allowed for more direct use of racial and ethnic identifiers in the future if a situation were to develop whereby "there may be identifiable racial or ethnic concentration at a particular school or schools that will adversely affect SFUSD's educational goals or programs in that school or schools."[44] It is

37. 147 F.3d 854 (9th Cir. 1998).

38. NAACP v. San Francisco Unified Sch. Dist., 576 F. Supp. 34 (N.D. Cal. 1983) (upholding a consent decree that used voluntary school choice as a means to integrate SFUSD schools and remedy findings of discrimination). It should be noted that by the terms of a stipulated settlement, approved later, SFUSD is scheduled to achieve unitary status as of December 31, 2002. NAACP v. San Francisco Unified Sch. Dist., 59 F. Supp. 2d 1021, 1025 (N.D. Cal. 1999).

39. *Ho*, 147 F.3d at 865.

40. *Id.*

41. NAACP v. San Francisco Unified Sch. Dist., 59 F. Supp. 2d at 1023.

42. *Id.* at 1025.

43. *Id.*

44. *Id.* at 1026. If such an eventuality occurs, the settlement agreement sets forth a process for the parties to meet and discuss the matter and to come to terms, if necessary with the help of a State Monitor, on further modifications in the district's student assignment program. *Id.*

also interesting to note, that although the judge did not make a ruling on the issue, *per se*, the court expressed the opinion that "plaintiffs were likely to succeed on their claim that the race-based student assignment plan is no longer constitutional."[45]

### B. *Wessmann v. Gittens*[46]

Boston Latin School (BLS), a public school serving the City of Boston, determines its student population largely by means of a competitive examination.[47] Although the school district had been declared unitary with respect to student assignment,[48] school officials continued to employ a policy designed to maintain racial and ethnic diversity at BLS. The policy determined each applicant's composite score combining the entrance exam score with his/her grade point average.[49] Those scores were then ranked and those who scored in the top 50% of the applicants were designated as the "qualified applicant pool" (QAP).[50] The first 50% of seats available were filled strictly by merit from this pool. The remaining group was designated the "remaining pool of qualified applicants" (RQAP).[51] The racial and ethnic composition of the RQAP was then calculated by sorting students into five categories (African American, White, Asian, Hispanic, and Native American) and computing the relative proportions of each group in the pool.[52] The remaining 50% of seats available were filled in such a way that the racial proportion of the filled seats matched the proportions of the RQAP.

A student denied entry under this procedure challenged the program. The First Circuit Court of Appeals split 2 to 1 in finding the program unconstitutional. The court examined two rationales given by the Boston School Committee to justify its policy: (1) it promoted diversity in education and (2) it targeted the vestiges of past discrimination.[53] In relation to the justification concerning diversity, the court noted several problems. First, the court found fault in the district's consideration of only five racial groups.[54] Moreover, the school's diversity goal was tied solely to racial and ethnic diversity and did not consider any other forms of diversity. Second, the court determined that the policy violated the standards

45. *Id.* at 1029.
46. 160 F.3d 790 (1st Cir. 1998).
47. *Id.* at 792.
48. Morgan v. Nucci, 831 F.2d 313 (1st Cir. 1987).
49. Wessmann v. Gittens, 160 F.3d at 793.
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.* at 796.
54. *Id.* at 798.

set forth by *Regents of the University of California v. Bakke*.[55] Rather than using race as one of a number of criteria, the court concluded that "[t]he policy does precisely what Justice Powell deemed anathematic: at a certain point, it effectively forecloses some candidates from all consideration for a seat at an examination school simply because of the racial or ethnic category in which they fall."[56] Therefore, although the court assumed for the sake of argument that diversity was a compelling state interest, the court concluded the policy failed the narrow tailoring portion of strict scrutiny.

The school committee's second rationale of targeting vestiges of past discrimination fared no better. The fact that Boston had been found by a court to operate a segregated school system in the past did not convince the court that the district's goal of racial diversity was sufficiently compelling in the present.[57] To justify its approach, the school district tried to tie the present imbalances to the deliberate segregating policies of the past. As evidence of such a link, the school pointed to the low achievement test scores of African-American and Hispanic students when compared with the scores of Caucasian and Asian-American students. For the court, this approach was too broad a scope from which to infer a causal connection. "We do not propose that the achievement gap bears no relation to some form of prior discrimination. We posit only that it is fallacious to maintain that an endless gaze at any set of raw numbers permits a court to arrive at a valid etiology of complex social phenomena."[58] The court characterized the other indications of past discrimination offered by the defense as anecdotal speculations without sufficient scientific rigor demonstrating causation.[59]

### C. *Tuttle v. Arlington County School Board*[60]

The Arlington County School District in Virginia[61] used a weighted lottery system for filling open seats at its magnet or alternative schools.[62] Once the number of open seats was determined, each application was assigned weights based on three criteria: "(1) whether the applicant was from a low-income or special family background; (2) whether English was

55. *Id.* at 799–800 (citing *Bakke*, 438 U.S. 265).

56. *Wessmann*, 160 F.3d at 800.

57. *Id.* at 801–08.

58. *Id.* at 804.

59. *Id.* at 805–08.

60. 195 F.3d 698 (4th Cir. 1999).

61. The Arlington County School District had been found to operate an unconstitutional segregated school system in 1963. *See* Brooks v. County Sch. Bd., 324 F.2d 303 (4th Cir. 1963). The school district achieved unitary status in 1972. Hart v. County Sch. Bd., 459 F.2d 981, 982 (4th Cir. 1972).

62. *Tuttle*, 195 F.3d at 701–02.

the applicant's first or second language; and (3) the racial or ethnic group to which the applicant belonged."[63] The stated goal of this policy was to promote specialty school populations that mirrored the district's overall population so as to "prepare and educate students to live in a diverse, global society" and to "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."[64] The policy had not been developed as part of any formal remedy to any finding of past discrimination.

Parents of two children who were not selected and who had neither siblings nor any factor that increased their probability of selection challenged the policy as a violation of the Equal Protection Clause of the Fourteenth Amendment.[65] Specifically, they alleged that the racial criterion used in the weighted lottery violated the constitution. The Fourth Circuit Court of Appeals affirmed the lower court's ruling that the program violated the constitution.[66] The school district had argued that the program met the compelling state interest of diversity. The court accepted that assertion for the sake of argument but did not decide whether diversity was sufficiently compelling to meet this standard.[67] Rather, the court focused its analysis on whether the means employed were narrowly tailored to address diversity.

The court determined that the use of the racial criterion as one of the weighting factors constituted racial balancing and that racial balancing in the absence of a remedial order contravenes the constitution.[68] The court also examined "(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 for waivers if the goal cannot be met, and (5) the burden on innocent third parties."[69] The court found each factor to balance in favor of the parents' position. First, the district had considered other race-neutral policies before adopting the one under scrutiny.[70] Second, the duration of the policy was unspecified and had no stopping point.[71] Third, the policy engaged in racial balancing even though it did not set aside seats for minorities and that balancing was "not require[d]" to achieve the

63. *Id.* at 701.

64. *Id.*

65. *Id.* at 702–03.

66. *Id.* at 708.

67. *Id.* at 705.

68. *Id.*

69. *Id.* at 706 (citing Hayes v. North State Law Enforcement Officers Ass'n, 10 F.3d 207, 216 (4th Cir. 1993)). *See also* U.S. v. Paradise, 480 U.S. 149, 171 (1987).

70. *Tuttle*, 195 F.3d at 706, n.11.

71. *Id.* at 706.

goal of diversity.[72] Fourth, the policy was inflexible because it did not consider applicants as individuals but rather granted preferential treatment to some applicants on the basis of race.[73] Finally, the court stated "[w]e find it ironic that a Policy that seeks 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 certain racial and ethnic groups."[74] Accordingly, the court concluded that the policy was not narrowly tailored to achieve the stated goal of diversity.[75]

### D. *Eisenberg v. Montgomery County Public Schools*[76]

The Montgomery County Board of Education in Maryland serves approximately 125,000 students and operates some of its 183 schools as magnet schools. Students who wish to attend one of the magnet schools must petition for a transfer from the school assigned on the basis of geographical residence. At the time of the complaint, the district's policy required that each request be screened according to four criteria: (1) school stability, (2) utilization enrollment,[77] (3) diversity profile,[78] and (4) the reason for the request (e.g., personal hardship).[79]

A transfer may be denied on the basis of diversity if the child's transfer would affect the racial balance at either the sending or receiving school in a "negative" way.[80] To determine racial balance, students were classified as an African American, Asian, Hispanic, or White.[81] The targeted balance was equivalent to the proportions of each racial group in the overall student population.[82] If granting the transfer would shift the percentages to a higher level than the countywide average for a particular group, the transfer could be denied. This process also was intended to prevent any school from becoming "racially isolated."[83]

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72. *Id.* at 707.

73. *Id.*

74. *Id.*

75. *Id.*

76. 197 F.3d 123 (4th Cir. 1999).

77. Utilization refers to the percent of student capacity at a given school. An underutilized school operates below 80% capacity, while an overutilized school operates above 100% capacity. *Id.* at 126.

78. The use of a "diversity profile" reflects the fact that the magnet schools were developed to create a diverse student body at the county's schools by means of voluntary student transfers. *Id.* at 125.

79. *Id.* at 126.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Eisenberg*, 197 F.3d at 127.

The school district had no history of court-ordered desegregation or a finding of past discrimination. The Office for Civil Rights had investigated a complaint in 1981 that Rosemary Hills Primary School was approving student transfers in a way that led to "minority isolation" at that school.[84] The magnet school and transfer policy were developed, at least in part, in response to that complaint.

Jacob Eisenberg, a white student, was entering first grade at the time the controversy arose. His transfer request was denied due to the racial provisions and thus he challenged the program.[85] The Fourth Circuit Court of Appeals determined that the program failed to satisfy the requirement that any use of a racial criterion be necessary and narrowly tailored to a compelling state interest. As it had in *Tuttle v. Arlington County School District*, the court declined to decide whether the district's diversity goals met the compelling purpose portion of the test.[86] Instead, the court concentrated on whether the means employed by the district were narrowly tailored to meet the espoused ends. The court concluded they were not. The court rejected the district's assertion that racial balancing was necessary and held that such balancing was unconstitutional and that the criteria used by the district resulted in transfers being approved on the basis of race.[87] For example, had this student challenger been African American, Hispanic or Asian, his transfer would have been approved.

### E. *Hunter ex rel. Brandt v. Regents of the University of California*[88]

A lab school operated by the University of California—Los Angeles tightly controlled admissions to the school by a committee who met each year to determine what characteristics entering students should have in order to fulfill the research being conducted during that year.[89] In addition to gender, race, ethnicity, and family income, the committee examined other factors such as dominant language, permanence of residence, and parents' willingness to comply with the school's parental involvement requirements.

A student denied admittance sued the University alleging that the racial criterion was unconstitutional.[90] The Ninth Circuit Court of Appeals decided 2 to 1 to uphold this race-conscious selection procedure

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84. *Id.* at 125, n.2.

85. *Id.* at 125.

86. *Id.* at 130.

87. *Id.* at 129.

88. 190 F.3d 1061 (9th Cir. 1999).

89. *Id.* at 1062.

90. Keeley Hunter, a child "who claims her ethnic identity as one-quarter Asian and three-quarters Caucasian" brought suit through her parents in Hunter v. Regents of the University of California, 971 F. Supp. 1316, 1318 (C.D. Cal. 1997). *Id.* at 1063.

because "California had a compelling state interest in operating a research-oriented elementary school dedicated to improving the quality of education in urban public schools."[91] Furthermore, the court found the school's "use of race/ethnicity in its admissions is narrowly tailored to achieve the necessary laboratory environment to produce research results which can be used to improve the education of California's ethnically diverse urban public school population."[92] Therefore, the school's use of race-conscious selection survived constitutional scrutiny.

### F. *Brewer v. West Irondequoit Central School District*[93]

This case considered a challenge to a longstanding program operated by the state of New York that allows students to voluntarily transfer between districts to achieve the goals of "Reducing Minority Group Isolation; Encouraging Intercultural Learning; Promoting Academic Excellence and Fostering Responsible Civic Leadership."[94] In its current form only minority students are permitted to transfer out of predominately minority Rochester City School District (RCSD) schools to suburban schools with low minority student populations.[95] Non-minority suburban students are also given an opportunity to transfer to those schools within RCSD with large minority populations. Transfer requests are permitted only if they do "not negatively affect the racial balance of the receiving school."[96] A minority pupil is defined by the regulations 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."[97]

In this case, a White student who attended an urban mostly minority school applied to transfer to a suburban school.[98] She was accepted for the inter-district transfer program in July 1998 after being interviewed by Iroquois Elementary School's Assistant Principal. Her acceptance was later revoked after another administrator noticed her appearance and checked

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91. *Hunter ex rel.*, 190 F.3d at 1074. In his dissent, Judge Beezer compared the educational research interest to the role model theory espoused by the defendant school district in *Wygant v. Jackson Board of Education* and found insufficiently compelling by the Supreme Court: "Just like the 'role model' theory in *Wygant*, an 'educational research' rationale is 'amorphous' and admits of 'no logical stopping point.' " *Id.* (citing *Wygant*, 476 U.S. 267, 275–76 (1986) (plurality opinion)).

92. *Id.* at 1066.

93. 212 F.3d 738 (2d Cir. 2000).

94. *Id.* at 742.

95. *Id.* at 741.

96. *Id.* at 742.

97. N.Y. COMP. CODES R. & REGS. tit. 8, § 175.24(a) (1999).

98. *Brewer*, 212 F.3d at 741.

her records to confirm that she listed Caucasian as her race. The Second Circuit Court of Appeals split 2–1 in reaching its decision. When considering the merits of the complaint, the majority applied a strict scrutiny standard because of the school district's use of a racial classification. The court found the central purpose of the program to be the "reduc[tion] of racial isolation" for the purpose of "(1) 'preparing students to function in adult society, in which they will encounter and interact with people from many different backgrounds'; (2) 'mak[ing] students more tolerant and understanding of others throughout their lives'; and (3) 'eliminating *de facto* segregation.' "[99] It noted that the parties had not argued the issue of *de facto* segregation at the trial court level, presumably because the defendants believed the plaintiffs had conceded that reducing racial isolation constituted a compelling state interest.[100]

The district court had declared the program unconstitutional and based its conclusion that the inter-district program failed the strict scrutiny test from *Hopwood v. Texas*,[101] a case in which the Fifth Circuit concluded that remedying past governmental wrongdoing was the only interest sufficiently compelling to justify racial classification.[102] The Second Circuit found this reliance misplaced and pointed out that other circuits have not found Supreme Court jurisprudence on the issue so clear.[103] The Second Circuit also cited the Supreme Court's decision in *Regents of the University of California v. Bakke*,[104] where the Supreme Court held that even when no history of *de jure* discrimination exists, race, as one of many factors to determine admission to a program, was permissible.

The court further pointed out that the district court had not consulted precedent from within the Second Circuit, specifically *Parent Association of Andrew Jackson High School v. Ambach* ("Andrew Jackson I")[105] and *Parent Association of Andrew Jackson High School v. Ambach* ("Andrew Jackson II"),[106] where the appellate court concluded that a voluntary high school program aimed at reducing *de facto* segregation served a compelling governmental interest. The *Brewer* court extensively reviewed the reasoning of *Andrew Jackson I* and *II* and reaffirmed the decisions in these cases, finding no conflict between these precedents and subsequent cases decided by the Supreme Court. The court concluded "that a compelling

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99. *Id.* at 745.

100. *Id.*

101. 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996).

102. *Id.* at 944.

103. *Brewer*, 212 F.3d at 747. *See also* Smith v. Univ. of Wa., 233 F.3d 1188, 1200 (9th Cir. 2000), *cert. denied*, 121 S. Ct. 2192 (2001) ("We, therefore, leave it to the Supreme Court to declare that the *Bakke* rationale regarding university admissions policies has become moribund, if it has. We will not.").

104. 438 U.S. 265 (1978).

105. 598 F.2d 705 (2d Cir. 1979).

106. 738 F.2d 574, 577, 579 (2d Cir. 1984).

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."[107]

In the analysis of the narrow tailoring component of strict scrutiny, the court determined that the district court erred because it considered only whether the program was narrowly tailored to address "true diversity" and not whether it was sufficiently tailored to the end of reducing *de facto* segregation.[108] Thus, the Court of Appeals remanded the case to the District Court "to again explore the Program's administration on a more fully developed factual record."[109]

### G. *Comfort ex rel. Neumyer v. Lynn School Committee*[110]

The Lynn, Massachusetts School Committee adopted an intra-district transfer policy entitled, "A Voluntary Plan for School Improvement and the Elimination of Racial Isolation" (Lynn Plan).[111] The Lynn Plan assigns students to their neighborhood schools and guarantees that every child may attend that school.[112] The plan also allows students to volunteer to transfer to another school. Space permitting, transfers are approved unless they would result in increased "racial isolation (too low a minority percentage) or racial imbalance (too high a minority percentage)."[113] Elementary schools are considered racially balanced if the ratio of White to minority students in the school is within 15% of the same proportion in the district as a whole. For middle schools and high schools, the percentage shifts to 10%. All high schools satisfy this requirement, but only 2 of 5 middle schools and none of the elementary schools satisfy the requirement.[114]

A group of students initially denied their choice school challenged the program.[115] The district court judge determined that a preliminary injunction was not warranted given the information available. The court, although not ruling on the merits of the claim, laid out several issues that the parties should address as they prepared for trial. First, the court distinguished this case from *Wessmann v. Gittens*, finding that the *Wessmann* decision provided guidance but did not control the outcome of this

107. *Brewer*, 212 F.3d at 752.

108. *Id.* at 753.

109. *Id.*

110. 100 F. Supp. 2d 57 (D. Mass. 2000).

111. *Id.* at 59. As the title of the plan indicates, the Lynn Plan did not arise because of any court order, nor was the school district ever found to operate *de jure* segregation in its schools.

112. *Id.*

113. *Id.* at 61.

114. *Id.*

115. *Id.* at 62.

controversy.[116] The court noted that, while the *Wessmann* court raised numerous problems with diversity as a compelling state interest, it did not hold that diversity could never be compelling. Second, the court noted that the school district would have a "substantial burden" and that the court would "carefully scrutinize the record, and ... will not 'allow generalities emanating from the subjective judgments of local officials to dictate whether a particular percentage of a particular racial or ethnic group is sufficient or insufficient [to achieve the policy's stated goals].' "[117] To that end, the parties were alerted to the expectation that the school district would have to "link the concrete workings of the Lynn Plan to reliable social science evidence."[118]

### H. *Hampton v. Jefferson County Board of Education*[119]

This Kentucky case involved a challenge to the operation of one of the magnet schools operated by the Jefferson County Board of Education, the Central High Magnet Career Academy (Academy). Brought by a group of African-American students denied entry to the high school, the plaintiffs challenged the race-conscious selection process used at the school by filing a petition to dissolve an existing desegregation decree.[120] The Academy has no geographic attendance area from which students are routinely assigned. Instead, it was developed as a means to further integration by providing an attractive program that allows students to pursue one of four special programs; business, law and government, computer technology, and medicine.[121]

The student population of the school at the time the plaintiffs were denied entry was 50% African American, the upper limit for racial concentration established under the district's desegregation plan.[122] Although the school was under-subscribed,[123] the district denied the

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116. *Comfort ex rel.*, 105 F. Supp. 2d at 65.

117. *Id.* at 66 (citing *Wessmann*, 160 F.3d at 800).

118. *Id.* at 67, n.18. On a subsequent complaint involving the same parties, the court ruled that since the children involved had been accepted at their preferred schools and faced only a "theoretical possibility of future harm," plaintiffs lacked the standing to seek declaratory or injunctive relief. The judge did allow the case to go forward in order to determine whether or not plaintiffs were entitled to nominal damages for their earlier denial of transfer requests based on their race. Comfort v. Lynn Sch. Comm., 150 F. Supp. 2d 285 (D. Mass. 2001).

119. 102 F. Supp. 2d 358 (W.D. Ky. 2000).

120. *Id.* at 359. For purposes of this article, the court's analysis of the dissolution petition will not be reviewed. Rather, only the court's discussion regarding the magnet school's student selection processes will be discussed.

121. *Id.* at 377.

122. *Id.* (The range was set at 15%–50%).

123. *Id.* (The school was 300–400 students below capacity).

students' transfer requests, because their admittance would have placed the school outside the established racial guidelines. Thus, for an additional African-American student to be admitted, a student of another race would have to apply and be admitted.

After determining that the petitioners' request for dissolution of the desegregation decree should be granted, the district court concluded that as a consequence, the district's use of race in admissions at the Academy could no longer withstand constitutional scrutiny.[124] The court first acknowledged that diversity may provide a compelling state interest in the absence of a remedial order,[125] but concluded that "the current student assignment method for Central—which fixates only on race—does not satisfy any diversity analysis and must be stopped."[126] The court also recognized that the district might assert that it has a compelling interest in maintaining the gains made through its desegregation efforts. However, the court reasoned that such an interest is not "categorically compelling."[127] Instead the court distinguished between what it termed "vertical and horizontal distributions of resources."[128] The court explained that since most schools are fungible, movement from one to another is a horizontal choice. In contrast, since the focus of instruction at the Academy specified a particular and unique focus, the choice to attend was vertical, more analogous to admissions into higher education institutions. Therefore, "[w]hen it decides who may attend [the Academy], JCPS uses a racial classification that denies a benefit, causes a harm, and imposes a burden on unsuccessful African-American applicants."[129] For these reasons, the court ordered the district to revise its admission policies at the Academy and any similar policies for other magnet schools.[130]

### I. *Belk v. Charlotte-Mecklenburg Board of Education*[131]

This case is the latest in a line of cases chronicling the desegregation efforts, or the lack thereof, made by the Charlotte-Mecklenburg School District.[132] Like *Hampton*, the challenge to the district's magnet school plan was eventually considered as part of a larger issue of whether the

124. *Id.* at 379–82.

125. *Hampton*, 102 F. Supp. 2d at 378 (citing *Bakke*, 438 U.S. 265).

126. *Id.* at 379.

127. *Id.* at 380.

128. *Id.*

129. *Id.* at 381.

130. *Id.* at 382. Using the same logic, the court stated that the district's use of race at non-magnet schools (horizontal choices) was constitutionally permissible. *Id.* at 381.

131. 269 F.3d 305 (4th Cir. 2001).

132. *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Capacchione v. Charlotte-Mecklenburg Sch., 80 F. Supp. 2d 557 (W.D. N.C. 1999).

school district had achieved unitary status with respect to its desegregation efforts.[133]

Cristina Capacchione, who identifies her race as Hispanic and Caucasian, had been denied entry into one of the district's magnet schools.[134] Her father filed suit challenging the district's magnet school admissions policies. The admissions procedure called for applicants to first be screened for proximity of residence to the school, as a set number of seats are reserved for neighborhood children.[135] Next, applicants who were siblings of returning students are automatically admitted.[136] Finally, remaining seats were filled by means of two "parallel lotteries, one for black students and one for students of other races," until the racial balance was 40% African American and 60% other students.[137]

Sitting en banc, the Fourth Circuit Court of Appeals divided 6–5 in deciding that the magnet school program survived constitutional scrutiny.[138] The decision hinged on whether the magnet program had been established as part of the court-ordered desegregation efforts or whether it was a voluntary effort to address the effects of increasing neighborhood racial isolation.[139] The court determined that the magnet program was part of the district's larger plan to remove the vestiges of discrimination. Thus, bound by the Supreme Court's precedent in *Swann v. Charlotte-Mecklenburg Board of Education*,[140] the program was a constitutional remedy.[141] As Chief Judge Wilkinson explained:

> It is true that in the early 1990's, the school board in its magnet program eagerly accepted the courts' invitation to rely upon numerical benchmarks. I believe, however, that is necessary to afford a school board some latitude in

133. That portion of the case will not be discussed here. Rather, as with *Hampton*, this discussion will concern only the analysis with regard to race-conscious student selection in the magnet schools operated by the school district.

134. *Belk II*, 269 F.3d at 316–17. *See also* Capacchione v. Charlotte Mecklenburg Sch., 57 F. Supp. 2d 228, 239 (W.D.N.C. 1999).

135. *Capacchione*, 57 F. Supp. 2d at 287.

136. *Id.*

137. *Id.*

138. *Belk II*, 269 F.3d at 311. The panel also decided by a vote of 7–4 that the Charlotte-Mecklenburg School District had achieved unitary status in all respects, but denied by a vote of 6–5 a petition for attorneys' fees on the unitary status issue. The court unanimously vacated the district court's injunction preventing the school district from considering race in its magnet school student selection process and unanimously affirmed the imposition of sanctions against the school district for failing to respond to requests for additional information during the discovery process. *Id.*

139. *Id.* at 354. Although, the plaintiffs argued that even if the magnet program was developed pursuant to the desegregation order, it nevertheless failed strict scrutiny and was therefore unconstitutional. *Id.*

140. 402 U.S. 1.

141. *Belk II*, 269 F.3d at 411.

> attempting to meet its desegregative obligations if we are not to undermine the rule of law. To do otherwise leaves the Board between a rock and a hard place. Namely, if the school board fails to carry out the court desegregation order, it can be cited for contempt or held not to have achieved unitariness. But if the Board acts aggressively to implement the court order, it risks facing judicial condemnation and the threat of litigation on the grounds that it was acting ultra vires. This is not the kind of quandary into which we should force institutions that are, for better or worse, under judicial decree.[142]

The court also noted that this connection to an existing desegregation order distinguished the case from its earlier decisions in *Eisenberg* and *Tuttle*.[143]

### J. *Parents Involved in Community Schools v. Seattle School District No. 1*[144]

This case arose from a challenge to the Seattle School District's intra-district open enrollment program where enrollments at each of the district's ten high schools are determined via an "open choice" program.[145] Students list the schools they desire to attend in order of preference. If a school receives more applicants than seats, students are selected according to "tiebreakers." First, siblings of returning students are admitted and next, "students whose race will help mitigate the imbalance of the racial makeup of the chosen school" are selected.[146] The racial tiebreaker was only employed in schools where the student population varies more than 15 percentage points from the overall racial makeup of the student population, which, at the time, was "approximately 40% white and 60% nonwhite."[147] The purpose of the choice program and its use of a racial tiebreaker is to "achiev[e] diversity, limit[] racial isolation, and provid[e] an equal opportunity to receive a quality education."[148] A group of parents

142. *Id.* at 354.

143. *Id.* at 410–11 ("The distinction between a unitary school system and a school system under court order to desegregate is, from a legal standpoint, fundamental.").

144. 137 F. Supp. 2d 1224 (W.D. Wash. 2001).

145. *Id.* at 1226.

146. *Id.* Additional tiebreakers include proximity of home to school and finally a random lottery. *Id.*

147. *Id.*

148. *Id.*

concerned that their children would not be assigned to their school of choice filed suit to challenge the program's constitutionality.[149]

The court, applying strict scrutiny, described the school district's purpose for the open enrollment policy as a means "to mitigate the historical effects on its high schools of the residential segregation of Seattle's neighborhoods, and to allow all students the opportunity to benefit from the pedagogical and socio-cultural values a racially diverse school offers."[150] The court determined that this goal squared with a number of Supreme Court precedents recognizing the authority of local school boards to devise voluntary measures to address *de facto* segregation, and therefore constituted a compelling state interest.[151]

Turning to the narrow tailoring analysis, the court found that evidence demonstrated that the district's schools "would revert to their pre-existing 'natural state' of racial segregation" within a few years if the program did not exist.[152] The court noted with approval several features of the policy that demonstrated the limited use of race: (1) the policy applied the tiebreaker only to those schools that had been deemed out of balance and as soon as an entering class of students achieved balance, the policy called for remaining seats to be filled without examination of race; (2) the policy did not call for a specific quota but rather allows a 15% deviation from the current racial proportions of the student body; and (3) the district had a history of "reducing" the use of race in student assignment policies, including the end of mandatory busing.[153] Finally, the court determined that the open choice policy "is a 'deck-shuffle' . . . and as such does not, strictly speaking, prefer one race over any other" since all children are subject to the plan.[154] For these reasons the court held that the policy survived strict scrutiny and granted the school district's motion for summary judgment.

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149. The plaintiffs also asserted that the program created a racial preference in contravention of the Washington Civil Rights Act (RCW 49.60.400, also known as "Initiative 200") and in violation of the Washington State Constitution. *Id.* The court rejected this claim finding the program did not create a preference and, in fact, honored the Washington Supreme Court's earlier precedents establishing a constitutional duty to operate integrated schools. *Id.* at 1228 (citing Citizens Against Mandatory Bussing v. Palmason, 495 P.2d 657, 661 (Wash. 1972).

150. *Id.* at 1233.

151. *Id.* at 1234. *See also* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971)); North Carolina Bd. Of Educ. v. Swann, 402 U.S. 43 (1971); Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982); Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 242 (1973); Bustop, Inc. v. Bd. of Educ., 439 U.S. 1380, 1381 (1978).

152. *Parents Involved*, 137 F. Supp. 2d at 1237.

153. *Id.* at 1238–39.

154. *Id.* at 1239.

### K. *Summary of Cases*

In providing an overview of the ten cases reviewed, one cannot conclude judicial uniformity. Table I below provides a summary of the cases according to the policies under scrutiny and the holdings of the courts. Three race-conscious programs were declared constitutional,[155] four were found unconstitutional,[156] and three were placed in the "maybe" category as the courts remanded the cases for further proceedings.[157] It is also interesting to note that in addition to the split between courts on the outcomes of the cases, there was considerable dissension within courts in reaching a conclusion with four decisions being the product of divided courts.[158] Despite these seemingly divergent outcomes, it is possible to extrapolate several patterns.

TABLE I
TEN CASES ON RACE-CONSCIOUS STUDENT SELECTION SUMMARIZED

| CASE | LOCATION/COURT | POLICY UNDER SCRUTINY | RULING OF THE COURT |
|---|---|---|---|
| Ho by Ho v. San Francisco Unified School District | San Francisco/ 9th Circuit Ct. of Appeals | Continuance of racial balancing provisions of a consent decree when students wish to transfer from their assigned school to another school within the district. | Racial criterion may or may not be constitutional; remanded with further instructions. |
| Wessmann v. Gittens | Boston/ 1st Circuit Ct. of Appeals | Weighted selection process that used race as one factor for admittance to the Boston Latin School. | Racial criterion unconstitutional. |
| Tuttle v. Arlington County School Board | Arlington County, Virginia/ 4th Circuit Ct. of Appeals | Weighted selection process that used race as one factor for selection into a district magnet or specialty school. | Racial criterion unconstitutional. |

155. *Hunter*, 190 F.3d 1061; *Parents Involved*, 137 F. Supp. 2d 1224; and *Belk II*, 269 F.3d 305.

156. *Wessmann*, 160 F.3d 790; *Tuttle*, 195 F.3d 698; *Eisenberg*, 197 F.3d 123; and *Hampton*, 102 F. Supp. 2d 358.

157. *Ho*, 147 F.3d at 865; *Brewer*, 212 F.3d at 741; and *Comfort*, 100 F. Supp. 2d at 60.

158. *Wessmann*, 160 F.3d 790; *Hunter*, 190 F.3d 1061; *Brewer*, 212 F.3d at 740; and *Belk II*, 269 F.3d 305.

| CASE | LOCATION/COURT | POLICY UNDER SCRUTINY | RULING OF THE COURT |
|---|---|---|---|
| Eisenberg v. Montgomery County Public Schools | Montgomery County Maryland/ 4th Circuit Ct. of Appeals | Selection process using race as one factor for determining admission at a math/science magnet school. | Racial criterion unconstitutional. |
| Hunter ex rel. Brandt v. the Regents of the University of California, | Los Angeles/ 9th Circuit Ct. of Appeals | Selection process using race as one factor for admittance into the UCLA laboratory school. | Racial criterion constitutional. |
| Brewer v. West Irondequoit Central School District | Rochester, New York/ 2nd Circuit Ct. of Appeals | Selection process using race as a singular criterion for participation in an inter-district transfer program operated by the state to reduce racial isolation due to de facto segregation. | Racial criterion may or may not be constitutional; vacated injunction & remanded with further instructions. |
| Comfort ex rel. Neumyer v. Lynn School Committee | Lynn, Massachusetts/ U.S. Dist. Ct. of Mass. | Selection process using race as one criterion for participation in an intra-district transfer program operated by the district, in part, to reduce racial isolation due to de facto segregation. | Racial criterion may or may not be constitutional; denied request for preliminary injunction. |
| Hampton v. Jefferson County Board of Education | Louisville, Kentucky/U.S. Dist. Ct. for the Western District of Kentucky | Selection process using race as a singular criterion for participation in magnet program operated as a voluntary means to maintain gains made through desegregation. | Racial criterion unconstitutional. |
| Belk v. Charlotte-Mecklenberg | Charlotte, North Carolina/ 4th Circuit Court of Appeals | Selection process using race for participation in a magnet program operated as part of district's court-ordered desegregation plan. | Racial criterion constitutional. |

| CASE | LOCATION/COURT | POLICY UNDER SCRUTINY | RULING OF THE COURT |
|---|---|---|---|
| Parents Involved in Community Schools v. Seattle School District No. 1 | Seattle, Washington/U.S. Dist. Ct. for the Western District of Washington | Selection process using race as one criterion for participation in an intra-district transfer program operated by the district, in part, to reduce racial isolation due to de facto segregation. | Racial criterion constitutional. |

## II. ANALYSIS OF PATTERNS

Although each of the decisions in these cases rests on the specificity of the particular facts of each policy under scrutiny, comparative analysis of decisions still yields some notable patterns. Those patterns include general observations, the application of strict scrutiny analysis, the reading of Supreme Court precedents, and courts' reliance on social science research in their analysis. This section reviews those patterns.

### A. *General Observations*

Several patterns reveal themselves at first glance. First, it cannot escape notice that, with the exceptions of *Ho v. San Francisco Unified School District*[159] and *Hampton v. Jefferson County Board of Education*,[160] White children who were denied entrance into their school of choice filed each challenge.[161] Second, unlike the discrimination at issue in *Brown v. Board of Education*,[162] each policy under scrutiny here was intended to integrate, not segregate, students on the basis of race. In that way, these cases all examine what has been called "benign" discrimination, that is, the use of

159. 147 F.3d 854 (1998).

160. 102 F. Supp. 2d 358 (2000).

161. Sharon Rush suggests that "white privilege" blinds many people of good will to the existence of modern racism, particularly institutional racism and the limits placed on minorities. She writes: "Thus, color-blindness seems to offer a way out of the race paradox that perplexes people of goodwill. Specifically, they are most comfortable not talking about race and succeed in avoiding such discussion so long as the world operates under their view of color-blindness. Correspondingly, they are less reluctant to talk about race in instances where they believe the color-blind principle is violated, as they think it is in affirmative action." Susan E. Rush, *Sharing Space: Why Racial Goodwill Isn't Enough*, 32 CONN. L. REV. 1, 20 (1999). *See also* Sylvia A. Law, *White Privilege and Affirmative Action*, 32 AKRON L. REV. 603 (1999).

162. 347 U.S. 483 (1954).

race for "good" rather than "malevolent" intentions.[163] Third, given the espoused intentions of the programs, it is interesting, but perhaps not surprising, to note that organizations participating as *amici curiae*,[164] all filed briefs in support of the school districts. These groups, filing briefs individually or in combination, include an impressive array of educational and public policy groups.[165] In addition, the United States Department of Justice has filed amicus briefs in support of the schools' use of race-conscious practices in three of the cases.[166]

### B. *Application of Strict Scrutiny*

Although these general observations are interesting, the central issue in each case is the method the courts employed in weighing the interests involved when reaching their respective decisions. Courts in nine out of the ten cases reviewed in this article employed strict scrutiny to guide their analysis. Only the *Belk v. Charlotte-Mecklenburg Board of Education* court did not, because it determined that the school district was allowed and even compelled to consider race in student assignments until the district achieved unitary status with respect to that aspect of district operations.[167] Table II, below, outlines the application of strict scrutiny for each of the nine cases employing the test.[168]

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163. Regents of the Univ. of Cal. v. Bakke, 428 U.S. 265, 294 (1978).

164. Plural of *amicus curiae*, which means "a person who is not a party to a lawsuit but who petitions the court . . . to file a brief in the action because that person has a strong interest in the subject matter." BLACK'S LAW DICTIONARY 83 (7th ed. 1999).

165. The groups that have filed such amicus briefs include: American Association of School Administrators, Association of Multi-Ethnic Americans, Center for the Study of Bi-racial Children, Council of Great City Schools, Horace Mann League, Magnet Schools of America, National Alliance of Black School Educators, National Association for the Advancement of Colored People (NAACP), National Association for Multicultural Education, National Association of Secondary School Principals, National School Boards Association (and various state affiliates).

166. The Department of Justice filed such briefs in Tuttle v. Arlington County School Board, 195 F.3d 698 (4th Cir. 1999), Eisenberg v. Montgomery County Public Schools, 197 F.3d 123 (4th Cir. 1999), and Brewer v. West Irondequoit Central School District, 212 F.3d 738 (2d Cir. 2000). It should be noted that each of these cases occurred under the Clinton Administration. It is unknown what stance the Bush Administration will take on the issue.

167. 269 F.3d 305, 353–355 (4th Cir. 2001).

168. To reiterate, the application of strict scrutiny requires a determination of a compelling state interest and an analysis determining whether the means are narrowly tailored to achieve that compelling state interest.

TABLE II
APPLICATION OF STRICT SCRUTINY IN BY RECENT COURTS

| CASE | COMPELLING STATE INTEREST | NARROW TAILORING ANALYSIS |
|---|---|---|
| Ho by Ho v. San Francisco Unified School District<br>147 F.3d 854 (9th Cir. 1998). | Complying with the consent decree is a compelling state interest if: "vestiges remain of the racism that justified . . . the consent decree in 1983?" (at 865). | Use of racial criterion may be narrowly tailored if: the policy "is . . . necessary to remove the vestiges if they do remain" (at 865). |
| Wessmann v. Gittens<br>160 F.3d 790 (1st Cir. 1998). | Assumed without deciding that racial diversity could be a compelling state interest.<br><br>Rejected school's contention that the program served the goal of remedying vestiges of past discrimination because: (a) the district had been declared unitary in 1987; and (b) achievement gap between minority and non-minority students not enough to show remaining vestiges of past discrimination. | School erred by defining diversity as just racial and ethnic diversity; program only slightly altered the racial make-up of school from what a merit-only approach would have produced; determined that policy was one of racial balancing; policy "does not meet the Bakke standard" (at 800).<br><br>"[W]e fail to see how the adoption of an admissions policy that espouses a brand of proportional representation is designed to ameliorate the harm that allegedly occurred" (at 807). |
| Tuttle v. Arlington County School Board<br>195 F.3d 698 (4th Cir. 1999). | Assumed without deciding that racial diversity could be a compelling state interest. | Determined that policy was one of racial balancing and that it was not narrowly tailored to the interest of diversity. |
| Eisenberg v. Montgomery County Public Schools<br>197 F.3d 123 (4th Cir. 1999). | Assumed without deciding that racial diversity could be a compelling state interest. | Determined that policy was one of racial balancing and that it was not narrowly tailored to the interest of diversity. |
| Hunter ex rel. Brandt v. the Regents of the University of California<br>190 F.3d 1061 (9th Cir. 1999). | Held that state's (university's) interest in operating a research-oriented elementary school in order to learn how to improve the quality of elementary education in urban school districts was compelling. | After reviewing testimony from a "parade of experts" held that use of race in admissions was "narrowly tailored to achieve the necessary laboratory environment" (at 1067). |

| CASE | COMPELLING STATE INTEREST | NARROW TAILORING ANALYSIS |
|---|---|---|
| Brewer v. West Irondequoit Central School District 212 F.3d 738 (2nd Cir. 2000). | "[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" (at 752, emphasis in original). | Held that district court erred because it considered only whether the program was narrowly tailored to address "true diversity" and not whether it was sufficiently tailored to the end of reducing de facto segregation (at 752). |
| Comfort ex rel. Neumyer v. Lynn School Committee 100 F. Supp.2d 57 (D.Mass. 2000). | Assumed that diversity could be a compelling state interest. | "[D]efendants [school officials] will have to link the concrete workings of the Lynn Plan to reliable social science evidence" (at 67, note 18). |
| Hampton v. Jefferson County Board of Education,102 F. Supp.2d 358 (W.D.Ky. 2000). | Assumed that diversity could be a compelling state interest.<br><br>"[V]oluntary maintenance of the desegregated school system should be considered a compelling state interest . . . [but] like many other interest, this one is not categorically compelling" (at 379). | "Without a doubt, however, the current assignment method for Central—which fixates only on race—does not satisfy any diversity analysis and must be stopped" (at 379).<br><br>Magnet school creates "vertical effects" and therefore using a racial classification "denies a benefit, causes a harm, and imposes a burden on unsuccessful African American applicants" (at 381). |
| Parents Involved in Community Schools v. Seattle School District No. 1, 137 F. Supp.2d 1224 (W.D.Wash. 2001). | "Achieving racial diversity and mitigating the effects of de facto segregation are, the court finds, compelling government interests as a matter of law" (at 1235). | "Defendants have presented sufficient evidence that a less burdensome plan would not, at this time, produce the degree of integration necessary to achieve their goals. The court finds therefore that the defendants have established that their plan is narrowly tailored to further the compelling interests asserted in this case." (at 1239). |

### 1. Application of Strict Scrutiny—Compelling Ends?

In analyzing the compelling state interest invoked in the cases examined, one can discern several patterns. But first, it is interesting to focus on what could be termed the outlier case of the group. *Hunter* is by far the most unique case arising from the most unusual set of facts. Accordingly, the Ninth Circuit's application of strict scrutiny focuses on inquiries not applicable to the other situations. In *Hunter*, the educational context of a university laboratory school served multiple goals, particular among them, UCLA's research mission.[169] It was that mission, not the curricular obligations owed to the students attending the school, that formed the justification for the use of race-conscious student selection processes. Accordingly, the *Hunter* court's discussion of the compelling state interest asserted by the university examined considerations not at issue in the other cases.[170] In examining the patterns found in the other cases, the courts' consideration of "diversity" necessitates attention. Although seven opinions engaged in discussions of the issue of diversity,[171] it becomes clear that "diversity" is a fluid term without uniform meaning. As the *Wessmann* court observed, "[t]he word 'diversity,' like any other abstract concept, does not admit of permanent, concrete definition. Its meaning depends not only on time and place, but also upon the person uttering it."[172] Careful examination of these cases and the discussions of diversity occurring in the party and amici briefs suggests three distinct iterations of the term—each with different consequences for the application of strict scrutiny analysis. The courts have used "diversity" to mean: (1) diversity as an extension of the right to free speech; (2) diversity as an extension of the district's curricular control; and (3) diversity to address and combat the effects of *de facto* segregation.

#### *a. Diversity as an Extension of the Right to Free Speech*

Diversity as an extension of the right to free speech can be found in the First Circuit's decision in *Wessmann*,[173] in the Fourth Circuit's decisions in *Tuttle*[174] and *Eisenberg*,[175] and in the federal district court's holding in

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169. 190 F.3d at 1062.

170. *Id.* at 1063.

171. Parents Involved v. Seattle Sch. Dist. No. 1, 137 F. Supp. 2d 1224 (W.D. Wash. 2001); Comfort *ex rel.* Neumyer v. Lynn Sch. Comm., 100 F. Supp. 2d 57 (D. Mass. 2000); Wessmann v. Gittens, 160 F.3d 790, 796–800 (1st Cir. 1998); *Tuttle*, 195 F.3d 698; *Eisenberg*, 197 F.3d 123; *Brewer*, 212 F.3d at 749–752; *Hampton*, 102 F. Supp. 2d at 378–79;.

172. *Wessmann*, 160 F.3d at 796.

173. *Id.* at 797.

174. 195 F.3d at 704.

175. 197 F.3d at 130–32.

*Hampton*.[176] The majority opinion in *Wessmann* captures this idea with the following statement: "Encounters between students of varied backgrounds facilitate a vigorous exchange of ideas that not only nourishes the intellect, but also furthers mutual understanding and respect, thereby eroding prejudice and acting as a catalyst for social harmony."[177] Later, finding fault with this conceptualization of diversity, the court continues:

> Furthermore, if justified in terms of group identity, the Policy suggests that race or ethnic background determines how individuals think or behave—although the School Committee resists this conclusion by arguing that the greater the number of a particular group, the more others will realize that the group is not monolithic. Either way, the School Committee tells us that a minimum number of persons of a given race (or ethnic background) is essential to facilitate individual expression. This very position concedes that the Policy's racial/ethnic guidelines treat "individuals as the product of their race," a practice that the Court consistently has denounced as impermissible stereotyping.[178]

Ironically, this iteration of diversity has its home in the Supreme Court's decision in *Bakke*, a case that established the permissible use of race in student selection at the higher education level. As Justice Powell explained, this conception of diversity is tied to the First Amendment's guarantee of freedom of speech and the relationship "academic freedom" has to that right:

> Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body . . . The atmosphere of "speculation, experiment and creation"—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body. As the Court noted in *Keyishian*, it is not too much to say that the "nation's future depends upon leaders trained through wide exposure" to the ideas and mores of students as diverse as this Nation of many peoples . . . Thus, in arguing that its universities must be accorded the right to select those students who will contribute the most to the "robust exchange of ideas," petitioner invokes a countervailing constitutional interest, that of the First

176. 102 F. Supp. 2d at 378.

177. 160 F.3d at 797.

178. *Id.* at 799 (quoting Miller v. Johnson, 515 U.S. 900, 912 (1995)).

> Amendment. In this light, petitioner must be viewed as seeking to achieve a goal that is of paramount importance in the fulfillment of its mission.[179]

*Wessmann* and the other courts' use of diversity in this *Bakke*-esque manner may stem from the fact that they examined magnet school policies, where the application and selection processes are arguably most analogous to the higher education environment. The *Brewer* court termed the notion of diversity, "true diversity," noting that this view of diversity "may certainly be defined more broadly than race."[180] Furthermore, this broadness of definition makes it more difficult to sustain arguments that the program is sufficiently narrow to that end when the second portion of the strict scrutiny test, the narrow tailoring analysis, is applied.

Moreover, differences between the higher education and K-12 contexts may be neglected when the state's interest is couched as one of "true diversity."[181] As the *Parents Involved* court observed, "interests asserted at the higher education level carry much different implications than those asserted at the elementary and secondary school level."[182] In fact, Judge Gertner, in the *Comfort* decision, suggests that the *Wessmann* court missed this important distinction:

> The diversity interest defendants argue here makes no assumptions about any groups' "unique contribution." Rather, it reflects a concern that elementary school children simply get used to being in classrooms with people different from themselves. In fact, it assumes that the more diverse a classroom is, the more likely students will learn that all people are different, no matter what their color or ethnic background. It is not a form of stereotyping, but a method to prevent the formation of stereotypes.[183]

It is this focus on what a child learns that presumably gives rise to the second definition of diversity; diversity as an extension of the district's curricular control.

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179. *Bakke*, 438 U.S. at 312–313 (internal citations omitted).

180. 212 F.3d at 752.

181. *See e.g.*, Kevin Brown, *The Constitutionality of Racial Classifications in Public School Admissions*, 29 HOFSTRA L. REV. 1 (2000); Joanna R. Zahler, *Lessons in Humanity: Diversity as a Compelling State Interest in Public Education*, 40 B.C. L. REV. 995 (1999).

182. *Parents Involved*, 137 F. Supp. 2d at 1235.

183. *Comfort*, 100 F. Supp. 2d at 65, n.12.

*b. Diversity as an Extension of the District's Curricular Control*

The definition of diversity as an extension of the state's legitimate interests in curricular control[184] was present in several briefs. A brief filed by the National School Boards Association and other educational organizations in support of Montgomery County's petition for a writ of certiorari to the Supreme Court in *Eisenberg* articulated this viewpoint:

> The public school curriculum goes beyond merely the traditional academic goals of reading, writing, and arithmetic. Our communities depend upon the leaders of K-12 to do much more to fully accomplish their mission. A complete education is holistic, addressing the child's development in areas of social skills, workplace skills, and critical thinking, nurturing a youngster's ability to grow in all respects.[185]

This argument asserts that race-conscious selection processes merely effectuate the district's educational policy goals and are, therefore, a curricular decision within the discretion of school authorities and due considerable deference from reviewing courts.[186] To support this assertion, proponents refer to dicta from the Supreme Court's opinion in the desegregation case, *Swann v. Charlotte-Mecklenburg Board of Education*, which states:

> School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court.[187]

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184. *See, e.g.*, State *ex rel.* Andrews v. Webber, 8 N.E. 708 (Ind. 1886); Sch. Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 50 (1973); Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 207 (1982). *But see, Wessmann*, 160 F.3d at 797, n.3.

185. Brief of Amici Curiae National School Boards Association et al. at 12, Montgomery County Public Schools v. Eisenberg, 120 S. Ct. 1420 (2000) (No. 99-1069).

186. *See, e.g., Schempp*, 374 U.S. 203; *San Antonio Sch. Dist.*, 411 U.S. at 55; *Rowley*, 458 U.S. at 207. *But see, Wessmann*, 160 F.3d at 797, n.3.

187. 402 U.S. at 16 *cited in* Brief of Amici Curiae the United States at 15, Brewer v. West Irondequoit Cent. Sch. Dist., 212 F.3d 738 (2d Cir. 2000) (No. 99-7186). *See also, Parents Involved*, 137 F. Supp. 2d at 1234.

Using the tool of controlling the racial composition of schools for curricular ends was also reflected in the reasoning of the *Parents Involved* court. The court noted with approval the curricular interests identified by the Board of Directors of the Seattle School District as the purpose for its open choice policy. The board encapsulated those interests by issuing its "Board Statement Reaffirming Diversity Rationale." The statement reads:

> Diversity in the classroom increases the likelihood that students will discuss racial or ethnic issues and be more likely to socialize with people of different races. Diversity is thus a valuable resource for teaching students to become citizens in a multi-racial/multi-ethnic world.
>
> Providing students the opportunity to attend schools with diverse student enrollment also has inherent educational value from the standpoint of education's role in a democratic society ... Diversity brings different viewpoints and experiences to classroom discussions and thereby enhances the educational process. It also fosters racial and cultural understanding, which is particularly important in a racially and culturally diverse society such as ours.
>
> Based on the foregoing rationale, the Seattle School District's commitment is that no student should be required to attend a racially concentrated school. The District is also committed to providing students with the opportunity to voluntarily choose to attend a school to promote integration. The District provides these opportunities for students to attend a racially and ethnically diverse school, and to assist in the voluntary integration of a school, because it believes that providing a diverse learning environment is educationally beneficial for all students.[188]

The *Comfort* court raises an interesting question stemming from the logical extension of the courts' reasoning in cases like *Wessmann*, *Tuttle*, and *Eisenberg*. If the constitution prohibits race-conscious practices for establishing the composition of an entire school's student body, "[w]ould there be a constitutional impediment to a school administrator assigning students to classes within a school building to maximize diversity to prevent [B]lack children from choosing one class, and [W]hite children choosing another[?]"[189]

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188. Minutes of Executive Session of the Board of Directors, Nov. 17, 1999, Taylor Decl., Exh. 3 at 12, *quoted in Parents Involved*, 137 F. Supp. 2d at 1232.

189. *Comfort*, 100 F. Supp. at 67, n.17. In fact, a recent case out of the Seventh Circuit considered exactly this point. Billings v. Madison Metro. Sch. Dist., 259 F.3d 807 (7th Cir.

2001). On the issue of determining class composition, the court granted summary judgment on behalf of the school district because even though race and ethnicity factored into class assignment, the complaining student had been assigned to his class for reasons unrelated to his race. The court then examined another alleged Equal Protection violation stemming from the teacher's practice of creating cooperative work groups that assigned racial minorities in pairs to each group so that no minority student would feel isolated. The court determined that this issue survived the motion for summary judgment and required further fact-finding to determine whether the practice violated the constitutional guarantee of equal protection. *Id.*

The Seventh Circuit's discussion in *Billings* further illustrates Judge Gertner's observation that the holdings in *Wessmann*, *Tuttle* and *Eisenberg* may be used to challenge numerous educational policies that implicate the day-to-day operation of schools. The following excerpt provides as example of how entangled courts may be asked to become in instructional delivery:

> They maintain that Ms. Zabel treated B.B. differently because of her race in the classroom seating arrangement: that Ms. Zabel required that African American and Hispanic students sit in pairs in class. Although Ms. Zabel's deposition testimony is not without ambiguity, this claim appears supported by both that testimony as well as her student teacher's testimony. Not only did Ms. Zabel admit that, at an early period in the school year, she arranged for minority students to sit in pairs in her classroom, but she stated that she did so purposefully. Ms. Zabel explained that she utilized the race-conscious seating arrangement because she believed that African American students 'need' a partner because 'they view things in a global manner.' . . . In requiring that African American and Hispanic students sit in pairs, Ms. Zabel may have believed that she was acting in their best interest. Nevertheless, her action was based purely on the race of the student, and differences in treatment based on race in the classroom must be regarded as highly suspect. . . . This record provides no basis for justifying the racially based seating arrangement other than Ms. Zabel's reliance on a stereotypical notion that African American students 'view things in a global manner.' No evidence of record indicates that this arrangement was implemented to rectify past discriminatory conduct that had left its effect on these students. On this record, without any justification other than Ms. Zabel's stereotypical notion as to how African American children learn, her action cannot be justified, and, consequently, summary judgment is inappropriate. It may be that, in further proceedings, Ms. Zabel will be able to explain in a more satisfactory manner the reasons for her adoption of the racially based buddy system seating plan. Perhaps her decision was based on her professional assessment that, because of past discriminatory practices, students in this particular school had difficulty in adjusting to a racially diverse educational environment. However, we cannot accept as adequate her conclusory explanation. We must decide the case on the record before us.

*Id.* at 814–15 (citations omitted).

This passage also suggests that the Seventh Circuit, along with some of the courts analyzed in this article, has not adequately considered the difference between retrospective relief and prospective educational policy in equal protection analysis in public school settings, further demonstrating the need for the U.S. Supreme Court to provide guidance on the issue.

Interestingly, however, the arguments that schools' goals for diversity in student body composition are inextricably tied to curricular policy discuss the curriculum only in terms of its broad goals. There was no attempt to directly tie race-conscious student selection to the fulfillment of specific curricular goals, such as a social studies or multicultural curriculum.[190] One possible explanation is that no such ties existed. More likely, the omission originates from the fact that these goals have become so commonplace, educators assume that they are general knowledge and implicitly understood as part of those broad goal statements, thereby requiring no explicit description. Yet, the *Wessmann*, *Tuttle*, *Eisenberg*, and *Hampton* courts, in their seeming attempts to separate diversity from the curricular goals of the schools involved, suggest that the connections that are obvious to educators are not so apparent to the judiciary.[191] As will be argued in the next section, tying these policies to explicit curricular goals may aid in successfully surviving the narrow tailoring analysis that forms the second component of strict scrutiny.

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190. For example, the Madison Metropolitan School District of Madison, Wisconsin lists the following objectives, among others, as part of its eighth grade social studies curriculum; all of which could be used to demonstrate the emphasis on diversity as an explicit matter of curricular control:

> [a] Describe the cultural contributions of racial, ethnic and religious groups in the United States. [b] Explain how slavery impacts American history. [c] Give specific examples and explain how the arts, literature, and media influence and reflect societal values and perspectives of historical events. [d] Identify how Americans have worked to reform society. [e] Identify institutions that influence the behavior and decision-making of individuals and groups in American history. [f] Explain how beliefs and practices about race, age, socio-economic status, and gender may lead to conflict between people of different regions or cultures and give examples of such conflicts that have or have not been resolved in American history. [g] Illustrate the importance of multiple viewpoints for understanding people, events and issues. [h] Empathize with people of different historical periods, places, and backgrounds. [i] Make connections and look for patterns with the understanding that most issues encountered in social studies are complex, need thoughtful analysis, and may lack simple solutions. [j] Survey and appraise the role of leadership throughout the course of United States history (e.g., political leaders, economic innovators, social reformers). [k] Give examples to explain how factors such as family, gender, race and socioeconomic status contribute to one's own identity and development.

MADISON METROPOLITAN SCH. DIST., GRADE LEVEL PERFORMANCE STANDARDS: GRADE EIGHT: THE BEHAVIORAL SCIENCES: INDIVIDUALS, INSTITUTIONS, SOCIETY, *at* http://www.madison.k12.wi.us/tnl/social05.htm#eight (last updated Feb. 9, 1999).

191. *Wessmann*, 160 F.3d at 796–800; *Tuttle*, 195 F.3d at 705–06; *Eisenberg*, 197 F.3d at 130–33; *Hampton*, 102 F. Supp. 2d at 377–81.

### *c. Diversity as a Tool to Address and Combat Effects of De Facto Segregation*

The third definition of diversity relates to its application as a method of addressing and combating the effects of *de facto* segregation. Although related to the first two definitions, this conception of diversity became central to those cases examining inter- and intra-district transfer programs.[192] This focus on *de facto* segregation is an obvious extension of the purpose of the programs in connection with earlier desegregation litigation or states' efforts to avoid such litigation through the structuring of various voluntary integration plans. As Judge Heyburn wrote in *Hampton*, "[t]he very analysis for dissolving desegregation decrees supports continued maintenance of a desegregated system as a compelling state interest."[193]

For example, the facts giving rise to the dispute in *Ho* include the judicial history of earlier findings of intentional *de jure* segregation in the San Francisco Unified School District. Perhaps, the most surprising aspect of that case is that the school district seemingly did not try to forcefully connect current efforts to current *de facto* segregation, where state intent is not an issue.[194] Rather, the district relied solely on the consent decree as its justification for the policy. Accordingly, the court's analysis focused directly on whether current problems can be properly termed vestiges of the intentional discrimination that originally motivated the consent decree. The decision included no discussion about whether the district might have a proper motivation in maintaining the integration gains made under the consent decree by avoiding the negative consequences of allowing the district to return to segregation, albeit *de facto* and not *de jure*.

Likewise, both the *Wessmann*[195] and *Hampton*[196] courts analyzed whether the race-conscious selection processes at issue could be justified as remedies for "vestiges" of past discrimination. Taken together, the three cases, *Ho*, *Wessmann* and *Hampton*, demonstrate the difficulties defendant school districts encounter when using the term, "vestiges," as it obligates

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192. *Ho*, 147 F.3d 862–65; *Brewer*, 212 F.3d at 749–53; *Comfort*, 100 F. Supp. 2d at 65–68; *Parents Involved*, 137 F. Supp. 2d at 1235–36.

193. *Hampton*, 102 F. Supp. 2d at 380.

194. *See* NAACP v. San Francisco Unified Sch. Dist., 59 F. Supp. 2d 1021, 1034–35 (N.D. Cal. 1999) (reviewing a settlement agreement and noting that the research by Gary Orfield indicated that the school district was likely to resegregate if race could not be considered in making student assignments. That discussion centers only on the causal connection of "current problems in the SFUSD" to "governmental race discrimination that justified the adoption of the Consent Decree in 1983" without touching on the issues of addressing the contemporary problems associated with racial isolation regardless of its cause).

195. 160 F.3d at 795.

196. 102 F. Supp. 2d 358.

the reviewing court to scrutinize the issue of causation and the structuring of "remedies."[197] In other words, the analysis turns to the past, even though the school district's focus is not on the past, but the future. Education, because of its function and purpose, is future-oriented.[198] In that sense, educational policy-makers are less concerned with the cause of racial isolation and more interested in addressing its effects and in making certain that children are not educational casualties of the social phenomenon of racially isolating housing patterns.[199] Districts with voluntary integration policies make no attempt to change demographic patterns, but attempt to create educational environments that seek to open minds about and to offset the effects of those patterns – to challenge and to be certain that those patterns are not determinative of opportunity. As such, the policies are not designed as "remedies" in the legal sense of the word as "the means of enforcing a right or redressing a wrong; [providing] legal or equitable relief."[200] Rather, they are remedies in a more generic sense, as "means of counteracting . . . evil."[201] This pertinent distinction in framing the compelling governmental interests with a focus on prospective goals rather than retrospective relief was apparent in *Parents Involved*.[202] Particular care to frame the discussion toward addressing the "effects" of *de facto* segregation,[203] and not attempting to combat the racial

197. "Most of the intervenors' complaints suffer as a constitutional matter from an absence of causation . . . Intervenors introduced no evidence of actual, tangible racial discrimination within the school system . . . Though the Intervenors raised many thought-provoking educational issues, none is of constitutional significance." *Hampton*, 102 F. Supp. 2d at 358. *See also Ho*, 147 F.3d at 865; *Wessmann*, 160 F.3d at 804.

198. In *Brown*, the Supreme Court stated: "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." *Brown*, 347 U.S. at 493.

199. *See Hampton*, 102 F. Supp. 2d at 373. Note the discussion in *Hampton* of whether the consent decree under which the Jefferson County Board of Education operated included a requirement of "eliminating the county's racial demography" and whether the school district "can practicably do [anything] to eliminate that demography." *Id.* The court's discussion never touches on the issue of whether it is proper for the district to create educational policy to address the *effects* of the racial demography, irrespective of whether that policy might have future (though certainly attenuated) consequences for the longstanding residential patterns themselves. *Id.*

200. BLACK'S LAW DICTIONARY 1296 (7th ed. 1999).

201. FUNK AND WAGNALLS NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1065 (Comprehensive Edition 1997).

202. 137 F. Supp. 2d at 1234–39.

203. *Id.* at 1233–39.

isolation itself, shifted the discussion away from issues of causation and legal remedies and toward educational policy and curricular control.[204] In fact, the court repeatedly used the term "integration-positive" to describe the policies used by the school district, thereby concentrating on the future orientation and the educational benefits for all children of integrated learning environments.[205]

Given the ties of these choice programs to the country's efforts to more fully integrate its schools, the inter- and intra-district programs debated in *Brewer*, *Comfort*, and *Parents Involved* also employ the most explicit racial criteria, often, though not always, to the exclusion of other factors.[206] Although such explicit use of a racial criterion may create a higher burden under strict scrutiny, the decisions in all three cases suggest that it does not necessarily doom the programs on constitutional grounds. As the United States Department of Justice brief points out, such programs have even been encouraged through Congressional action.[207] Chief among these actions is the Magnet School Assistance Program[208] (MSAP) passed by Congress in 1984 to continue the integration goals first codified and funded under the Emergency School Aid Act of 1972.[209] Congress reauthorized MSAP in 1994. To demonstrate the need for this legislation, Congress found that "magnet schools are a significant part of our Nation's effort to achieve voluntary desegregation in our Nation's schools."[210] In addition, proponents of race-conscious plans point to other

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204. *See Comfort*, 100 F. Supp. 2d at 65, n.12. The Hampton court's search for constitutional causation effectively extinguished the educational arguments Intervenors made in support of the policy. *Hampton*, 102 F. Supp. 2d at 388.

205. Thro, *supra* note 22, also misses this distinction. He consistently discusses school district policies as remedies in the legal sense of the word, thereby minimizing the goal of the policies, which is to create learning environments focused on the benefits they provide for the future.

206. For example, in *Comfort*, other factors taken in consideration included siblings attending the same school, safety, medical needs, hardships due to day care situations, and classification of bi-racial and multi-racial students. 100 F. Supp. 2d at 61.

207. Brief for Amicus Curiae the United States at 20–22, Brewer v. West Irondequoit Cent. Sch. Dist., 212 F.3d 738 (2d Cir. 2000) (No. 99-7186).

208. 20 U.S.C. § 7201–7213 (1994).

209. Ch. 36, §§ 702–720, 86 Stat. 354 (1972) (codified at 20 U.S.C. § 1601).

210. 20 U.S.C. § 7201(1). The Act also states that

> it is in the best interest of the Federal Government to: (A) continue the Federal Government's support of school districts implementing court-ordered desegregation plans and school districts seeking to foster meaningful interaction among students of different racial and ethnic backgrounds, beginning at the earliest stage of such students' education; (B) ensure that all students have equitable access to quality education that will prepare such students to function well in a culturally diverse, technologically oriented, and highly competitive global community; and (C) maximize the ability of local educational agencies to plan, develop,

federal legislation that provide funds for specific educational purposes tied to classifications of students by income, language, gender, race, and national origin. For example, such programs include the following:[211] Bilingual Education Program[212] (language); Emergency Immigrant Education Program[213] (national origin); Indian, Native American, and Alaska Native Education Program[214](race); Project Head Start[215] (income); Title I of the Elementary and Secondary Education Act[216] (income); and Women's Educational Equity Act[217] (gender).

The role of voluntary parental-choice programs in the prevention of *de facto* segregation has also been highlighted in various briefs in support of such programs. As one group of organizations argued in support:

> [Concluding that race-conscious plans violate the Constitution] interprets the equal protection clause to require schools to assume legal and financial responsibility for curing the immense adverse consequences that segregation causes but to prevent schools from voluntarily taking race conscious action aimed at preventing the development of racially isolated schools before the separation and inequities become so intense that judicial intervention is necessary to remedy them. To declare this to be the state of the law defies all logic.[218]

The defiance of logic also received attention in *Parents Involved*. The court in *Parents Involved* pointed out that these voluntary measures are far less restrictive than the bussing plans courts approved in the 1970s: "Absent a Supreme Court or Ninth Circuit directive on point, it would defy logic for this court to find that the less intrusive programs of today violate the Equal Protection Clause while the more coercive programs of the

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> implement, and continue effective and innovative magnet schools that contribute to State and local systemic reform.

*Id.* § 7201(5).

211. *See* Brief of Amici Curiae American Association of School Administrators et al. at 16–19, Tuttle v. Arlington County Sch. Bd., 195 F.3d 698 (4th Cir. 1999) (No. 98-1604) (listing programs using criteria similar to those by Arlington County Public Schools).

212. 20 U.S.C. § 7402.

213. *Id.* § 7541.

214. *Id.* § 7401.

215. 42 U.S.C. § 9831 (2000).

216. 20 U.S.C. § 6301.

217. *Id.* § 7231.

218. Brief of Amici Curiae American Association of School Administrators et al. at 20, Tuttle v. Arlington County Sch. Bd., 195 F.3d 698 (4th Cir. 1999) (No. 98-1604).

1970s did not."[219] In contrast, both *Belk* and *Hampton* appear to suggest that the race-conscious mechanisms used to enable a school district to achieve dissolution of a consent decree could not be assumed to be constitutional the day after dissolution.[220] However, as mentioned earlier, both *Belk* and *Hampton* miss the simple fact that actions taken pursuant to a consent decree are retrospective legal remedies that become removed only through a process of comparing the present to the past. Voluntary integration policies, in contrast, are prospective policies designed to affect children's futures by addressing the present. The reasoning of the *Belk*[221] and *Hampton*[222] courts neglects the idea that as one goal is successfully obtained through race-conscious means, another equally compelling goal may be served by continuation of the same means.

Another point concerning diversity as a compelling state interest must be noted. These ten cases exemplify a judicial reluctance to draw any conclusion about whether schools' interest in diversity (regardless of definition) rose to the level of a compelling state interest. Of the seven courts that directly addressed the issue of diversity, five left the question unanswered as a "maybe."[223] In these situations, the courts assumed for the sake of argument, without deciding, that diversity satisfied the compelling state interest requirement.[224] In these cases, judicial focus then turned to the second prong of the strict scrutiny analysis—the narrow tailoring analysis.[225]

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219. *Parents Involved*, 137 F. Supp. 2d at 1235. Relatedly, Peter Rubin argued that school districts have the authority to use racial criteria for purposes of drawing school attendance zones as no child has a right to attend any particular school and no child is denied an education as a result and that such actions would clearly survive constitutional scrutiny. Rubin, *supra* note 22, at 38.

220. Belk *v. Charlotte-Mecklenburg Bd. of Educ.*, 233 F.3d 232, 276 (4th Cir. 2000) [hereinafter *Belk I*]; *Hampton*, 377 F. Supp. 2d at 361.

221. *Belk II*, 269 F.3d at 355.

222. 377 F. Supp. 2d at 379.

223. *See infra* Table II.

224. *Cf.* Boger, *supra* note 27, at 1744 (tracing Supreme Court precedent and concluding that "in nearly half a dozen decisions rendered over a twelve-year period—*Swann*, *Bustop*, *Keyes*, *Bakke*, and *Seattle School District No. 1*—the Court itself or various of its Justices gave express approval and constitutional sanction to the voluntary use of race by states or local governmental agencies to achieve ends of educational diversity").

225. *See Wessmann*, 160 F.3d at 807–08; *Tuttle*, 195 F.3d at 705–07; *Eisenberg*, 197 F.3d at 131–33; and *Hampton*, 102 F. Supp. 2d at 378–81 (hinging their decisions on the narrow tailoring analysis). *But see Brewer*, 212 F.3d at 753 (holding that the district court had erred by not properly conducting the narrow tailoring analysis and remanding the case for application of the analysis to the goal of reducing *de facto* segregation); *Comfort*, 100 F. Supp. 2d at 65–69 (not actually applying strict scrutiny, but providing direction to the parties as they prepared for a full trial on the issue).

### 2. Application of Strict Scrutiny—Tailoring the Means

As illustrated by the same four cases, *Wessmann*, *Tuttle*, *Eisenberg*, and *Hampton*, a court may well conclude that, despite compelling goals, the policy fails because it is not narrowly drawn sufficient to satisfy constitutional standards. Strict scrutiny requires examination of both the ends and the means of a policy. Upon a state's articulation of compelling ends, the "necessary and narrowly tailored" portion of strict scrutiny shifts examination to the means employed by the policy. The *Wessmann* court described the narrow tailoring analysis as an inquiry into "whether the concrete workings of the Policy merit constitutional sanction. Only by such particularized attention can we ascertain whether the Policy bears any necessary relation to the noble ends it espouses. In short, the devil is in the details."[226] Therefore, in applying the narrowly tailored analysis, courts examine whether other means, without employing racial classifications, could achieve the same ends.

As noted in the discussion on the various courts' examination of the compelling state interest standard, *Hunter* proved to be unique among these cases. UCLA's goal, for which race-conscious student selection was the means, emanated from its research mission.[227] When the scrutiny shifted to fitting the means to those ends, the university was able to successfully demonstrate how controlling the variable of race was necessary and narrowly tailored to the university's compelling interest in conducting valid and reliable educational research.[228] This argument was in many ways a simpler line of reasoning to defend than the arguments presented in the other cases. The university argued that the lab school existed as a place to conduct social science research and, therefore, the university needed only to demonstrate scientific rationales for controlling variables in that research. As a result, the uniqueness of *Hunter's* context limits its precedential value for more traditional school environments where race-conscious student selection policies are in force or being considered.[229]

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226. *Wessmann*, 160 F.3d at 798.

227. Hunter *ex rel.* Brandt v. Regents of the Univ. of Cal., 190 F.3d 1061, 1062 (9th Cir. 1999).

228. *Id.* at 1066–67.

229. It is conceivable, that a school district may wish to create or charter a school in order to "test" an innovation to determine if it has merit for its other schools. In that context, officials might be able to make the argument that they also need to replicate the racial/ethnic composition of the school district as a whole in order to realistically test the innovation and determine whether to transfer its use to other contexts. Universities with charter school authority make likewise wish to replicate *Hunter's* laboratory approach.

All four courts that found plans unconstitutional did so on the basis of this portion of the analysis.[230] Three cases found fault with what they termed the central means employed, so-called "racial balancing."[231] The First Circuit condemned the process, noting, "[i]t cannot be said that racial balancing is either a legitimate or necessary means of advancing the lofty principles recited in the Policy."[232] The Fourth Circuit was even more direct, declaring that "nonremedial racial balancing is unconstitutional."[233] The Fourth Circuit grounded this assertion with a reference to a quotation from the Supreme Court's decision in *Freeman v. Pitts*, establishing that "[r]acial balance is not to be achieved for its own sake."[234] Yet, the Second Circuit's decision in *Brewer* makes note of the fact that the First and Fourth Circuit's reliance on *Freeman* may be misplaced, as the logic of such reliance appears to ignore the distinction between a duty to correct a racial imbalance and voluntary efforts to achieve the same end.[235]

Careful examination of the Fourth Circuit's reasoning in this regard suggests the presence of some circular reasoning. Racial balancing, if you accept the court's characterization of those programs, becomes both the ends and the means. School officials argued that racial balance was not targeted for its own sake, but for the compelling state interest of creating diverse learning environments as curricular policy. And yet, the court's analysis ignores this difference, effectively severing the means from the educational ends.

Thorough inspection of *Tuttle*'s narrow tailoring analysis reveals this flaw.[236] The Fourth Circuit framed its analysis with a five-part test based on the Supreme Court's ruling in *U.S. v. Paradise*[237] and later applied by the

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230. *Wessmann*, 160 F.3d at 807–08; *Tuttle*, 195 F.3d at 705–07; *Eisenberg*, 197 F.3d at 131–33; *Hampton*, 102 F. Supp. 2d at 378–81.

231. *Wessmann*, 160 F.3d at 799; *Tuttle*, 195 F.3d at 707; *Eisenberg*, 197 F.3d at 131.

232. *Wessmann*, 160 F.3d at 799.

233. *Tuttle*, 195 F.3d at 705.

234. *Id.* (citing Freeman v. Pitts, 503 U.S. 467, 494 (1992)).

235. *Brewer*, 212 F.3d at 752 ("The absence of a duty sheds little light on the constitutionality of a voluntary attempt.").

236. As *Tuttle* was the only decision to frame its narrow tailoring analysis with a "test," that test will likewise be used to frame the comparative analysis here. This approach is also used because cases that found policies unconstitutional after *Tuttle* cited *Tuttle* as persuasive, if not controlling, authority on the issue. *See Eisenberg*, 197 F.3d at 131. *Ho* and *Wessmann*, two cases that chronologically preceded *Tuttle*, did not devote extensive analysis to this portion of the test. *Ho* merely touched on the issue by identifying the questions necessary for resolving the dispute on remand. 147 F.3d at 865. The *Wessmann* opinion concentrated the majority of its analysis on the compelling state interest portion of the test. *But see* 160 F.3d at 828–31 (Lipez, J., dissenting) (employing the same factors in his narrow tailoring analysis). *See also Belk I*, 233 F.3d at 307–308 (Traxler, J., concurring in part and dissenting in part) (employing the *Paradise* test).

237. 480 U.S. 149, 171 (1987) (finding a 50 percent promotion requirement for African American troopers adopted to racially integrate the Alabama state police force a constitutional remedy to findings of discriminatory hiring and promotion).

Fourth Circuit in *Hayes v. North State Law Enforcement Officers Association.*[238] The court examined "(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."[239]

### *a. Efficacy of Alternative Race-neutral Policies*

The *Tuttle* court's discussion of the first factor, the efficacy of race-neutral alternatives, notes that the committee in advising the school board on admissions policies listed three race-neutral options.[240] However, existence of race-neutral policies does not satisfy the first factor of the test, which requires the court to examine the "efficacy" of those alternatives.[241] A determination of efficacy necessarily requires analysis of the means in relation to the ends, not cut adrift from them. Yet, nowhere does the *Tuttle* court engage in an examination of the effectiveness of the proffered alternatives and whether any or all had the potential to effect the same ends. Although the opinion is unclear concerning the process used, it can be assumed that the committee in determining which alternative to recommend did engage in some sort of deliberation concerning the potential effectiveness of each policy alternative.[242] All of the alternatives listed,[243] including the weighted lottery, which was

238. 10 F.3d 207, 213 (4th Cir. 1993).

239. *Tuttle*, 195 F.3d at 706.

240. *Id.* at 706, n.11.

241. In contrast, see discussion of alternatives for the committee's ability to achieve the stated goals. *Wessman*, 160 F.3d at 831 (Lipez, J., dissenting).

242. Note the following discussion from *Tuttle*: "Fortunately, we need not engage in judicial policymaking today because the School Board's own Alternative Schools Admission Study Committee offered one or more alternative race-neutral policies in its Report to the Superintendent. While the Committee ultimately recommended the currently challenged Policy, the fact that the Committee also proposed one or more race-neutral alternatives demonstrates that the School Board has race-neutral means to promote diversity." *Tuttle*, 195 F.3d at 706. The court recognizes the presence of alternatives but engages in no analysis of their relative strengths or weaknesses. Nor does the court report any rationale for the committee's ultimate recommendation.

243. The alternatives included: (1) assign each school a geographic home area and reserve seats from that area with remaining seats filled through a lottery of applicants; (2) place all students of entering classes in a school into a lottery and select students at random until a sufficient number accept the offer of an available seat in that school; (3) guarantee each neighborhood school a number of seats at each alternative or magnet school with the number of slots to be determined by the extent of overcrowding at the school. Presumably if applicants outnumbered seats available, a lottery would determine entering students. *Tuttle*, 195 F.3d at 706, n.11.

eventually selected, relied in some measure on random drawings. What distinguished the selected policy was the addition of weights that, while they did not guarantee any child a seat, did increase the chances of selection for children who came from low-income families, who spoke English as a second language, or who were racial minorities in the district. None of the other alternatives had any "controls" for what might be termed diversity factors, effectively requiring that the district leave its curricular policy of creating diverse learning environments to chance.

The school board clearly determined that its commitment to providing the educational benefits of racially and ethnically diverse classrooms to all children required more than a reliance on the luck of the draw. Thus, the board's approach essentially asked for parents to volunteer their children to aid in the espoused ends and used the inducement of magnet schools to attract students from diverse backgrounds. Then, to ensure that granting a particular transfer would not undermine the purpose for granting the ability to apply for a transfer in the first place, the district created a procedure by which to increase the odds of selecting students such that parents' preferences and the district's goals coincided. While parents may have had multiple reasons for wanting their child to attend a particular school (a commitment to diversity, the magnet focus, academic reputation, proximity to work or childcare, or family tradition), the district, ultimately, had only one predominant purpose, and it took the necessary steps to ensure that its goal drove the selection process. Even though the Fourth Circuit did not analyze any alternative with respect to the intended goal of the policy, it considered the alternative methods preferable to the carefully considered selection of the district. This conduct reveals precisely the judicial conceit that the Supreme Court cautioned against when reviewing educational policy.[244] Clearly the *Tuttle* court, despite its protestations to the contrary,[245] engaged in educational policy-making from the bench.

### *b. Policy's Planned Duration*

The *Tuttle* court next looked at the planned duration of the policy and faulted the policy for having no logical stopping point. The policy governed the "1999–2000 school year and thereafter."[246] Evidently, the court had hoped to see an explicit date set for stopping the weighted

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244. *See, e.g.*, State *ex rel.* Andrews v. Webber, 108 Ind. 31, 8 N.E. 708 (Ind. 1886); Sch. Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 55 (1973); Bd. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 207 (1982). *But see*, *Wessmann*, 160 F.3d at 797, n.3.

245. *Tuttle*, 195 F.3d at 706.

246. *Id.* The inquiries directed by the *Ho* court on remand also reflect attention to time. The inquiries directed by the Ninth Circuit in *Ho* suggests that a program that withstands scrutiny at its inception may not fare so well at a later date in time if forecasts of the effectiveness of the means prove false. *Ho*, 147 F.3d at 865.

lottery and concluded that its absence meant the procedure would be employed "in perpetuity."[247] However, this analysis ignores the implicit stopping point found in the race-conscious lottery weights. Once siblings of currently attending students were admitted, the policy dictated that the procedure only be used when the applicant pool deviated more than 15 percentage points from the composition of the county-wide student body. In other words, if the applicant pool fell within the prescribed range, an—off switch—was automatically triggered and the practice stopped. This procedure ensured that race-conscious procedures would be used only on an as-needed basis, irrespective of some arbitrary calendar date. Judge Rothstein explained this approach in *Parents Involved*:

> Plaintiffs claim there is no "end point," or "sunset provision," but the integration-positive tiebreaker applies only to schools deemed out of balance. Once a school is considered in balance . . . the board will abandon the use of race in its assignments to that school. In addition, under the newly-revised plan, the district switches off the racial tiebreaker as soon as an entering class comes into balance, and will not use race to assign the remaining spaces in that school.[248]

This thinking also recognizes the pivotal distinction discussed earlier between prospective and retrospective compelling state interests. In the context of retrospective remedies, a one-time "endpoint" or sunset provision makes sense. The provision provides the time when the remedy has cured the original problem and no further treatment is needed. In contrast, when reaching for prospective goals, a one-time cure to a problem is no longer applicable. Rather, a "switch" that employs a mechanism for prospective ends when needed is more relevant from a public policy standpoint. Thus, if the goal of an integrated learning environment can be met without attention to race during school admissions, use of race becomes unnecessary and the switch is turned off. If the goal cannot be met, then and only then is the switch turned on and race considered, as it is necessary to achieve the goal. Such use of a racial criterion does not grant unfettered discretion to school officials, but ties the use of a racial criterion exactly to the goal that motivates it.

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247. *Tuttle*, 195 F.3d at 706.

248. *Parents Involved*, 137 F. Supp. 2d at 1238; *Accord Wessmann*, 160 F.3d at 829 (Lipez, J., dissenting) ("While it is not 'self terminating' in an involuntary, mechanical sense, nothing about this race preference implies permanence in the sense of the Supreme Court's general warning against 'remedies that are ageless in their reach into the past, and timeless in their ability to affect the future.' ") (citing Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276 (1986)).

*c. Relationship Between the Numerical Goal and the Percentage of Minority Group Members in the Relevant Population*

The third factor guiding the Fourth Circuit's tailoring analysis examined the "numerical goal" and the "percentage of minority group members in the relevant population or work force."[249] The *Tuttle* court declared that the means amounted to "racial balancing," and 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."[250] Yet, the court made no attempt to provide a rationale for its declaration.

It is interesting to compare the *Tuttle* analysis on this point with that used in both *U.S. v. Paradise*[251] and *Hayes v. North State Law Enforcement*,[252] two cases cited as precedent. In *Paradise*, the Court assessed this factor:

> We must also examine the relationship between the numerical relief ordered and the percentage of nonwhites in the relevant work force. The original hiring order of the District Court required the Department to hire 50% black applicants until 25% of the state trooper force was composed of blacks; the latter figure reflects the percentage of blacks in the relevant labor market. The enforcement order at issue here is less restrictive: it requires the Department to promote 50% black candidates until 25% of the rank in question is black ... Thus, had the promotion order remained in effect for the rank of corporal, it would have survived only until 25% of the Department's corporals were black.[253]

Here, the Court seemed to approve of the mathematical relationship between the promotion percentage and the minority representation in the "labor market." Yet, the Fourth Circuit rejected a similarly related range directly tied to the minority representation of the student population in *Tuttle*.[254] In *Hayes*, the court declared unconstitutional the policy that granted the Chief of Police the discretion to promote any eligible police officer, where eligibility was determined by a series of tests and

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249. *Tuttle*, 195 F.3d at 707.

250. *Id.*

251. The analysis here sets aside for the moment the distinct difference that *Paradise* concerned the limits of a judicial order rather than a voluntary effort to integrate schools and whether this fact makes any precedent set by *Paradise* applicable in the school context. *Paradise*, 480 U.S. 149.

252. 10 F.3d 207 (4th Cir. 1993).

253. 480 U.S. at 179 (citations omitted).

254. *Tuttle*, 195 F.3d at 707.

interviews, based on any factor he believed "relevant."[255] Although this policy, like the Arlington School District's, was voluntary as opposed to court-ordered, it shared none of the safeguards established by the school district's procedure, such as no reserved seats, a built in "off switch," and submission to random selection to allow every child to compete for every seat. Still, the Fourth Circuit considered these "distinctions without differences."[256]

In contrast, the *Parents Involved* court specifically cited similar features[257] of that district's policy as reasons why the policy did not "mandate a specific racial quota" and therefore survived this portion of scrutiny.[258] Similarly, the *Wessmann* dissent explains that this narrow tailoring element "assures that the beneficiaries of any program will be qualified, thereby minimizing the cost of the preference to society while assuring that the favored applicants are not unjustly enriched."[259] Judge Lipez concluded, therefore, that the admissions policy for the Boston Latin School that selected some students by means of proportional representation had "clearly been structured to meet this qualification requirement."[260]

### *d. Flexibility of the Policy*

The next element of the *Paradise* analysis considers the policy's flexibility. In this instance, the *Tuttle* panel rejected the district's claims of flexibility,[261] concluding instead that the policy erred because it did not consider each applicant as an individual in contravention of *Bakke*.[262] While more will be discussed about individual rights in the next section, this conclusion comes without examining flexibility in relation to the policy's goal. Rather, as with all the other factors, the court discussed flexibility for its own sake, without reference to what purpose flexibility

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255. 10 F.3d at 213 (stating "Chief Stone testified that he gave preference to African American officers pursuant to the consent order, which required the goal of 20% African American sergeants, and because of his 'belief that the Charlotte Police Department should be integrated and be reflective of the community at large, both in terms of police officers as well as the supervisors,' in order to increase the effectiveness of the police force through enhanced cooperation and support from the citizens of Charlotte").

256. *Tuttle*, 195 F. 3d at 707.

257. The policy allowed a 15% deviation from its overall student composition of 40% white and 60% non-white. *Parents Involved*, 137 F. Supp. 2d at 1238–39.

258. *Id.*

259. 160 F.3d at 829.

260. *Id.*

261. Again, Judge Lipez reached the opposite conclusion in his dissenting opinion in *Wessmann*, citing as evidence of flexibility the procedural variance produced by the yearly changes in the composition of the applicant pool. *Id.*

262. *Tuttle*, 195 F.3d at 707.

should serve.[263] In contrast, for example, the *Comfort* court identified one simple indicator of flexibility never addressed by the *Tuttle* court—the fact that no child "is forced to transfer against his or her will."[264] Only when considering the purpose of the race-conscious procedure itself, and the purpose for the granting of parental choice in the first instance, can one see that voluntariness[265] itself adds flexibility to the policy.[266]

*e. Burden on Innocent Third Parties*

The final element considered under the *Paradise/Hayes* analysis is the burden of the policy on "innocent third parties." The Fourth Circuit identifies *Tuttle*'s "innocent third parties" as "young kindergarten-age children like the Applicants who do not meet any of the Policy's diversity criteria."[267] The court then comments on the irony of teaching about race by being conscious about race.[268] No further analysis ensues, leaving undiscussed any identification of the burden borne by these children. Presumably, the court concluded that denial of their applications was of itself sufficiently burdensome and required no further discussion. The *Wessmann* court made a similar assumption about the Boston Latin School admissions procedure, explaining, "[e]ven though we may not know before the fact which individuals from which racial/ethnic groups will be affected, we do know that someone from some group will be benefited and a different someone from a different group will be burdened."[269]

Other courts engaged in what might be termed a more nuanced examination of what loss was suffered by those denied requested transfers. The *Hampton* court considered what it termed horizontal and vertical resource allocation.[270] In the first instance of horizontal transfers, such as transferring from one traditional elementary school to another, the court

263. In *Sheet Metal Workers Int'l Ass'n v. Equal Opportunity Comm'n*, Justice Powell discusses the flexibility of the court's mandated remedy to be sure that the remedy did not become an end unto itself but maintained fidelity to the purpose for which it was imposed. 478 U.S. 421, 486, (Powell, J., concurring in part and concurring in judgment). Likewise, the majority opinion in Paradise ties flexibility to "fairness." *See also Paradise*, 480 U.S. at 188.

264. *Comfort*, 100 F. Supp. 2d at 67.

265. Here, it is necessary to recognize the voluntariness on the part of the parent in participating in the program, as well as the school district in developing the program in the first place.

266. Kevin Brown further illustrates this point, writing: "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." Brown, *supra* note 181, at 79.

267. *Tuttle*, 195 F.3d at 707.

268. *Id.*

269. *Wessmann*, 160 F.3d at 794.

270. See discussion *infra* Part I.H.

reasoned that denial did not constitute a burden because the programs were fungible and, thus, the denied student lost nothing but the choice. In contrast, the *Hampton* court considered denial of entry into a magnet school program a denial of "vertical resource allocation" since magnet schools provide a type of value-added program. The *Comfort* court suggested that this difference may also be revealed in whether the program is race-preferential or race-conscious, the first being more difficult to justify than the second.[271] Similarly, the *Parents Involved* court differentiated between "reshuffle" and "stacked deck" programs.[272] Reshuffle programs integrate an existing group, while stacked deck programs "confer[] a government benefit to members of a minority group at the expense of those of the majority."[273] These three cases, unlike *Tuttle*, examined the burden in connection with, not separated from, the program's purpose.

The *Wessmann* dissent points out another salient factor that should enter into any discussion of burdens borne by plaintiffs. That is, "[r]ather than being removed from a superior school because of a racial preference, Wessmann was denied the opportunity to move from a good school to a better school. There is no constitutional right to attend a school of one's choice."[274] In fact, when analyzing the plaintiff's claim that the open choice policy of *Parents Involved* violated the state constitution and statutes, that court expressly rejected the characterization of that program as a "preference."[275] The court found it within the proper discretion of the school board to determine that "it cannot provide an equitable and diverse educational opportunity to the district as whole without depriving some students of access to their first choice."[276]

It is also instructive to further examine the notion that a child is simply denied a choice. A child is neither denied an education, nor asked to delay an education. *Wessmann*, *Tuttle*, *Eisenberg*, and *Hampton* all characterize this denial as a burden and correspondingly, the granting of a choice as a benefit.[277] However, these conclusions all misapprehend the difference between a benefit and an inducement. All of the programs under scrutiny here, with the exception of *Hunter*, are more accurately classified as inducements. Unlike the programs in colleges and universities, these procedures do not exist simply to control access to a particular academic program. Rather, the programs create an incentive to encourage

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271. *Comfort*, 100 F. Supp. 2d at 67.

272. 137 F. Supp. 2d at 1230 (citing Associated Gen. Contractors of Cal. v. San Francisco Unified Sch. Dist., 616 F.2d 1381, 1386 (9th Cir. 1980)).

273. *Id.*

274. *Wessmann*, 160 F.3d at 830.

275. *Parents Involved*, 137 F. Supp. 2d at 1232.

276. *Id.*

277. *Wessmann*, 160 F.3d at 794; *Tuttle*, 195 F.3d at 707; *Eisenberg*, 197 F.3d at 133; and *Hampton*, 102 F. Supp. 2d at 381.

parents to enroll their children in a school the child would not otherwise attend. In essence, they reward parents and their children for their willingness to enroll the child in an integrated setting, even if the parents have other reasons for doing so. The reward is either the ability to make a choice of schools (inter- and intra-district choice programs) or the choice coupled with a particular instructional focus (magnet school programs).

In *Hampton*, Judge Heyburn's understanding of vertical rewards neglects this grounding in the program's purpose. He also misinterprets the importance of the lack of "fungibility" between magnet schools and more traditional schools.[278] While it is true that magnet schools adopt methodologies and content concentrations that mark them as unique in order to attract their students, the differences are relative, not absolute as they are in the higher educational setting. In fact, much of the curriculum and the targeted outcomes from one school to the next are comparable. All schools must adhere to the same outcome measures as established by state and local curriculum standards and all must be tested by the same tests to hold schools accountable to those standards. No district claims or, more to the point, no plaintiff claims that the non-magnet high schools graduate less-prepared students. And unlike an aspirant to a college or university program, no plaintiff claims that a student who aspires to be a doctor must attend a magnet school with medicine as its focus. These choices were created by the school district to craft an attraction over and above the benefits of integrated education that might motivate parents and students who otherwise might be reluctant to attend an integrated school. That school authorities create programs that give parents an appealing reason based on the curriculum to select the school in order to further the district's objective of integrated education cannot be dismissed from the analysis.

As discussed earlier, the disconnect of the *Tuttle* panel's analysis of the policy's means from the educational goals they address stems from the court's limited view of the concept of diversity as an extension of the right to free speech.[279] The *Brewer* court, in discussing the district court decision it reviewed, explained the impact of this misconception on the narrow tailoring analysis:

> We recognize that the District Court did conduct a narrow tailoring analysis.[280] We believe, however, that it focused on

278. *Hampton*, 102 F. Supp. 2d at 380.

279. See *infra* notes 177–83 and accompanying text.

280. "[T]he Program as applied is anything but narrowly tailored . . . The Program does little to achieve anything other than seek some type of facial diversity . . . Furthermore, because so few students are accepted into the Program even this flawed goal is suspect. The introduction of a handful of minority students into a suburban school that is substantially white does little to reduce so-called racial isolation." Brewer v. West Irondequoit Cent. Sch. Dist., 32 F. Supp. 2d 619, 632–33 (W.D. N.Y. 1999).

> the wrong question: the District Court asked whether the Program is narrowly tailored to achieve the goal of "true diversity," when the appropriate inquiry, as evident from our discussion in the preceding sections, is whether the Program is narrowly tailored to achieve its primary goal of reducing racial isolation resulting from *de facto* segregation. The difference in these two frameworks is not mere semantics. If reducing racial isolation is standing alone a constitutionally permissible goal, as we have held it is ... then there is no more effective means of achieving that goal than to base decisions on race. "True diversity," on the other hand, may certainly be defined more broadly than race. Indeed, the cases cited by the District Court in support of its decision that the use of race alone in the Program was not narrowly tailored, ... (*Wessmann*, *Bakke*, and *Hopwood*), only address the efficacy of employing strictly racial classifications to achieve "true diversity." Those decisions are, therefore, inapplicable to the present situation where the Program's aim, as initially found by the District Court and affirmed by this Court today, is precisely to ameliorate racial isolation in the participating districts.[281]

As this excerpt illustrates, the narrow tailoring analysis must examine the fit between the ends and the means. Therefore, a clear understanding of how diversity, as an end, is defined becomes essential.[282] Accordingly, the Fourth Circuit's refusal to countenance the curricular goals of the district while conducting the narrow tailoring analysis transmuted means into ends with no further analysis.

Another problem with the Fourth Circuit's analysis is that it demonstrates the problems attendant with trying to wrench the square peg of educational facts into the round hole of an analytic framework developed from the employment context. Both *Paradise* and *Hayes* involved efforts to remedy past discrimination in police force personnel decisions. In *Paradise*, those efforts were court-ordered, while in *Hayes* they were voluntary.[283] However, both were in place to offset problems associated with past exclusion of African Americans from law enforcement ranks. Those facts differed markedly from those presented to the *Tuttle* court or to the other cases under examination here. The educational efforts present in the ten disputes are voluntary and occur in an instructional context where the

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281. 212 F.3d at 752–53 (citations omitted).

282. Recall that the *Brewer* court remanded the case because the court below had not conducted a narrow tailoring analysis with the goal of reducing *de facto* segregation in mind. *Id.* at 753.

283. *Paradise*, 480 U.S. at 163; *Hayes*, 10 F.3d at 211.

benefits of diverse educational environments are so readily apparent that no major educational policy-making organizations supported the plaintiff's claims, while several supported the district's goals as *amici*.[284] Establishing sound educational policy is markedly different than determining hiring and promotion practices. Ignoring those differences neglects the fact that such a test may not "make the transition from the employment to the educational contest gracefully; education, after all, is directed at shaping individuals in a prospective manner."[285]

### 3. Summary of the Application of Strict Scrutiny

This section has reviewed the courts' application of strict scrutiny in race-conscious student selection processes. Analysis reveals three distinct iterations of the concept of diversity as a compelling state interest motivating the use of race: (1) diversity as an extension of the right to free speech; (2) diversity as an extension of the district's curricular control; and (3) diversity to address and combat the effects of *de facto* segregation. Likewise, a review of the courts' narrow tailoring analysis demonstrates the impact of clearly articulating which conception of diversity provides purpose to the race-conscious means employed. In addition, the importance of prospective rather than retrospective justification becomes apparent.

## C. *Courts' Use of Supreme Court Precedent*

As the judges rendering decisions in these cases were quick to point out, the Supreme Court has yet to hear a case that considers the limits of local and state school authorities in the use of race-conscious student selection processes at public elementary and secondary schools.[286] Accordingly, the courts examined the Supreme Court's precedents in other instances where race-conscious mechanisms were used for state decision-making. Although not a complete compilation of all Supreme Court precedents cited, five cases figured most strongly in the judges' calculus including: *Adarand Constructors, Inc. v. Pena*,[287] *Richmond v. J.A. Croson Company*,[288] *Wygant v. Jackson Board of Education*,[289] *Regents of the University*

284. *See infra* note 164 and accompanying text.

285. *Wessmann*, 160 F.3d at 829 (Lipez, J., dissenting) (referring to the factor of numerical goals).

286. *See, e.g.*, *Parents Involved*, 137 F. Supp. 2d at 1234; *Tuttle*, 195 F.3d at 705.

287. 515 U.S. 200 (1995).

288. 488 U.S. 469 (1989).

289. 476 U.S. 267 (1986).

*of California v. Bakke*,[290] and *Swann v. Charlotte-Mecklenburg Board of Education*.[291]

Beyond supporting the proposition that strict scrutiny formed the relevant analytic framework and defining that framework,[292] *Adarand*, the most recent of the five cases, did not prove very instructive to the cases at bar. However, the following rebuke penned by Justice O'Connor regarding courts' application of the test was used by the *Hampton* court to demonstrate that selection of the analysis did not necessarily predict the outcome of its application:

> [W]e wish to dispel the notion that strict scrutiny is 'strict in theory' but 'fatal in fact.' The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it.[293]

*Swann v. Charlotte-Mecklenburg Board of Education* also played a small, but pivotal role in the reasoning of some courts.[294] Dicta, quoted earlier[295] from *Swann*, appeared to provide courts with a demarcation point from which to explore the discretion of school boards in making voluntary efforts toward integration. The quote stood for the assertion that even though a court may be constrained in its efforts to order desegregation, school districts may employ race-conscious measures as discretionary educational policy. However, one should note that the *Wessmann* court remained unpersuaded and cautioned that:

> [T]he *Swann* dictum, properly construed, recognizes that a low percentage of minority students in a particular school does not necessarily betoken unconstitutional conduct ... This well-accepted principle does not help the School Committee. The *Swann* Court had no occasion to consider

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290. 438 U.S. 265 (1978).

291. 402 U.S. 1 (1971).

292. *See Ho*, 147 F.3d at 864; *Wessmann*, 160 F.3d at 794; *Tuttle*, 195 F.3d at 703; *Eisenberg*, 197 F.3d at 129; *Hunter*, 190 F.3d at 1063; *Brewer*, 212 F.3d at 745; *Hampton*, 102 F. Supp. 2d at 377; and *Parents Involved*, 137 F. Supp. 2d at 1232.

293. *Hampton*, 102 F. Supp. 2d at 377 (citing *Adarand*, 515 U.S. at 237). *Accord Wessmann*, 160 F.3d at 828 (Lipez, J., dissenting).

294. *Swann* was more central to the consideration of the dispute in *Belk v. Charlotte-Mecklenburg Board of Education*. *Belk II*, 269 F.3d 305. However, that reliance was most dispositive on the issue of the petition for dissolution, not in the court's consideration of the race-conscious selection processes used in the school district's magnet schools. *Id.* at 317–35.

295. *Swann*, 402 U.S. at 16. *See also supra* note 187 and accompanying text.

> the question, central to this appeal, of whether and to what extent the Constitution circumscribes school officials' discretion to formulate and implement an admissions policy that embraces a particular brand of pluralism.[296]

*Croson*, *Wygant* and *Bakke* played a larger role in the courts' reasoning, either relying on principles enunciated by the Court or distinguishing the precedents from the case at bar. Courts cited *Croson* for three central premises. First, *Croson* was referenced to assert that the burden of justification of any state use of race falls on the government, not the challenging party.[297] Second, as the First Circuit noted in *Wessmann,* to meet this burden, *Croson* directed reviewing panels to require government officials "to muster a 'strong basis in evidence'[298] showing that current social ill in fact has been caused by [past intentional discrimination]."[299] Extending this reliance, the *Wessmann* court then read this admonition to mean that only the most rigorous research is sufficient to demonstrate causation, and that judges must resist attempts to equate correlation with causation.[300] Judge Boudin, in his concurrence, strongly suggested that conclusions based upon qualitative research methodologies[301] would be insufficient to satisfy *Croson*'s directive to engage in "searching judicial inquiry"[302] as such research relies on "general statements or anecdote."[303] The third proposition courts took from *Croson* was the Supreme Court's rejection of "a 'generalized assertion' of past discrimination and present effects" as sufficiently compelling to meet the burden of persuasion since it "provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy."[304] As Judge Beezer explained in his dissent in *Hunter*: "Not only does such a theory lack any connection to 'the kind of prior discrimination . . . that would justify race-based relief,' but also it 'could be

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296. *Wessmann*, 160 F.3d at 797.

297. *Ho*, 147 F.3d at 865.

298. *Wygant* was also cited for the proposition that a "strong basis in evidence" defined the defendants' burden of persuasion. *Hunter*, 190 F.3d at 1073 (Beezer, J., dissenting).

299. *Wessmann*, 160 F.3d at 800 (citing Richmond v. Croson, 488 U.S. 469, 500 (1989)).

300. *Id.* at 804 (referring to *Croson*, 488 U.S. at 504).

301. Qualitative research is defined as "any kind of research that produces findings not arrived at by means of statistical procedures or other means of quantification. It can refer to research about persons' lives, stories, behavior, but also about organizational functioning, social movements, or interactional relationships." ANSELM STRAUSS & JULIET CORBIN, BASICS OF QUALITATIVE RESEARCH: GROUNDED THEORY PROCEDURES AND TECHNIQUES 17 (1990). It was this type of research that was employed by the school district's expert witness, William Trent, and rejected by the court as insufficiently rigorous. *Wessmann*, 160 F.3d at 805–806.

302. *Croson*, 488 U.S. at 493.

303. *Wessmann*, 160 F.3d at 809.

304. *Ho*, 147 F.3d at 865; *Croson*, 488 U.S. at 498. *See also Brewer*, 212 F.3d at 751.

used to justify race-based decisionmaking essentially limitless in scope and duration.' "[305]

Nonetheless, the Second Circuit in *Brewer*, the Ninth Circuit in *Hunter*, and the District Court in *Parents Involved* soundly rejected *Croson* as controlling authority. All three agreed that the holding in *Croson* shed no light on the issue of non-remedial goals serving as compelling state interests.[306] The *Brewer* court recognized that "the danger identified by the Supreme Court as inherent in non-remedial based programs is not present when a local school board acts to remedy clearly identifiable, indeed obvious, racial isolation in particular school districts."[307]

As might be expected, the courts' use of *Wygant* followed similar patterns. In addition to adding further weight to the concepts gleaned from *Croson* for requiring a "strong basis in evidence" and for rejecting societal discrimination as "too amorphous" to justify race-conscious decision making, courts read *Wygant* for two related propositions.[308] First, several courts noted the Supreme Court's strong rejection of the "role model" theory as a justification for the race-based teacher lay-off provisions of a collective bargaining agreement at issue in *Wygant*.[309] Second, the *Eisenberg* court used *Wygant* as a source of direction in the application of the narrow tailoring analysis, referencing the Court's characterization of this

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305. *Hunter*, 190 F.3d at 1070 (citing *Croson*, 488 U.S. at 497–98).

306. *Brewer*, 212 F.3d at 748; *Parents Involved*, 137 F. Supp. 2d at 1233. *See also*, *Hunter*, 190 F.3d at 1064, n.6 (explaining Croson has "no bearing on the question whether a non-remedial interest, such as the operation of a research-oriented elementary school dedicated to improving the quality of education in urban public schools, can serve as a compelling interest sufficient to survive strict scrutiny").

307. *Brewer*, 212 F.3d at 751 (internal citation omitted); *see also Parents Involved*, 137 F. Supp. 2d at 1233–34 (reasoning cited with approval).

308. *Wygant*, 476 U.S. at 276–77.

309. As the Supreme Court explained:

> The role model theory announced by the District Court and the resultant holding typify this indefiniteness. There are numerous explanations for a disparity between the percentage of minority students and the percentage of minority faculty, many of them completely unrelated to discrimination of any kind. In fact, there is no apparent connection between the two groups. Nevertheless, the District Court combined irrelevant comparisons between these two groups with an indisputable statement that there has been societal discrimination, and upheld state action predicated upon racial classifications. No one doubts that there has been serious racial discrimination in this country. But as the basis for imposing discriminatory legal remedies that work against innocent people, societal discrimination is insufficient and over-expansive. In the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future.

*Id.* at 276. *See also Brewer*, 212 F.3d at 751; *Hunter*, 190 F.3d at 1070 (Beezer, J., dissenting); *Hampton*, 102 F. Supp. 2d at 369, n.26.

procedure as the search for the "most exact connection" between the state's ends and means.[310]

Even those courts that eventually found in favor of defendant school districts also found *Wygant* instructive, particularly Justice O'Connor's concurrence. O'Connor's narrowing of the plurality's ruling proved especially relevant where she clarified:

> [C]ertainly nothing the Court has said today necessarily forecloses the possibility that the Court will find other governmental interests which have been relied upon in the lower courts but which have not been passed on here to be sufficiently 'important' or 'compelling' to sustain the use of affirmative action policies.[311]

The *Parents Involved* court noted Justice O'Connor's explanation concerning which party bears the burden of persuasion in cases challenging "reverse discrimination," commenting that once the governmental agency provides a rationale for its actions, the burden reverts to the plaintiffs to establish that unlawful discrimination has occurred.[312] The *Wessmann* dissent also pointed out that the *Wygant* Court factored the nature of the injury suffered into its narrow tailoring analysis by noting that the loss of a job creates a more intrusive burden than the use of hiring preferences.[313] The dissent analogized that difference to the difference between denial of an education and denial of a choice and reasoned that such a distinction must play a role in the tailoring calculus for race-conscious student selection processes.

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310. *Eisenberg*, 197 F.3d at 129.

311. 476 U.S. at 286, *quoted in Brewer*, 212 F.3d at 748. *See also Parents Involved*, 137 F. Supp. 2d at 1233.

312. *Parents Involved*, 137 F. Supp. 2d at 1236, n.10. "In 'reverse discrimination' suits, as in any other suit, it is the plaintiffs who must bear the burden of demonstrating that their rights have been violated. The findings a court must make before upholding an affirmative action plan reflect this allocation of proof and the nature of the challenge asserted. For instance, in the example posed above, the nonminority teachers could easily demonstrate that the purpose and effect of the plan is to impose a race-based classification. But when the Board introduces its statistical proof as evidence of its remedial purpose, thereby supplying the court with the means for determining that the Board had a firm basis for concluding that remedial action was appropriate, it is incumbent upon the nonminority teachers to prove their case; they continue to bear the ultimate burden of persuading the court that the Board's evidence did not support an inference of prior discrimination and thus a remedial purpose, or that the plan instituted on the basis of this evidence was not sufficiently 'narrowly tailored.' Only by meeting this burden could the plaintiffs establish a violation of their constitutional rights, and thereby defeat the presumption that the Board's assertedly remedial action based on the statistical evidence was justified." *Wygant*, 476 U.S. at 292–93 (O'Connor, J., concurring in part and concurring in the judgment). *See also Wessmann*, 160 F.3d at 816 ( Lipez, J., dissenting).

313. *Wessmann*, 160 F.3d at 830 (discussing *Wygant*, 476 U.S. at 282–83).

Distinguishing *Wygant* from the cases at bar also rested on the same differences that distinguished *Croson*. Namely, that education is a very different context from those heretofore addressed by the Court rendering no previous Supreme Court decision sufficiently analogous to the issues presented by these situations. As summarized by the First Circuit in *Brewer*:

> Neither case, however, involved desegregation of a student population in the public school system, a goal that we may assume at this point in the proceedings is more compelling than reduction of racial isolation or underrepresentation in the commercial context—teachers' jobs and the construction industry—at issue in *Wygant* and *Croson*.[314]

Turning to the courts' use of the Supreme Court's decision in *Bakke*, some might assume that defendants who succeeded in convincing jurists that their race-conscious programs survived strict scrutiny did so by relying on this seminal higher education case as controlling. Although courts found some of the issues in *Bakke* directly applicable, distinguishing *Bakke* from the controversies under examination became an important linchpin in successful legal arguments in support of school district discretion. First, it is enlightening to examine those issues for which courts found *Bakke* directly applicable. Several courts noted that *Bakke* established that diversity may be compelling in an educational context, but did not resolve the question.[315] Courts also understood *Bakke* to require rejection of programs that used race as a single criterion for decision-making[316] or that used racial quotas or racial balancing.[317] Finally, both the First and Fourth Circuits cited Justice Powell's caution against using racial stereotypes. As the Fourth Circuit explained:

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314. *Brewer*, 212 F.3d at 751.

315. However, none were moved to follow the Fifth Circuit and declare *Bakke* no longer good law. The Fifth Circuit came to that conclusion in *Hopwood v. Texas*, 78 F.3d 932, 944 (5th Cir. 1996). The First Circuit assumed *arguendo* that *Bakke* is still good law. *Wessmann*, 160 F.3d at 796. The Second Circuit also assumed that Bakke's conclusion regarding diversity remains valid. *Brewer*, 212 F.3d at 747. The Fourth Circuit assumed without deciding that diversity could be compelling. *Tuttle*, 195 F.3d at 705; Eisenberg, 197 F.3d at 131. The U.S. District Court for the Western District of Kentucky made the same assumption. Hampton, 102 F. Supp. 2d at 378. For discussions critical of the *Hopwood* decision and its reading of *Bakke*, see Phillip T.K. Daniel & Kyle Edward Timken, *The Rumors of My Death have been Exaggerated: Hopwood's Error in "Discarding" Bakke*, 28 J.L. & EDUC. 391 (1999); Mark R. Killenbeck, *Pushing Things up to Their First Principles: Reflections on the Values of Affirmative Action*, 87 CAL. L. REV. 1299, 1361 (1999). *But cf.*, Michael E. Rosman, *The Error of Hopwood's Error*, 29 J.L. & EDUC. 355 (2000).

316. *Hampton*, 102 F. Supp. 2d at 378–9; *Wessmann*, 160 F.3d at 798; *see also Bakke*, 438 U.S. at 315.

317. *Tuttle*, 195 F.3d at 705.

> In *Bakke*, Justice Powell explained that constitutionally permissible programs such as the Harvard College admissions program promote diversity by 'treat[ing] each applicant as an individual in the admissions process.' The Policy [at issue in *Tuttle*], like the Davis admissions program in *Bakke*, does not treat applicants as individuals. The race/ethnicity factor grants preferential treatment to certain applicants solely because of their race.[318]

No court countered this notion that student selection processes violated the individuality of the child by using race as one means of decision-making.[319] Rather, the courts enunciated the differences in the school cases in order to show the limitations of the precedent set in *Bakke* and avoided the necessity of applying the concepts of "plus factors" and individual rights over group interests. First, courts pointed to the obvious —that the programs at issue did not happen in a higher education context and therefore could not be analogized to seeking entry into medical school.[320] In some judicial opinions, judges drew attention to the fact that children are merely denied a choice, not an education.[321] Also, as described above, courts noted that *Bakke* considered only one type of diversity— "true diversity"—and therefore could not be read to control programs with purposes to address the effects of *de facto* segregation.[322]

In summary, there was no uniform application of Supreme Court precedent in the ten cases reviewed here. Nonetheless, the five major cases examined by the courts, *Swann*, *Bakke*, *Wygant*, *Croson*, and *Adarand*, and the principles discerned from them, provided insight into successfully challenging or successfully defending race-conscious student selection processes.

### D. *Use of Social Science Research*

The final pattern apparent in these cases is the reliance of the courts on social science research. Continuing a practice first exemplified in *Brown v. Board of Education*,[323] the parties, *amici*, and courts all looked to social science research for evidence that a policy used race to serve

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318. *Id.* at 707 (quoting *Bakke*, 438 U.S. at 318).

319. An argument will be made to counter this point in the section entitled "Proposed Legal Argument." *See infra* Part III.

320. *Parents Involved*, 137 F. Supp. 2d at 1235; *Comfort*, 100 F. Supp. 2d at 60; *Brewer*, 212 F.3d at 751.

321. *Brewer*, 212 F.3d at 751; *Wessmann*, 160 F.3d at 819 (Lipez, J., dissenting).

322. *Brewer*, 212 F.3d at 752–53; *Parents Involved*, 137 F. Supp. 2d at 1235; *Comfort*, 100 F. Supp. 2d at 65, n.12.

323. 347 U.S. 483, 494–95, n.11 (1954).

compelling interests and only when necessary and absolutely justified.[324] Social science research was used in these cases to demonstrate a compelling state interest and the need for attention to diversity. Similarly, research played a role in the narrow tailoring analysis to show the efficacy of the policy under scrutiny and the comparison of the policy's means to other methods to show that a race-conscious method was the only effective means available.

As might be expected the research cited predominantly addresses the benefits of education in a diverse educational environment given our pluralistic society and the harmful effects of racial isolation.[325] The *Parents Involved* court quoted the school district's expert witness, Dr. William Trent, a scholar from the University of Illinois, to identify:

> [F]our discrete reasons why racial balance at the high school level is important:
>
> [1.] Opportunity and achievement. The research shows that a desegregated educational experience opens opportunity networks in the areas of higher education and employment, particularly for minority students, which do not develop when students attend less integrated schools. . . .
>
> [2.] Teaching and learning. The research shows that academic achievement of minority students improves when they are educated in a desegregated school, likely because they have access to better teachers and more advanced curriculum. The research also shows that both white and minority students experienced improved critical thinking skills—the ability to both understand and challenge views which are different from their own—when they are educated in racially diverse schools.

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324. *See, e.g.*, Brief of Amici Curiae National Association for the Advancement of Colored People et al. at vii–ix, Brewer v. West Irondequoit Cent. Sch. Dist., 212 F.3d 738 (2d Cir. 2000) (No. 99-7186) (listing 17 references to social science research).

325. *See, e.g.*, Brief for Montgomery County Public Schools at ix, Eisenberg v. Montgomery County Pub. Sch., 197 F.3d 123 (4th Cir. 1999) (No. 98-2503) (citing Maureen T. Hallinan, *Diversity Effects on Student Outcomes: Social Science Evidence*, 59 OHIO ST. L.J. 733 (1998); J. Braddock II and J. McPartland, *Social-Psychological Processes that Perpetuate Racial Segregation: The Relationship between School and Employment Desegregation*, 19 J. BLACK STUD. 3:267 (Mar. 1989)); Brief for Amici Curiae National Association for the Advancement of Colored People et al. at vii–ix, Brewer v. West Irondequoit Cent. Sch. Dist., 212 F.3d 738 (2d Cir. 2000) (No. 99-7186) (citing GARY ORFIELD, HARVARD CIVIL RIGHTS PROJECT, CITY-SUBURBAN DESEGREGATION: PARENT AND STUDENT PERSPECTIVES IN METROPOLITAN BOSTON (Sept. 1997); Florence Wagman Roisman, *Intentional Racial Discrimination and Segregation by the Federal Government as a Principal Cause of Concentrated Poverty: A Response to Schill and Wachter*, 143 U. PA. L. REV. 1351 (1995)).

> [3.] Civic values. The research clearly and consistently shows that, for both white and minority students, a diverse educational experience results in improvement in race-relations, the reduction of prejudicial attitudes, and the achievement of a more democratic and inclusive experience for all citizens .... Recent research has identified the critical role of early school experiences in breaking down racial and cultural stereotypes....
>
> [4.] Employment. Research ... shows that, as a group, minority students who exited desegregated high schools were more likely to be employed in a racially diverse workplace, obtained more prestigious jobs than those who did not, and that their jobs tended to be higher paying than those students who did not attend desegregated schools.[326]

In the same case, even the plaintiffs' witness, Dr. David Armor,[327] Research Professor at George Mason University, "concede[d] that '[t]here is general agreement by both experts and the general public that integration is a desirable policy goal mainly for the social benefit of increased information and understanding about the cultural and social differences among the various racial and ethnic groups.' "[328] In addition, research on the persistent achievement gap between minority and non-minority students was touted to show the need for creating racially mixed learning environments.[329] Plaintiff's experts did not try to demonstrate the benefits of racially isolated education; rather, as did Dr. Armor, their testimony suggested that statistical analyses do not support conclusions regarding causation.[330]

One interesting argument concerning social science research ensued between the majority and dissenting judges in *Wessmann*. As in *Parents Involved*, the school district had Dr. Trent[331] testify as an expert witness to show the necessity of its race-conscious plan at the Boston Latin School. Dr. Trent did not conduct original research in Boston. Rather, he applied the findings of his research in Kansas to the Boston context based on (1) data the district had collected about the achievement gap between African-American and White students, (2) data regarding when teachers

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326. *Parents Involved*, 137 F. Supp. 2d at 1236 (quoting Trent Decl. ¶ 4).

327. *See also Belk II*, 269 F.3d at 331 (using Dr. Armor's testimony).

328. *Parents* Involved, 137 F. Supp. 2d at 1236.

329. *See* discussion accompanying *supra* notes 48–59 (referring to Dr. William Trent's research in both the majority and dissenting opinions).

330. *See e.g.*, DAVID J. ARMOR, FORCED JUSTICE SCHOOL DESEGREGATION AND THE LAW (1995). *See also* Orfield, *supra* note 12 (further discussing this issue of causation and expert testimony).

331. *See also Belk II*, 269 F.3d 305 at 335 (referencing the use of Dr. Trent's expert report in evaluating the schools' remedial plan).

had begun teaching in relation to the formerly segregated Boston school system, and (3) interviews with school officials.[332] Based on the facts provided, the majority dismissed his testimony as unreliable. The majority explained:

> One difficulty with Dr. Trent's testimony is that it relies on evidence from one locality to establish the lingering effects of discrimination in another ... Dr. Trent, however, never conducted a "climate survey" for the Boston school system. His conclusions for Boston were based only on a review of statistical data documenting the achievement gap (basically, the statistics regarding achievement test results and differing application and enrollment rates), statistics concerning teacher seniority, and anecdotal evidence about teacher attitudes supplied by school officials. When asked on cross-examination whether the data that he relied on for his conclusions anent teacher attitudes were scientifically gathered, Dr. Trent responded in the negative. Dr. Trent thus freely conceded that the data he used was not of the quality necessary to satisfy the methodological rigors required by his discipline. Because Dr. Trent failed to follow his own prescribed scientific methodology for collecting data on the one issue central to his hypothesis about achievement gap causation, the trial court could not credit his conclusions.... An expert witness can only deviate from accepted methods of scientific inquiry in ways that are consistent with the practices and usages of the scientific community.[333]

The dissent took painstaking umbrage with this characterization of Dr. Trent's evidence. Circuit Judge Lipez explained his disagreement with the majority:

> [Dr. Trent] testified that his conclusions were based on a reasonable methodology in his profession. He evaluated statistics documenting student performance and teacher histories in the Boston school system. He studied the observations of a well-trained administrator in the Boston school system describing teacher performances in the classroom, the impact of these performances on students, and faulty attempts to alter teacher attitudes. He knew the history of segregation in the Boston school system. Seeing statistics and patterns in Boston that he had observed in

332. See discussion *infra* Part I, Wessmann v. Gittens.

333. *Wessmann*, 160 F.3d at 804–05.

> other school systems where he had found a link between student achievement gaps and prior discrimination, he testified to the probability of such a link in the Boston school system. He had an adequate basis for making that judgment.[334]

Judge Lipez further explained that the *Wessmann* majority's error, in his view, derived from misconceptions about evidence necessary to establish the requisite fit between ends and means under strict scrutiny and the rigors of social science inquiry. He posited:

> The majority goes awry because it reads *Wygant*'s requirement of a "strong basis in evidence" for an affirmative action program and *Croson*'s reference to a "searching judicial inquiry" into the justification for an affirmative action program as demands for evidence grounded in quantifiable social science data rather than human judgments. There is no such demand in *Wygant, Croson* or any other Supreme Court precedent. Numbers are not the only source of the requisite degree of certainty about low teacher expectations for minorities and causation. In this case, the extensive observations of experienced administrators in the Boston public schools, supplemented by the testimony of a highly qualified expert who recognized in the Boston public schools a phenomenon he had studied extensively elsewhere, were as probative as the statistical surveys and regression analyses demanded by the majority.[335]

This argument suggests that because of the rigors of the narrow tailoring analysis, courts may be less inclined to accept research that is not specific to the context in which the policy arose.[336] As further support of this suggestion, note how the court in *Comfort* addressed the issue:

> [D]efendants have offered expert testimony, the affidavit of Professor Gary Orfield ("Professor Orfield"), premised in part on social science evidence, that the Lynn Plan is necessary to achieve the educational benefits of preparing students to live in a pluralistic society. Conversely, Professor Orfield states that abandoning the Lynn Plan will have "detrimental effects" which include an impact on minority students' academic achievement.

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334. *Id.* at 825.

335. *Id.* at 833 (footnotes omitted).

336. The *Hampton* court drew similar conclusions. 102 F. Supp. 2d at 366, n.14.

> And his observations are not based on unsystematic observation of racially mixed classrooms. Rather, they are based on comparing estimates of the actual student populations of the Lynn schools (were the plan to be dismantled) with the fruits of social science research . . . Professor Orfield's conclusions stem not only from studying the concrete dynamics of the Lynn Plan, but also from studying Lynn's demographic make-up.[337]

Although the demand for context-specific research arose in the narrow tailoring analysis, more general research appeared to be viewed more positively when used to support the need for the policy's goals at the compelling state interest stage of the analysis.

## III. PROPOSED LEGAL ARGUMENT

Teasing out the patterns discernible in the ten cases under examination in this article also becomes instructive for those who might be called upon to justify other race-conscious policies in the future. Taking the lessons of these cases to heart, a viable case can be made in support of race-conscious student selection policies, particularly in a context of parental choice. The legal argument outlined here attempts to address each of the faults found with the policies under scrutiny in the cases reviewed. Accordingly, the argument focuses on prospective rather than retrospective ends that honor the core mission of public elementary and secondary schools and school districts. The argument consists of five major points: (1) No child is denied an education; (2) Choice is granted to parents as a means to a particular goal; (3) Education for success in a diverse society is a compelling and specific curricular goal within the discretion of the legitimate policy-making authority of state and local authorities; (4) That goal is at the center of the public elementary and secondary educational enterprise; and (5) In today's world, conscious use of race is necessary and narrowly tailored to that core educational goal. This part discusses each of these central factors.

### A. *No Child is Denied an Education*

As Justice Marshall stated in his dissent in *Wygant*, discerning whether anyone has suffered a constitutional injury "calls for calm, dispassionate reflection upon exactly what has been done, to whom, and why."[338] To that end, the first salient point often made by the schools and

337. *Comfort*, 100 F. Supp. 2d at 66 (note 15 included).

338. Wygant v. Jackson Bd. of Educ., 476 U.S. 286, 303 (1986) (Marshall, J., dissenting).

their *amici* bears repeating here. Unlike cases from the higher education context, no child is required to postpone his/her education by virtue of a denied request to participate in a choice plan. The bottom line is that no education is denied and no education is delayed. As established by the courts in *Brewer v. West Irondequoit Central School District, Comfort ex rel. Neumyer v. Lynn School Committee*, and *Parents Involved v. Seattle School District No. 1*, this difference marks a way to distinguish such "injuries" from those suffered in by plaintiffs in *Adarand Constructors, Inc. v. Pena, Richmond v. J.A. Croson, Wygant v. Jackson Bd. of Educ.*, or *Regents of the University of California v. Bakke*.[339] While it is certainly true that a constitutional violation is an injury in and of itself, the reasoning in *Wygant*[340] and *United States v. Paradise*[341] demonstrate that consideration of the burden borne by the plaintiffs in relation to the state's articulated goals as part of the narrow tailoring analysis determines, in part, whether any constitutional violation has occurred in the first place. It is difficult to demonstrate how being told "no" creates a real burden in the lives of the children whose parents try to overturn schools' denials of requests to transfer from one school to another. While a preferred program may have aspects that mark it as academically superior in some respect, it does not follow that denying the parent's request relegates the child to a substandard educational experience. As discussed earlier,[342] even in magnet school programs, schools share much curricula in common with non-magnet

339. *See Brewer*, 212 F.3d 738 (2d Cir. 2000); *Comfort*, 100 F. Supp. 2d 57 (D. Mass 2000); *Parents Involved*, 137 F. Supp. 2d (W.D. Wash. 2001); *Adarand*, 515 U.S. 200 (1995); *Croson*, 488 U.S. 469 (1989); *Wygant*, 476 U.S. 267 (1986); *Bakke*, 438 U.S. 265 (1978).

340. " 'Any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees.' There are two prongs to this examination. First, any racial classification 'must be justified by a compelling governmental interest.' Second, the means chosen by the State to effectuate its purpose must be 'narrowly tailored to the achievement of that goal.' We must decide whether the layoff provision is supported by a compelling state purpose *and* whether the means chosen to accomplish that purpose are narrowly tailored." 476 U.S. at 273–74 (citations omitted) (emphasis added). *See also supra* note 282.

341. "Finally, and particularly important, the effect of the order on innocent white troopers is likely to be relatively diffuse. Unlike layoff requirements, the promotion requirement at issue in this case does not 'impose the entire burden of achieving racial equality on particular individuals,' and does not disrupt seriously the lives of innocent individuals. Although the burden of a narrowly prescribed promotion goal, as in this case, is not diffused throughout society generally, the burden is shared by the nonminority employees over a period of time. As noted above, only qualified minority applicants are eligible for promotion, and qualified nonminority applicants remain eligible to compete for the available promotions. Although some white troopers will have their promotions delayed, it is uncertain whether any individual trooper, white or black, would have achieved a different rank, or would have achieved it at a different time, but for the promotion requirement." 480 U.S. 149, 188–89 (Powell, J., concurring) (citations omitted).

342. See *infra* Part II and text accompanying note 278.

schools making any denial relative, not absolute.[343] Once it is clear that the "injury" is simply the denial of a choice, narrow tailoring analysis must weigh that denial against the purposes for which it occurred.

This weighing of injury endured against the legitimate interests of the school has figured strongly in other rights-based school cases heard by the Supreme Court. In the seminal students' rights case, *Tinker v. Des Moines Independent Community School District*,[344] the Court considered the proper balance between students' rights to freedom of speech under the First Amendment of the Constitution and the school's authority. As the Court explained:

> [A student] may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without "materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school" and without colliding with the rights of others. But conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.[345]

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343. For example, note the following discussion by the Wisconsin Supreme Court of its definition of equal educational opportunity. "An equal opportunity for a sound basic education is one that will equip students for their roles as citizens and enable them to succeed economically and personally. The legislature has articulated a standard for equal opportunity for a sound basic education in Wisconsin Statute §§ 118.30(lg)(a) and 121.02(L) (1997–98) as the opportunity for students to be proficient in mathematics, science, reading and writing, geography, and history, and for them to receive instruction in the arts and music, vocational training, social sciences, health, physical education and foreign language, in accordance with their age and aptitude. An equal opportunity for a sound basic education acknowledges that students and districts are not fungible and takes into account districts with disproportionate numbers of disabled students, economically disadvantaged students, and students with limited English language skills. So long as the legislature is providing sufficient resources so that school districts offer students the equal opportunity for a sound basic education as required by the constitution, the state school finance system will pass constitutional muster." Vincent v. Voight, 614 N.W. 2d 388, 396–97 (Wis. 2000) (internal citations omitted). This passage suggests that while differences between schools are inevitable, schools have common characteristics as required by state legislative standards that mark their uniformity.

344. 393 U.S. 503 (1969). In affirming the rights of students to wear black armbands in protest over the Vietnam war, the Court determined that students continued to enjoy the protection of the Constitution even while at public schools as long as no material or substantial disruption to the educational process resulted. *Id.*

345. *Id.* at 512–13 (internal citations omitted).

The conclusion that students' rights to freedom of speech might sometimes be outweighed by the legitimate concerns of school officials was reaffirmed in *Bethel School District v. Fraser*[346] and *Hazelwood School District v. Kuhlmeier*.[347] As the *Hazelwood* Court summarized:

> We have nonetheless recognized that the First Amendment rights of students in the public schools "are not automatically coextensive with the rights of adults in other settings,"[348] and must be "applied in light of the special characteristics of the school environment."[349]

Those special characteristics of the school environment have also entered into the Court's balancing of interests in cases involving students' rights to be free from unreasonable searches and seizures under the Fourth Amendment. The Court first expressed the need for such weighing of interests in *New Jersey v. T.L.O.*[350] by explaining:

> 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.[351]

The Court reiterated the recognition that the school environment must factor into Fourth Amendment analysis in *Vernonia School District 47J*

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346. 478 U.S. 675 (1986) (determining that school officials could discipline a student for making a lewd speech at a school assembly without offending the Constitution).

347. 484 U.S. 260 (1988) (holding that student curricular speech could be controlled and even censored if reasonably balanced by a legitimate pedagogical concern).

348. *Id.* at 266 (quoting *Bethel Sch. Dist.*, 478 U.S. at 682).

349. *Id.* (quoting *Tinker*, 393 U.S. at 506); *cf.* New Jersey v. T. L. O., 469 U.S. 325, 341–43 (1985).

350. 469 U.S. at 341.

351. *Id.* The Court further explained its reasoning this way: "This standard will, we trust, neither unduly burden the efforts of school authorities to maintain order in their schools nor authorize unrestrained intrusions upon the privacy of schoolchildren. By focusing attention on the question of reasonableness, the standard will spare teachers and school administrators the necessity of schooling themselves in the niceties of probable cause and permit them to regulate their conduct according to the dictates of reason and common sense. At the same time, the reasonableness standard should ensure that the interests of students will be invaded no more than is necessary to achieve the legitimate end of preserving order in the schools." *Id.* at 342–43.

*v. Acton*.[352] As Justice Scalia, writing for the majority, made clear, "Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are *different* in public schools than elsewhere; the 'reasonableness' inquiry *cannot disregard the schools' custodial and tutelary responsibility for children*."[353] Schools' "custodial and tutelary responsibility" likewise grounded the Court's most recent analysis on the issue, *Board of Education of Independent School District No. 92 v. Earls*.[354] In upholding the school district's random drug screening policy as applied to students participating in extracurricular activities, the Court reasoned that:

> [T]he need to prevent and deter the substantial harm of childhood drug abuse provides the necessary immediacy for a school testing policy [even lacking evidence of a local drug problem]. Indeed it would make little sense to require a school district to wait for a substantial portion of its students to begin using drugs before it was allowed to institute a drug testing program designed to deter drug use.[355]

In addition to First and Fourth Amendment principles, balancing the special interests of the school environment against a child's constitutional rights under the Fourteenth Amendment has also come before the Court, as Justice Scalia referenced in the quotation from *Vernonia* above. In *Goss v. Lopez*,[356] the Court was asked to determine what due process rights a student enjoys when faced with a suspension from school of less than 10 days. Again the Court considered the rights of students by balancing them against the concerns of the school. First, the Court recognized that "[s]ome modicum of discipline and order is essential if the educational function is to be performed" and that effective discipline "sometimes require[s] immediate, effective action" and that suspension can be a "valuable educational device."[357] Second, the Court indicated a desire to avoid "imposing elaborate hearing requirements in every suspension case."[358] Considering these interests, the Court then concluded that:

> Students facing temporary suspension have interests qualifying for protection of the Due Process Clause, and due process requires, in connection with a suspension of 10 days

352. 515 U.S. 646 (1995).
353. *Id.* at 656 (emphasis added).
354. 122 S. Ct. 2559, 2565 (2002).
355. *Id.* at 2568.
356. 419 U.S. 565 (1975).
357. *Id.* at 580.
358. *Id.*

> or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story . . . We stop short of construing the Due Process Clause to require, countrywide, that hearings in connection with short suspensions must afford the student the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident.[359]

All of these students' rights cases, *Tinker*, *Bethel*, *Hazelwood*, *T.L.O.*, *Vernonia*, *Earls* and *Goss*, demonstrate that substantial Supreme Court precedent exists to examine any alleged violation of students' rights against school's role in society.[360] That such precedent exists in First, Fourth, and Fourteenth Amendment Due Process contexts strongly supports the notion that such considerations must enter into any Equal Protection analysis in public elementary and secondary school settings. Therefore it is appropriate to examine the child's denial of choice in light of the purposes for which the choice was granted.

### B. *Choice is Granted to Parents as a Means to a Particular Goal*

The second key feature of an argument to support race-conscious student selection processes in public school choice contexts should be to emphasize that choice is granted to parents as a means to a particular goal. As the ten cases reviewed here illustrate, choice is not the goal but rather the instrument used to realize another goal. The plaintiffs in these cases try to cast the issue as the denial of a right to participate in a state offered benefit. "But unfairness ought not be confused with constitutional injury."[361] Nothing compels the state or local educational authorities to grant parents some voice in the school assignment process. Choice is offered to parents to serve an educational end and only those parental choices that are consistent with that end should be honored.[362] As evidenced by each of the ten programs under scrutiny, schools use choice

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359. *Id.* at 581–83.

360. As mentioned above, some educational organizations argued in their amicus brief in *Eisenberg* that a different, lower standard than strict scrutiny should apply in school equal protection cases. The proposed argument discussed here does not use the student rights cases in that manner. Rather than arguing that a lower analytic standard should apply, it is proposed here that the student rights precedents set in *Tinker*, *Bethel*, *Hazelwood*, *T.L.O.*, *Vernonia*, and *Goss* suggest additional inquiries and considerations should be applied within a strict scrutiny framework. *See supra* note 25 and accompanying text.

361. *Wygant*, 476 U.S. at 296 (Marshall, J., dissenting).

362. Parents have multiple reasons for choosing, but it is the effect of that choice and its match with the district's goals that is dispositive.

instrumentally to achieve other goals. It is these goals that take precedence. They are the conditions under which the benefit of choice was granted. As demonstrated by the programs here, parental choice is frequently offered, at least in part, to spur educational integration.[363]

Consequently, participation in the program presupposes, at a minimum, parental acquiescence to the district's goal of voluntary integration. It is, thus, proper to deny requests that subvert rather than serve the purpose of the program. Accordingly, a majority student moving to a predominantly majority school or a minority student transferring to a predominantly minority school does not serve the purpose of the program, no matter how much the student might desire it. When one volunteers for a program, one volunteers to be used for the purposes of that program. Even in the magnet school context, this logic holds true. The very name, "magnet school," itself stems from a school's ability to attract students who might not otherwise attend a particular school because of geography and the racial isolation associated with it.[364] Therefore the existence of the magnet program is inextricably tied to addressing or avoiding *de facto* segregation.[365]

Parents who elect to have their child compete for admission to a magnet or specialty school or inter-district transfer program must recognize all that they are choosing, including assisting the district's legitimate and compelling interest in avoiding racial isolation in its schools. In essence, parents volunteer to allow the district to use the race of their child to create appropriately diverse learning environments for their child and all the district's children.[366] In the same manner that a school designs an advanced academic program by limiting the class membership to those that pass an academic bar or that it designs the varsity team roster by setting physical hurdles for entry, it may design a integration program by limiting enrollment by racial or ethnic distinctions. By not deliberately manipulating school populations, schools do not abdicate their role as shapers of social harmony. Rather, by maintaining the status quo of the neighborhood, schools actively create society.

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363. Of these ten cases, only the UCLA lab school did not hold integrated education as its purpose. Rather it created an integrated educational environment to serve the research purpose of the university. Some may argue that charter school programs exist to offer choice simply for the sake of choice. However, even charter schools are established as a means to another end, most frequently, educational innovation, which creates increased educational accountability. This analysis will not touch on the particular issues of applying this argument to charter schools because of some unique issues that arise in that context. For example, for charter schools to be eligible for federal financial assistance under the Charter Schools Expansion Act, students must be selected using a random lottery whenever applicants outnumber available seats. 20 U.S.C. § 8066(1)(H).

364. *See* discussion *infra* Part II.

365. *See supra* note 7 and accompanying text.

366. *See* Brown, *supra* note 181, at 79.

The right that the district creates in designing a policy using race is the right for each student to have the opportunity to learn in an environment that mirrors the world they will enter beyond school. The choice is to attend this enlightened program, not to attend a specific school building. As these integrative choice programs cannot exist without the distinctions objected to by the plaintiffs in these cases, plaintiffs are essentially claiming the right to end these programs. They want the choice absent its purpose; but choice is only offered if one chooses integration. Understood in this manner, the plaintiffs' complaint is akin to demanding a position on a football team, but refusing to play football.

The conditional relationship between the offer of parental choice and the goal of integrated educational environments is another fact that distinguishes challenges to race-conscious student selection processes from the facts presented to the Supreme Court in previous non-educational cases. For instance, the denial in *Adarand* of a subcontract for building a highway did not relate to the reason for building the highway. It may also be argued that the Supreme Court has recognized that other conditional relationships, even when constitutional rights are implicated, are within the discretion of school authorities because of the special relationship schools have with students and the special role schools play in society.

Again, the student's rights cases discussed above provide precedent. In *Bethel*[367] and *Hazelwood*,[368] the Court concluded that children had the right to free expression in school-established forums, conditioned on using the platform for speech in a manner consistent with the school's educational goals. In *Vernonia* and *Earls*, the Court concluded that, because of the school district's legitimate concerns for safety and its desire to strengthen its stance on the dangers of drugs and alcohol, it was constitutionally allowable for a school district to condition all extra-curricular participation on student submission to random urinalysis.[369] Following this analogy to other students' rights cases, one might argue that because of the concerns about and the educational need for integrated learning environments, it is constitutionally allowable for schools to condition parental choice on agreement to disclose the child's race and allow it to be used instrumentally to further integration.

### C. *Education For Success in a Diverse Society is a Compelling and Specific Curricular Goal*

When demonstrating the compelling nature of schools' desire for integrated learning environments, it first appears prudent to remind any court of Justice O'Connor's admonition that precedents establishing that

367. 478 U.S. at 685–86.

368. 484 U.S. at 271, 273.

369. Veronia Sch. Dist. 47J v. Acton, 515 U.S. 646, 665 (1995); *Earls*, 122 S. Ct. at 2569.

correcting past discrimination as a compelling state interest do not "necessarily foreclose" the fact that other goals might also be found to rise to that level of constitutional import.[370] It also should be noted, as have various legal scholars,[371] that the Supreme Court members, writing as a whole or as individual justices, have given "express approval and constitutional sanction to the voluntary use of race by states and local governmental agencies to achieve ends of educational diversity" in several cases.[372] Those cases supporting such a proposition include *Swann v. Charlotte-Mecklenburg Board of Education*, where the Court distinguishes between court-ordered and voluntary desegregation efforts,[373] Justice Powell's discussion of diversity in *Bakke*,[374] and the four cases that follow.

In *Bustop, Inc. v. Board of Education*,[375] then-Justice Rehnquist commented that while the U.S. Constitution would not have compelled the Supreme Court of California to approve a voluntary integration plan in Los Angeles, he had "very little doubt that it was *permitted* by that Constitution to take such action."[376] Justice Powell, in *Keyes v. School District No. 1*, argued that the Court should abandon its distinction between *de jure* and *de facto* segregation in order to require integration, not simply desegregation.[377] He further emphasized that "[s]chool boards would, of course, be free to develop and initiate further plans to promote school desegregation ... Nothing in this opinion is meant to discourage school boards from exceeding minimal constitutional standards in promoting the values of an integrated school experience."[378] Kevin Brown notes that Justice Powell reiterated his view of diversity in education serving as a compelling state interest to the elementary and secondary level when in a dissent to *Columbus Board of Education v. Penick*,[379] he wrote: "[i]t 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 view to which I subscribe."[380]

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370. *Wygant*, 476 U.S. at 286.

371. *See* Boger, *supra* note 27; Brown, *supra* note 181.

372. Boger, *supra* note 27, at 1744.

373. *Swann*, 402 U.S. at 15.

374. *Bakke*, 438 U.S. at 315.

375. 439 U.S. 1380 (1978). *See also* Boger, *supra* note 27; Brown, *supra* note 181.

376. *Bustop*, 439 U.S. at 1383. *See also* Boger, *supra* note 27, at 1741; Brown, *supra* note 181, at 41–42; *Parents Involved*, 137 F. Supp. 2d at 1234.

377. *Keyes*, 413 U.S. 189, 242–43 (1973) (Powell, J., concurring in part and dissenting in part). *See also* Boger, *supra* note 27, at 1741.

378. *Keyes*, 413 U.S. at 242. *See also Parents Involved*, 137 F. Supp. 2d at 1234–35.

379. 443 U.S. 449 (1979).

380. *Id.* at 486 (Powell, J., dissenting); Brown, *supra* note 266, at 10–12. *See also* Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979).

In 1982, after considering the case of *Washington v. Seattle School District No. 1*,[381] the Court again spoke to the issue of school officials' discretion to create programs to desegregate its schools in the absence of a judicial order. At issue was Initiative 350, a voter initiative that prohibited the use of mandatory bussing for integration purposes in Washington's public school districts. The Court agreed with the Seattle School District that Initiative 350 violated the Equal Protection Clause. The school district argued, and the Court agreed, that since the measure allowed school officials to exercise their discretion to bus students for a variety of purposes unrelated to integration and foreclosed the practice only when integration was its target, it created an impermissible racial classification.[382] As the Court explained:

> Before adoption of the initiative, the 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 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.[383]

Taken together, these opinions indicate a willingness on the part of the Court to consider the compelling nature of even non-remedial uses of race. However, given the examples set by the ten cases reviewed here, great care should be taken when articulating precisely what non-remedial state interest motivates the conscious use of race. It should also be clear that those who wish to justify a race-conscious goal should use considerable caution when using the term "diversity." To that end, using the word "diversity" alone as the descriptor of the compelling state interest for the policy, given its multiple meanings and applications, seems foolhardy. Accordingly, as described in the previous section, "diversity," when the term is used, must be clearly defined to incorporate all its complexities. Recall that these ten cases utilized three different, but related, conceptions of diversity: (1) diversity as an extension of the right to free speech; (2) diversity as an extension of the district's curricular control; and (3) diversity to address or combat *de facto* segregation.

The courts' treatment of these concepts suggests that the *Bakke*-esque notion of diversity as an extension of the right to free speech might best be eliminated from any argument seeking to support race-conscious student selection processes. First, the notion of "true diversity" muddies the contexts and masks factors that distinguish elementary and secondary

381. 458 U.S. 457 (1982); *see also* Brown, *supra* note 181, at 8–11; Boger, *supra* note 27.

382. *Id.* at 470–71 (citing Hunter v. Erickson, 393 U.S. at 395).

383. *Id.* at 479–80.

education from higher education.[384] Second, as demonstrated in *Wessmann*, *Tuttle*, and *Eisenberg*, using this conception of diversity allows the inference that policy-makers use race as a proxy for what a child adds to the classroom conversation thus obfuscating the true rationale for the use of race-conscious means. While having students from a variety of familial and cultural backgrounds certainly enriches any discussion, that rationale does not adequately capture the compelling reasons that often motivate educational policy-makers to employ race-conscious procedures. Lastly, the facts associated with a "true diversity" interest appear to hamper survival of the narrow tailoring analysis. It becomes difficult, if not impossible, to make the connection that using race in student selections is an essential and precisely crafted mechanism to ensuring a multiplicity of ideas in the classroom.[385]

Thus, given the examples of the cases examined here, using the latter two conceptions of diversity in tandem appears to best capture educational policy-makers' true interest in the use of race in student selection processes in choice environments. That is, education for success in a diverse society is a compelling and specific curricular goal within the discretion of the legitimate policy-making authority of state and local authorities.

First, it goes without saying that the identification of educational problems and the crafting of measures to address those problems falls within the purview of state and local policy-makers.[386] State and local educational authorities have long recognized that racial and ethnically isolated schools do not adequately prepare children for life in the modern community or workplace. The country as a whole and the workplace in particular is becoming more, not less diverse.[387]

Adding to this general knowledge, research shows that considerable re-segregation has occurred in the last decade and highlights the problem of *de facto* racial and ethnic segregation.[388] Therefore, research demonstrates a tendency toward segregation, not integration, and reveals that active

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384. *See infra* notes 177–80 and accompanying text.

385. *See infra* notes 279–82 and accompanying text.

386. *See* State *ex rel.* Andrews v. Webber, 108 Ind. 31, 8 N.E. 708 (Ind. 1886); Sch. Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 50 (1973); Bd. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 207 (1982).

387. U.S. Census 2000.

388. *See* GARY ORFIELD & NORA GORDON, HARVARD CIVIL RIGHTS PROJECT, SCHOOLS MORE SEPARATE: CONSEQUENCES OF A DECADE OF RESEGREGATION (July 2001); GARY ORFIELD & JOHN T. YUN, HARVARD CIVIL RIGHTS PROJECT, RESEGREGATION IN AMERICAN SCHOOLS, (June 1999); *see also* James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249 (1999) (discussing some of the problems associated with racial isolation in schools).

steps are necessary to address the educational effects of this segregation.[389] Those effects and their mirror image, the educational benefits available to all children in integrated educational environments,[390] provide foundation for the assertion that separated environments demand an educational response. The short-term and long-term advantages for all students of being in racially integrated learning environments have been well-documented at all levels of education,[391] with results that show consistency and resiliency in findings from setting to setting and context to context. Given the weight of educational research to support it, it is right and proper for school officials to conclude that integrated educational environments are not simply desirable, but necessary to an adequate education in the twenty-first century.[392] Or as one group of *amici* explained, "[m]any school

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389. *See supra* note 388; *see also* AMY STUART WELLS & ROBERT L. CRAIN, STEPPING OVER THE COLOR LINE: AFRICAN AMERICAN STUDENTS IN WHITE SUBURBAN SCHOOLS (1997) (suggesting that active steps must be taken to integrate urban areas in order to address the unequal educational opportunities associated with poverty in those areas); David S. Tatel, *Desegregation Versus School Reform: Resolving the Conflict*, 4 STAN. L. & POL'Y REV. 61, 68 (1993) (arguing that moves toward decentralizing schools have created conflicts with desegregation efforts, but noting that increasing diversity makes "the argument for integrated schools more, not less compelling").

390. *See* Michael Kurlaender & John T. Yun, *Is Diversity a Compelling Educational Interest? Evidence from Louisville*, *in* DIVERSITY CHALLENGED 111 (Gary Orfield, ed., 2001); MARGUERITE A. WRIGHT, I'M CHOCOLATE, YOU'RE VANILLA: RAISING HEALTHY BLACK AND BIRACIAL CHILDREN IN A RACE-CONSCIOUS WORLD 1 (1998); William T. Trent, *Outcomes of School Desegregation: Findings from Longitudinal Research*, 66 J. OF NEGRO EDUC. 255 (1997); Jane Ward Schofield, *Review of Research on School Desegregation's Impact on Elementary ad Secondary School Students*, *in* HANDBOOK OF RESEARCH ON MULTI-CULTURAL EDUCATION 597–616 (James Banks & Cherry A. McGee Banks eds., 1995); Amy Stuart Wells & Robert L. Crain, *Perpetuation Theory and the Long-Term Effects of School Desegregation*, 64 REV. OF EDUC. RES. 531 (1994); Jomills Henry Braddock, II, Marvin P. Dawkins, & William Trent, *Why Desegregate? The Effect of School Desegregation on Adult Occupational Desegregation of African Americans, Whites and Hispanics*, 31 INT'L J. CONTEMP. SOC. 273 (1994); Braddock II & McPartland, *supra* note 325; Jomills Henry Braddock II, Robert L. Crain, & James M. McPartland, *A Long Term View of School Desegregation: Some Recent Studies of Graduates as Adults*, PHI DELTA KAPPAN, Dec. 1984, at 259; CHRISTINE H. ROSSELL & WILLIS D. HAWLEY, THE CONSEQUENCES OF SCHOOL DESEGREGATION (1983); MARTIN PATCHEN, BLACK-WHITE CONTACT IN SCHOOL: ITS SOCIAL AND ACADEMIC EFFECTS (1982); Robert E. Slavin & Nancy A. Madden, *School Practices that Improve Race Relations*, 16 AM. EDUC. RES. J. 169 (1979).

391. *See generally* WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS (1998) (finding long-term positive consequences for students admitted under race-conscious policies in a study of 28 selective colleges and universities).

392. John Charles Boger articulates it this way:

> As the world grows more racially and ethnically interdependent every year, reasonable educators might well conclude that every child has a compelling interest in learning more about children of other racial and ethnic backgrounds. From that exposure, children can see for themselves the role that racial background plays (or very often, does *not* play) in

districts around the nation have concluded that separate is academically deficient."[393]

It is important to note here, that this attention is necessary to address a contemporary problem, not to redress past wrongs. The courts' responses to the disputes in *Ho*, *Wessmann*, *Hampton*, and *Belk* all demonstrate the difficulty in causally connecting current problems to "vestiges of discrimination."[394] While integration was initially focused on the benefits to minorities of receiving a higher quality education, it is now seen as beneficial for all children in preparing them to work in an increasingly multicultural world. Education's obligation to equip each student for success in a diverse world makes integration a compelling state interest, regardless of how the environment came to be as it is today.

As Chief Justice Warren explained in *Brown*, "education is perhaps the most important function of state and local governments."[395] The compelling state interest, as asserted here, merely recognizes that policy-makers at all levels have recognized the ever-present and increasing compulsion that multi-cultural considerations be a core component of a basic education. Federal lawmakers have urged integration on state and local

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> prompting a child to respond to good literature, think about civic issues, to work in groups, and to create new solutions for contemporary problems. Indeed, the pedagogical objective in assuring racially diverse classrooms seems founded not upon some chimerical stereotype about what African American children think or how Latino children behave, but on precisely the *opposite* view—that all children share many more things in common than they do differences and that the best device for overcoming lingering racial suspicions or prejudices is exposure, not separation.

*See supra* note 27, at 1765–66.

393. Brief of Amici Curiae National School Boards Association et al. at 20, Montgomery County Pub. Sch. v. Eisenberg, 120 S. Ct. 1420 (2000) (No. 99-1069).

394. *Ho*, 147 F.3d at 865; *Wessmann*, 160 F.3d at 801–02; *Hampton*, 102 F. Supp. 2d 361–62; *Belk II*, 269 F.3d at 334–35. Jeanne Weiler argues that plaintiffs hoping to continue court-ordered desegregation should "center on the issue of 'educational vestiges,' such as within-school segregation, differential course availability, and the educational performance gap between white and minority students." Jeanne Weiler, *Recent Changes in School Desegregation*, 133 ERIC CLEARINGHOUSE ON URB. EDUC. DIG. 4 (1998). However, analysis of the cases here suggests following such advice is fraught with dangers. First, it may be difficult to sufficiently tie such effects to vestiges of past discrimination to satisfy the rigors of demonstrating causation in Equal Protection terms. Secondly, when plaintiffs oppose the district's integration efforts and the district is trying to defend them, as in these cases, resting an argument on the vestiges of past discrimination requires districts to accept the political costs of the school district conceding that discrimination continues to affect operations. In the end, it may argued that the cause of the problems Weiler enumerates is less important than crafting an educational response for the future. Therefore, a prospective interest appears a better justification.

395. 347 U.S. at 493.

authorities and have used funding to encourage state efforts to that end.[396] State level policymakers have codified the importance of education for a diverse society in a variety of ways, including requiring school districts to adopt multi-cultural curricula and requiring teachers to demonstrate multi-cultural understanding as a precondition for licensure.[397]

These legislative enactments at both national and state levels bolster the conclusion that education for success in a diverse society is a compelling state interest. It is also important to note that these enactments occurred, not as a result of concerns for formal discrimination, but given findings of the importance of understanding the richness of America's diversity for a successful democracy. In other words, the goal is compelling even absent any finding of discrimination. As Justice Marshall observed fifteen years ago, "[t]he real irony of the argument urging mandatory, formal findings of discrimination lies in its complete disregard for a longstanding goal of civil rights reform, that of integrating schools without taking every school system to court."[398]

To further emphasize this point, it would strengthen any argument for a district to be able to enumerate specific curricular objectives related to integrated education. Rather than simply describing the broad curricular aspirations of educating for and about diversity, proponents must go beyond those statements to include the specific parts of the curriculum served by such policies.[399] Not only would this specificity aid school districts in making the case for a compelling state interest, it would affect the narrow tailoring analysis and could help to demonstrate the crucial role taking explicit care in student body composition plays in the fulfillment of educational policy.

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396. *See* discussion *infra* note 208 and accompanying text.

397. Donna M. Gollnick, *National and State Initiatives for Multicultural Education*, *in* HANDBOOK OF RES. ON MULTI-CULTURAL EDUC. 44–64 (James A. Banks & Cherry A. McGee Banks, eds., 1995) (reporting that of 47 states reviewed, 22 had standards for multicultural education in k-12 schools, 21 addressed the issue through standards for accrediting teacher preparation programs, 14 had related requirements for teacher licensure, and 40 required local districts to adopt multicultural curricula).

398. *Wygant*, at 305 (Marshall, J., dissenting).

399. As noted above, the natural curricular links would probably be found in social studies and multicultural curricula. It might even be noted that the policy allows the opportunity for students to learn that sometimes individual interests must bow to others' interests; that no right is absolute and that sometimes the legitimate needs of the collective will outweigh the rights of the individual just as surely as the converse is true in some circumstances; and that our Bill of Rights and the Fourteenth Amendment provide the mechanisms by which these interests can be weighed and balanced. *See supra* note 190.

### D. *That Goal is at the Center of the Elementary and Secondary Educational Enterprise*

Another important point that seemed to be implied but not explicitly stated in the arguments supporting the programs in these cases is that the goals at issue are at the core of the educational enterprise. Unlike the race-conscious policies in employment or even in higher education contexts, the goals targeted by these policies directly relate to the reason for the very existence of the institution. As mentioned earlier, the race-conscious policies used in *Adarand* and *Croson* did not directly relate to reason the contractors were being sought in the first place. Even in *Wygant*, the lay-off provisions at issue, while indirectly related to the school's mission, do not bear a direct relationship. Schools do not exist to provide jobs to teachers, but to provide education to students. Even in higher education institutions, there are differences, not the least of which is the idea of compulsory education. Elementary and secondary schools exist to carry out the state's mandatory education requirements.

A majority of states have determined that an important and mandatory part of that education is the inculcation of democratic values.[400] Higher education, while certainly related, is not compulsory and occurs largely because of an *individual's* desire for further education, not the *state's* desire for ensuring a minimal level of educational training. Therefore elementary and secondary public education is a special context. As Judge Gertner explained in *Boston's Children First v. City of Boston*, "[d]iversity may well be more important at this stage than any other—[as this] is when first friendships are formed and important attitudes shaped."[401] Accordingly, education for success in a diverse society is not simply something desirable public elementary and secondary schools do; it is why these schools exist. This goal parallels the importance of reading, writing, or arithmetic, or other traditional subject-centered curricular goals in today's K-12 public schools.[402] All are part of properly preparing youth for adulthood.

The enmeshment of the policy's goal and reason for existence of the institution also factored into the reasoning of Supreme Court in the students' rights cases, *Tinker*, *Hazelwood*, *Bethel*, *T.L.O.*, *Vernonia*, *Earls* and

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400. Gollnick, *supra* note 397; *see also*, Linda Darling-Hammond, *Education, Equity and the Right to Learn*, *in* THE PUBLIC PURPOSE OF EDUCATION AND SCHOOLING 41 (John I. Goodlad & Timothy J. McMannon, eds., 1997).

401. 62 F. Supp. 2d 247, 259 (D. Mass. 1999). *See also* CARYL STERN-LAROSA AND ELLEN HOFHEIMER BETTMANN, THE ANTI-DEFAMATION LEAGUE'S HATE HURTS: HOW CHILDREN LEARN AND UNLEARN PREJUDICE 1, 30 (2000) (pointing out that the advent of school often brings with it children's "first conscious contact with hate" making it all the more important to actively address issues associated with racial isolation and racism).

402. Gollnick, *supra* note 397.

*Goss*. In *Bethel*, *Hazelwood*, *Vernonia*, and *Earls*, the Supreme Court determined that individual rights had been outweighed by legitimate educational concerns of the schools. In each of these cases, it was the educational mission of the schools that provided the justification for the intrusion of the state in ways that would not be allowed in non-school contexts.[403] Even in *Tinker*, where the students prevailed, the Court was careful to balance the students' rights against the school's interests. The Court established that whenever student speech results in the material and substantial disruption of the educational environment, school officials are justified in curtailing student expression. *T.L.O.* and *Goss* further illustrate the point. In *T.L.O.*, the Court justified moving from a standard of probable cause in searches to one of reasonable suspicion when school authorities believed it necessary to search students precisely because of a "legitimate end in preserving order in schools."[404] In *Goss*, the Court likewise justified its determination that due process procedures in schools were not coextensive with judicial forums because of the context in which they would be applied and the value of suspension as an educational tool, writing: "To impose in each such case even truncated trial-type procedures might well overwhelm administrative facilities in many places and, by diverting resources, cost more than it would save in educational effectiveness. Moreover, further formalizing the suspension process and escalating its formality and adversary nature may not only make it too costly as a regular disciplinary tool but also destroy its effectiveness as part of the teaching process."[405] Again, these student rights precedents argue for recognition of the special environment of elementary and secondary schools in any Equal Protection analysis.

### E. *In Today's World, Conscious Use of Race is Necessary and Narrowly Tailored to that Core Educational Goal*

> [C]laims that law must be "color-blind" or that the datum of race is no longer relevant to public policy must be seen as aspiration rather than as description of reality. This is not to denigrate aspiration; for reality rebukes us that race has too often been used by those who would stigmatize and oppress minorities. Yet we cannot ... let color blindness become myopia which masks the reality that many "created equal"

403. As Justice Scalia explained in *Vernonia*, "[T]he nature of [State's power over schoolchildren] is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults." 515 U.S. at 655.

404. 469 U.S. at 343.

405. *Goss*, 419 U.S. at 583.

> have been treated within our lifetimes as inferior both by the law and by their fellow citizens.[406]

Although it is indeed ironic, as the Fourth Circuit noted,[407] to use race consciously in order to be able to teach students that people of all races have a right to equal opportunities, the sad truth is that in today's world it is still necessary.[408] It is necessary because we have not yet realized a society in which "datum of race is no longer relevant to public policy."[409] First, once the compelling interest is identified as success for education in a diverse society as a legitimate educational policy response to racial and ethnic isolation, the link between ends and means becomes more apparent. Without direct attention to the educational environment, including the children in it, the curricular goals connected to the policy are severely compromised.

In addition to the integrated educational environment affirmatively addressing those goals, the absence of a racially diverse set of classmates arguably limits the effectiveness of the explicit curriculum being taught. In order to teach that the "content of [one's] character"[410] is not dependent on the color of one's skin or the language spoken in the home or the money amassed in some bank account, a child needs to meet and meaningfully engage with other children whose mere presence challenges stereotypes, either those that exist already or those that may form.[411] Research has shown that curricular efforts alone do not alter racial attitudes while integrated education does.[412] One of the briefs filed in connection with Tuttle hints at this argument when it explains:

> Students learn as much from their experiences as they do from what they are told. They can be told that people are equal regardless of race, but when they learn it from their

406. *Bakke*, 438 U.S. at 327 (Brennan, J., concurring in part and dissenting in part).

407. *Tuttle*, 195 F.3d at 709.

408. *See, e.g.*, Deborah Waire Post, *The Salience of Race*, 15 TOURO L. REV. 351 (1999).

409. *Bakke*, 438 U.S. at 327.

410. Martin Luther King, Jr., *I Have a Dream*, *in* A CALL TO CONSCIENCE: LANDMARK SPEECHES OF DR. MARTIN LUTHER KING, JR. 75 (2001).

411. *See Comfort*, 100 F. Supp. 2d at 65, n. 12; *see also supra* note 182 and accompanying text.

412. *See* Robert E. Slavin & Nancy A. Madden, *School Practices that Improve Race Relations*, 16 AM. EDUC. RES. J. 169 (1979). *See also* James A. Banks, *Multicultural Education: Its Effects on Students' Racial and Gender Role Attitudes*, *in* HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION 617 (James A. Banks & Cherry A. McGee Banks, eds., 1995).

> own experience, it becomes a life-long lesson rooted in reality and not a mere platitude or an idealistic notion.[413]

However, the brief does not take the last step of actually noting that realization of the district's goals would actually be hampered by an inability to control the make-up of the educational environment. In other words, that a diverse student body is necessary in order that the students' educational environments do not place in doubt the veracity of the explicit goals of a multicultural curriculum. Leaving the racial and ethnic makeup of schools, particularly schools of choice, to random chance places the efficacy of such curricular goals in jeopardy because students may draw incorrect negative inferences about race based on the presence or absence of students in the learning environment. Even facial diversity (what children see when they look around the classroom) plays a role in how children learn. For example, John Dewey linked the teacher's spoken instruction with the educational environment in which it was presented:

> With respect to the training of habits of thought, the teacher's problem is thus two fold. On the one side, he needs ... to be a student of individual traits and habits; on the other side, he needs to be a student of the conditions that modify for better or worse the directions in which individual powers habitually express themselves. He needs to recognize that method covers not only what he intentionally devises and employs for the purpose of mental training, but also what he does without any conscious reference to it-anything in the atmosphere and conduct of the school that reacts in any way upon the curiosity, the responsiveness, and the orderly activity of children ... There is always a temptation for the teacher to keep attention fixed upon a limited field of the pupil's activity ... When the teacher fixes his attention exclusively on such matters as these, the process of forming underlying and permanent habits, attitudes and interests is overlooked. Yet the formation of the latter is the more important for the future. The other side of this fact is that the teacher, while fixing attention upon the specific conditions that seem to affect learning of the immediate lesson before the class, ignores the more general conditions that influence the creation of permanent attitudes, especially

413. Brief of Amici Curiae American Association of School Administrators et al. at 11, Tuttle v. Arlington County Sch. Bd., 195 F.3d 698 (4th Cir. 1999) (No. 98-1604).

> the traits of character, open-mindedness, wholeheartedness, and responsibility.[414]

Simply put, children learn from their environments, not just their teachers. In fact, research has shown that classroom discussions of race produce limited weak effects on children's thinking, while interaction between students of different races produce strong effects and hold the most promise for improving attitudes about race.[415] It is necessary then, in today's world, to ensure that students do not infer lessons counter to the actual goal of learning about racial equality. When those inferences are reinforced by the broader culture (such as, television, print media, the prevalence of hate groups), as they arguably are today, then the curricular aspirations of a multicultural curriculum seem extraordinarily limited, if not destined to fail. Likewise, the ability of educators to challenge countervailing assertions about race that children encounter in non-school environments is severely compromised. Since these curricular goals, by definition, seek to teach and reinforce cardinal principles of democracy and challenge the status quo of general societal racism,[416] their success demands direct and explicit attention to both the educational "speech" in the form of what is taught, and also the environment in which it is taught. Otherwise, the state and local school officials risk creating environments that cultivate rather than cure stereotypes. Therefore, policies that seek to ensure racially diverse learning environments are both necessary and narrowly tailored to the fulfillment of compelling curricular objectives.

An illustrative example may further elucidate this point. Children are taught that all people can achieve with desire, industry and opportunity. But if children attending an urban or suburban math and science magnet school notice that African-American or Hispanic children are noticeably absent from their environment, they may incorrectly infer that "those" people cannot do math and science. If that inference is then reinforced by what they hear adults say outside of school and what they observe on the television whenever an "expert" is called upon to explain math and science,[417] the fact that their teachers tell them all students can succeed in difficult subjects will hold little sway on their thinking.

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414. JOHN DEWEY ON EDUCATION: SELECTED WRITINGS 231–32 (Reginald D. Archambault ed., 1974).

415. Slavin & Madden, *supra* note 412, at 177–79.

416. This discussion uses societal racism to include all forms of racism whether historical, individual, or institutional.

417. *See generally* JEFF COHEN & NORMAN SOLOMON, THROUGH THE MEDIA LOOKING GLASS: DECODING BIAS AND BLATHER IN NEWS MEDIA (1995) (noting the pattern of using White males as experts on all major television news programs).

The Supreme Court has recognized the tendency of children to learn that which schools do not wish to teach and the importance of the context of children's learning. For example, in *Grand Rapids v. Ball*, the Court explained the concern for carefully examining issues related to state establishment of religion occurs because children's "experience is limited and whose beliefs consequently are the function of environment as much as of free and voluntary choice."[418] While the holding in *Ball* has since been overruled,[419] this reasoning forms the basis for the endorsement analysis used to discern the presence or absence of Establishment Clause violations in K-12 settings and was recently applied in *Board of Education of Westside Community Schools v. Mergens*[420] and *Santa Fe v. Doe*.[421] That test asks not only what the state intends to convey, but also what children are likely to conclude.[422]

Another reason such policies are necessary relates to the inadequacies of random selection from a pool of voluntary applicants. True, if random selection processes produce the desired environment, the need for race-conscious programs evaporates.[423] However, research would suggest that such an assertion is an ideal yet to be realized in most locations as research regarding who participates in parental choice programs, particularly in the magnet school context, demonstrates that reliance on random selection process will likely not produce a pool reflective of the larger population because minority parents, particularly those who are poor, are less likely to choose.[424] Therefore, truly open enrollment with random selection will create greater racial isolation because the pool from which students are selected will likely have under-representations of racial and ethnic minorities within the district's student population.[425] In fact, studies of unrestricted choice in other contexts have demonstrated a tendency for

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418. 473 U.S. 373, 390, n.9 (1985).

419. Mitchell v. Helms, 120 S. Ct. 2530, 2556 (2000).

420. 496 U.S. 226 (1990).

421. 530 U.S. 290 (2000).

422. *See* Julie K. Underwood & Julie F. Mead, *Establishment of Religion Analysis: The Lemon Test or Just Lemonade?* 35 J.L. & EDUC. 55 (1996) (discussing this test and other Establishment Clause analyses used in school cases).

423. Recall that one problem with the Boston Latin School policy noted by the *Wessmann* court was that a policy based on merit alone produced almost the same results as a race-conscious policy.

424. WHO CHOOSES? WHO LOSES?: CULTURE, INSTITUTIONS, AND THE UNEQUAL EFFECTS OF SCHOOL CHOICE (Bruce Fuller et al. eds., 1996); Amy Stuart Wells, *The Sociology of School Choice: Why Some Win and Others Lose in the Educational Marketplace, in* SCHOOL CHOICE: EXAMINING THE EVIDENCE 29 (Edith Rasell & Richard Rothstein eds., 1993); Philip T.K. Daniel, *A Comprehensive Analysis of Educational Choice: Can the Polemic of Legal Problems be Overcome?* 43 DEPAUL L. REV. 1, 33–35 (1993).

425. *See supra* note 424.

such choices to result in more racial separatism, not less.[426] Local patterns of who chooses and who does not would also provide further support for the necessity of controlling choices in order to achieve the objectives for providing the choice in the first place.

Furthermore, the necessity of such attention, lest racial isolation results, is an important factor to include in any argument supporting race-conscious plans in a school choice context. Given policy-makers' justifiable fears that choice may be used either consciously or unconsciously to segregate schools,[427] deliberate attention to the racial and ethnic make-up of schools is necessary to avoid such an outcome. The experience of a charter school in Verona, Wisconsin provides a case in point. As the Wisconsin Legislative Audit Bureau (WLAB) noted: "Some individuals are concerned that the admissions practices of Core Knowledge Charter School . . . were designed to minimize the number of minority students attending the school."[428] School officials adamantly denied the racial composition of the school was engineered, claiming instead that it was an unexpected and even undesirable outcome given the applications received. Administrators increased advertising efforts to address this concern, but with a limited number of seats, and the continuing eligibility of returning students,[429] even increased numbers of minority applicants did not significantly alter the number of minorities admitted to the school.[430] As the WLAB concluded "the school's racial demographics are unlikely to change significantly in the future unless the board expands the school's enrollment, because no existing students will be compelled to leave."[431]

As Justice O'Connor noted in *Wygant*, public institutions face competing vulnerabilities to challenges based on race.[432] If they take action, as

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426. *See* EDWARD B. FISKE & HELEN F. LADD, WHEN SCHOOLS COMPETE: A CAUTIONARY TALE 189–93 (2000) (reporting on the "increased ethnic polarization" that resulted when New Zealand employed an open enrollment program); Lynn Schnaiberg, *Charter Schools: Choice Diversity May be at Odds*, EDUC. WK. (May 10, 2000) (reporting that charter schools that do not control student selection are increasing racial isolation in some locations).

427. *See* Fiske & Ladd, *supra* note 426.

428. WIS. LEGIS. AUDIT BUREAU, AN EVALUATION: CHARTER SCHOOL PROGRAM, 98-15, at 35 (1998).

429. Under Wisconsin statutes, both returning students and their siblings may be given priority in charter school admissions. Wis. Stat. § 118.40.

430. WIS. LEGIS. AUDIT BUREAU, *supra* note 428, at 35.

431. *Id.* at 36.

432. Justice O'Connor wrote: "[P]ublic employers are trapped between the competing hazards of liability to minorities if affirmative action is not taken to remedy apparent employment discrimination and liability to nonminorities if affirmative action is taken. Where these employers, who are presumably fully aware both of their duty under federal law to respect the rights of all their employees and of their potential liability for failing to do so, act on the basis of information which gives them a sufficient basis for concluding that

these ten cases illustrate, they risk challenge for improper use of race. If they take no action, they risk challenges that they allowed racial segregation to occur by negligence or intention. Beyond these risks of litigation, failure to act to end or forestall racial isolation abdicates responsibility for a very real educational concern with far-reaching consequences for the children it affects; both those chosen and those left behind.

Another factor that should be emphasized in the narrow tailoring analysis is that these policies are less intrusive than other potential tools at a district's disposal.[433] Nothing compels a school district to allow parents the option to choose. That state and local authorities have attempted to address the educational problem of racial isolation by employing voluntary measures speaks more to sensitivity about race than its opposite.[434]

Finally, it must be underscored that the goals of these policies are consistent with the goals of the Fourteenth Amendment.[435] The compelling state interest espoused here seeks to demonstrate a respect for individuality by constructing a learning environment best able to transmit that message. There is an "exact connection"[436] between this goal and race-conscious student selection means because the burden has been minimized (children are told no; not denied an education) and because there is no stigma attached to any denial. In fact, such policies actively seek to avoid the development of an educational stigma associated with housing patterns. The policies employ a narrow use of race only when necessary to reduce racial isolation and ensure as much equal educational opportunity as possible. It is that opportunity that is the right that should be protected.

The intricacies of our constitution, laws, and precedent allow for the deduction of a number of rights enjoyed by citizens. As they spring from different quarters, these rights grow in competition for influence over the conduct of governmental policy towards individuals. In all the cases discussed, the rights of individuals have been pitted against those of an admission policy; but truly, they are in contest with the rights of the individuals those policies attempt to help. Those policies are not so much remedies for an unchangeable past, as they are active expressions of the current rights of minorities to the same facilities, education, and social

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remedial action is necessary, a contemporaneous findings requirement should not be necessary." 476 U.S. 267, 291.

433. *See supra* note 219 and accompanying text.

434. If not enough parents volunteer to send their children to integrated educational environments, it also begs the policy question of what the proper response should be in the face of consistent and persistent evidence that the benefits of integrated learning environments far outweigh the alternative.

435. *See also* Brown, *supra* note 181, 266. Mark R. Killenbeck makes this assertion with respect to affirmative action policies in higher education admissions. Killenbeck, *supra* note 315.

436. *Wygant*, 476 U.S. at 281.

networks as their White counterparts and of the current rights of White and minority students to a diverse educational setting that will prepare them for an increasingly integrated workplace.

The combination of these diverse rights of many individuals form the compelling right of the state to permit schools to override the rights of individuals to choose their schools. This is similar to the suspension of the right to choose for those who fail admission to schools because of their academic abilities. No guarantee to a neighborhood school exists to the extent that it trumps the curricular needs of the school system, else the one-room school would still be the rule. We sort children based on age, ability, and disability. As the district does not have the duty to provide each neighborhood with each grade, with each type of magnet school, or with each step on the continuum of placement for the children with disabilities, it does not have the duty to provide every individual with a specific academic or preferred placement. If a district can take advantage of its overall diversity by allowing all students to experience a diverse educational setting, it has not usurped the rights of individuals to any greater degree than it has in a host of other curricular policies, many with less purpose than racial and ethnic diversification.

The phantom stature currently given the rights of individuals to choose their school is more a result of a "fatal" application of strict scrutiny than a result of any logical balancing of the various individual rights at the heart of the cases at hand. That one individual is allowed to scuttle an accepted curricular goal of our society[437] makes a mockery of those judges that frame their rejection of these policies in the larger picture of removing government from dictating sociological patterns.[438] By doing nothing, a district does much, as is the case when it allows the sociological patterns of the neighborhoods it serves to dictate the curricular potential of its schools. Yet, in forcing schools to maintain the status quo of racial isolation, judges ask schools to prepare students for the past, not for the future. Such is in opposition to an educator's duty.

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437. For example, Linda McNeil makes the point that after litigation forced Houston Magnet schools to cease using race-conscious selection processes the program's "primary emphasis on desegregation" was replaced by one of "academic choice" alone. LINDA M. MCNEIL, CONTRADICTIONS OF SCHOOL REFORM: EDUCATIONAL COSTS OF STANDARDIZED TESTING 31 (2000).

438. *See* David I. Levine, *The Chinese American Challenge to Court-Mandated Quotas in San Francisco's Public Schools: Notes from a (Partisan) Participant-Observer*, 16 HARV. BLACK LETTER L.J. 39 (2000) (arguing that recent court actions illuminate the myth of local control of school policy-making).

## CONCLUSION

As the above discussion indicates, race-conscious student selection processes are a complex and controversial issue. A thorough review of the ten cases involving race-conscious student selection processes in choice contexts discerns several patterns. Those patterns surrounding the courts' application of strict scrutiny, the courts' use of Supreme Court precedent and of social science research provide a firm basis for a legal argument that may prevail in future instances. The legal argument presents the five assertions that (1) No child is denied an education; (2) Choice is granted to parents as a means to a particular goal; (3) Education for success in a diverse society is a compelling and specific curricular goal within the discretion of the legitimate policy-making authority of state and local authorities; (4) That goal is at the center of the public elementary and secondary educational enterprise; and (5) In today's world, conscious use of race is necessary and narrowly tailored to that core educational goal.

Analysis of these cases suggests that districts currently employing race-conscious student selection processes could take specific steps to reduce vulnerability to litigation and to bolster their chances of surviving strict scrutiny should a challenge ensue. First, districts should carefully review such policies and their rationales and employ race only in the most necessary of circumstances.[439] Next, districts should make findings based on research to justify policies before the policies are challenged. In addition to the research available in existing literature, districts should conduct specific research within the district to demonstrate the local existence of racial isolation and the necessity for integration. Research concerning patterns of parental choice, if choice is already offered, should also be conducted to demonstrate the narrowness of their approach to the issue and the inadequacy of providing choices absent racial and ethnic controls for student assignment to schools. Likewise, policy-makers should work evaluative components into any policy and include a provision in the policy for periodic review of the policy as a whole. These evaluative components would suggest that the district anticipates or at least hopes for a sunset for the conscious use of race. In other words, when evaluation shows that the policy is no longer needed, it is repealed. District policies should further tie the race-conscious provisions explicitly to various parts of the curriculum in the policy and cross-reference those district documents. State statutes that require multicultural education should be explicitly referenced and school officials should make certain that policy goals are clearly articulated and included on all informational brochures

439. Note how the Seattle School District was complimented for its measured use of race and history of reducing reliance on racial criteria over time. *See supra* note 149 and accompanying text.

and web sites.[440] Particular attention should be paid to making explicit all a parent chooses when they participate in the "choice" program.

It remains highly probable that further challenges to similar policies will be forthcoming. The uneven responses of the various Courts of Appeals illustrate the critical need for direction concerning race-conscious practices on a national scale. To that end, the Supreme Court may be forced to grant *certiorari* sometime in the future on this issue. If and when it does, one can only hope that the Justices will fully understand that in public elementary and secondary schools, all policy is curriculum.[441]

Public elementary and secondary educational institutions exist for no reason other than to transmit to students what others have learned, inspire students to new learning, and inculcate the values held dear by our democracy. Student assignment or selection policies also teach. Schools can either turn a blind eye to the ramifications of racial isolation and enduring racial stereotypes, thereby becoming complicit in their perpetuation; or schools can accept the mantle that has defined them as public institutions since the Supreme Court's decision in *Brown*. They can take the steps necessary to ensure that children's futures are not held hostage to the racial divide that plagues our present and defined our past.

Sacrificing schools' efforts at voluntary educational integration on the altar of judicial piety[442] will unnecessarily hobble state and local policy-makers whose commitment to equal educational opportunity demands action. It will not move us with "deliberate speed"[443] to the colorblind world we envision as our goal. It will teach our children that espoused beliefs in equality of opportunity and strength in our diversity are merely platitudes insufficient to withstand even the most self-serving of challenges. It will teach that we accept the world we now see and have accepted that we are largely powerless to change it. These are reckless lessons that today's schools can ill afford to transmit for they abdicate an educator's duty. In fulfillment of that duty, state and local policy-makers must be allowed to be conscious about all aspects affecting a child's devel-

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440. For example, a review of the web site materials guiding parental choices for the Seattle School District makes no mention of the policy grounding the availability of choices or the purposes for which the policy exists. Seattle Public Schools Enrollment Guide for Parents and Students 2001–2002. Available at: http://inside.seattleschools.org/SPS2Guide.pdf.

441. My thanks to David Schimmel at the University of Massachusetts—Amherst for this simple, but elegant way of putting educational policy in its proper perspective. For a discussion of how this principle can be put into practice when developing school rules, see David Schimmel, *Traditional Rule-Making and the Subversion of Citizenship Education*, 61 SOC. EDUC. 70 (1997).

442. *See* Boger, *supra* note 27, at 224.

443. Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955).

opment, including consciousness about race. Though we may decry its necessity, for the time being, it is only through this conscious use of race in the creation of learning environments that we best affect the consciousness of the students charged to our care.