

Chapter 5

The New Legal Attack on Educational Diversity in America's Elementary and Secondary Schools

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Introduction

During the past 50 years, school boards throughout the nation have struggled with varying degrees of earnestness and success to dismantle public school systems once segregated by law or practice. Impelled by the Supreme Court's seminal decision in *Brown v. Board of Education*,¹ later by other key federal judicial decisions, and eventually by their own growing appreciation of the many values of educational diversity, thousands of public school officials have made considerable progress, especially in those school districts where the school-age population remains racially diverse.

Several lower federal courts, however, have recently accepted a novel argument that the well-intentioned practice of assigning students to assure racial and ethnic diversity is itself unconstitutional (except when it is a direct response to a court order to eliminate illegal segregation). Other federal courts are presently facing similar legal challenges. Under the logic of these new attacks, since *all* government actions must be "colorblind" (except in narrowly defined remedial contexts), voluntary efforts by school boards to assure that students will learn together in racially diverse classrooms are forbidden by the Equal Protection Clause.

This remarkable extension of "colorblind" jurisprudence to the elementary and second-

ary school context is justified neither by the Supreme Court's prior jurisprudence nor by this multiethnic nation's pressing educational and social needs. The conservative advocates who advance this position purport to rely upon a body of affirmative action cases in the contracting and higher education context, none of which presumes to address, or place limits on, public school assignment policies. To be sure, in those cases — principally disputes among rival claimants for scarce governmental resources such as construction contracts,² public employment,³ admission to competitive graduate and professional schools,⁴ or redistricting of state and federal voting districts⁵ — the Supreme Court has counseled judicial "skepticism" of all governmental classifications by race and has obligated federal courts to undertake a "strict judicial scrutiny" of all governmental decisions that rely, even in part, upon racial or ethnic considerations.⁶

Although such "strict scrutiny" often works to invalidate governmental decisions when scarce benefits or competitive awards depend upon race or ethnicity alone, the Supreme Court has repeatedly emphasized that the 14th Amendment *does not* forbid state and federal decision makers from racial or ethnic considerations in every context. As Justice O'Connor explained in 1995:

[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. . . . When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the “narrow tailoring” test this Court has set out in previous cases.⁷

The recent challenges that attack elementary and secondary school assignments appear deaf to these cautions. Even more remarkably, they have overlooked a 30-year body of Supreme Court cases that acknowledge the constitutionality of race-conscious public school assignments, including a unanimous Supreme Court decision rendered in 1971⁸ and a variety of opinions by at least six subsequent Justices. It is this substantial body of constitutional authority that, with ample justification, has been relied upon by school officials throughout the nation for the past two generations.

If this new challenge were simply a technical dispute among scholars over the history of some narrow constitutional phrase, it could be appropriately relegated to law school libraries or obscure journals. Yet the campaign threatens immediate, real-world harm to millions of American school children. Belying its surface gesture toward “racial fairness,” it could eventually overrule the good-faith educational judgments of hundreds of school boards and lead to the resegregation of literally thousands of the nation’s schools, exacerbating the present socio-economic isolation of millions of lower income American schoolchildren.⁹

The growing success of this new legal campaign constitutes a disturbing and reactionary chapter in the long history of America’s judicial involvement in issues of race and social justice. Policymakers and judges who would forbid school boards from consider-

ing race in making school assignments cannot plausibly claim to be unaware of the inevitable social consequences of these unorthodox decisions. Neither can they accurately claim that Supreme Court precedent dictates such actions. Instead, they must take full responsibility for abandoning, on ideological grounds alone, what have long been, with all their difficulties and disappointments, the most effective means for knitting together our increasingly heterogeneous society — racially and ethnically diverse public schools.¹⁰ This misguided effort to extend “colorblind” policy to the elementary and secondary school context should be vigorously opposed and defeated. The Justice Department which, during the Clinton Administration, supported school authorities in defending thoughtful diversity policies, should continue to do so.

I. The Nature and Extent of the New Attack

The new challenge has come in nearly half a dozen recent federal lawsuits filed by parties who contend that school boards may not consider race or ethnicity when assigning children to schools. These parties recently won two key victories in the conservative U.S. Court of Appeals for the 4th Circuit — *Tuttle v. Arlington County School Board*¹¹ and *Eisenberg v. Montgomery County Public Schools*.¹² Relying on a different ground, a federal district court within the 4th Circuit has also accepted the “colorblind” argument in the long-running Charlotte/Mecklenburg school desegregation case.¹³ This essay will carefully examine each of these three decisions, since they exemplify the dubious legal rationales on which the broader legal assault has relied.

These three 4th Circuit opinions do not stand alone, however; plaintiffs have gone to federal court in recent years in Boston

and Lynn, Massachusetts, in suburban Rochester, New York, in Louisville, Kentucky, in Los Angeles, and in Seattle to challenge public school assignment policies.¹⁴ Indeed, a small coterie of public advocates and attorneys¹⁵ have pledged a broad attack on all race-conscious public student assignments, ensuring that such legal challenges will continue.

One possible source of public confusion about this new legal threat to public schools is that prominent conservatives have directed much of their present fire against college and university admissions policies. In those cases, they take aim at the Supreme Court's 1979 decision in the *Bakke* case, which held that the use of racial consideration as a "plus" factor in college admissions decisions does *not* violate the 14th Amendment or federal civil rights statutes.¹⁶ The ultimate success of these ongoing challenges to *Bakke* — some of which have been successful in the lower federal courts¹⁷ and others of which have failed¹⁸ — ultimately will lie with the Supreme Court.

Yet none of those challenges has controlling impact on the very different issues presented when a public school board offers, not a limited number of admissions to a handful of successful college applicants, but universal assignments to every single elementary and secondary student in the system. As one district court in Washington has recently observed when approving a school board's use of race-conscious public school assignments, designed to further educational diversity and reduce racial isolation:

[There are] two different types of governmental programs that take race into account. On the one hand are "affirmative action" programs, such as those used in higher education admissions and contracting awards that use racial minority status as a positive factor, conferring a government benefit to members of a minority at the expense of those of the major-

*ity. On the other hand are measures, such as those designed to effect racially integrated public schools, that seek to ensure that a benefit, available to all, is distributed in a manner that the governing body has decided will benefit the citizenry as a whole.*¹⁹

Whether through a process of zealous overgeneralization or a more deliberate sleight-of-hand, those who press the present challenges against public school assignment policies obscure the profound differences that distinguish the two situations. The following section will examine these constitutionally significant differences.

II. The Legal Support for School Boards' Use of Race in Making Student Assignments to Public Schools

To appreciate the constitutional dimension of these issues, it is necessary to examine three bodies of law: (a) the Supreme Court's long-standing prescriptions for those school districts found to have engaged in deliberate segregation; (b) the Supreme Court's frequent and favorable acknowledgment of school board decisions that undertake voluntary, race-conscious student assignments as a matter of educational policy; and (c) the Supreme Court's decisions prescribing "strict judicial scrutiny" of all race-conscious governmental actions or decisions. In considering this third body of law, we will closely examine the three decisions within the 4th Circuit that have most aggressively and uncritically transposed general affirmative action principles designed to address government contracting and other scarce benefits cases.

A. The Supreme Court's Imposition of Mandatory, Race-Conscious Student Assignments on School Districts That Have Practiced Deliberate School Segregation

Although *Brown v. Board of Education*²⁰ began the long task of desegregating the nation's public schools in 1954, it was not until *Green v. County School Board*²¹ in 1968 and *Swann v. Charlotte-Mecklenburg Board of Education*²² in 1971 that the specific tools for carrying out *Brown's* constitutional command were finally forged. *Green* and *Swann* together established the parameters for every subsequent desegregation order. *Green* imposed an "affirmative duty" upon every formerly segregated Southern school board to "take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."²³ *Green* directed federal district judges, in overseeing the transition to "unitary status," to assess the racial impact of school board actions and identify any "vestiges" of segregation in the student attendance patterns as well as five other areas of school operations.²⁴

Three years later, in *Swann*, a unanimous Court authorized district judges, as they oversaw the desegregation process, to employ a variety of sturdy remedial tools to desegregate students and schools, including: (1) express racial goals for student populations at each desegregating school; (2) express faculty and staff racial ratios; (3) administrative "pairing" of geographically dispersed neighborhoods within a school district, if necessary, to meet these student and staff desegregation goals; and (4) cross-town busing or other transportation remedies necessary to facilitate desegregation.²⁵ The Court in *Swann* recognized, of course, that dismantling the former dual systems would require school boards to consider race in as-

signing school children and teachers to desegregated schools.²⁶ Indeed, the Court added that "school authorities should make every effort to achieve the greatest possible degree of actual desegregation [among students] and will thus necessarily be concerned with the elimination of one-race schools."²⁷

The Court ratified race-conscious assignment policies even more explicitly in *North Carolina State Board of Education v. Swann*,²⁸ a companion case decided the same day as *Swann*. In this case, the Court unanimously struck down a North Carolina state law that had forbidden any assignment of school children by race.²⁹ Writing for the Court, Chief Justice Burger described race-conscious student assignments as an essential tool to fulfill "the promise of *Brown*" and rebuffed North Carolina's contention that the federal Constitution required "color-blind" student assignments.³⁰ "The [North Carolina] legislation," Chief Justice Burger observed, "exploits an apparently neutral form to control school assignment plans by directing that they be 'color blind;'" moreover, the Court's approval of "color-blind" statutes, set "against the background of segregation, would render illusory the promise of *Brown*," and "deprive school authorities of the one tool absolutely essential to the fulfillment of their constitutional obligations to eliminate existing dual school systems."³¹

Although the Supreme Court later tackled important school issues outside the South,³² *Green* and *Swann* set the parameters for Southern school desegregation litigation throughout the 1970s and 1980s. Hundreds of judicial decrees were implemented in formerly state-segregated districts, including scores in North Carolina, in reliance upon the unanimous holdings of these cases.

B. The Supreme Court's Frequent Indications of Approval for Public School Boards That Engage in Voluntary Assignment of Students To Achieve Racial and Educational Diversity

While *Swann* circumscribed the authority of federal courts to order local school boards to engage in race-conscious school assignments, the Supreme Court never suggested that school boards themselves lacked constitutional authority to do so. To the contrary, in a series of decisions, the Court strongly supported the proposition that school boards might lawfully choose to assign students to achieve racial diversity for educational reasons. The most prominent of these cases was *Swann* itself.³³ There, Chief Justice Burger contrasted the limited authority reposed in the federal judiciary to remedy constitutional violations with the far broader discretion that school boards possess when they use racial assignments for pedagogical reasons:

*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.*³⁴

Subsequently, then-Justice Rehnquist, acting on an emergency application in 1978,³⁵ decisively rejected a 14th Amendment argument put forward by California parents who

were unhappy with a race-conscious student assignment plan being implemented in Los Angeles County.³⁶ Justice Rehnquist noted that the white parents' "novel" argument seemed to depend upon an assumption "that each citizen of a State who is either a parent or a schoolchild has a 'federal right' to be 'free from racial quotas and to be free from extensive pupil transportation.'"³⁷ Although Justice Rehnquist emphasized that California was under no obligation to undertake voluntary desegregation, he wrote that he had "very little doubt that it was permitted . . . to take such action."³⁸

A third voice validating school boards' discretion to use race in making student assignments came from Justice Powell in the Denver school case in 1973.³⁹ Justice Powell observed that, beyond their constitutional duty to remedy prior segregation, "[s]chool boards would, of course, be free to develop and initiate further plans to promote school desegregation."⁴⁰ Underscoring the need in our "pluralistic society" to teach "students of all races [to] learn to play, work, and cooperate with one another," Justice Powell insisted that his opinion was not "meant to discourage school boards from exceeding minimal constitutional standards in promoting the values of an integrated school experience."⁴¹ In sum, Justice Powell agreed with the earlier opinions by Chief Justice Burger and Chief Justice Rehnquist, that school boards could engage in voluntary, race-conscious student assignments for educational reasons without violating the federal Constitution.⁴²

In 1982, the Supreme Court addressed a statewide initiative in the State of Washington that had effectively forbidden the Seattle school district to institute a voluntary, race-conscious desegregation of its public schools.⁴³ The school district, which recognized that segregated housing patterns in Seattle had led to racially imbalanced schools and that its prior efforts to overcome this racial isolation had not succeeded, had formally adopted "racial balance" goals to

eliminate all imbalances within three years.⁴⁴

When the statewide voter initiative succeeded with Washington voters, the Seattle School Board went to federal court, challenging the state-imposed constraints on its local student assignment policies. The Supreme Court agreed with the Seattle board and struck down the state initiative under the Equal Protection Clause, reasoning that it “remove[d] the authority to address a racial problem — and only a racial problem — from the existing decisionmaking body, in such a way as to burden minority interests.”⁴⁵ In writing for a majority of the Court, Justice Blackmun clearly signaled that no federal constitutional principles prevented Seattle school districts from carrying it out. Although Justice Blackmun acknowledged that such assignments, especially when accomplished by busing for desegregation, often engendered strong public controversy,⁴⁶ his opinion stated that in the absence of a constitutional violation, “the desirability and efficacy of school desegregation are matters to be resolved through the political process.”⁴⁷ The Supreme Court’s decision thus freed the local school board to resume its voluntary efforts to desegregate its schools by race, achieve racial diversity, and end racial isolation, despite state efforts to impede the choice of the local board.⁴⁸

One of the most difficult and contentious issues to confront the Supreme Court during the 1970s was whether public institutions of higher education could use race as a criterion for admission to their institutions. In *Regents of the University of California v. Bakke*⁴⁹ in 1978, a disappointed applicant to the University of California at Davis Medical School challenged a policy that set aside 16 out of 100 seats in each entering class for applicants from certain minority groups.⁵⁰ Justice Powell concluded while a state’s use of race in making admissions decisions should prompt strict judicial scrutiny by a federal court — necessitating proof that the

state’s race-conscious means were “precisely tailored” to accomplish its “compelling” state interest⁵¹ — the “attainment of a diverse student body . . . clearly is a constitutionally permissible goal for an institution of higher education.”⁵² In sum, Justice Powell’s opinion held that student diversity in higher education *is* a compelling state interest sufficient to survive strict scrutiny by a federal court.⁵³ In subsequent years, Justice Powell’s opinion in *Bakke* became a familiar guidepost used to shape thousands of voluntary admissions policies, not only for institutions of higher education, but for elementary and secondary schools as well.⁵⁴ The Supreme Court, fully aware of this widespread reliance on its *Bakke* opinion by educational authorities, neither renounced nor sought later reconsideration of that decision.

In sum, then, the Supreme Court or various of its Justices, in nearly half a dozen decisions rendered over a 30-year period — *Swann*, *Bustop, Inc.*, *Keyes*, *Bakke*, and *Seattle School District No. 1* — offered express approval of, and gave constitutional sanction to, the voluntary use of race-conscious student assignment policies by states or local school boards to achieve ends of educational diversity to end racial isolation in schools.

III. The Supreme Court’s Recent Affirmative Action Decisions: Their Dubious Significance for School Boards That Wish To Assign Elementary and Secondary Students To Achieve Racial and Educational Diversity

The new “colorblind” challenge to student assignment policies relies principally upon

certain Supreme Court affirmative action decisions announced since 1989, especially two decisions rendered in the governmental contracting area, *City of Richmond v. J.A. Croson Co.*⁵⁵ and *Adarand Constructors, Inc. v. Peña*.⁵⁶ From those cases, they draw the premise that state or federal governmental actors may not engage in any race-conscious governmental decisions *unless* (1) they are pursuing ends that are found constitutionally “compelling” and (2) the means they have chosen to achieve those “compelling” ends are “narrowly tailored” to avoid unnecessary racial harm. This two-part constitutional litmus test — demanding both a compelling governmental interest and a narrowly tailored means — has indeed become a commonplace of 14th Amendment jurisprudence. Public school assignment policies admittedly must survive just such a judicial review.

It is in taking the next step that these new decisions so clearly falter, for the Supreme Court cases set forth above strongly suggest that assigning students to public schools to assure racial diversity *is* a compelling end, and the means employed by most American school boards to achieve these ends *are* narrowly tailored enough to survive judicial review. The new federal decisions, however, disagree on one (or both) of these two points. Some decisions have held or suggested that achieving racial or “educational diversity” can never be a compelling end; they argue that only government actions to remedy its own prior segregative policies can ever meet that standard. Other decisions have held or assumed that educational diversity may be compelling, but have concluded, oddly enough, that school boards’ use of race in assigning students is an unacceptable means to achieve racial diversity in schools.

This section will carefully examine these contentions, focusing on the Charlotte-Mecklenburg school decision rejecting educational diversity as a “compelling end” for school boards, and two sister decisions from

the 4th Circuit concluding race-conscious assignments are an unacceptable means of achieving that end.

A. Can Educational Diversity Be a “Compelling State Interest”? The Limited Relevance of the Supreme Court’s Affirmative Action Decisions

The first decision we must examine was rendered by a federal district court in 1999 in the historic *Swann v. Charlotte-Mecklenburg School Board* case (later redesigned *Capacchione v. Charlotte-Mecklenburg Schools*⁵⁷ in the district court litigation in 1999–2000, and most recently redesignated as *Belk v. Charlotte-Mecklenburg Board of Education*⁵⁸). This decision, which we will call *Swann/Capacchione*, concluded that the Charlotte-Mecklenburg School Board could not lawfully adopt school assignment policies that take race or ethnicity into account, even to maintain educational diversity, once the board had finally met its constitutional obligations under the Supreme Court’s *Swann* decision and been declared “unitary.” The linchpin of the ban announced by the *Swann/Capacchione* court was its assertion that “[m]odern Supreme Court precedent” could not countenance educational diversity as an acceptable end, since that precedent recognizes only *one* proper state interest that would justify race-based classifications: remedying the effects of a school board’s own past racial discrimination.⁵⁹

I. The Dubious Argument for Limiting States to the Remedial Ends: The Supreme Court Precedent That’s Just Not There

The “[m]odern Supreme Court precedent” invoked by the district court began with Justice O’Connor’s opinion in *City of Richmond*

*v. J.A. Croson Co.*⁶⁰ The battle among the contending parties in *Croson*, as Justice O'Connor recounted it, was "the scope of [the City of Richmond's] power to adopt legislation designed to address the effects of past discrimination"⁶¹ by setting aside a portion of Richmond's city contracts for minority business enterprises. The *Croson* Court identified two *remedial* interests that might justify Richmond's reliance on those racial considerations — redressing its own prior, proven discrimination, or ending its "passive participation" in an entrenched system of racial exclusion in the private market.⁶² For our purposes, what is crucial is that Justice O'Connor was concerned with possible *remedial* uses of race-conscious standards. *Croson* simply was not a case in which the Court set out to identify the full roster of state interests that might justify state use of racial distinctions. Instead, it addressed a more limited question: what is the authority of a state or city to use race *within a remedial context*? The answer *Croson* gave was that remedial uses of race by state actors must be carefully circumscribed.

To be sure, one voice in *Croson* strongly urged that the *only* permissible use of race by government is to achieve remedial ends, and that even then such uses must be employed sparingly. The voice was that of Justice Scalia, who summarized his contention as follows: "In my view there is only one circumstance in which the States may act *by race* to 'undo the effects of past discrimination': where that is necessary to eliminate their own maintenance of a system of unlawful racial classification."⁶³

Justice Scalia indeed spoke to the very issue now under consideration in the school assignment cases — the authority of school boards to use voluntary, race-conscious methods *outside* of a remedial context. Scalia acknowledged prior Supreme Court cases, including *Green* and *Swann* that had sanctioned the use of race-conscious student assignment policies to remediate prior school

board discrimination. He contended that this was the *only* appropriate use of race: "[I]t is implicit in our cases that after the dual school system has been completely disestablished, the States may no longer assign students by race."⁶⁴

If Justice Scalia had spoken for the unanimous Supreme Court, or even for a bare majority of Justices, both *Swann/Capachione* and the new federal decisions would have identified a controlling "[m]odern Supreme Court precedent." Yet no other Justice chose to join Scalia. Indeed, Justice O'Connor's opinion seemed meant deliberately to repudiate his extreme position, noting that

*the purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.*⁶⁵

In other words, Justice O'Connor implied, contrary to Justice Scalia's view, that there *are* state goals "important enough to warrant use" of racial considerations, even though such uses are subject to strict judicial scrutiny to ferret out "illegitimate" legislative motives such as "racial prejudice or stereotype."⁶⁶

A majority of the Court reemphasized this point in several later cases. For example, Justice O'Connor again sought to correct the misapprehension that all governmental uses of racial classifications are forbidden in *Adarand Constructors Inc. v. Peña* in 1995: "Strict scrutiny does not 'trea[t] dissimilar race-based decisions as though they were equally objectionable,'" she wrote; "to the contrary, it evaluates carefully all governmental race-based decisions *in order to decide*

which are constitutionally objectionable and which are not.”⁶⁷ By requiring strict scrutiny of racial classifications, she explained, “we require courts to make sure that a governmental classification based on race . . . is legitimate, before permitting unequal treatment based on race to proceed.”⁶⁸

As in *Croson*, Justice Scalia disagreed with the majority’s conclusion in *Adarand*, insisting that race-conscious classifications should only be used to provide remedies to the proven victims of the state’s own prior discrimination.⁶⁹ Justice Scalia’s argument managed to win the agreement of one additional Justice, Clarence Thomas, who wrote separately that “government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice.”⁷⁰

Thus, in the two key affirmative action cases, *Croson* and *Adarand*, only two of the Court’s nine justices supported the position that school assignment opponents presently seek to establish. In both of those cases, moreover, all four dissenters wrote to endorse a far broader range of compelling state interests that might justify a state’s adoption of race-conscious policies. For example, Justice Stevens argued in *Croson* that the Equal Protection Clause should be interpreted to permit the race-conscious selection of public school teachers if a “school board had reasonably concluded that an integrated faculty could provide educational benefits to the entire student body that could not be provided by an all-white, or nearly all-white, faculty.”⁷¹ He later noted in *Adarand* that the majority had not reached or decided the question of diversity as a possible compelling governmental interest: “[The] proposition that fostering diversity may provide a sufficient interest to justify such a program is not inconsistent with the Court’s holding today — indeed, the question is not remotely presented in this case.”⁷²

Justice Marshall, writing for himself and Justices Brennan and Blackmun in *Croson*,

would not only have subjected race-conscious state classifications to a much lower level of judicial scrutiny,⁷³ but would have upheld a state goal of remedying prior societal discrimination as well as “the prospective [goal] . . . of preventing the city’s own spending decisions from reinforcing and perpetuating the exclusionary effects of past discrimination.”⁷⁴ Finally, in *Adarand*, both Justice Souter, in a dissent joined by Justices Ginsburg and Breyer, and Justice Ginsburg, in a dissent joined by Justice Breyer, voiced support for race-conscious actions by state and federal governments that were designed to diminish lingering racial discrimination in the broader society.⁷⁵

To summarize the analysis thus far, the only direct support for the view of “[m]odern Supreme Court precedent” upon which the district court relied in *Swann/Capacchione* has come from two Justices, Scalia and Thomas, who have never attracted additional support. To the contrary, their views appear to have been considered and repudiated, not only by the four more liberal members of the current Court (Justices Stevens, Souter, Ginsburg, and Breyer), but also by Justices O’Connor and Kennedy, and Chief Justice Rehnquist as well, in both *Croson* and *Adarand*.⁷⁶

Beyond *Croson*, *Adarand*, and a sentence from the *Metro Broadcasting* dissent (which cannot bear the weight the *Capacchione* court intended for it),⁷⁷ the *Swann/Capacchione* court’s reference to “[m]odern Supreme Court precedent” dwindles to nothing more than a single 5th Circuit case, *Hopwood v. State of Texas*.⁷⁸ To be sure, *Hopwood* did repudiate the use of race, at least in the higher educational context.⁷⁹ Yet *Hopwood* is not a Supreme Court decision, nor did the Supreme Court subsequently affirm it.⁸⁰ It was, instead, a bold departure by a lower federal court, like *Capacchione*, that set sail against the winds of prior Supreme Court precedents — ignoring *Swann*, *Bus-top, Inc.*, and *Bakke* — with apparent confi-

dence that it could foresee a future time in which the Court would repudiate its former handiwork. In sum, then, *Swann/Capacchione's* conclusion that educational diversity could never be deemed 'compelling' under the Equal Protection Clause has no substantial support.⁸¹

2. The Argument for Limiting States to Remedial Ends: The Rationales That Simply Don't Apply

It is perhaps unjustified to judge the work of these new federal courts solely on the strength of the precise legal holdings of prior cases. If the underlying concerns that prompted the Supreme Court in *Croson* or *Adarand* to reject race-conscious classifications in those cases can be shown to extend to the elementary and secondary school context, then the district court's decision might be vindicated through the power of well-reasoned analogy. To evaluate these new decisions on these grounds, it is first necessary to identify the considerations that have prompted the Supreme Court to guard against the unreflective use of race-conscious state classifications. In *Croson*, Justice O'Connor spoke of several such considerations: (1) the "'personal rights' of all citizens to be treated with equal dignity and respect";⁸² (2) the need to avoid "illegitimate notions of racial inferiority"; (3) the risk that racial classifications might become a form of "simple racial politics"; (4) "a danger of stigmatic harm"; and (5) the prospect of "'reinforc[ing] common stereotypes."⁸³ The Supreme Court has also worried about "giving local governments license to create a patchwork of racial preferences based on statistical generalizations about any particular field."⁸⁴

Most of these concerns arise, however, when a government must award a scarce resource to one among several rival claimants of different races — whether a government construction contract (*Croson*, *Adarand*), a

government franchise (*Metro Broadcasting*), a seat in a graduate or professional school (*Bakke*, *Hopwood*), a merit-based scholarship (*Podberesky v. Kirwan*⁸⁵), or a seat in a competitive-exam high school (*Wessmann v. Gittens*⁸⁶). When such glittering prizes are being bestowed, it is plausible to reason, as the district court did in *Swann/Capacchione*, that "'the use of race as a reparational device risks perpetuating the very race-consciousness such a remedy purports to overcome."⁸⁷ It seems instinctively "unfair" or "unequal" if such decisions, which ought be based upon worth or merit — lowest bid, best qualified, most competitive — tip toward one less qualified or less competitive solely because of his or her race or ethnicity. Moreover, if others sense that recipients actually are inferior, their suspicions will not only breed resentment but also will ultimately stigmatize those who have been selected on racial grounds.

Access to second-grade teachers or fifth-grade classrooms, however, is not a scarce resource but a public good. Every child is sent to school; no child is denied. Of course, every public elementary and secondary school has its own special characteristics: its history, its identifying architectural features, its corps of teachers (each with their own special talents and personalities). Yet as Chief Justice Rehnquist observed in *Bustop, Inc.*, there is no "federal right" granted any parent or child that assures attendance at any particular public school.⁸⁸ For legal purposes, public schools have been deemed equivalent and fungible, and to that extent, at least, our law normally recognizes no "winners" and "losers" in the distribution of public school resources.⁸⁹ Therefore, a child's assignment to a particular elementary school does not stigmatize in the ways that worried Justice O'Connor in *Adarand* and *Croson*, because the criteria for assignment do not reflect adversely upon the character of students or their ability to perform.

Some recent cases have involved the use of racial criteria in the context of special “merit schools,” i.e., public schools where admission is normally predicated on objective indicia of excellence. The 1st Circuit’s recent decision in *Wessmann v. Gittens*⁹⁰ offers perhaps the greatest support for this position, and it understandably became a source of special reliance in the Charlotte litigation.⁹¹ *Wessmann* involved the use of race as one criterion for admission to such a merit school, Boston Latin, where access was normally reserved for students with the highest scores on competitive merit examinations. The 1st Circuit’s decision held that when school boards operate special schools with the goal of nurturing exceptional talent, no child should be deprived of a place earned on the merits, because of inflexible racial considerations — even to further diversity ends.⁹² Student assignments to most public schools, by contrast, are not made on the basis of merit, and *Wessmann*’s logic simply does not extend to those routine choices, as two Massachusetts federal courts have since concluded when addressing challenges against ordinary student assignment practices in other Massachusetts school districts.⁹³

To summarize, then, neither the affirmative action decisions of the Supreme Court nor the logic and rationale of those decisions hold or suggest that school board efforts to achieve racial and educational diversity in America’s public schools are impermissible ends. As we will see later, the overwhelming weight of educational research and informed public policy argues strongly to the contrary. Bringing the children of this multi-ethnic nation together to live and learn in our classrooms and schoolyards is one of the most compelling objectives for state and local governments in the early 21st century.

B. Are Race-Conscious Student Assignment Policies “Narrowly Tailored”?

In two sister decisions announced in 1999, both of which examined school assignment policies — one from Arlington County, Virginia, *Tuttle v. Arlington County School Board*,⁹⁴ and the other from Montgomery County, Maryland, *Eisenberg v. Montgomery County Public Schools*⁹⁵ — the 4th Circuit has declared that it will assume, at least until the Supreme Court declares otherwise, that efforts to achieve “diversity in student populations” do further a constitutionally sufficient end. Yet both decisions faulted school board assignment policies for being insufficiently “narrowly tailored” to survive the second prong of the Supreme Court’s strict scrutiny test.

In reaching its conclusion, *Tuttle* looked to five “narrow tailoring” criteria that had earlier been cited by the Supreme Court in *United States v. Paradise*,⁹⁶ an affirmative action case involving employment discrimination in the hiring of Alabama state troopers. The five *Paradise* factors included:

- (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.⁹⁷

In measuring Arlington’s policies against these five factors, the *Tuttle* court began by noting that a local committee, studying admissions policies in Arlington County, had identified an alternative assignment policy, not adopted by the school board, that would have been race-neutral. The court concluded

that since this alternative proposal would have been race-neutral, the board's race-conscious policy was not tailored narrowly enough to avoid the unnecessary use of racial considerations.⁹⁸

Yet the *Tuttle* panel stopped too soon, for the Supreme Court had earlier made clear that when examining this "narrow tailoring" requirement, a court's job did not end simply because it had identified an alternative, race-neutral plan. Lower courts are instead obligated to "examine the purposes the [challenged school policy] was intended to serve" and determine whether alternative means would *equally or better serve to carry out those purposes*.⁹⁹ Moreover, the *Paradise* Court admonished that a remedial plan need not be limited to "the least restrictive means of implementation." It recognized that the "choice of remedies to redress racial discrimination is 'a balancing process.'"

The *Tuttle* panel next turned to consider the "planned duration of the [p]olicy" instituted by the Arlington school board.¹⁰⁰ Quoting Justice O'Connor's opinion from *Croson*, the court proposed an invariable rule that "a racial classification cannot continue in perpetuity but must have a 'logical stopping point,'" and concluded that the Arlington policy was not "narrowly tailored" because it was of apparently indefinite duration.¹⁰¹ Once again, this approach avoids serious reflection on the purpose of the criterion. When the government's objective is the remediation of its own prior discrimination, the need will usually be only temporary, until it has redressed the wholesale exclusion of the previously underrepresented racial group. Under those circumstances, it is logical for courts to insist upon a stopping place. By contrast, a school board's objective in creating a diverse student population is not for remediation of past misdeeds but to further a future goal of best educating children who will live and work in a heterogeneous, multi-racial nation. That need is not short term but long term, extending at least as long as

America's racial and ethnic groups maintain any separate cultural and social identity.¹⁰²

In its consideration of the third *Paradise* factor, what seemed dispositive to the *Tuttle* panel was its view that "racial balancing" was driving the entire Arlington County process.¹⁰³ For the *Tuttle* panel, the desire for racial balance seemed sufficient to condemn the Arlington policy without further analysis or citation; the *Eisenberg* court agreed, citing a number of cases that purportedly condemned racial balancing. Yet what those Supreme Court cases actually condemned was racial balancing ordered *by federal courts*.¹⁰⁴ As we noted earlier, the Supreme Court expressly distinguished in *Swann* between the limited authority of federal courts to order racial balancing to remedy a proven constitutional violation and the "broad power" of school boards "to formulate and implement educational polic[ies that] might well [include] . . . a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole."

The *Tuttle* panel turned next to the fourth of the five *Paradise* factors, "the flexibility of the [state's race-conscious] policy."¹⁰⁵ The panel contrasted Justice Powell's favorable discussion in *Bakke* of Harvard's flexible admissions plan, one that considered race a "plus" factor in reviewing applications — Harvard was, by the 4th Circuit's lights, "treat[ing] each applicant as an individual in the admissions process" — with the more inflexible policies that, like those of the Arlington school board, did "not treat applicants as individuals."¹⁰⁶ Yet the differences between Harvard and the Arlington public schools are manifest. Elementary students have no enforceable right to be "treated as individuals" when being assigned to public schools. Indeed, there is little pretense that school boards weigh student abilities or interests at all in making school assignments. Residential location has traditionally been determinative, and district lines are adjusted every few years—often dividing streets and

neighborhoods in ways that would be judged purely arbitrary if assessed in terms of the needs or interests of the individual children on each street. Yet because school districts deliver a system of “common, public schools, available to all,” their schools are deemed fungible for legal purposes, and students are deployed to different schools at the discretion of the school board. As one recent federal court in Massachusetts observed in upholding a race-conscious transfer program in the Lynn public schools:

As compared to the Boston Latin School [the competitive school at issue in the Wessmann case] the schools in the Lynn system are more fungible. Nothing indicates that one school is considered clearly superior to all others. While parents’ subjective preferences for certain schools may be strong, there is no clear objective benefit to attending any one school over another. In this sense, the plan is merely race-conscious in deciding where students will be eligible to attend school, not race-preferential in deciding which students may attend better schools.

Moreover, no merit issues are involved. The policies do not grant preferences to students of one race who are objectively less qualified than students of other races. Unlike many challenged race-based programs, more qualified applicants are not excluded from access to a scarce resource or benefit. No one is excluded from participating in the benefit; all students attend a school.¹⁰⁷

Of course, if and when school boards institute public merit schools limited to students with exceptional needs or abilities, they normally undertake individualized consideration among potential applicants. At that point (though not before) the concerns voiced in *Bakke* begin to outweigh a school board’s unilateral authority. Neither *Tuttle*’s weighted lottery plan for magnet schools nor

Eisenberg’s transfer plan, however, purported to assess the individual merit of student applicants for magnet schools or transfers; thus, the considerations of fairness that were central in the 1st Circuit’s decision in the *Wessmann* decision are not applicable in the more routine assignment case.

The final *Paradise* factor considered in *Tuttle* was “the burden on innocent third parties” whom it depicted as “young kindergarten-age children.”¹⁰⁸ The court suggested it would be ironic for the Arlington board “to teach young children to view people as individuals rather than members of certain racial and ethnic groups [and yet] classif[y] those same children as members of certain racial and ethnic groups.”¹⁰⁹ Such assignment policies, however, are neither ironic nor self-contradictory. What public school students learn from each other when they arrive at school is neither limited to, nor constrained by, the assignment plans that have brought them together. Schools, principals, and teachers often mix together elementary students for a variety of reasons: those with different academic strengths; boys with girls; stronger readers with weaker — all to pursue valid educational goals. Schools have done so at every academic level from time immemorial. It is simply untrue that the deliberate use of racial classifications will necessarily lead students to think of their classmates only in racial or ethnic terms.

Indeed, it is far more likely that if willing school boards cannot assign students to schools by race or ethnicity, we risk a return to a time when each school child could (and did) identify “white schools” and “black schools,” simply by reference to the predominant race of the children who attended them. Far more certainly than school boards’ good-faith efforts to assure educational diversity, this *de facto* resegregation of our schools will re-create the conditions condemned in *Brown* in 1954.

Beyond the 4th Circuit's mistaken reliance upon the five *Paradise* factors in assessing the adequacy of the school board's "narrow tailoring" of their race-conscious plans, the more fundamental failure of these two 4th Circuit cases was their neglect of the deeper questions that "narrow tailoring" presents in the public school context. Both decisions purported to accept educational diversity as a constitutionally acceptable end. Yet if achieving diversity in local school populations is indeed *compelling*, why may school boards not work to attain it in the most direct and logical way — assigning children to assure that every school will reflect racial and ethnic diversity? The 4th Circuit's best (non)answer seems to be that school boards may only achieve racial diversity *indirectly*, by employing nonracial assignment considerations.

Yet that answer betrays an underlying conceptual misunderstanding. If a school board that employs another, racial-neutral assignment plan fails thereby to achieve actual racial and ethnic diversity in its schools, may it try again? Surely it would be untenable for federal courts to say 'no,' that is, to acknowledge a state interest as compelling, yet refuse to allow the means necessary to attain it. On the other hand, if school boards *may* try again, then presumably they can try a succession of race-neutral methods, one after another, until they find one that succeeds in achieving racial diversity. Yet this brings us full circle, for if a school board may permissibly pursue school diversity as a race-conscious goal, why is it impermissible to take a direct route rather than an administratively cumbersome, analytically dubious, path toward the same end?

The best, though unsatisfying, answer may be the courts' concern to avoid harm to "innocent parties" to the full extent possible; indeed, the two opinions voice precisely this concern. Yet when a school board is distributing a common good—when its assignments are made not to the most meritorious, or to

the lowest bidder, or to the most reliable company, but to all — there simply *are* no victims in the sense that has troubled federal courts in other, zero-sum-game contexts.

Were the Tuttle plaintiffs disappointed when their daughter was denied attendance at the Arlington Traditional School? Of course they were. But every autumn, hundreds of thousands of parents are similarly disappointed when they learn that their children have been assigned to public schools not of their hearts' desire. Dispatching children to new and unfamiliar schools can provoke apprehension in parents and children alike. Yet federal and state laws do not recognize these anxious parents as legal victims, with rights to vindicate or losses that entitle them to seek compensation. There are no principles of constitutional educational law that afford a cognizable, vested liberty or property interest in attending any particular elementary and secondary school.¹¹⁰

In sum, then, our close evaluation of the legal evidence has reached three conclusions. First, the Supreme Court has long directed school boards to employ race-conscious student assignment policies to remedy their own prior creation and maintenance of segregated public schools. Second, the Supreme Court has sent strong signals, for at least 30 years, that public school authorities may voluntarily take race or ethnicity into account in order to achieve educational diversity or eliminate lingering racial isolation when they assign children to public schools. Third, the Supreme Court's constitutional decisions in the contracting, set-aside, and employment area simply do not support the broad extension of a "colorblind" approach to school boards that assign elementary or secondary students to public schools for educational diversity ends.

Conservative advocates who now support a contrary position doubtless have strong

ideological convictions in doing so; some may actively wish for, or be indifferent to, the widespread racial resegregation that will certainly follow if their arguments are broadly accepted. They cannot plausibly claim, however, that their misguided course is compelled either by the 14th Amendment or by the prior jurisprudence of the Supreme Court.

IV. The Crucial Need for Educational Diversity in Coming Decades

Although this essay has dealt chiefly with legal considerations, school boards — in shaping the essential mission of the public schools — normally begin with careful consideration of the chief educational interests at stake. In a world growing more racially and ethnically interdependent every year, many boards nationwide have concluded that children have compelling educational interests in learning more about children of other racial and ethnic backgrounds. From that exposure, children can discern for themselves the role that racial background plays (or very often, does *not* play) in students' responses to good literature, their thoughts on civic issues, their work together in groups, and the way they approach 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 Hispanic 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 the lingering racial suspicions or prejudices is exposure, not separation.

These judgments rest upon a large body of social scientific evidence, conducted in the

past two decades, that strongly confirms the desirability of integrated schooling.¹¹¹ Public schools present many children with their first and only public interracial experiences.¹¹² Such experiences often lead to significant reductions in racial stereotyping among students, reduced interracial anxieties, and positive responses to persons of other races in interracial vocational settings.¹¹³

Interracial exposure strongly affects future life trajectory as well. One extensive ongoing study of minority children who moved from segregated Chicago city schools to integrated suburban Chicago schools has established that these integrated children are subsequently "more likely to be (1) in school, (2) in college-track classes, (3) in four-year colleges, (4) employed, and (5) employed in jobs with benefits and better pay."¹¹⁴ Studies in other school districts confirm that desegregated educational experiences can lead to significant improvements in the higher educational attainment, employment success, and residential community choice of minority students.¹¹⁵

In addition, desegregation has been shown to positively affect the academic performances of minority students. Professors Christopher Jencks and Meredith Phillips report extensive research suggesting that "[d]esegregation seems to have pushed up southern blacks' [school test] scores a little without affecting whites either way." Professors Rita Mahard and Robert L. Crain have found that desegregated public school experiences by students who began desegregated education in the early grades had significant, though modest, improvements in the tests scores of minority students.¹¹⁶

One federal court in Washington State recently summarized such a body of expert evidence in a case challenging student assignment plans:

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. . .

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.

. . . 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.

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.¹¹⁷

A number of the new federal decisions, including that of the district court in *Swann/Capacchione*, have conceded the significance of much of this evidence, noting “that children may derive benefits from encounters with students of different races.”¹¹⁸ Yet the *Swann/Capacchione* judge nonetheless condemned the Charlotte-Mecklenburg school board’s “single-minded focus on racial diversity” and ordered that students be viewed

as individuals, not “as cogs in a social experimentation machine.”¹¹⁹

It is the prospect that additional federal court decisions may soon follow, replacing the carefully considered, extensively debated, good-faith judgment of elected school board officials with an inflexible role nowhere found in the Constitution or the precedents of the Supreme Court, that presently pose a real and immediate threat to the educational experiences of millions of American school children.

V. The Indispensable Role To Be Played by Federal and State Officials in Maintaining Racially and Ethnically Diverse Public Schools

A legal campaign is underway, as we have seen, one with a far-reaching agenda. It would forbid all American school boards from taking race or ethnicity into account when they assign students to particular schools (even from considering racial demography when they redraw school attendance zones).¹²⁰ Many school boards simply do not have the legal sophistication to counter the well-financed, expertly counseled, ideologically driven foe they now face. Although the traditional civil rights groups have served as counsel in a number of these cases, they have small budgets, face many competing litigation priorities, and ultimately lack the capacity to respond to these attacks in every forum in which they may arise.

The U.S. Department of Justice has played a crucial role in mounting or assisting in many school desegregation cases during the past 40 years.¹²¹ More recently, its voice and resources have played an important role in affirming that educational diversity is an end

sufficiently compelling to survive strict judicial scrutiny under the Equal Protection Clause.¹²² It will be of greatest importance in the coming decade, as school boards struggle to educate American children for life in a nation and a world grown ever more diverse, for the Department of Justice to support — with its prestige as well as its legal resources — the critical distinction between government consideration of race in various zero-sum contexts and voluntary, good-faith efforts by willing school boards to assure that their elementary and secondary schools do not become racially and ethnically isolated, one from another. For, as Chief Judge J. Harvie Wilkerson, III, has observed:

The values of Brown are most poignantly implicated [in public education], because

society has traditionally relied upon public schools to lay the bedrock for integration. Elementary and secondary schools were not only designed to prepare students for the challenges and opportunities of American life; they were also meant to serve as melting pots where interracial friendship could counteract prejudice at an early age. Separatist educational arrangements threaten both of these goals.¹²³

Nothing less than a “separatist educational arrangements” is at stake in litigation that would deprive school boards of the discretion to assure students the opportunity to learn in schools “meant to serve as melting pots where interracial friendship could counteract prejudice at an early age.”

Endnotes

¹ 347 U.S.C. § 483 (1954).

² See *Richmond v. J.A. Croson Co.*, 488 U.S.C. § 469 (1989) (municipal construction contracts); *Adarand Constructors, Inc. v. Peña*, 515 U.S.C. § 200 (1995) (“*Adarand*”) (federal construction contracts).

³ See *U.S. v. Paradise*, 480 U.S.C. § 149 (1987) (hiring of state troopers); *Wygant v. Jackson Board of Education*, 476 U.S.C. § 267 (1986) (layoffs of public school teachers).

⁴ See *Regents of University of California v. Bakke*, 438 U.S.C. § 265 (1978) (admission to medical school); see also *Hopwood v. Texas*, 78 Federal Reporter 3d 932 (5th Circuit 1996) (admission to law school).

⁵ See *Shaw v. Hunt*, 517 U.S.C. § 899 (1998); *Miller v. Johnson*, 515 U.S.C. § 900 (1995); *Shaw v. Reno*, 509 U.S.C. § 630 (1993).

⁶ *Adarand*, 515 U.S.C. § at 223.

⁷ *Id.* at 237.

⁸ *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S.C. § 1, 16 (1971) (“*Swann*”) (observing that a school board decision to require each school to meet “a prescribed ratio of Negro to white students . . . as an educational policy is within the broad discretionary powers of school authorities”).

⁹ Of course, the crucial link between colorblindness and these dire educational and social consequences lies in the nation’s continued residential segregation, a social reality even the “colorblind” can surely see. Although some school boards may turn to creative alternatives, see Elizabeth Jean Bower, Note, “Answering the Call: Wake County’s Commitment to Diversity in Education,” 78 *North Carolina Law Review* 2026 (2000) (describing the Wake County, North Carolina plan, which will rely on both student test scores and parental income levels to distribute school children among Wake County schools), most school boards, if no longer able to consider race or ethnicity as they make student assignments, will experience strong political and social pressures to assign students based upon their neighborhood of residence. And throughout the nation at large, most of those neighborhoods are currently, and long have been, segregated by race, and to a lesser extent by socio-economic class. See generally Douglas S. Massey and Nancy A. Denton, *American Apartheid: Segregation and the Making of the Underclass*, at 61-88, tables 3.1, 3.3, 3.4 (1993) (describing and documenting the persistence of residential segregation and “hypersegregation” in major metropolitan areas in every geographical region of the United States in 1970 and 1980); Reynolds Farley and William H. Frey, “Changes in the Segregation of Whites from Blacks during the 1980s: Small Steps toward a More Racially Integrated Society,” 59 *American Sociological Review* 1 (1994) (documenting a slight overall decline

in average residential segregation from 1980 to 1990, measured by the widely used “dissimilarity index,” from 78.8 to 74.5); *see also* John Yinger, “Housing Discrimination Is Still Worth Worrying About,” 9 *Housing Policy Debate* 893, 910-11 (1998) (noting that these declines reported by Farley and others are “modest,” and insisting that “[t]he degree of [residential] segregation between blacks and whites, by any measure, remains far above the degree observed between any other two large groups,” which rarely exceed 30 among any European ethnic group); Gary Orfield and Susan Eaton, *Dismantling Desegregation: The Quiet Reversal of Brown v. Board of Education*, at 291-300 (1996) (“*Dismantling Desegregation*”) (examining the close relationship between housing segregation and the educational isolation of minority students, and federal judicial reluctance to acknowledge either the relationship or the extensive governmental complicity in perpetuation of segregated housing).

¹⁰ *See* William L. Taylor, “The Continuing Struggle for Equal Educational Opportunity,” in *Race, Poverty, and American Cities*, at 463-70 (John Charles Boger and Judith Welch Wegner, eds., Chapel Hill, NC: University of North Carolina Press 1996) (reviewing evidence on the positive educational benefits of desegregation); Gary Orfield, “Unexpected Costs and Uncertain Gains of Dismantling Desegregation,” in *Dismantling Desegregation* at 73-114 (reviewing both the positive benefits of school integration and the unrecognized costs of resegregation).

¹¹ 195 Federal Reporter 3d 698 (4th Circuit 1999), *cert. dismissed*, 120 Supreme Court Reporter 1552 (2000).

¹² 197 Federal Reporter 3d 123 (4th Circuit 1999), *cert. denied*, 120 Supreme Court Reporter 1420 (2000).

¹³ *Capacchione v. Charlotte-Mecklenburg Schools*, 57 Federal Supplement 2d 228 (W.D.N.C. 1999), *aff’d in part and rev’d in part sub nom. Belk v. Charlotte-Mecklenburg Board of Education*, 269 Federal Reporter 3d 305 (4th Circuit 2001) (*en banc*).

¹⁴ *See generally, Boston’s Children First v. Boston*, 98 Federal Supplement 2d 111, 112-14 (D. Massachusetts 2000) (denying school committee’s motion to dismiss plaintiffs’ allegations that the Boston School Committee’s creation of attendance zones, based in part on racial considerations, violates the 14th Amendment and other federal and state laws); *Comfort v. Lynn School Committee*, 100 Federal Supplement 2d 57 (D. Massachusetts 2000) (denying injunctive relief to plaintiffs who allege that school district’s plan, which limits student transfers that might increase racial isolation or imbalance, violates the 14th Amendment and various federal and state statutes); *Brewer v. West Irondequoit Central School District*, 212 Federal Reporter 3d 738 (2d Circuit 2000) (vacating a district court injunction that had forbidden a school board’s use of race-conscious assignment policies as a 14th Amendment violation and remanding for a full trial on whether the goal of reducing racial isolation constitutes a sufficiently compelling interest to justify race-conscious assignments to public schools); *Rosenfeld v. Montgomery County Public Schools*, 2001 U.S. App. LEXIS 27330 (4th Circuit, Dec. 27, 2001) (affirming, the dismissal, for lack of legal standing, of a challenge brought by white parents who alleged that Montgomery County’s assignment plan for “gifted and talented” students relied, in part, upon racial considerations); *Hampton v. Jefferson County Board of Education*, 102 Federal Supplement 2d 358, 382 (W.D. Kentucky 2000) (dissolving a 25-year-old school desegregation decree and enjoining any further use of race-conscious admissions for a special magnet high school that operated to exclude African American students from those programs); *Hunter v. Regents of University of California*, 190 Federal Reporter 3d 1061, 1067 (9th Circuit 1999) (rejecting a challenge to the race-conscious selection of elementary students for admission to a university-based, research-oriented public school that sought, as part of its mission, to study the effects of racial integration); *Parents Involved in Community Schools v. Seattle School District No. 1*, 137

Federal Supplement 2d 1224 (W.D. Washington 2001) (rejecting the claim that the 14th Amendment and federal statutes forbid the Seattle School Board from considering race in making school assignments, even for the objectives of encouraging racial diversity and combating de facto racial segregation). See also *Lutheran Church-Missouri Synod v. FCC*, 141 Federal Reporter 3d 344, 354 (D.C. Circuit 1998) (suggesting that racial diversity may never be a compelling governmental interest).

¹⁵ The Center for Individual Rights (CIR) and the Institute for Justice are both active on this issue. The CIR has crafted a litigation campaign to challenge any use of race, proclaiming in its web site that:

CIR is perhaps best known for its role as counsel to the plaintiffs in Hopwood v. Texas, a constitutional challenge to racial preference in student admissions. Hopwood was the first successful challenge since the Supreme Court 1978 ruling in the Bakke decision. The Fifth Circuit's decision in Hopwood is widely viewed as the most important civil rights case of the 1990s. CIR since has moved to extend the Hopwood holding through legal challenges to racially discriminatory admissions systems in other judicial circuits, including the University of Washington Law School [Smith v. University of Washington Law School, CV No. C-97-335 (W.D. Washington filed Mar. 5, 1997)] and the University of Michigan.

See <<http://www.cir-usa.org/cr-aa.htm>>. See generally "Beachhead for Conservatism," *National Law Journal*, Dec. 27, 1999, at A11 (naming the Center as its "runners-up" for lawyers of the year and explaining that while "[s]everal conservative groups are fighting similar battles — the Institute for Justice and the Washington Legal Foundation, among others — . . . CIR has been especially effective, carefully selecting both its battles and the circuits they fight them in, with an eye to victory").

The Institute for Justice, which describes itself alternatively as "our nation's only libertarian public interest law firm" and as a "merry band of libertarian litigators," see <<http://www.ij.org/profile/index.html>>, <http://www.ij.org/merry_band/index.html>, has identified opposition to racial preferences as one of the six legal areas in which its work focuses, although that work to date seems directed more toward the active support of citizen initiatives or referenda, in states such as California and Washington, to ban all race-conscious governmental actions, than toward participation in litigation. <<http://www.ij.org/cases/index.html>>.

¹⁶ *Regents of the University of California v. Bakke*, 438 U.S.C. § 265 (1978) ("Bakke"). The plaintiff in that case was a disappointed applicant to the University of California at Davis Medical School who challenged a policy that set aside 16 out of 100 seats in each entering class for applicants from certain minority groups. In resolving this challenge, the Court fractured into three groups. The first group, a more liberal faction of four Justices, contended that "benign" uses of race (such as affirmative action when used to increase the number of minority students attending institutions of higher education) should be judicially reviewed under the 14th Amendment, applying a less exacting "intermediate" standard that can be met by demonstrating that a state's use of race was "substantially related" to an "important governmental interest," such as the redress of prior "societal discrimination." A second group of four more conservative Justices would not have reached the 14th Amendment issues in *Bakke* at all, urging instead that any race-conscious behavior violated Title VI of the Civil Rights Act of 1964.

Justice Powell wrote alone, though his judgment for the Court drew four votes from more liberal Justices on some positions and four votes from more conservative Justices on others. While every major facet of his opinion commanded five votes, no other single Justice agreed

with his entire opinion. Justice Powell did reach the 14th Amendment issues in *Bakke*, and concluded that the state's use of race in admissions decisions required strict scrutiny by a federal court—proof that the racial considerations were “precisely tailored” to accomplish a “compelling” state interest. In addition, Justice Powell, joined by the four liberals, went on to hold that the “attainment of a diverse student body . . . clearly is a constitutionally permissible goal for an institution of higher education.” 438 U.S.C. § 311-12. Nevertheless, he did not approve the particular use that UC Davis Medical School made of race during its admissions process, and reasoned that “[e]thnic diversity . . . is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body.” In sum, Justice Powell's opinion held that while achieving student diversity in higher education is a compelling state interest sufficient to survive strict scrutiny by a federal court, and while race may constitutionally be used as a “plus” factor in admissions decisions, race may not be employed as the sole factor in determining admission for seats in an entering medical school class. 438 U.S.C. § 311-18.

¹⁷ See *Hopwood v. Texas*, 78 Federal Reporter 3d 932 (5th Circuit), *cert. denied*, 518 U.S.C. § 1033 (1996) (holding that the use of racial considerations by the University of Texas Law School in making admission decisions violated the Equal Protection Clause); *Johnson v. Board of Regents of University of Georgia*, 263 Federal Reporter 3d 1234 (11th Circuit 2001) (holding that the University of Georgia's preferential treatment of nonwhite applicants violated the Equal Protection Clause); *Grutter v. Bollinger*, 137 Federal Supplement 2d 8212, 848 (rejecting educational diversity as a sufficiently compelling interest to justify race as one consideration in making law school admissions decisions) (E.D. Michigan 2001), *appeal pending*, 247 Federal Reporter 3d 821 (6th Circuit 2001) (granting stay pending the appeal).

¹⁸ *Smith v. University of Washington Law School*, 233 Federal Reporter 3d 1188, 1201 (9th Circuit 2000) (holding that “educational diversity is a compelling governmental interest that meets the demands of strict scrutiny of race-conscious measures”), *cert. denied*, 121 Supreme Court Reporter 2192 (2001); *Gratz v. Bollinger*, 122 Federal Supplement 2d 811, 819021 (E.D. Michigan 2000) (upholding the use of racial considerations by the University of Michigan in making undergraduate admissions decisions), *appeal pending*.

¹⁹ *Parents Involved in Community Schools v. Seattle School District No. 1*, 137 Federal Supplement 2d 1224, 1230 (W.D. Washington 2001).

²⁰ 347 U.S.C. § 483 (1954).

²¹ 391 U.S.C. § 430 (1968).

²² 402 U.S.C. § 1 (1971).

²³ *Green*, 391 U.S.C. § 437-38.

²⁴ *Id.* § 435.

²⁵ *Swann*, 402 U.S.C. § 22-31.

²⁶ Proper remediation in Charlotte-Mecklenburg, Chief Justice Burger wrote, would require an “[a]wareness of the racial composition of the whole school system;” a “limited use . . . of mathematical ratios [setting a 71% white, 29% black target for assignment of students to most Charlotte schools] was within the equitable remedial, discretion of the District Court.” *Id.* § 25.

²⁷ *Id.* § 26.

²⁸ 402 U.S.C. § 43 (1971).

²⁹ *Id.* § 46.

³⁰ *Id.* § 45-46.

³¹ *Id.*

³² See *Keyes v. School District No. 1, Denver, Colorado*, 413 U.S.C. § 189, 208 (1973) (holding

that a districtwide school desegregation decree was warranted upon proof that a school board had administered its school statutes with the intent to create or maintain racially segregated schools in a substantial portion of the system); *Milliken v. Bradley*, 418 U.S.C. § 717, 744-45 (1974) (holding that a federal court lacked authority to order interdistrict school segregation in a metropolitan area absent proof that the district lines were drawn for racial reasons, or that the violations in one school district caused segregation in an adjacent district).

³³ 402 U.S.C. § 1 (1971).

³⁴ *Id.* § 16.

³⁵ *Bustop, Inc. v. Board of Education*, 439 U.S.C. § 1380, 1383 (1978).

³⁶ *Id.* § 1382-83.

³⁷ *Id.* § 1383.

³⁸ *Id.*

³⁹ *Keyes v. School District No. 1, Denver, Colorado*, 413 U.S.C. § 189, 242 (1973) (Powell, J., concurring in part and dissenting in part).

⁴⁰ *Id.* (Powell, J., concurring in part and dissenting in part).

⁴¹ *Id.*

⁴² See also *Offermann v. Nitkowski*, 378 Federal Reporter 2d 22, 24 (2d Circuit 1967) (holding that a school district's voluntary use of race in making school assignments to end *de facto* segregation is constitutionally permissible when "its use is to insure against, rather than to promote deprivation of equal educational opportunity"); *Lee v. Nyquist*, 318 Federal Supplement 710 (W.D.N.Y. 1970), *aff'd without opinion*, 402 U.S.C. § 935 (1971) (holding that a New York State statutory provision that forbade state officials or appointed school boards from assigning students or from altering school attendance zones in order to improve racial balance was unconstitutional).

⁴³ See *Washington v. Seattle School District No. 1*, 458 U.S.C. § 457 (1982) ("*Washington*").

⁴⁴ *Id.*

⁴⁵ *Washington*, 458 U. S.C. § 474.

⁴⁶ *Id.* § 473.

⁴⁷ *Id.* § 474.

⁴⁸ A dissenting opinion in *Washington* by Justice Powell did not dispute the constitutional authority of the local board to engage in race-conscious student assignments, but instead focused on whether it was appropriate for federal courts to intrude on a dispute between the State of Washington and its local school boards over student assignment policies. *Washington*, 458 U.S.C. § 488-89.

⁴⁹ 438 U.S.C. § 265 (1978).

⁵⁰ *Id.* § 269-75.

⁵¹ *Id.* § 299, 305.

⁵² Although Justice Powell and four other members of the Court concluded that race may constitutionally be used as a "plus" factor in admissions decisions, Justice Powell additionally held that race may not be employed as the sole factor in determining admission for seats in an entering medical school class. Instead, he reasoned that "[e]thnic diversity . . . is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body." *Id.* § 311-12, 314.

⁵³ *Id.* § 316-18.

⁵⁴ For evidence that the *Bakke* principle was relied upon by colleges and universities, one need look no further than to former Presidents of Princeton and Harvard, see William G. Bowen and Derek Bok, *The Shape of the River: Long Term Consequences of Considering Race in College*

and *University Admissions*, at 8 (1998) (“On of the authority of Justice Powell’s decisive opinion in *Bakke*, virtually all selective colleges and professional schools have continued to consider race in admitting students”). See also Bernard Schwartz, *Behind Bakke: Affirmative Action and the Supreme Court*, at 154 (“A special committee appointed to analyze [New York University Law School’s] admission policy in light of the *Bakke* decision reported that the policy should be guided by the Powell opinion.”)

⁵⁵ 488 U.S.C. § 469 (1989).

⁵⁶ 515 U.S.C. § 200 (1995).

⁵⁷ 57 Federal Supplement 2d 228 (W.D. N. C. 1999), *aff’d en banc sub nom. Belk v. Charlotte-Mecklenburg Board of Education*, 269 Federal Reporter 3d 305 (4th Circuit 2001) (*en banc*).

⁵⁸ 269 Federal Reporter 3d 305 (4th Circuit 2001) (*en banc*).

⁵⁹ 57 Federal Supplement 2d 241.

⁶⁰ 488 U.S.C. § 469 (1989).

⁶¹ *Croson*, 488 U.S.C. § 486. In *Croson*, the parties drew their battle lines over the meaning of a prior decision by the Supreme Court in *Fullilove v. Klutznick*, 448 U.S.C. § 448 (1980), which had recognized *congressional* authority to set aside a certain percentage of government construction contracts for minority contractors in order “to identify and redress the effects of society-wide discrimination.” In her *Croson* opinion, Justice O’Connor explained that the latitude afforded to Congress by *Fullilove* had been dependent upon “the unique remedial powers of Congress under §5 of the Fourteenth Amendment.” Because of its constitutionally authorized role “to enforce the dictates of the Fourteenth Amendment,” Congress could use racial classifications to “identify and redress the effects of society-wide discrimination” under a more deferential standard of judicial review. In contrast, Justice O’Connor reasoned, “States and their subdivisions are [not] free to decide that such remedies are appropriate. Section 1 of the 14th Amendment is an explicit constraint on state power, and the *States must undertake any remedial efforts* in accordance with that provision.” *Croson*, 488 U.S.C. § 488–90.

⁶² *Id.* § 491–92; see also *id.* § 504. In this portion of her *Croson* opinion, only Chief Justice Rehnquist and Justice White join Justice O’Connor; elsewhere, she spoke for at least five members of the Court.

⁶³ *Id.* § 524 (Scalia, J., concurring in the judgment).

⁶⁴ *Id.* § 525 (Scalia, J., concurring in the judgment). Justice Scalia’s sole authority for the “implicit” principle he attempted to identify was a single “*cf.*” citation to the Court’s 1976 decision in *Pasadena City Board of Education v. Spangler*, 427 U.S.C. § 424 (1976) (“*Pasadena*”). Upon examination, however, *Pasadena* offers no support for Justice Scalia’s position. Indeed, the case stands for the very different proposition that once a dual system has been completely disestablished, *federal courts* may not order further race-conscious relief. *Pasadena* says absolutely nothing about the latitude open to school boards that act voluntarily. See *Pasadena*, 427 U.S.C. § 433–35.

⁶⁵ *Croson*, 488 U.S.C. § 493 (emphasis added). In this portion of the opinion, Chief Justice Rehnquist and Justices White and Kennedy joined Justice O’Connor.

⁶⁶ To be sure, as Justice O’Connor was explaining the central purpose of the strict scrutiny standard — “to ‘smoke out’ illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool” — she pointed out the “danger of stigmatic harm” that racial classifications often carry, and observed in passing that “[u]nless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority.” 488 U.S.C. § 493. Although one circuit judge, writing in dissent, has characterized her remark as holding that racial classifications can never be justified except in a

remedial context, (see *Hunter ex rel. Brandt v. Regents of University of California*, 190 Federal Reporter 3d 1061, 1070 (9th Circuit 1999) (Beezer, J., dissenting)), other respected jurists such as Judge Richard Posner have expressly declined to read Justice O'Connor's remark in so categorical and sweeping a fashion, see, e.g., *Wittmer v. Peters*, 87 Federal Reporter 3d 916, 919 (7th Circuit 1996).

⁶⁷ 515 U.S.C. § 228.

⁶⁸ *Id.*

⁶⁹ See *id.* § 239 (Scalia, J., concurring in part and concurring in the judgment).

⁷⁰ *Id.* § 241 (Thomas, J., concurring in part and concurring in the judgment).

⁷¹ *Croson*, 488 U.S.C. § 468, 512 (1989) (Stevens, J., concurring in part and concurring in the judgment); see also *Adarand*, 515 U.S.C. § 243 (Stevens, J., dissenting) (contending that benign race-conscious state actions should not be subjected to strict judicial scrutiny, since “[n]o sensible conception of the Government’s constitutional obligation to ‘govern impartially,’ . . . should ignore [the] distinction” between “a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination”).

⁷² *Adarand*, 515 U.S.C. § 258 (Stevens, J., dissenting).

⁷³ *Croson*, 488 U.S.C. § 551-52 (Marshall, J., dissenting).

⁷⁴ *Id.* § 536-37 (Marshall, J., dissenting).

⁷⁵ See *Adarand*, 515 U.S.C. § 264-72 (Souter, J., dissenting); *id.* § 271-72 (Ginsburg, J., dissenting).

⁷⁶ After reviewing *Croson*, *Adarand*, and other pertinent authorities, Judge Richard Posner of the 6th Circuit concluded in 1996 that “[a] judge would be unreasonable to conclude that no other consideration except of history of discrimination” could warrant state use of race-conscious measures without first considering the specific circumstances that presented themselves to state policymakers. *Wittmer v. Peters*, 87 Federal Reporter 3d 916, 919 (6th Circuit 1996). Judge Posner expressly held that “the rectification of past discrimination is not the only setting in which government officials can lawfully take race into account in making decisions.” *Id.* § 919.

⁷⁷ The *Swann/Capacchione* court also cited a dissenting opinion by Justice O'Connor, joined by the Chief Justice and by Justices Scalia and Kennedy, in the case *Metro Broadcasting, Inc. v. FCC*, 497 U.S.C. § 547, 602 (1990) (O'Connor, J., dissenting), *overruled by Adarand*, 515 U.S.C. § 227 (“*Metro Broadcasting*”). The five-Justice majority in *Metro Broadcasting* upheld the promotion of “programming diversity” as a sufficiently important governmental end (under a lower standard of Equal Protection review deemed applicable to *federal* governmental decisions) to justify a racial/ethnic preference in the federal government’s awarding or transferring of certain FCC-supervised broadcasting licenses. In dissent, Justice O'Connor subjected the FCC’s justification of “broadcast diversity” to a withering analytical attack. The heart of her argument appears in the following quotation:

Modern equal protection doctrine has recognized only one [compelling governmental interest]: remedying the effects of racial discrimination. The interest in increasing the diversity of broadcast viewpoints is clearly not a compelling interest. It is simply too amorphous, too insubstantial, and too unrelated to any legitimate basis for employing racial classifications. The Court does not claim otherwise. Rather, it employs its novel standard and claims that this asserted interest need only be, and is “important” [under intermediate scrutiny review]. This conclusion twice compounds the Court’s initial error of reducing its level of scrutiny of a racial classification. First, it too casually extends the justifications that might support racial classi-

fication, beyond that of remedying past discriminations. . . . Second, it has initiated this departure by endorsing an insubstantial interest.

497 U.S.C. § 613. It was almost certainly from this paragraph that the district court in *Swann/Capacchione* drew its generalization about the permissible range of “compelling governmental interests.” Yet a close reading defeats the meaning that the court would ascribe to the passage. Justice O’Connor clearly was not speaking prescriptively here — to set the outer boundaries of compelling state interest law — but instead descriptively — to observe that *no previous decision* of the Court had recognized a nonremedial interest as compelling. Her descriptive use appeared even more clearly in her follow-up critique, in which she lamented that the Court had “too casually” extended the justification for a race-conscious action. What evidently distressed Justice O’Connor was that, by lowering the standard of review, the majority had gone into unfamiliar legal territory — approving a nonremedial justification for a racial classification — without the careful consideration that strict scrutiny entails.

Justice O’Connor’s later insistence in *Adarand* that some additional compelling governmental interests do exist and might survive strict scrutiny made it unmistakable that neither she nor the other *Metro Broadcasting* dissenters (apart from Justice Scalia, of course) intended permanently to close the door on governmental interests that might justify race-conscious actions for other than remedial ends.

⁷⁸ 78 Federal 3d 932 (5th Circuit 1996).

⁷⁹ *Id.* § 944.

⁸⁰ Instead, the Court denied certiorari. *See Hopwood v. Texas*, 518 U.S.C. § 1033 (1996). Justice Ginsburg, joined by Justice Souter, wrote a brief opinion respecting the denial of certiorari, emphasizing that, while the use of race by public universities in their admissions decisions was “an issue of great national importance,” *Hopwood* itself was not a good vehicle for Supreme Court review, since all parties conceded “that the particular admissions procedure used by the University of Texas Law School in 1992 was unconstitutional” and had “long since been discontinued.” *Id.* § 1034.

⁸¹ Moreover, the *Swann/Capacchione* court failed to address earlier cases that pointed in the opposite direction. Among those were the following lower court decisions, all of which recognized some appropriate use of racial considerations in voluntary schooling contexts. *See Riddick v. School Board of Norfolk*, 784 Federal Reporter 2d 521 (4th Circuit 1986) (upholding authority of a unitary school board to take “white flight” into consideration and to adopt a plan relying upon neighborhood schools with the aim “to keep as many white students in public education as possible and so achieve a stably integrated school system”); *Parents Association of Andrew Jackson High School v. Ambach*, 598 Federal Reporter 2d 705, 717-21 (2d Circuit 1979) (holding that a race-conscious state student assignment plan, designed to minimize white flight from public schools, can survive strict scrutiny if it is narrowly tailored to attain the compelling end of promoting racially integrated public schools).

⁸² *Croson*, 488 U.S.C. § 493.

⁸³ *Id.* § 493-94.

⁸⁴ *Id.* § 499.

⁸⁵ 38 Federal Reporter 3d 147 (4th Circuit 1994).

⁸⁶ 160 Federal Reporter 3d 790 (1st Circuit 1998).

⁸⁷ *Capacchione*, 57 Federal Supplement 2d 241 (quoting *Maryland Troopers Association v. Evans*, 993 Federal Reporter 2d 1072, 1976 (4th Circuit 1993)).

⁸⁸ *See, e.g., In re United States ex rel. Missouri State High School Activities Association*, 682

Federal Reporter 2d 147, 152 (8th Circuit 1982) (observing that “[s]tudents have no infeasible right to associate through choice of school. Mandatory assignment to public schools based on place of residence or other factors is clearly permissible”); *Wharton v. Abbeville School District No. 60*, 608 Federal Supplement 70, 76 (D. S. C. 1984) (noting that plaintiffs in that school desegregation case had “presented no independent source, either in the law of South Carolina, or otherwise, which has granted to them a legitimate claim of entitlement to attend a particular school”); *Citizens Against Mandatory Bussing v. Palmason*, 495 P.2d 657, 663 (1972); cf. *Bronson v. Board of Education of City School District*, 550 Federal Supplement 941, 959 (S. D. Ohio 1982) (noting that “Ohio law . . . does not confer a right upon pupils to attend a specific school, even if they were previously assigned thereto”), *modified and aff’d on other grounds*, 525 Federal Reporter 2d 344 (6th Circuit 1975).

⁸⁹ As the Chief Judge of the 4th Circuit has noted, “[i]n drafting attendance plans, school boards have always been free to deny parental preference for any one of a hundred reasons . . . [O]nce a child is in a public school, the parent cannot dictate what teacher he gets, what courses he takes, what grades he receives, or what discipline he meets.” J. Harvie Wilkinson, III, *From Brown to Bakke: The Supreme Court and School Integration*, at 109 (1979) (“Wilkinson”).

⁹⁰ 160 Federal Reporter 3d 790 (1st Circuit 1998).

⁹¹ See *Capacchione*, 57 Federal Supplement 2d 291-92.

⁹² 160 Federal Reporter 3d 800.

⁹³ See *Comfort ex rel. Neumyer v. Lynn School Committee*, 100 Federal Supplement 2d 57, 65-68 (D. Massachusetts 2000) (distinguishing *Wessmann*); *Boston’s Children First v. Boston*, 62 Federal Supplement 2d 247, 258-61 (D. Massachusetts 1999) (same).

⁹⁴ 195 Federal Reporter 3d 698 (4th Cir. 1999), *cert. dismissed*, 120 Supreme Court Reporter 1552 (2000).

⁹⁵ 197 Federal Reporter 3d 123 (4th Circuit 1999), *cert. denied*, 120 Supreme Court Reporter 1420 (2000).

⁹⁶ 480 U.S.C. § 149, 171 (1987).

⁹⁷ *Tuttle*, 195 Federal Reporter 3d 706 (quoting *Hayes*, 10 Federal Reporter 3d 16; *Paradise*, 480 U.S.C. § 171).

⁹⁸ *Id.* § 706 and note 11. In footnote 11, the panel recited the alternatives that had been mentioned by the school committee, but it made no independent assessment of their effectiveness in promoting diversity.

⁹⁹ *Paradise*, 480 U.S.C. § 172-73. Indeed, in *Paradise* itself, the Supreme Court rejected arguments by the State of Alabama that other proposed alternatives would suffice, finding them “inadequate because [they] failed to address” some of the compelling ends identified in the opinion.

¹⁰⁰ *Tuttle*, 195 Federal Reporter 3d 706.

¹⁰¹ *Id.* (quoting *Croson*, 488 U.S.C. § 498).

¹⁰² See *Wilkinson* at 304 (commenting with approval on Justice Powell’s choice of diversity as the “most acceptable public rationale” in *Bakke*, contrasting its forward-looking perspective with remedial or compensatory rationales, and observing that at least in education, “the need for diversity will continue forever, as long as race matters to men”).

¹⁰³ *Tuttle*, 195 Federal Reporter 3d 706; see *Eisenberg*, 197 Federal Reporter 3d 131-32.

¹⁰⁴ See *Tuttle*, 195 Federal Reporter 3d 707; *Eisenberg*, 197 Federal Reporter 3d 131-32, citing *Pasadena City Board of Education v. Spangler*, 427 U.S.C. § 424, 436 (1976) and *Freeman v. Pitts*, 503 U.S.C. § 467, 497-98 (1992).

¹⁰⁵ *Tuttle*, 195 Federal Reporter 3d 707.

¹⁰⁶ *Id.*

¹⁰⁷ *Comfort ex rel. Neumyer v. Lynn School Committee*, 100 Federal Supplement 2d 67. See also *Parents Involved in Community Schools v. Seattle School District No. 1*, 137 Federal Supplement 2d 1230-32 (distinguishing between more neutral “reshuffling” plans that do not confer any special benefit by race and “stacked deck” plans that specifically favor some racial groups in competitive applications).

¹⁰⁸ *Id.* at 707.

¹⁰⁹ *Id.*

¹¹⁰ See, generally, Leroy J. Peterson *et al.*, *The Law and Public School Operation*, § 11.6, at 333-34 (1968) (stating that school boards are not required to assign a child “to the nearest school or the school most conveniently located,” nor will a court “compel reassignment to the school selected by the parents”); 3 James A. Rapp, *Education Law*, § 8.02[8], at 8-64 (1999) (“There is no constitutional right to a particular placement. A student does not have a proprietary interest in where the student receives an education. Students do not have a right to . . . a particular school.”); 1 William D. Valente, *Education Law: Public and Private*, § 9.2, at 138-39 (1985) (“The discretion vested in local school boards to assign students to particular schools is limited only by the rules against abuse of discretion and special circumstances. . . . Absent constitutional compulsion or state legislation that mandates neighborhood school assignments, students have no general right to be assigned to a neighborhood school.”).

¹¹¹ See, e.g., Janet W. Schofield, *Promoting Positive Peer Relations in Desegregated Schools, in Beyond Desegregation: The Politics of Quality in African American Schooling*, at 91, 93 (Mwalimu J. Shujaa, ed., 1996).

¹¹² Janet W. Schofield, “Review of Research on School Desegregation’s Impact on Elementary and Secondary School Students,” in *Handbook on Research on Multicultural Education* (James A. Banks and Cherry A. McGee Banks, eds., 1994)

¹¹³ James E. Rosenbaum *et al.*, “Can the Kerner Commission’s Housing Strategy Improve Employment, Education, and Social Integration for Low-Income Blacks?,” in *Race, Poverty, and American Cities*, at 273, 300 (John Charles Boger and Judith Welch Wegner, eds., 1996).

¹¹⁴ Amy Stuart Wells and Robert L. Crain, “Perpetuation Theory and the Long-Term Effects of School Desegregation,” 64 *Review of Education Research* 531 (Winter, 1994); Marvin Dawkins *et al.*, “Why Desegregate? The Effect of School Desegregation on Adult Occupational Desegregation of African American, Whites, and Hispanics,” 31(2) *International Journal of Contemporary Sociology* 273 (1994); James M. McPartland and Jomills H. Braddock, II, “Going to College and Getting a Good Job: The Impact of Desegregation,” in *Effective School Desegregation* (Willis D. Hawley, ed., 1981).

¹¹⁵ Christopher Jencks and Meredith Phillips, “The Black-White Test Score Gap: An Introduction,” in *The Black-White Test Score Gap*, at 1, 9, 26, 31 (Christopher Jencks and Meredith Phillips, eds., 1998); Rita Mahard and Robert L. Crain, “Research on Minority Achievement in Desegregated Schools,” in *The Consequences of School Desegregation*, at 103-25 (Christine H. Rossell and Willis D. Hawley, eds., 1983).

¹¹⁶ *Capacchione*, 57 Federal Supplement 2d 291.

¹¹⁷ *Id.*

¹¹⁸ *Capacchione*, 57 Federal Supplement 2d at 291.

¹¹⁹ *Id.*

¹²⁰ See *Boston’s Children First v. City of Boston*, 62 Federal Supplement 2d at 249 (noting that plaintiffs there seek not only to “eliminate the use of race as a factor in the assigning of

students to individual schools” but “challenge the way in which the [Boston School Committee has] divided up the school zones”).

¹²¹ The United States Department of Justice led or participated in many of the most wide-ranging Southern school desegregation cases. *See, e.g., United States v. Jefferson County Board of Education* 372 Federal Reporter 2d 836 (5th Circuit 1966), *adopted en banc* 380 Federal Reporter 2d 385 (5th Circuit 1967) (requiring school districts throughout the six states of the old 5th Circuit — Georgia, Florida, Alabama, Mississippi, Louisiana, and Texas — to begin immediate school desegregation); *Lee v. Macon County Board of Education*, 267 Federal Supplement 458, 460-61 (M.D. Alabama), *aff'd sub nom. Wallace v. United States*, 389 U.S.C. § 215 (1967) (requiring immediate steps toward statewide school desegregation in Alabama); *United States v. State of Georgia*, 19 Federal Reporter 3d 1388, 1390 (11th Circuit 1994) (noting that in 1969, the United States filed suit against the state of Georgia and 81 public school districts in the state, seeking school desegregation); *United States v. State of Texas*, 158 Federal Reporter 3d 299, 301 (5th Circuit 1998) (noting that since 1971 the Texas public education system has been governed by a federal court desegregation order). The DOJ has also played a major role in many Northern and Midwestern school cases. *See, e.g., Reed v. Rhodes*, 607 Federal Reporter 2d 714 (6th Circuit 1979) (Cleveland, Ohio); *Liddell v. Board of Education*, 667 Federal Reporter 2d 643 (8th Circuit 1981) (St. Louis); *Columbus Board of Education v. Penick*, 443 U.S.C. § 449 (1979) (*amicus curiae* in support of court-ordered desegregation of Columbus, Ohio, schools); *Dayton Board of Education v. Brinkman*, 443 U.S.C. § 526 (1979) (*amicus curiae* in support of court-ordered desegregation of Dayton, Ohio, schools); *United States v. Yonkers Board of Education*, 837 Federal Reporter 2d 1181 (2d Circuit 1989) (affirming school and housing desegregation orders in Yonkers, New York). According to Professor Parker, the Department of Justice was a party to school desegregation litigation in approximately 400 school districts as of 1997. Wendy Brown, “The Supreme Court and Public Law Remedies: A Tale of Two Kansas Cities,” 50 *Hastings Law Journal* 475, 480 n. 16 (1999).

¹²² *See, e.g. Eisenberg v. Montgomery County Board of Education*, 197 Federal Reporter 3d 123 (4th Circuit 1999) (*amicus curiae* in support of race-conscious student transfer plan); *Brewer v. West Irondequoit Central School District*, 212 Federal Reporter 3d 738 (2d Circuit 2000) (*amicus curiae* in support of inter-district, race-conscious school transfer program).