2-2007

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ARTICLES

MOVING BEYOND STRICT SCRUTINY: THE NEED FOR A MORE NUANCED STANDARD OF EQUAL PROTECTION ANALYSIS FOR K THROUGH 12 INTEGRATION PROGRAMS

Deborah N. Archer

“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.”

INTRODUCTION

Throughout several areas of the law the Supreme Court has often rationalized the restrictions and limitations put on the remedial use of race by stating that many of the ultimate goals of affirmative action in higher education and employment are best left to K through 12 education to achieve. At the same time, federal courts have taken

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2 K through 12 education refers to kindergarten through the twelfth grade.
steps to curtail the ability of primary and secondary school boards to voluntarily craft measures to address racial inequalities and disparities that continue to plague our public schools fifty years after *Brown v. Board of Education* declared separate schools unconstitutional. If the courts are going to defer resolution of the nation’s race problems to our public schools, they cannot simultaneously prevent these schools from using the tools most directly capable of bringing the nation closer to achieving the promise of *Brown*.

Recently in Massachusetts, a federal appellate court applied the Supreme Court’s affirmative action analysis from *Grutter v. Bollinger* to strike down a race-conscious K through 12 integration program. In *Comfort v. Lynn School Committee*, the United States Court of Appeals for the First Circuit evaluated a race-conscious integration program using the strict scrutiny framework of *Grutter*. *Comfort* is part of a trend of applying strict scrutiny to race-conscious integration programs that has gained new momentum following the decision in *Grut-
ter. Invited by the Supreme Court's seemingly unequivocal language in *Adarand Constructors v. Pena* that "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny," federal district and appellate courts confronted with the question have generally treated the equal protection issues raised by voluntary school integration in the tradition of affirmative action, no matter how they ultimately decide the matter on the merits. While *Grutter* and its companion case, *Gratz v. Bollinger*, provided significant guidance on the use of race-conscious admissions policies in higher education, the decision did not shed light on the applicability of these standards to K through 12 student assignment programs. That affirmative action programs and race-conscious integration programs both involve education does not mean they implicate the same rights.

While racial distinctions are irrelevant to nearly all legitimate state objectives and are properly subjected to the most rigorous judicial scrutiny in most instances, they are highly relevant to the one legitimate state objective of eliminating the pernicious vestiges of past discrimination; when that is the goal, a less exacting standard of review is appropriate. This principle is even more compelling when the state action reviewed is the elimination of segregation among primary and secondary school children.

While many courts have recognized that important differences exist between affirmative action in higher education and employment, and while race-conscious student assignment programs exist and must be carefully weighed, the courts have largely treated these as

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8 See also *Parents Involved I*, 377 F.3d 949, 968 (9th Cir. 2004) (applying strict scrutiny analysis to race-conscious school integration program); *Brewer v. W. Irondequoit Cent. Sch. Dist.*, 212 F.3d 738, 745 (2d Cir. 2000) (same); *Eisenberg*, 197 F.3d at 129 (same); *Tuttle*, 195 F.3d at 704 (same).


10 Id. at 227.

11 See, e.g., *Parents Involved I*, 377 F.3d at 960 (applying affirmative action analysis to race-conscious integration program); *Brewer*, 212 F.3d at 745 (same); *Tuttle*, 195 F.3d at 707 (same); *Hunter v. Regents of the Univ. of Cal.*, 190 F.3d 1061, 1063 (9th Cir. 1999) (same); *Wessmann v. Gittens*, 160 F.3d 790, 809 (1st Cir. 1998) (same); *McFarland v. Jefferson County Pub. Sch.*, 330 F. Supp. 2d 834 (W.D. Ky. 2004) (same).

12 539 U.S. 244 (2003).


14 See *United States v. Fordice*, 505 U.S. 717, 728-29 (1992) (noting that remedies used in public schools such as pupil assignments, busing, quotas, and zoning are unavailable when people freely choose to pursue an advanced education); *Comfort v. Lynn Sch. Comm.* (*Comfort II*), 283 F. Supp. 2d 328, 369 (D. Mass. 2003) (advocating a "fact-sensitive inquiry"). The court in *Comfort II* went as far as stating its disagreement with the application of strict scrutiny. Id. at 366; see also *Gomillion v. Lightfoot*, 364 U.S. 339, 343-44 (1960) ("[I]n dealing with claims under broad provisions of the Constitution, which derive content by an interpretative process of inclu-
differences in degree, not differences in kind. The courts have also largely ignored that the acceptable approach in affirmative action cases is simply not feasible for a local school district. This term, the United States Supreme Court will review the cases of McFarland v. Jefferson County Public Schools, and Parents Involved in Community Schools v. Seattle School District, No. 1 to determine whether voluntary integration efforts by school districts should be viewed in the light of affirmative action and subjected to strict scrutiny.

Rather than conceding that strict scrutiny is the appropriate constitutional standard when dealing with public primary and secondary schools, this Article endeavors to begin the jurisprudential inquiry anew and concludes that voluntary school integration does not emerge out of the historical or legal fabric of affirmative action in higher education or employment, nor does it analytically fit in the mold there created. Accordingly, courts should not import wholesale the standards of the Supreme Court's affirmative action jurisprudence into the K through 12 arena.

Part I of this Article explores the implications of the judiciary placing increasing responsibility for addressing the legacy of segregation in the hands of local school boards, while simultaneously making it increasingly difficult for school boards to address these inequalities through non-merit-based, race-conscious student assignment policies. Part II examines Brown and its progeny as the point of departure in determining the applicable standard for K through 12 integration programs. Finally, Part III of this Article concludes that courts should view voluntary school integration as an extension of the Court's school desegregation jurisprudence rather than the Court's affirmative action jurisprudence. This makes sense not only historically, but analytically as well. Supreme Court cases finding no harm from integrative student assignments are analytically inconsistent with affirmative action rulings. In affirmative action cases, the Equal Protection Clause requires courts to consider the harm done to a white student who has been denied admission to an institution of higher
education. Those same considerations are not triggered, however, when school districts delicately manage the assignment of K through 12 students in largely fungible public schools for pedagogical purposes. Relieving school districts that engage in voluntary integration efforts from having to satisfy the strict scrutiny standard would also have important and valuable practical implications, as the Grutter paradigm fails to acknowledge and give due weight to the myriad considerations that school districts must balance as they formulate and implement effective student assignment policies.

I. INCOMPATIBILITY OF STRICT SCRUTINY AND INTEGRATION PROGRAMS

A. A Historical Perspective

Since the Court pronounced that "[s]eparate educational facilities are inherently unequal" in Brown, the nation has struggled, often against great resistance and with mixed results, to rid itself of the scourge of segregation and its effects. Following the Court's decision in Brown, local school boards resorted to subtle and creative measures to avoid the Brown mandate. Many lawsuits were initiated to try to realize the promise of Brown, but to mixed results.

18 See infra notes 133–38 and accompanying text.
19 See infra notes 143–45 and accompanying text.
22 See, e.g., Griffin v. County Sch. Bd., 377 U.S. 218 (1964) (describing how a school board, in response to a desegregation order, closed its public schools and opened a private school for whites); Hall v. St. Helena Parish Sch. Bd., 197 F. Supp. 649 (E.D. La. 1961) (noting that a school board changed public schools to private schools in order to avoid desegregation); see also Reno v. Bossier Parish Sch. Bd., 528 U.S. 320, 344 (2000) (Souter, J., concurring in part and dissenting in part) (finding that "the School Board had applied its energies for decades in an effort to 'limit or evade' its obligation to desegregate the parish schools").
23 See generally Milliken v. Bradley, 418 U.S. 717 (1974) (holding that a multidistrict remedy for single-district de jure segregation was improper in the absence of findings that the other included districts had failed to operate unitary school systems or had committed acts that effected segregation); Keyes v. Sch. Dist. No. 1, 413 U.S. 189 (1973) (holding that a finding of intentionally segregative school board actions in a school system created a prima facie case of unlawful segregated design on part of school authorities and shifted to those authorities the burden of proving that other segregated schools within the system were not the result of intentionally segregative actions); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) (holding that where a dual school system had been maintained and school board had defaulted in its duty to come forward with acceptable plan of its own, limited use of mathematical ratios of white to black students, pairing of noncontiguous school zones, and a system of a bus transportation were all permissible tools within the power of the district court); Green v. County Sch. Bd., 391 U.S. 430 (1968) (holding that a freedom of choice plan in which not a single white child had chosen to attend a former black public school and eighty-five percent of black children in system still attended that school did not constitute adequate compliance with school
The disappointing history of school desegregation after the Brown decision has been ably recounted by many others. The vast majority of post-Brown Supreme Court school desegregation cases have dealt with the constitutional obligations of former de jure segregated school systems and the authority of federal courts to order remedies. In Green v. County School Board, the Supreme Court mandated that school boards had "the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." The Court further ordered that school boards must craft desegregation plans "that promise[] realistically to work, and promise[] realistically to work now." By the 1970s, local school boards resigned to protecting segregation were running out of creative measures to combat desegregation. White parents took matters into their own hands and many fled the cities for nearby suburbs, leaving inner-city school districts without sufficient numbers of white students to craft effective intra-district desegregation plans. Federal courts, emboldened by the mandates of Brown and its implementing cases, issued desegregation orders that included white suburban school districts in the remedy. By the mid-to late 1970s, the Court began to question the permissible scope, reach, and limitations of the remedies that were sought, thus revising the methods that lower courts employed in crafting their desegregation plans.

board's responsibility to achieve a system of determining admission to public schools on nonracial basis); Griffin, 377 U.S. 218 (holding that action of the school board in closing the public schools while contributing to the support of private segregated white schools that took their place violated the Equal Protection Clause); Cooper v. Aaron, 358 U.S. 1 (1958) (holding that school board stood as agent of state and that their good faith would not constitute legal excuse for delay in implementing plan for desegregating schools).


25 See, e.g., Keyes, 413 U.S. at 211–12 (finding non-southern school districts with racially-segregative policies constitutionally liable); Swann, 402 U.S. at 29–30 (ordering transportation of students to achieve desegregation); Green, 391 U.S. at 439–42 (requiring school systems to take race into account in order to eliminate vestiges of prior segregation).

26 391 U.S. at 430.

27 Id. at 437–38.

28 Id. at 439.


30 Id. at 521.

In the 1980s and 1990s, federal courts began routinely releasing these formerly de jure segregated school districts from their obligations under desegregation orders. In Missouri v. Jenkins, Freeman v. Pitts, Board of Education v. Dowell, and Green, the Supreme Court turned its attention to the task of establishing standards for the release of school districts from court supervision altogether, returning control to local school administrators. In the wake of these cases, numerous school districts each year have returned to federal court seeking unitary status, and all but a nominal few have been denied.

Although Brown got off to a rocky start, it has caused major transformations in our nation’s public education system. Since the early 1970s, while white students’ achievement has remained constant, the achievement level of black students, particularly in earlier grades, has increased. Nevertheless, wide disparities remain. The average stu-

See Belk v. Charlotte-Mecklenburg Bd. of Educ., 269 F.3d 305, 324–25 (4th Cir. 2001) (holding that a school system achieved unitary status); People Who Care v. Rockford Bd. of Educ., 246 F.3d 1073, 1074–78 (7th Cir. 2001) (terminating school desegregation decree since consequences of segregation had been eliminated); Lisa J. Holmes, Comment, After Grutter: Ensuring Diversity in K–12 Schools, 52 UCLA L. REV. 563, 566 (2004) (discussing how courts have increasingly released school districts from desegregation orders).


See Michael Heise, Brown v. Board of Education, Footnote 11, and Multidisciplinarity, 90 CORNELL L. REV. 279, 292 (2005) (“A series of Court decisions in the 1990s accelerated school districts’ efforts to seek unitary status as well as signaled the Court’s desire to disengage with decades of court supervision of school desegregation activities.”); see also Jenkins, 515 U.S. at 101–02 (stating that the elimination of racial disparities is not required for granting unitary status unless plaintiffs can trace disparities directly to prior segregation); Freeman, 503 U.S. at 492–95 (noting that supervision may be withdrawn for individual Green factors despite existence of racial disparities so long as district complied with court order for a reasonable time); Dowell, 498 U.S. at 248 (asserting that supervision of federal courts is intended as a temporary remedy and that return of local control is the fundamental end-goal of school desegregation litigation).

Desegregation orders must be dissolved if the school district has complied in good faith with the order and the vestiges of past discrimination have been eliminated to the extent practicable. Dowell, 498 U.S. at 249.

See Wendy Parker, The Decline of Judicial Decisionmaking: School Desegregation and District Court Judges, 81 N.C. L. REV. 1623, 1633 (2003) (citing a ten-year study of federal district and appellate court rulings demonstrating that every request for unitary status made was granted, save one in which the court ordered partial unitary status under Freeman). Moreover, education expert Gary Orfield has argued that school districts have too quickly moved to receive a declaration of unitary status, and federal courts have moved too quickly to grant their requests. See Gary Orfield, Conservative Activists and the Rush Toward Resegregation, in LAW AND SCHOOL REFORM: SIX STRATEGIES FOR PROMOTING Educational Equity 39 (Jay P. Heubert ed., 1999).

dent attends a racially segregated school, the average black student attends a school that is sixty-seven percent black, and the average white student attends a school that is eighty percent white. In fact, there is a trend towards resegregation. "As courts across the country end long-running desegregation plans and, in some states, have forbidden the use of any racially-conscious student assignment plans, the last ten to fifteen years have seen a steady unraveling of almost twenty-five years worth of increased integration." 

"Recognizing the social and academic benefits of racially integrated schools, many districts have implemented voluntary race-conscious assignment policies" following release from desegregation orders. Other school districts, either fearing litigation or independently seeking to redress entrenched and evident racial inequalities, have voluntarily implemented race-conscious student assignment programs and integration plans. Courts have been reluctant to uphold these voluntary efforts by school districts to avoid the pernicious effects of de facto segregation. Before and after Grutter, courts have consistently applied strict scrutiny analysis, developed in the context of higher education admissions and government contracting and employment, to analyze and frequently strike down such programs. The lower courts in these cases acknowledged the fact that the Supreme Court had yet to hear a case that considered the limits of public school officials’ ability to voluntarily consider race in student selec-

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44 Holmes, supra note 32, at 566. 
45 Voluntary integration programs are those that school boards adopt absent court order or judicial intervention. 
46 Cavalier v. Caddo Parish Sch. Bd., 403 F.3d 246 (5th Cir. 2005) (striking down program because school board failed to offer a compelling governmental interest and did not consider race-neutral alternatives); Eisenberg v. Montgomery County Pub. Sch., 197 F.3d 123, 129 (4th Cir. 1999) (noting that "any racial classification, including that present here, must survive strict scrutiny review"); Tuttle v. Arlington County Sch. Bd., 195 F.3d 698, 704 (4th Cir. 1999) (applying Adarand and holding that "all racial classifications are subject to strict scrutiny" in striking Arlington’s voluntary transfer program). The programs in Comfort II and Parents Involved II were struck down by the district courts and original courts of appeal panels. But, both programs were recently upheld by en banc review by the courts of appeals after years of litigation. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1 (Parents Involved II), 426 F.3d 1162, 1175 (9th Cir. 2005); Comfort v. Lynn Sch. Comm. (Comfort II), 283 F. Supp. 2d 328, 356 (D. Mass. 2003), aff’d en banc, Comfort v. Lynn Sch. Comm. (Comfort III), 418 F.3d 1 (1st Cir. 2005).
tion and turned to the Supreme Court's affirmative action precedents for guidance. The opinions in these cases assumed, without deciding, that diversity was a compelling justification, but several courts concluded that race-conscious student assignment policies are not narrowly tailored to achieving that goal. With the decision in Grutter, courts have found what they believe is an appropriate and uniform framework to assess the constitutionality of these voluntary plans.

B. Grutter v. Bollinger and the Supreme Court's Affirmative Action Narrow-Tailoring Analysis

In Grutter, the Supreme Court heard a challenge by applicants to the University of Michigan Law School's affirmative action program. The petitioner alleged that the law school's race-conscious admissions policy violated her equal protection rights under the Fourteenth Amendment. Relying on its affirmative action jurisprudence, the Supreme Court applied strict scrutiny to the law school's program and held that the University of Michigan Law School had a compelling interest in "obtaining the educational benefits that flow from a diverse student body." In the process, the Supreme Court developed a framework for analyzing race-conscious admissions programs. Under this analytic framework, a court must engage in a four-part inquiry to determine if the use of race is narrowly tailored. First, the use of race must not "insulat[e] each category of applicants with certain desired qualifications from competition with other applicants" solely because of race. In essence, the program must allow for individualized review of each applicant. Second, the institution must consider workable, race-neutral alternatives. Third, the use of race...
must not "unduly harm members of any racial group." And, fourth, the use of race must be limited in time.

Navigating the Grutter framework may prove too difficult for public secondary and elementary schools. Public school systems that have voluntarily chosen to consider race in student assignments will likely encounter little difficulty articulating a compelling interest after Grutter, but may fall short of achieving their integration goals under the weight of narrow tailoring. What the Supreme Court has said to be the constitutionally accepted approach for the use of race in affirmative action programs is simply not feasible for a school district that must assign thousands of students across multiple schools in a given district. Indeed, school boards with limited financial resources are unlikely to devote substantial sums to lure individuals to conduct individualized reviews of "admissions" or transfer applications to elementary and secondary public schools. "And it borders on the absurd to imagine these hypothetical phalanxes of public school admissions officers purporting to conduct searching, individualized 'holistic reviews' of detailed files of millions of four-year-olds applying to kindergartens across the country." And, although some school boards may ultimately be able to successfully defend their programs in court, most will likely choose to abandon their race-conscious programs to avoid lengthy litigation, which even if ultimately successful, can be time-consuming, expensive, and politically divisive. Tying the hands of school districts in this way threatens to undo the progress made since Brown.

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55 Id. at 341.
56 Id. at 342.
57 See generally Levine, supra note 29, at 520–21 (arguing that given practical and financial constraints, public schools most likely will continue to employ "mechanical and routinized" methods).
58 See id. at 520–21 (noting that in light of the type of individualized review approved in Grutter, the University of Michigan has had to hire additional application reviewers and counselors at a cost of almost $2 million).
59 Id. at 521.
60 See id. Comfort is an excellent example of the quandary faced by school boards seeking to combat segregation. In light of a challenge, the school board chose to defend its limited transfer program. Although ultimately successful in its defense, the victory came only after six years of litigation through the federal court system. Comfort v. Lynn Sch. Comm. (Comfort III), 418 F.3d 1, 6 (1st Cir. 2005).
61 See GARY ORFIELD & SUSAN E. EATON, DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION 108 (1996) (describing the public perception towards Brown at the time it was decided and towards the desegregation methods, such as busing, used to enforce Brown). This does not mean that school districts should be given unfettered discretion in their use of race in student assignment decisions. Indeed, in light of the entrenchment and creativity to avoid the mandate of Brown shown by many school districts, some meaningful review should be applied to assess the validity of the use of race. That review need not be strict scrutiny. See Jacobson v. Cincinnati Bd. of Educ., 961 F.2d 100, 102 (6th Cir. 1992) (applying intermediate scrutiny); Kromnick v. Sch. Dist., 739 F.2d 894, 902–03 (3d Cir. 1984) (same).
II. VOLUNTARY INTEGRATION AND AFFIRMATIVE ACTION: TWO DISTINCT LINES OF JURISPRUDENCE

The question of the constitutionality of voluntary efforts to achieve racial integration in public schools must be viewed in the proper context. While certainly a cousin to it, voluntary school integration does not emerge out of the legal fabric of affirmative action in higher education, public employment, or government contracting. Rather, it is a milestone along the long and difficult road down which this nation has traveled over the past fifty years in its quest to achieve the promise of Brown. The Supreme Court’s cases applying strict scrutiny to race-conscious affirmative action policies dealt not with the constitutional viability of integrative, race-conscious public school student assignments, but instead with policies and programs that considered race among other factors in the distribution of what the Court deemed to be legally cognizable burdens and benefits. Brown and its progeny, therefore, provide the most appropriate point of departure to determine the applicable standards for K-12 voluntary efforts, not cases like Adarand or even Grutter.

In Brown, the Court famously and emphatically declared that “in the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal.” Having determined that segregated schools violated the Fourteenth Amendment, the Court then ordered, one year later, that dual systems of education across the United States be dismantled “with all deliberate speed.” Opponents of voluntary school integration, and of affirmative action, often cite Brown to support the claim that race may never be considered in the assignment of students to public schools. Brown dealt with the specific question of whether race, when used for the purpose of segregating children, was constitutionally permissible. Nothing in the Court’s brief opinion indicates that race-conscious assignments for the purpose of furthering integration would violate the Fourteenth Amendment. Indeed, if anything, the Supreme Court’s language suggests just the opposite conclusion—that voluntary efforts to further racial integration would benefit students

65 See, e.g., Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978) (citing Brown to support the proposition that giving preference because of race was discrimination).
66 Brown, 347 U.S. at 493.
67 See Owen Fiss, Racial Imbalance in the Public Schools: The Constitutional Concepts, 78 HARV. L. REV. 564, 577-79 (1965) (arguing that a school board is constitutionally permitted to take actions to further racial integration).
regardless of whether the alternative segregation is de jure or de facto.\textsuperscript{68}

\textbf{A. Voluntary Efforts Are Well Within the Authority of Local School Officials}

In its school desegregation jurisprudence, the Supreme Court has expressed the importance of deference to school boards in crafting educational policies.\textsuperscript{69} In \textit{Brown II}, the Court expressed hesitation in imposing remedies upon formerly de jure school systems without first allowing the local governing bodies—through the political process—time to cure the constitutional ills on their own.\textsuperscript{70} Over time, however, the Court’s patience with local school authorities waned, as virtually no advancement in desegregation was made in the decade that followed \textit{Brown}.\textsuperscript{71} Despite its frustration with the perennial failure of local school authorities to take the measures necessary to desegregate their schools, the Court continued to afford deference to local school administrators in taking the first swipe at desegregation before federal courts stepped in.\textsuperscript{72}

It was not long after the Court approved broad judicial remedies to de jure segregation in \textit{Swann} that it began the process of refocusing the goal of desegregation litigation from an unequivocal mandate in \textit{Green} to eliminate the vestiges of past segregation “root and branch,”\textsuperscript{73} to the alternative “end purpose . . . to restore state and local authorities to the control of a school system that is operating in compliance with the Constitution.”\textsuperscript{74} The Supreme Court laid down a

\textsuperscript{68} See, e.g., \textit{Brown}, 347 U.S. at 494–95 (noting that racial segregation in grade and high schools, even more than segregation in institutions of higher education, has negative effects on children “that may affect their hearts and minds in a way unlikely ever to be undone”); \textit{id.} at 494 (“Segregation of white and colored children in public schools has a detrimental effect upon the colored children. \textit{The impact is greater when it has the sanction of the law}; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group.” (emphasis added)).

\textsuperscript{69} See \textit{Freeman v. Pitts}, 503 U.S. 467, 490 (1992) (“As we have long observed, ‘local autonomy of school districts is a vital natural tradition.’” (quoting \textit{Dayton Bd. of Educ. v. Brinkman}, 433 U.S. 406, 410 (1977))); \textit{Milliken v. Bradley}, 418 U.S. 717, 741–42 (1974) (“No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process.”).


\textsuperscript{71} See \textit{Swann v. Charlotte-Mecklenburg Bd. of Educ.}, 402 U.S. 1, 13 (1971) (noting that “very little progress” had been made between the Court’s decisions in \textit{Brown} and \textit{Green}); \textit{Green v. County Sch. Bd.}, 391 U.S. 430, 439 (1968) (expressing vexation with one school board’s recalcitrance and demanding that it implement a working plan immediately).

\textsuperscript{72} See \textit{Swann}, 402 U.S. at 15–16 (recognizing that school authorities have broad authority to formulate educational policy).


\textsuperscript{74} \textit{id.} at 489.
foundation for this goal in *Milliken*\textsuperscript{75} and *San Antonio School District v. Rodriguez*,\textsuperscript{76} expounded upon it in cases including *Dayton Board of Education v. Brinkman*,\textsuperscript{77} and then finally identified it as the “ultimate objective” of school desegregation in its 1990s trilogy of school desegregation cases.\textsuperscript{78} In a series of sharply divided decisions in *Missouri v. Jenkins*,\textsuperscript{79} *Freeman v. Pitts*,\textsuperscript{80} and *Board of Education v. Dowell*,\textsuperscript{81} the Supreme Court turned its attention to the task of establishing standards for the release of school districts from court supervision, returning control to local school administrators.\textsuperscript{82} The Supreme Court’s school desegregation jurisprudence continued to express the need for deference to school boards as they crafted educational policies.\textsuperscript{83}

These cases implicate several rationales for preservation of local control. First, they acknowledge the value of allowing the political process to determine how the needs of individual children within each school district are best met.\textsuperscript{84} Furthermore, local control also serves to encourage “experimentation, innovation, and a healthy

\textsuperscript{75} *Milliken*, 418 U.S. at 741–42 (extolling the virtues of local control of educational programs).

\textsuperscript{76} 411 U.S. 1, 50 (1973) (stating that local control of educational programs encourages citizen participation, enhances competition, and addresses local needs).

\textsuperscript{77} 433 U.S. 406, 410 (1977) (“[T]he case for displacement of the local authorities by a federal court in a school desegregation case must be satisfactorily established by factual proof and justified by a reasoned statement of legal principles.”).

\textsuperscript{78} See *Missouri v. Jenkins*, 515 U.S. 70, 131 (1995) (Thomas, J., concurring) (“[L]ocal autonomy of school districts is a vital national tradition.” (quoting Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 410 (1977))); *Freeman*, 503 U.S. at 490 (“As we have long observed, ‘local autonomy of school districts is a vital national tradition.’” (quoting Dayton Bd. of Educ., 433 U.S. at 410)); Bd. of Educ. v. Dowell, 498 U.S. 237, 248 (1991) (“‘[N]ecessary concern for the important values of local control of public school systems dictates that a federal court’s regulatory control of such systems not extend beyond the time required to remedy the effects of past intentional discrimination.’” (quoting Spangler v. Pasadena City Bd. of Educ., 611 F.2d 1239, 1245 n.5 (9th Cir. 1979) (Kennedy, J., concurring))).

\textsuperscript{79} 515 U.S. 70.

\textsuperscript{80} 503 U.S. 467.

\textsuperscript{81} 498 U.S. 237.

\textsuperscript{82} See *Jenkins*, 515 U.S. at 101 (holding that elimination of racial disparities was not required for granting unitary status unless plaintiffs can trace disparities directly to prior segregation); *Freeman*, 503 U.S. at 489–90 (noting that supervision may be withdrawn for individual Green factors despite existence of racial disparities so long as district complied with court order for a reasonable time); *Dowell*, 498 U.S. at 248 (concluding that supervision of federal courts is intended as a temporary remedy, and return of local control is a fundamental end-goal of school desegregation litigation).

\textsuperscript{83} See infra notes 85–99 and accompanying text.

\textsuperscript{84} See, e.g., *Freeman*, 503 U.S. at 490 (“When the school district and all state entities participating with it in operating the schools make decisions in the absence of judicial supervision, they can be held accountable to the citizenry, to the political process, and to the courts in the ordinary course.”); *Dowell*, 498 U.S. at 248 (“Local control over the education of children allows citizens to participate in the decisionmaking, and allows innovation so that school programs can fit local needs.”).
competition for educational excellence," and public confidence in the school system generally. Frequently, the Court has acknowledged the value of local control because of its view that federal judges should not make pedagogical decisions within the purview of educators and school boards. Notably, based on this theory of local control, the Supreme Court in Dowell, Freeman, and Jenkins paved the way for findings of unitary status despite its recognition of large racial disparities in each of those cases. Similarly, the Court invoked the specter of local control in Milliken to strike down a remedial plan that would have denied whites a safe haven from integration by fleeing to the suburbs. The elevation of the tradition of local control in the context of public schools, therefore, in combination with the expression of hope that communities rather than judges are the best sources of sound, equitable policies, has served over the years to hold courts at bay even when plaintiffs challenged seemingly dubious education decisions with undisputed evidence of their racially disparate results. It would be ironic if the importance of local control could be invoked to insulate school officials from any legal obligation to address racial disparities within their systems, while well-intentioned unitary school districts, acting in good faith, were not afforded the same discretion necessary to implement and maintain policies that

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56 See, e.g., Milliken v. Bradley, 418 U.S. 717, 741–42 (1974) ("[L]ocal autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process.").
57 See, e.g., Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 488 (1979) (Powell, J., dissenting) (arguing that where racial imbalance is "beyond the reach of judicial correction," local school authorities should be encouraged to adopt voluntary measures to promote racial integration, such as majority-to-minority transfer programs and magnet schools); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 404 (1978) (Blackmun, J., concurring in part and dissenting in part) ("The administration and management of educational institutions are beyond the competence of judges and are within the special competence of educators, provided always that the educators perform within legal and constitutional bounds."); Milliken, 418 U.S. at 743–44 ("[T]he District Court will become first, a de facto 'legislative authority' to resolve these complex questions, and then the 'school superintendent' for the entire area. This is a task which few, if any, judges are qualified to perform . . . [allowing courts to play such a role] would deprive the people of control of schools through their elected representatives.").
58 Missouri v. Jenkins, 515 U.S. 70, 102 (1995) (permitting a finding of unitary status despite considerable racial disparities in educational achievement based on the conclusion that the disparities were not a result of past de jure segregation); Freeman, 503 U.S. at 476 (permitting lower court to find partial unitary status on issue of student assignment even though there was continued racial isolation in the district's schools based on a finding that the segregation was not the result of school district's de jure history but instead of individual, private housing choices); Dowell, 498 U.S. at 242 (permitting dissolution of court order even though new student assignment plan would result in an immediate return to segregation).
59 418 U.S. at 740–45.
would prevent a return to the kinds of racially isolated conditions that first led the Supreme Court to reach its conclusion in Brown.90

The Court’s jurisprudence also indicates approval of school boards that might choose to establish student assignment policies designed to achieve racial integration for educational reasons independent of any constitutional obligation to do so. The first signal of this nature came in Swann. There, a unanimous Court established busing as one among many remedies that courts could order when school boards refused or failed to meet their affirmative obligations under Brown and Green.91 However, it also expressed the view that even though federal courts may be limited by the principle that “the nature of the violation determines the scope of the remedy,”92 school boards possess far greater discretion in assigning students in ways that would achieve racial integration for pedagogical reasons:

School authorities are traditionally charged with broad power to formulate and implement education 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.*93

In *North Carolina State Board of Education v. Swann*,94 a companion case to *Swann*, the Court again reiterated its position that school boards have broad latitude in determining how to assign students: “[A]s a matter of educational policy school authorities may well conclude that some kind of racial balance in the schools is desirable quite apart from any constitutional requirements.”95

Although federal courts may be constrained in their ability and authority to order desegregation remedies, the Supreme Court has always suggested that state and local officials could go further on their own in trying to alleviate de facto segregation and achieve racial

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90 See Comfort v. Lynn Sch. Comm. (*Comfort I*), 263 F. Supp. 2d 209, 254 (D. Mass. 2003) (noting willingness of most courts to defer to local decision-making of school boards in de jure remedial cases in “determinations that unitary status has been achieved” and rationalizing that it would be “only logical to afford at least as much deference to a school board that voluntarily undertakes desegregation efforts”); *id.* at 254 (“There are good reasons to give deference to school boards’ attendance to the details of their student assignments and determinations of whether race-neutral alternatives are adequate. They are the experts in what will or will not work because they are uniquely attuned to the needs of a diverse urban community.”).
92 *Id.* at 16.
93 *Id.* (emphasis added).
95 *Id.* at 45; *see also* McDaniel v. Barresi, 402 U.S. 39, 40–41 (1971) (allowing a school board considerable deference in the desegregation process).
integration in their schools. 96 Not surprisingly, numerous lower courts have read the Court's pronouncements on this score to mean that local voluntary efforts are not only constitutionally permissible, but encouraged. 97 Such principles are completely incongruous with the application of strict scrutiny, which is reserved for disfavored behavior. 98

In the more than three decades since the Swann cases were decided, the Court has never issued an opinion contradicting the notion that state and local school officials could go further than federal courts in their efforts to foster racially integrated student bodies. 99 And, in interpreting this line of language, federal district and appellate courts have repeatedly held that local and state authorities may voluntarily use race-conscious student assignment policies to integrate their schools and eliminate racial isolation. 100 The Sixth Circuit

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96 See Swann, 402 U.S. at 16 (recognizing that school authorities have broad power unless there is a constitutional violation); Note, The Constitutionality of Race-Conscious Admissions Programs in Public Elementary and Secondary Schools, 112 HARV. L. REV. 940, 948 (1999) (stating that in Swann, the Court recognized that a school may implement a plan the Court did not have the authority to order); see also Brewer v. W. Irondequiot Cent. Sch. Dist., 212 F.3d 738, 752 (2d Cir. 2000) ("The absence of a duty [to desegregate] sheds little light on the constitutionality of a voluntary attempt.").

97 See Brewer, 212 F.3d at 750 (citing Swann as allowing voluntary integration efforts); Johnson v. Board of Education, 604 F.2d 504, 517 (7th Cir. 1979), vacated and remanded on other grounds, 449 U.S. 915 (1982) (recognizing that race must be considered when schools remedy segregation).

98 See generally Gerald Gunther, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection, 86 HARV. L. REV. 1, 8 (1972) (arguing that the Warren Court's new equal protection standard routinely utilized strict scrutiny to invalidate statutes). Recent decisions by the Court have confirmed the "fatality" of strict scrutiny in the context of affirmative action policies designed to remedy past discrimination. See, e.g., City of Richmond v. J. A. Croson Co., 488 U.S. 469 (1989) (striking down a subcontractor hiring plan featuring a quota for minorities, absent proof of past discrimination); Johnson v. Bd. of Regents of the Univ. of Ga., 263 F.3d 1234 (11th Cir. 2001) (striking down university affirmative action policy); Angelo N. Ancheta, Contextual Strict Scrutiny and Race-Conscious Policy Making, 36 LOY. U. CHI. L.J. 21 (2004) (observing that the Supreme Court's application of strict scrutiny invalidates most racial classifications).

99 In fact, lower federal courts have continued to embrace the principle. See Brewer, 212 F.3d at 752 ("The absence of a duty [to desegregate] sheds little light on the constitutionality of a voluntary attempt."); Hampton v. Jefferson County Bd. of Educ., 102 F. Supp. 2d 358, 379–80 (W.D. Ky. 2000) (recognizing the historical, moral, practical, and logical basis for affording school boards the authority to pursue integration as a goal).

100 See, e.g., Brewer, 212 F.3d at 751 ("[L]ocal school authorities have the power to voluntarily remedy de facto segregation existing in schools and, indeed, such integration serves important societal functions"); Parent Ass'n of Andrew Jackson High Sch. v. Ambach, 738 F.2d 574, 581 n.9 (2d Cir. 1984) (indicating that a school board may take otherwise "constitutionally suspect measures to counteract the perceived problem of accelerated white flight"); Clark v. Bd. of Educ., 705 F.2d 265, 271 (8th Cir. 1983) ("Although the possibility of white flight and consequent resegregation cannot justify a school board's failure to comply with a court order to end segregation, it may be taken into account in an attempt to promote integration.") (citation omitted); Johnson, 604 F.2d at 518 ("[T]he absence of a constitutional duty on the part of the school authorities to establish racially-based enrollments does not preclude the Board from pre-
Court of Appeals in particular has spoken on the matter in fairly clear terms:

Although boards of education have no constitutional obligation to relieve against racial imbalance which they did not cause or create, it has been held that it is not unconstitutional for them to consider racial factors and take steps to relieve racial imbalance if it is in their sound judgment such action is the best method of avoiding educational harm.

In dealing with the multitude of local situations that must be considered and the even greater number of individual students involved, we believe it is the wiser course to allow for the flexibility, imagination, and creativity of local school boards in providing for equal opportunity in education for all students. It would be a mistake for the courts to read Brown in such a way as to impose one particular concept of educational administration as the only permissible method of insuring equality consistent with sound educational practice. We are of the view that there may be a variety of permissible means to the goal of equal opportunity, and that room for reasonable men of good will to solve these complex community problems must be preserved.

The highest courts of several states have also reached the same conclusion, holding that some level of race-consciousness and/or reduction of racial isolation is necessary to satisfy the education provi-

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101 Deal v. Cincinnati Bd. of Educ., 369 F.2d 55, 61 (6th Cir. 1966) (internal citations omitted); see also Jacobson v. Cincinnati Bd. of Educ., 961 F.2d 100, 102 (6th Cir. 1992) ("This authority [afforded to local school officials] includes the power to prescribe a ratio of white to minority students that reflects the composition of the overall school district, particularly when such a policy is implemented in order to prepare students for life in a pluralistic society."); Hampton, 102 F. Supp. 2d at 379 ("If [the school board] voluntarily chooses to maintain desegregated schools, it acts with the traditional authority invested in a democratically elected school board . . . .").
sions of their state constitutions and concluding that the Federal Constitution is no obstacle.\textsuperscript{102}

While the Supreme Court was in the midst of determining the parameters of permissible remedies in the context of school desegregation, a separate but related set of legal challenges began to surface. Beginning in the late 1970s, a handful of cases worked their way up to the Supreme Court in which parties sought guidance on the applicable constitutional standards for various voluntarily adopted, race-conscious efforts by state legislatures and public institutions to provide increased opportunities to certain groups in employment and higher education.\textsuperscript{103} Unlike traditional racial discrimination cases with which the Court had become familiar,\textsuperscript{104} these policies—now collectively known as "affirmative action" policies—were not intended to subordinate racial minorities. Rather, they were designed to compensate the victims of systemic legal and economic exclusion resulting from our nation's long, tragic history of slavery, Jim Crow segregation, and racial discrimination.\textsuperscript{105} Within the span of a decade, the Supreme Court had issued opinions on these cases in a variety of areas, ranging from public employment,\textsuperscript{106} to university and graduate

\textsuperscript{102} See, e.g., Bustop, Inc. v. Bd. of Educ., 439 U.S. 1380 (1978) (upholding the California Supreme Court's use of the California Constitution to require race-conscious desegregation); Crawford v. Bd. of Educ., 551 P.2d 28 (Cal. 1976) (obligating the school boards to alleviate de jure and de facto racial segregation in public schools); Sheff v. O'Neill, 678 A.2d 1267 (Conn. 1996) (imposing a duty on the state to affirmatively remedy de jure and de facto racial segregation in public schools); Citizens Against Mandatory Bussing v. Palmason, 495 P.2d 657 (Wash. 1972) (allowing the school's mandatory busing scheme); Morean v. Bd. of Educ., 200 A.2d 97 (N.J. 1964) (permitting schools to take into account racial imbalance when assigning students to schools).

\textsuperscript{103} See, e.g., Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) (invalidating a school's layoff scheme that favored minority teachers); Fullilove v. Klutznick, 448 U.S. 448 (1980) (upholding a federal scheme setting aside at least ten percent of the funding to minority businesses); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (ruling that racial quotas for medical school admissions are unconstitutional, though schools may consider race as a factor in the admission process).

\textsuperscript{104} See, e.g., Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977) (holding constitutional the local authority's use of zoning law to deny developer's plan to build racially integrated housing); Washington v. Davis, 426 U.S. 229 (1976) (ruling that the police department's recruiting test is not discriminatory, though it has a disproportionate impact on African American applicants).


\textsuperscript{106} See, e.g., United States v. Paradise, 480 U.S. 149 (1987) (challenging a promotion policy, favoring black candidates, allegedly justified by the employer's history of racial discrimination); Wygant, 476 U.S. at 267 (challenging a shield law protecting minority teachers from certain budget-induced layoffs).
school admissions, to government contracting.

The Court's modern formulation and understanding of the strict scrutiny analysis ultimately emerged out of this context. In *Croson*, a five-Justice majority of the Court resolved confusion over the constitutional standard to apply in these cases, holding that all state and local policies that provide a "racial preference," regardless of their motivation, must promote a "compelling governmental interest" and be "narrowly tailored" to achieve that interest. Several years later, in *Adarand*, the Court extended the application of the strict scrutiny test announced in *Croson* to federal hiring programs that establish racial classifications. Since then, federal courts, including the Supreme Court, have widely employed this two-pronged approach to analyze all forms of race-conscious, affirmative action preferences—most recently and notably in *Gratz* and *Grutter*.

These two paths of equal protection jurisprudence rarely overlapped in any meaningful sense, maintaining distinct treatment by the Supreme Court. In the early years of post-*Brown* school desegregation, the Court made firm, broad pronouncements about the kinds of actions federal courts were required to take when school districts failed on their own to cure the constitutional harms they had inflicted. Never once in these cases did the Court mention a need to balance those remedies with any equal protection "right" of white children to be free from integrative student assignments. On the

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107 See, e.g., *Bakke*, 438 U.S. at 265 (challenging an admissions policy with racial quotas); *DeFunis v. Odegard*, 420 U.S. 144 (1977) (challenging a race-conscious admissions policy in a law school).

108 See, e.g., *Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990) (challenging federal policies affording preference to minority-owned businesses); *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989) (challenging a set-aside city contracting provision for minority-owned businesses); *Fullilove*, 448 U.S. at 448 (challenging the use of racial and ethnic criteria in the award of federal grants).

109 *488 U.S. at 493.*

110 See *Adarand Constructors v. Pena*, 515 U.S. 200, 227 (1995) (holding that the Constitution protects persons, not particular racial groups; hence, remedial racial classifications are not treated favorably).


112 See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971) (stating that federal courts are authorized to order broad-reaching remedies where school officials have refused to do so on their own); *Green v. County Sch. Bd.*, 391 U.S. 430, 435 (1968) (identifying various aspects of the public school system from which vestiges of prior segregation must be eliminated).

113 Even though the Supreme Court's rulings in the school desegregation context were made primarily in response to a finding of a constitutional liability, the way in which the Court spoke of remedies to that violation is nonetheless instructive.
contrary, since Brown, the Supreme Court's language has indicated an acknowledgment that steps taken to achieve racial integration are beneficial to all students, regardless of their race.\textsuperscript{114} Furthermore, the Court has never recognized an "injury" to students who may oppose their integrative school assignments, and thus has never definitely applied strict scrutiny in the context of school desegregation or voluntary school integration.

Even in the mid- to late 1970s, as the Court began to question the scope of some of the desegregation remedies ordered by lower courts,\textsuperscript{115} its concerns were expressed almost exclusively in terms of constraints on federal judicial authority, not in terms of any fear of trampling on the supposed rights of students who wish to be assigned to a specific school of their choice or to schools closer to their homes.\textsuperscript{116} And, significantly, the Court's affirmative action rationale did not appear anywhere of note in its trilogy of school desegregation cases of the 1990s. \textit{Dowell, Freeman,} and \textit{Jenkins} made much of the deference that courts should afford to school districts in evaluating their request for unitary status,\textsuperscript{117} but said nothing of constitutional burdens that continued court supervision or enforcement of desegregation might impose upon "innocent" third parties despite the fact that, during these same years, the Court was hearing the kinds of cases out of which strict scrutiny review emerged.

The Supreme Court's affirmative action cases and school desegregation cases not only have separate origins and express different constitutional concerns, but they also appear to have avoided jurisprudential collision. Despite their simultaneous emergence and development, strict scrutiny has never been applied in the context of school desegregation by the Supreme Court.\textsuperscript{118} Quite the contrary,


\textsuperscript{115} See Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 439 (1976) (stating that federally granted injunctions must first be obeyed before one can challenge the federal court's authority); Milliken v. Bradley, 418 U.S. 717, 744 (1974) (stating that federal courts can only remedy school plans when there is a constitutional violation).

\textsuperscript{116} Cf. Bustop, Inc. v. Bd. of Educ., 439 U.S. 1380, 1383 (1978) (Rehnquist, J.) ("While I have the gravest doubts that the Supreme Court of California was \textit{required} by the United States Constitution to take the action that it has taken in this case, I have very little doubt that it was \textit{permitted} by that Constitution to take such action.")

\textsuperscript{117} See, e.g., cases discussed supra note 84.

\textsuperscript{118} Several other commentators have made this observation as well. See Kevin Brown, \textit{The Constitutionality of Racial Classifications in Public School Admissions}, 29 HOFSTRA L. REV. 1, 7 (2000) ("The Supreme Court has not directly confronted the questions of whether and to what extent public schools can take account of race and ethnicity to foster an integrated student body in a context lacking an allegation of de jure segregation."); Wendy Parker, \textit{What School Desegregation Teaches Affirmative Action} 48 (Wake Forest U. Pub. Law Research Paper Series, Research Paper
the Court, when presented with a chance to do so in *Washington v. Seattle School District, No. 1*,\(^{119}\) elected to pass on the opportunity to equate non-remedial, race-conscious student assignment policies to typical race-preferential affirmative action. Indeed, it even went so far as to strike down efforts at the state level to ban their adoption.\(^{120}\)

At issue in *Washington* was whether the voters of Washington could, by popular initiative, ban all school districts in the state from using busing as one method to alleviate de facto racial segregation in their schools.\(^{121}\) In November 1978, Washington voters enacted Initiative 350, a measure that essentially permitted the use of transportation in student assignment for every conceivable educational purpose except for racial integration.\(^{122}\) Applying the principle it first established in *Hunter v. Erickson*,\(^{123}\) the Court concluded that the initiative violated the Fourteenth Amendment because

> the community's political mechanisms are modified to place effective decisionmaking authority over a racial issue at a different level of government. In a very obvious sense, the initiative thus "disadvantages those who would benefit from laws barring" de facto segregation "as against those who...would otherwise regulate" student assignment decisions; "the reality is that the law's impact falls on the minority."\(^{124}\)

Although not directly confronted with the question of the constitutionality of voluntary race-conscious student assignment,\(^{125}\) the Supreme Court nonetheless proceeded to opine about the values of in-

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\(^{120}\) *Id.* at 470–73.

\(^{121}\) The Court framed the question as follows: "[W]hether an elected local school board may use the Fourteenth Amendment to defend its program of busing for integration from attack by the State." *Id.* at 459.

\(^{122}\) The initiative required all students to be assigned to the school geographically closest to them, but then proceeded to set out numerous broad exceptions to the general rule for virtually every educational purpose except school integration. *Id.* at 462–63 (citing WASH. REV. CODE § 28A.26.010 (1981) and describing its applicability). The initiative allowed an exception for desegregation plans that were part of a court-ordered remedy. It was therefore understood to apply only to voluntarily enacted school integration plans, but that fact did not save it from its fate. *Id.* Interestingly, Initiative 350 banned voluntarily-enacted mandatory student assignment, which is often perceived as being more intrusive than are voluntarily-enacted, voluntary forms of student assignment. Apparently, even the initiative at issue in *Washington* would have permitted voluntarily enacted voluntary student assignment—that is, the sort of assignment system most school districts that practice voluntary school integration employ today. *Id.* at 469 n.13 & 475 n.16.

\(^{123}\) *393 U.S. 385* (1969) (allowing local authorities to prevent racial discriminations in housing without a majority of votes from local voters).

\(^{124}\) *Washington*, 458 U.S. at 474–75 (quoting *Hunter*, 393 U.S. at 391 (footnote omitted)).

\(^{125}\) *Id.* at 472 n.15.
integration and the important role that local communities can play in fostering interracial interaction among their students—regardless of any constitutional obligation to do so:

Education has come to be "a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." When that environment is largely shaped by members of different racial and cultural groups, minority children can achieve their full measure of success only if they learn to function in—and are fully accepted by—the larger community. Attending an ethnically diverse school may help accomplish this goal by preparing minority children "for citizenship in our pluralistic society," while, we may hope, teaching members of the racial majority "to live in harmony and mutual respect" with children of minority heritage . . . .

It is undeniable that busing for integration—particularly when ordered by a federal court—now engenders considerably more controversy than does the sort of fair housing ordinance debated in Hunter [v. Erickson, 393 U.S. 385 (1969)] . . . . But in the absence of a constitutional violation, the desirability and efficacy of school desegregation are matters to be resolved through the political process.

The Court also cited with approval the decision of a three-judge panel in Lee v. Nyquist, a case involving a three-judge district court decision, which it affirmed without opinion. In Lee, as in Washington, the court dealt with a state measure that barred local school officials from assigning students to attend a school for the purpose of racial integration. In the process of invalidating that state law under the Hunter doctrine, the court recognized that

[although there may be no constitutional duty to undo de facto segregation, . . . . it is by now well documented and widely recognized by educational authorities that the elimination of racial isolation in the schools promotes the attainment of equal educational opportunity and is beneficial to all students, both black and white.]

The Washington and Lee decisions are the closest the Supreme Court has come to confronting the constitutionality of voluntary school integration, and further demonstrate that the Court neither viewed nor analyzed the development of its affirmative action jurisprudence in conjunction with its school desegregation jurisprudence. Significantly, Washington was decided four years after a splintered Court confronted the affirmative action policy in Bakke, and yet the

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126 Id. at 472–74 (internal citations omitted) (emphasis added).
129 Lee, 318 F. Supp. at 712; see also Washington, 458 U.S. at 469 (calling the facts of Lee "strikingly similar to the one[s] now before us").
130 Lee, 318 F. Supp. at 713.
majority opinion in *Washington* hardly makes mention of *Bakke* at all. Instead, both *Washington* and *Lee* contain repeated references to the Court's mandate and vision in *Brown* and the important role that local school officials and the political process can play in balancing "the desirability and efficacy of school desegregation." 

III. THE APPLICATION OF TRADITIONAL STRICT SCRUTINY TO INTEGRATION PROGRAMS MAKES LITTLE ANALYTICAL SENSE

A. Different Context and Framework

The central problem with applying strict scrutiny to K–12 student assignment programs is similar to the problems Justice Marshall raised with the early developments of the strict scrutiny standard. During the Court's struggles to determine the appropriate standard of review for affirmative action programs and education, Justice Marshall repeatedly voiced his concerns about a rigid approach to equal protection analysis. According to Justice Marshall,

> A principled reading of what this Court has done reveals that it has applied a spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause. This spectrum clearly comprehends variations in the degree of care with which the Court will scrutinize particular classifications, depending, I believe, on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn... That is, an approach in which "concentration [is] placed upon the character of the classification in question, the relative importance to individuals in the class discriminated against of the government-

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151 The majority opinion in *Washington* references *Bakke* only when stating that the Court will not pass on the issue of the propriety of the use of race in student assignments because the practice was not challenged in the instant litigation. 458 U.S. at 472 n.15.

152 *Id.* at 474; see *Lee*, 318 F. Supp. at 717 (observing that elected boards have the power to take measures to achieve racial equality).

tal benefits that they do not receive, and the asserted state interests in support of the classification.\textsuperscript{134}

The most important fact is that all integrative student assignments are achieved through voluntary choices by children seeking to attend a school other than their neighborhood school, with all children retaining the right to attend their neighborhood school.\textsuperscript{135} In the final analysis, every student, regardless of race, is assigned a school within the district, all of which are "equal" in that they provide the same resources, are held to the same standards, teach the same curriculum and employ the same policies. This approach to achieving integration is itself minimally intrusive. It is in error to believe that in the absence of the use of race, there would be unmitigated school choice.

Another problem with the application of the Grutter analysis to elementary and secondary school assignment plans is that the courts view K through 12 educational decisions through the lens of affirmative action rather than public school integration. Thinking of enrollment in public schools in terms of "denial" instead of "assignment" invites an unnatural analogy to the selective admissions policies of colleges and universities. In its affirmative action decisions, the Supreme Court faced applicants, candidates or contractors who competed for positions, promotions or public contracts that were typically finite in number or unique in kind, involving considerations of merit or cost.\textsuperscript{136} At issue in these cases, according to the Court, are what are often called "zero-sum games," with so-called "winners" and "losers."\textsuperscript{137} Courts have stated that the resulting "injury" is the denial, based in some part on race, of a legally cognizable benefit in the form of some limited good to which the complaining party may have otherwise been entitled.\textsuperscript{138}

This basis does not extend to the context of public school student assignment. There, the analysis must begin with the premise that

\textsuperscript{134} Rodríguez, 411 U.S. at 98–99 (Marshall, J., dissenting).

\textsuperscript{135} See Comfort v. Lynn Sch. Comm. (Comfort II), 283 F. Supp. 2d 328, 334–35, 348 (D. Mass. 2003) (upholding a plan allowing parents and children to voluntarily balance race in schools); Mead, supra note 21, at 125–26 (arguing that parents and children should be able to voluntarily select a school in order to achieve racial balance).


\textsuperscript{138} See Hampton v. Jefferson County Bd. of Educ., 102 F. Supp. 2d 358, 380 (W.D. Ky. 2000) ("The workplace, marketplace, and higher education cases are poor models for most elementary and secondary public school education precisely because they always involve vertical choices—one person is hired, promoted, receives a valuable contract, or gains admission.").
students have no right to attend a particular public school and that every child will have the opportunity to go to school. Until fairly recently, the American system of public education afforded students no opportunity to choose where to go to school; they simply attended the facility to which school authorities assigned them. The only clearly established constitutional requirement in such assignment decisions is that students not be segregated by race. Otherwise, all students who reside within a district can be and are assigned to one of the schools within the system; in a public school system, no student is "denied" an assignment. In the limited instances where school districts elect to afford some degree of choice in assignment, typically there are no determinations of merit or qualifications to attend a particular school, even though some schools may turn out to be more popular among students than others.

This distinction is also of importance in a system where assignment decisions balance numerous objectives, but do not take into account test scores, grades, essays or any other matters relating to a student's merit or entitlement to attend a particular school. Unlike higher education or even selective secondary schools, school boards with race-conscious student assignment plans do not get involved in weighing comparative criteria in a competitive manner. Rather than excluding applicants, the goal of integrative programs is to create a more equitable school community for the education of all of its students. This does not require a focus on the strengths and weaknesses of individual students. For example, while the integration

139 See Johnson v. Bd. of Educ., 604 F.2d 504, 515 (7th Cir. 1979), vacated and remanded on other grounds, 449 U.S. 915, 457 U.S. 59 (1982) ("Federal and state courts have uniformly rejected the contention of a constitutional right to attend a particular school.") (citations omitted).

140 See, e.g., Bazemore v. Friday, 478 U.S. 385, 408 (1986) (White, J., concurring) ("[S]chool boards customarily ... designate the school that particular students may attend ... "); Johnson, 604 F.2d at 515 (ruling that students do not have a constitutional right to attend a particular school); Comfort v. Lynn Sch. Comm. (Comfort I), 263 F. Supp. 2d 209, 257-58 (D. Mass. 2003) ("Nothing compels a school district to allow parents to choose their child's school. There is no entitlement to attendance at a given school .... ")


142 See Comfort I, 263 F. Supp. 2d at 228 (requiring no qualifications to attend any schools within the district). But see Grutter, 539 U.S. at 315 (requiring, as a prerequisite to admission in a selective law school, grades, standardized tests, essays and other factors); Wessman v. Gittens, 160 F.3d 790, 791 (1st Cir. 1998) (requiring an examination score for admission to a selective high school).

143 See Hampton, 102 F. Supp. 2d at 379 (stating that only race matters in the assignment process examined).

plan in Comfort seeks to foster interracial tolerance and understanding by permitting and encouraging students to make voluntary integrative transfers among its schools, the ability to take advantage of such transfers does not hinge upon any determination of qualification or merit. Further, all students, regardless of race, may seek integrative transfers under the plan. Thus, absent in this context are the kinds of concerns raised in affirmative action cases about the permissibility of preferences or favoritism in a competitive process.

Conflating the unique goals and interests of a public school system and higher education also impacts the application of the narrow tailoring component of the strict scrutiny analysis. The Bakke and Grutter approaches to narrow tailoring do not translate mechanically to the pre-collegiate levels of public education. The Bakke-type diversity, also at issue in Grutter, is an expressive "diversity of viewpoints" predicated on the notion that people of different backgrounds will make unique contributions to academic discourse. This type of diversity "encompasses a far broader array of qualifications . . . of which racial and ethnic origin is but a single though important element." However, desegregation in the K–12 context is not based on "genuine" or view point diversity discussed in Grutter, but a commitment to racial and ethnic diversity. The diversity interest pushed by school boards seeking racial integration does not rely on any assumptions about any group's or individual's unique contribution, but reflects a concern that elementary and secondary school children get used to being in a classroom with people of different races and ethnicities.

Reading the United States Constitution to require consideration of race only as a "plus" factor, for example, in addition to other things such as sex, socio-economic background, family background, or life experiences would only be a more convoluted way to achieve racial integration and would impose fundamentally different education-

145 Compare Grutter, 539 U.S. at 315, and Wessman, 160 F.3d at 791, with Comfort v. Lynn Sch. Comm. (Comfort II), 283 F. Supp. 2d at 377 (the former cases involve merit-based admission policies, contrary to that in Comfort II).
146 Grutter, 539 U.S. at 306; see also Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 321 (1978) (stressing how essential diversity is to higher education).
147 Wessman, 160 F.3d at 798.
148 See Comfort v. Lynn Sch. Comm. (Comfort III), 418 F.3d 1, 15 (1st Cir. 2005) (holding that racial diversity can be a valid objective, and the school need not prove viewpoint diversity); Brewer v. W. Irondequoit Cent. Sch. Dist., 32 F. Supp. 2d 619, 627–28 (W.D.N.Y. 1999) (school program prohibiting non-minority students from transferring out of city schools to suburban schools, when the same opportunity is available to minorities).
149 See Brewer, 212 F.3d at 742 (observing that the school program's main goal is to reduce minority isolation); Comfort II, 283 F. Supp. 2d at 333–35 (arguing that allowing students to learn in a racially diverse environment promotes racial harmony in the society); Comfort v. Lynn Sch. Comm., 100 F. Supp. 2d 57, 65 n.12 (D. Mass. 2000) (expressing a concern with the racial diversity of the school, not viewpoint diversity).
tional goals on the school systems, turning student assignment policies into a mini-college admissions process. Courts should not force this outcome on schools because schools want to educate students in a racially integrated setting. In this context, where racial integration rather than "genuine diversity" is the goal, common sense says that the narrowest way to achieve that goal is to use race itself. Moreover, whatever the benefits that might be derived by adding these characteristics to the considerations for student assignment, doing so would not promote racial integration. For instance, making allowances for white children from economically disadvantaged backgrounds may only worsen the segregation. If the goal identified is one of racially integrated schools, the addition of more white children in an already predominantly white school (or more minority children in an already predominantly minority school) would merely increase the levels of isolation regardless of the unique talents or socioeconomic status of the newly admitted students. The distinct benefits of racial integration are gained through racial interaction. If one of the goals is to block the formation of stereotypes and racist attitudes, the most effective route is to promote multiracial interaction with exclusively race-based assignment processes. Theoretical discussions about racial tolerance are insufficient to effect change without meaningful contact with students of different races.

B. Strict Scrutiny Is Not Automatically Applied in All Other Contexts Where Race Is Considered

Despite its seemingly definitive language in Adarand, the Supreme Court has not automatically applied strict scrutiny to all governmental uses of race, influenced, in part, by the tradition of deference afforded to the governmental entity or the nature of the legislation. The application of strict scrutiny in the context of voluntary integra-

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151 See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1 (Parents Involved II), 426 F.3d 1162, 1191 (9th Cir. 2005) ("When racial diversity is a principal element of the school district's compelling interest, then a narrowly tailored plan may explicitly take race into account."); Comfort III, 418 F.3d at 18 (stating that when racial diversity is the compelling interest and goal, "[t]he only relevant criterion, then, is a student's race . . . ."); Brewer, 212 F.3d at 752 ("If reducing racial isolation is—standing alone—a constitutionally permissible goal . . . then there is no more effective means of achieving that goal than to base decisions on race."); Hunter v. Regents of the Univ. of Cal., 190 F.3d 1061, 1067 (9th Cir. 1999) (upholding the use of race in a laboratory school where the goal was obtaining a racially balanced research sample).

152 This is true in the context of schools, prisons, and electoral redistricting. In addition, because of the history of political relations between the federal government and Native Americans, strict scrutiny has not been evoked for classifications based on Native American ancestry. Ancheta, supra note 98, at 26.
tion programs would involve the Court in the unnecessary and artificial task of judging the extent to which a school board's consideration of race, in isolation from the truly complex web of motivations and considerations that drive public school student assignment decisions, can be labeled "compelling." There are many educationally-related goals of which school boards may be conscious in the assignment of their students. Considering race in combination with other interrelated aspects of the assignment mechanism may serve many of these interests. Indeed, strict scrutiny involves the search for an overarching constitutionally compelling motive and an analysis of competing models with the goal of identifying an alternative procedure in which race is absent or less weighted, even though that alternative significantly impedes the realization of the many other goals of student assignment.

For this reason, the fact that a student choice plan takes race into account should no more trigger classic strict scrutiny than the mere consideration of race in electoral redistricting should trigger strict scrutiny. In the realm of electoral redistricting, the Court has held that the consideration of race in legislative redistricting does not automatically trigger strict scrutiny as "the theory of strict scrutiny [has] yielded to the need for an electoral system that is equally open to members of minority groups." In Miller, the Court held that legislatures must be given the leeway to consider race because racial considerations are necessary to comply with the Voting Rights Act and with constitutional mandates. Moreover, legislative redistricting is within the authority of legislatures and, therefore, "the legislatures must have discretion to exercise the political judgment necessary to balance competing interests and courts must exercise extraordinary


154 Pamela S. Karlan, Easing the Spring: Strict Scrutiny and Affirmative Action After the Redistricting Cases, 43 WM. & MARY L. REV. 1569, 1603 (2002); see also Miller, 515 U.S. at 916 (indicating that legislative enactments will be afforded a presumption of good faith unless a plaintiff proves that the legislature subordinated traditional race-neutral districting principles to racial considerations). Analyses in electoral redistricting cases rest in part on the Voting Rights Act's and the Fifteenth Amendment's requirement of the awareness and consideration of race in electoral policies. While there are no parallel laws in the realm of public education, there are federal statutory, state statutory and constitutional provisions to either maintain racially integrated schools or to avoid programs that have a disparate impact on racial groups. Furthermore, Brown requires a degree of racial awareness and action on the part of school boards. At issue in Brown was the goal of eliminating separate schools identifiable by race. Elementary and secondary school integration programs are an evolution and steps towards realization of the Brown principles.

155 See also Bush, 517 U.S. at 992 (O'Connor, J., concurring) (emphasizing that leeway should be granted to states so they are not trapped between "competing hazards of liability").
caution in adjudicating claims that a State has drawn district lines on the basis of race." Therefore, courts assessing a redistricting plan "must be sensitive to the complex interplay of forces that enter a legislature’s redistricting calculus." Accordingly, strict scrutiny is not applied unless race is the predominant factor in creating a legislative district; not just a factor in the decision. And, not only must race predominate, but the plaintiff must also prove that "the legislature subordinated traditional race-neutral districting principles" to racial considerations. Finally, the Court acknowledged that in seeking to challenge electoral districts on the basis of race, the burden of proof on plaintiffs is a "demanding one." And, until the plaintiff meets this burden, the good faith of the legislature must be presumed.

While the Supreme Court has not yet articulated another context in which strict scrutiny will only be triggered if the use of race is found to predominate the decision-making process, there are parallels between legislative redistricting and K–12 education that support the conclusion that the adoption of race-conscious student assignment programs to eliminate segregation should not automatically trigger strict scrutiny.

School boards, like legislatures, must also comply with federal and state constitutional and statutory requirements, many of which require school boards to maintain racially integrated schools or to avoid programs that have a disparate impact on racial groups. In order to avoid violating these statutory and constitutional provisions, some level of race-consciousness when addressing student assignments is necessary.

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157 Miller, 515 U.S. at 915–16.
158 Easley, 532 U.S. at 241 (reiterating the "predominant" factor requirement of Miller).
159 Miller, 515 U.S. at 916.
159 Easley, 532 U.S. at 241 (citing Miller, 515 U.S. at 928 (O'Connor, J., concurring)).
160 See Miller, 515 U.S. at 916 (describing the burden placed on plaintiffs in districting cases).
161 Ancheta, supra note 98, at 40. But see NAACP v. San Francisco Unified Sch. Dist., 59 F. Supp. 2d 1021, 1025 (N.D. Cal. 1983) (describing a stipulated settlement allowing use of race or ethnicity in student assignments provided that race or ethnicity "may not be the primary or predominant consideration in determining" student admission criteria).
162 See generally Karlan, supra note 154, at 1578 (recognizing how inevitable racial awareness is to redistricting and admissions decisions).
163 See, e.g., Racial Imbalance Act, Mass. Ann. Laws ch. 71, § 37D (LexisNexis 2000) (directing the Board of Education to remedy de facto segregation in the public schools throughout Massachusetts); Brown v. Bd. of Educ., 347 U.S. 483 (1954) (finding that racial segregation in public schools violates the Equal Protection Clause); 34 C.F.R. § 100.3(b)(2) (2001) (forbidding recipients of federal funds from utilizing "criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color or national origin").
In redistricting, plaintiffs must establish that race predominated over race-neutral districting principles such as "compactness, contiguity and respect for political subdivisions or communities" in order for strict scrutiny to apply. Like redistricting, factors other than race are considered when implementing student assignment plans. Indeed, other considerations, such as respecting the ability of children to attend their neighborhood school and keeping siblings together, are routinely given more weight than race in determining student assignment. Requiring the identification of a discrete state interest in order to then scrutinize the policy for narrow tailoring fails to account for the realities of operating a K-12 educational system. School boards do not deliberate on each of these considerations in a vacuum or without practical limitations. Rather, they must also balance these goals with real world constraints such as budgetary allocations, finding ways to raise and distribute funds in a manner that reflects school equality and provides equity, and managing school transfers to avoid the neglect of any schools in the district. With the application of strict scrutiny, courts have evaluated the myriad of complex pragmatic and educationally-related considerations the school boards must weigh in developing their student assignment policies and program and resource allocation initiatives for the purpose of isolating a single motivating factor that can be labeled "compelling" in isolation from other considerations school boards consider in crafting their student assignment programs. This approach does not allow one to evaluate the plan as a whole, but forces focus on the one aspect that uses race, ignoring that there is an essential relationship between the race-conscious aspects of the plan and the curricular and structural changes in achieving their goals. Without the racial piece, the rest of the student assignment plan would fail to accomplish the intended goal.

The concurring and dissenting opinions by five Justices in a recent Supreme Court decision further softens the Court's pronouncement in *Adarand* that all racial classifications must automatically be subjected to strict scrutiny. In *Johnson v. California*, an
African-American prisoner challenged the California Department of Corrections’ policy of separating prisoners in double cells by race for up to sixty days each time a prisoner enters a new correctional facility in order to avoid gang and racial violence.\(^\text{169}\) In determining that strict scrutiny should apply to assess the constitutionality of the policy, the majority stated that a court must “apply strict scrutiny to all racial classifications to ‘smoke out’ illegitimate uses of race by assuring that government is pursuing a goal important enough to warrant use of a highly suspect tool.”\(^\text{170}\) Despite this language in the majority opinion, several Justices wrote separate opinions to support the general proposition that the use of race does not automatically trigger the application of strict scrutiny, particularly where the use of race is remedial or where the governmental entity has historically been afforded substantial deference.

First, three Justices, Justice Ginsberg, Justice Breyer and Justice Souter, joined the majority opinion in stating that the classification at issue was “stereotypical” and warranted the application of strict scrutiny,\(^\text{171}\) but filed a concurring opinion to state that “the same standard of review ought not to control judicial inspection of every official racial classification.”\(^\text{172}\) While the Justices agreed that “state-imposed racial segregation is highly suspect and cannot be justified on the ground that ‘all persons suffer the [separation] in equal degree,’”\(^\text{173}\) they also clearly expressed the belief that “actions designed to burden groups long denied full citizenship stature are not sensibly ranked with measures taken to hasten the day when entrenched discrimination and its aftereffects have been extirpated.”\(^\text{174}\)

In dissent, Justice Thomas, joined by Justice Scalia, argued that temporary segregation in prisons should not be subject to strict scrutiny, essentially for three interrelated reasons. First, Justice Thomas argued that strict scrutiny should not be applied because the Court has recognized that “constitutional demands are diminished in the unique context of prisons.”\(^\text{175}\) Thomas asserted that the case presented the Court with the challenge of applying two conflicting lines

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\(^{169}\) Id. at 502.

\(^{170}\) Id. at 506 (quoting City of Richmond v. J. A. Croson Co., 488 U.S. 469, 493 (1989) (plurality decision)).

\(^{171}\) Id. at 516.

\(^{172}\) Id.

\(^{173}\) Id. (quoting Powers v. Ohio, 499 U.S. 400, 410 (1991)).


\(^{175}\) Johnson, 543 U.S. at 541.
of precedent. The first line of precedent stems from *Adarand*'s pronouncement that all racial classifications must be subjected to strict scrutiny. The second is the Court's clear statements that a "relaxed" standard of review "applies to all circumstances in which the needs of prison administration implicate constitutional rights."

Second, Thomas advised that the courts should defer to the experts on the "proper" administration of prisons. Thomas cited to several instances in which the Court acknowledged that "experienced prison administrators, and not judges, are in the best position to supervise the daily operations of prisons across this country." This philosophy has led the Court to use the relaxed standard of review regardless of the standard that would apply outside of the prison context. According to Thomas, such deference is necessary because:

Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration. The rule would also distort the decisionmaking process, for every administrative judgment would be subject to the possibility that some court somewhere would conclude that it had a less restrictive way of solving the problem at hand. Courts inevitably would become the primary arbiters of what constitutes the best solution to every administrative problem, thereby unnecessarily perpetuating the involvement of the federal courts in affairs of prison administration.

Finally, Thomas argues that because the broad-sweeping language in *Adarand* and other affirmative action cases only "addressed the contention that classifications favoring rather than disfavoring blacks are not exempt," California's "neutral" practice of cell assignment where "no cells are designated for, nor any special privileges afforded to, any racial group" should not be subjected to the same level of scrutiny as uses of race that are not neutral. Thomas believes this contention is further supported because race is only one factor among many considered in housing decisions in California prisons. Prison officials also take into account gang affiliation, geographic

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176 Id. at 524.
178 Id. at 541.
179 Id. at 529 (citing Jones v. N.C. Prisoners' Labor Union, Inc., 433 U.S. 119, 125 (1977) and Procunier v. Martinez, 416 U.S. 396, 405 (1974)).
180 Id. at 530–31 (describing prior cases where prisoners' constitutional claims are not afforded the same standard of review as would apply outside of prison).
181 Id. at 531 (quoting Turner v. Safley, 482 U.S. 78, 89 (1987) (internal quotation marks and alterations omitted)).
182 Id. at 555.
183 Id. at 535–36.
origin, national origin, physical size, age, criminal history, mental health, and medical needs.  

Surprisingly, Justice Thomas's dissenting opinion stands as a blueprint of why the automatic application of strict scrutiny to K–12 integration programs makes little analytical sense. First, as in the context of prisons, there is a long history of school cases where the courts have held that students have different constitutional rights in the unique context of elementary and secondary education. While there are no constitutional rights implicated when a school district considers race as one factor among many in assigning students to generally interchangeable schools, that line of cases is still enlightening as to the Court's historical treatment of the interests of public school students. Second, there is a long line of precedent acknowledging that school administrators know better than courts what kind of learning environment is best for children and, as a result, are afforded considerable deference by the courts. Finally, unlike other cases in which strict scrutiny is applied, there is no legally cognizable privilege, benefit, or burden on a student being required to attend his or her zoned neighborhood school. Thomas apparently agrees that the absence of a "special privilege" should play a role in the constitutional analysis as to what standard courts apply. Coupled with the long-acknowledged benefits of being educated in an integrated environment and the undeniable harms of being educated in a segregated environment, the Court should find the case even more compelling when the policy that is challenged is one of integration of children rather than segregation of prisoners. Indeed, even the majority opinion in Johnson stands for the proposition that racial segregation is so abhorrent that great lengths must be taken to protect and promote integration.

C. A Different Level of Constitutional Scrutiny Applies in Elementary and Secondary Schools

The Supreme Court has carved out certain arenas in which constitutional rights are balanced against the need for discretion of those

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184 Id.
185 See infra notes 190–93 and accompanying text.
186 See supra note 141 and accompanying text.
187 See infra notes 197–202 and accompanying text.
188 See Johnson, 543 U.S. at 509 ("The United States contends that racial integration actually 'leads to less violence in [prisons] and better prepares inmates for re-entry into society.'" (quoting Brief for United States as Amicus Curiae Supporting Petitioner at 25, Johnson v. California, 543 U.S. 499 (2005) (No. 03-636))).
charged with running the institution. In his dissenting opinion in *Hazelwood School District v. Kuhlmeier*, Justice Brennan stated that

[public education serves vital national interests in preparing the Nation's youth for life in our increasingly complex society and for the duties of citizenship in our democratic Republic. The public school conveys to our young the information and tools required not merely to survive in, but to contribute to, civilized society. It also inculcates in tomorrow's leaders the "fundamental values necessary to the maintenance of a democratic political system. . . ."

The public educator's task is weighty and delicate indeed. It demands particularized and supremely subjective choices among diverse curricula, moral values, and political stances to teach or inculcate in students, and among various methodologies for doing so. For these reasons, public elementary and secondary schools are among those arenas. Indeed, the Supreme Court has acknowledged that the educational environment presents "special characteristics" and, although elementary and secondary school students are entitled to protection of their constitutional rights, those rights are not afforded the same level of protection as those of adults.

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191 Id. at 278 (Brennan, J., dissenting) (quoting Ambach v. Norwich, 441 U.S. 68, 77 (1979)) (citations omitted); see also Comfort v. Lynn Sch. Comm. (*Comfort II*), 283 F. Supp. 2d 328, 374 (D. Mass. 2003) ("Over and over again, courts have given school boards discretion to weigh the constitutional rights of students against the unique demands of a public education setting and curricular needs."); Brown, *supra* note 118, at 68-69 ("The Supreme Court's education jurisprudence makes it clear that the Court has interpreted constitutional rights in light of the special environment of public education. This general view of education has shifted the emphasis in educational disputes from a rights-based to a values-based ideology. Thus, the Court's determination of constitutional rights outside of the context of public education does not necessarily dictate their scope within the special environment of public education.") (footnote omitted) (quoting Rosemary C. Salomone, *Common Schools, Uncommon Values: Listening to the Voices of Dissent*, 14 YALE L. & POL'Y REV. 169, 186 (1996)); Ryan, *supra* note 189, at 1338 ("[T]he Court has characterized the government as acting in a special capacity—that of educator—and has accordingly given education officials greater leeway to bend constitutional rights in order to achieve certain educational goals.").


193 See id.; see also Bd. of Educ. v. Earls, 536 U.S. 822, 830 (2002) ("A student's privacy interest is limited in a public school environment where the State is responsible for maintaining discipline, health, and safety."); Vernonia Sch. Dist. 47 v. Acton, 515 U.S. 646, 664-65 (1995) (holding that random drug testing of student athletes in public schools does not violate the Fourth or Fourteenth Amendment protections against unreasonable searches and seizures); New Jersey v. T.L.O., 469 U.S. 325, 347 (1985) (upholding search of student's purse under the Fourth Amendment when there are reasonable grounds that the search will turn up evidence of infrac-
In *Hazelwood*, the Court dealt with the censorship of a student-published high school newspaper to remove articles dealing with issues of teen pregnancy and divorce. Quoting *Tinker v. Des Moines Independent Community School District*, the Court reiterated that "[s]tudents in the public schools do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'" However, the Court went on to state that

[educators are entitled to exercise greater control . . . to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school.]

The Court reasoned that if schools were not allowed to exercise greater control over the speech of their students, "the schools would be unduly constrained from fulfilling their role as 'a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.'" It is only when the action taken has no valid educational purpose that the First Amendment is so "directly and sharply implicate[d]" as to require judicial intervention to protect students' constitutional rights.

The principles announced in *Hazelwood* have guided the Court in its assessment of the level of First Amendment protection to afford in the educational environment. Lower federal courts have followed the Supreme Court's lead and have recognized that educators' decisions implicating the First Amendment are entitled to substantial deference.

> 194 *Hazelwood*, 484 U.S. at 260.
> 195 Id. at 262–64.
> 196 *Tinker*, 393 U.S. at 503.
> 197 *Hazelwood*, 484 U.S. at 266 (quoting *Tinker*, 393 U.S. at 506).
> 198 Id. at 271.
> 199 Id. at 272 (quoting Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954)).
> 200 Id. at 273 (quoting Epperson v. Arkansas, 393 U.S. 97, 104 (1968)) (citation omitted).
> 202 See, e.g., Nicholson v. Bd. of Ed. Torrance Unified Sch. Dist., 682 F.2d 858 (9th Cir. 1982) (holding that there is no violation in declining to rehire a journalism teacher on the basis that the teacher violated a school policy requiring review of student submissions); Seyfried v. Walton, 668 F.2d 214 (3rd Cir. 1981) (upholding a principal's decision to cancel a student musical because of its sexual theme); Trachtman v. Anker, 563 F.2d 512 (2d Cir. 1977) (declaring that school authorities can prohibit distribution of a sex questionnaire to high school freshmen and sophomores, but not juniors and seniors); Frasca v. Andrews, 463 F. Supp. 1043 (E.D.N.Y. 1979) (upholding the school's ability to seize student newspaper materials on the grounds that the materials would create disorder and disruption).
Similarly, in the area of Fourth Amendment rights, the Supreme Court has held that "[s]ecuring order in the school environment sometimes requires that students be subjected to greater controls than those appropriate for adults."\(^{205}\) In *Board of Education v. Earls*, the Court reiterated that "‘special needs’ inhere in the public school context. While schoolchildren do not shed their constitutional rights when they enter the schoolhouse, ‘Fourth Amendment rights . . . are different in public schools than elsewhere . . .’\(^{204}\) Similar to that of First Amendment rights, the privacy rights of a student must be balanced against “the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds.”\(^{205}\) Therefore, the “school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject\(^{206}\) and the prohibition of activities that are stringently protected if committed outside of the educational environment.\(^{207}\)

The decisions in *Hazelwood*, *Earls*, *Tinker* and *T.L.O.* evidence the Court’s understanding that the good faith decisions of educators should be afforded deference and that educators must enjoy flexibility in crafting methods to achieve their educational goals, even in light of constitutional protections.\(^{208}\) These categories of opinions rest on the general foundation that the standards of review of the Court should “neither unduly burden the efforts of school authorities to maintain order in their schools nor authorize unrestrained intrusions upon the [rights] of schoolchildren.”\(^{209}\) The goals of educating children in an integrated environment are no less compelling than those the Court articulated to justify diminished First Amendment and Fourth Amendment protection for students.

**CONCLUSION**

Federal courts should resist the request to import the strict scrutiny analysis from the affirmative action context and apply it to the voluntary school integration context to limit the broad latitude that school districts have traditionally enjoyed, and indeed need, in order to make sensitive, well-informed, educational policy decisions. Not


\(^{204}\) *Id.* at 829–30 (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653, 656 (1995)) (citations omitted).


\(^{206}\) *Id.* at 340.

\(^{207}\) *Id.* at 339.


\(^{209}\) *T.L.O.*, 469 U.S. at 342–43.
only would doing so run counter to the historical development of the Supreme Court's jurisprudence, but it would make little sense from a philosophical, analytical, and practical perspective. The qualitative and analytical differences between affirmative action and voluntary integration programs in the K–12 context, when viewed in conjunction with the distinct history and context out of which voluntary school integration emerged, and the critical, practical impact of subjecting race-conscious policies to "the skeptical, questioning, beady-eyed scrutiny"\(^\text{210}\) of strict scrutiny make it clear that strict scrutiny has no place here. In the end, when a school district takes race into account for the purpose of integration in student assignment, there simply is no legal injury; on the contrary, there is instead a universally shared benefit for all students—namely, the opportunity to learn in a racially integrated educational setting. The Court's decisions to apply strict scrutiny do not afford school districts the discretion necessary to implement and maintain policies that would prevent a return to the kinds of racially isolated conditions that first garnered the attention of those school boards. Rather, it empowers judges to make sensitive pedagogical decisions best left to school boards and educational experts.

\(^{210}\) Wittmer v. Peters, 87 F.3d 916, 918 (7th Cir. 1996).