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Integration Without Classification: Moving Toward Race-Neutrality in the Pursuit of Public Elementary and Secondary School Diversity

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NOTE

Integration Without Classification: Moving Toward Race-Neutrality in the Pursuit of Public Elementary and Secondary School Diversity

Paul Diller*

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INTRODUCTION

Ever since the Supreme Court’s invalidation of racially segregated public schools in *Brown v. Board of Education*,¹ America has wrestled with the challenge of successfully dismantling educational apartheid. In recent years, the federal judiciary has largely retreated from enforcing desegregation in school districts that were once under court supervision for engaging in intentional racial discrimination, finding that the vestiges of past discrimination have been satisfactorily ameliorated.² In some such unitary school districts,³ as well as in districts in

* The author would like to thank Professor Roderick M. Hills, Jr., for his assistance.

1. 347 U.S. 483 (1954) [hereinafter *Brown I*].

2. See Tamar Lewin, *Public Schools Confronting Issue of Racial Preferences*, N.Y. TIMES, Nov. 29, 1998, § 1, at 1 (noting that the “desegregation orders imposed by the courts decades ago are [being] lifted in more and more areas,” including “Nashville, Oklahoma

which no intentional segregation was ever identified by the courts, boards of education have voluntarily⁴ implemented student assignment plans⁵ designed to increase racial diversity. Many of these plans, particularly those explicitly relying on individual racial classifications, have come under legal attack as unconstitutional violations of the Equal Protection Clause of the Fourteenth Amendment.⁶ In the absence of clear Supreme Court precedent on the matter,⁷ federal courts have struggled with the question of what role, if any, racial classifications may constitutionally play in the assignment of public school students.

City, Denver, Wilmington, Del., and Cleveland"). The desegregation decree has also recently been lifted in Louisville, Kentucky. See *Hampton v. Jefferson County Bd. of Educ.*, 102 F. Supp. 2d 358 (W.D. Ky. 2000).

3. A "unitary" school district is one that "has eliminated the vestiges of its prior discrimination and has been adjudicated as such through the proper judicial procedures." *Bd. of Educ. v. Dowell*, 498 U.S. 237, 245 (1991) (quoting *Georgia State Conference Branches of NAACP v. Georgia*, 775 F.2d 1403, 1413 n.12 (11th Cir. 1985) (internal quotation marks omitted)). In other words, a school district found by the federal judiciary to have operated a "dual," or segregated, school system remains under court order to remedy this discrimination until the judiciary ultimately concludes that judicial supervision is no longer constitutionally required. At this point, when the school district is freed of court supervision, it is considered "unitary."

In *Green v. County School Board*, 391 U.S. 430, 435 (1968), the Court listed six factors to be used by lower courts in determining whether a school district had achieved unitary status: student attendance patterns, faculty, staff, transportation, extracurricular activities, and facilities. See also *Freeman v. Pitts*, 503 U.S. 467, 486 (1992) (discussing these "*Green* factors"). In *Freeman*, the Court held that a district court may find a school district unitary with regard to some of the *Green* factors, and not to others, and thereby "return control to the school system in those areas where compliance has been achieved, limiting further judicial supervision to operations that are not yet in full compliance with the court decree." *Id.* at 491. Since this Note focuses on the *Green* factor of student attendance patterns, it will use the term "unitary" to refer to school districts that have been declared "unitary" *at least* with respect to this factor alone. More generally, it will use the term "unitary" to refer to any school district that is not currently under a court order to desegregate, regardless of whether the school district *ever was* under such an order.

4. This Note uses the term "voluntary" to distinguish between uses of racial classifications adopted by a state actor under no court order to remedy past discrimination and those imposed by a federal court, which, of course, must logically be constitutional when adopted. See *Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 233 F.3d 232, 274 (4th Cir. 2000) ("[C]ourt-ordered remedial action cannot be found violative of the Constitution."), *vacated and reh'g en banc granted* (4th Cir. Jan. 17, 2001) (on file with author); cf. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

5. This Note uses the term "student assignment plan" to mean the process by which the public school district distributes its students among the district's schools.

6. U.S. CONST. amend. XIV, § 1 (forbidding a State from "deny[ing] to any person . . . the equal protection of the laws").

7. See Lewin, *supra* note 2, at 1 ("[T]he question of whether the educational value of diversity justifies race-conscious policies in public schools is an open one, never directly addressed by the United States Supreme Court."); see also *Hampton*, 102 F. Supp. 2d at 378 ("The Supreme Court has never considered, however, whether educational diversity could be a compelling goal of public secondary education.").

The modern history of racial classifications and public education begins with *Brown*. While in the immediate aftermath of *Brown* the Court remained deliberately ambiguous in prescribing precisely how the system of school segregation was to be dismantled,⁸ many observers believed the *Brown* Court to have endorsed a principle of governmental race-neutrality, or “colorblindness,” in declaring separate-but-equal schools unconstitutional, thereby outlawing only those forms of de jure segregation⁹ that explicitly discriminated.¹⁰ The ineffectiveness

8. See *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955) [hereinafter *Brown II*] (ordering the federal district courts to issue decrees and orders desegregating the public schools in the South “with all deliberate speed”).

9. De jure discrimination is intentional discrimination by the state, which may take the form of laws explicitly discriminating against racial and ethnic minorities, but may also exist in the form of race-neutral laws enacted with a discriminatory purpose or administered in a discriminatory way. WILLIAM B. LOCKHART ET AL., *CONSTITUTIONAL LAW* 1182 (8th ed. 1996). De facto segregation, on the other hand, describes segregation that is not the result of any purposeful government action. See *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 208 (1973) (“[T]he differentiating factor between de jure segregation and so-called de facto segregation . . . is purpose or intent to segregate.”).

Southern and some near-Southern states generally used explicitly discriminatory laws to effectuate segregation. See *Brown I*, 347 U.S. 483, 486 n.1 (1954) (noting that Delaware, Virginia, and South Carolina all had state constitutional provisions and statutes that required the segregation of blacks and whites in public schools; Kansas had a statute that permitted, but did not require, segregation). Such explicitly discriminatory schemes were undoubtedly declared unconstitutional in *Brown*. If *Brown* only required facial colorblindness, however, then de jure discrimination in the form of race-neutral policies enacted with a discriminatory purpose would be valid. It was not until 1973, in *Keyes*, 413 U.S. 189 (1973), that the Supreme Court made clear that race-neutral de jure discrimination — accomplished through school construction, gerrymandering attendance zones, and excessive use of mobile classroom units — amounted to unconstitutional segregation.

10. For instance, the Attorney General’s brief to the Court noted that in communities where residential segregation existed, the abolition of segregation in schools would produce few serious dislocations, and virtually no wholesale transfer of students. See John N. Popham, *Segregation: South Looks Ahead*, N.Y. TIMES, May 23, 1954, at 4E (quoting brief). The Attorney General’s office, at least in 1953, therefore, thought that desegregation meant the mere requirement of colorblindness, not the pursuit of affirmative race-conscious measures of integration. See *id.* (“[T]he lack of wholesale transfers after desegregation would result from purely geographic factors, because the pupils of a school ordinarily reflect the composition of the population of the district in which it is located.” (quoting brief) (internal quotations omitted)). A *New York Times* editorial within a week of *Brown* extolled the decision as finally establishing the rule of colorblindness advocated by Justice Harlan in his famous dissent in *Plessy v. Ferguson*, 163 U.S. 537, 554 (1896) (Harlan, J., dissenting), in which he stated, “In respect of civil rights, common to all citizens, the Constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights.” See Editorial, *Justice Harlan Concurring*, N.Y. TIMES, May 23, 1954, at 10E. In *Brown II* the Court itself seemed to be requiring only governmental race-neutrality when it mandated that all black students be “admit[ted] to public schools on a racially nondiscriminatory basis.” *Brown II*, 349 U.S. at 301.

Nine years after *Brown*, President John F. Kennedy also viewed the decision as validating Harlan’s proposed rule of colorblindness. See John F. Kennedy, *Radio and Television Report to the American People on Civil Rights*, PUB. PAPERS 468, 471 (June 11, 1963) [hereinafter Kennedy, *Radio and Television Report*] (stating that “the Negro community . . . ha[s] a right to expect that the law will be fair, that the constitution will be color blind, as Justice Harlan said at the turn of the century”); see also John F. Kennedy, *Special Message to the Congress on Civil Rights*, 6 PUB. PAPERS 221, 221 (Feb. 28, 1963) (quoting approvingly Justice Harlan’s assertion that “Our Constitution is color blind”). Indeed, Kennedy viewed

of mere colorblindness, however, in achieving meaningful school integration within the first fourteen years after *Brown* led the Court to endorse, and often require, race-consciousness as a method of accomplishing desegregation.¹¹ As a result, beginning with the seminal 1968 *Green v. County School Board* decision, the Court clarified the *Brown* desegregation mandate as charging school boards “with 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.”¹² In 1971, in *Swann v. Charlotte-Mecklenburg Board of Education*, the Court again made clear that merely facially race-neutral student assignment plans were not necessarily sufficient to remedy the constitutional injury in formerly de jure segregated school districts.¹³

Green and *Swann*, therefore, held that not only was race a permissible factor in student assignment, but that, at least in school districts found to have engaged in de jure discrimination, considerations of race, including racial classifications, were sometimes required.¹⁴

the Court's decision in *Brown* and subsequent cases nullifying segregation as affirming the proposition that “race has no place in American life or law.” Kennedy, *Radio and Television Report*, *supra*, at 469.

11. See *Green v. County Sch. Bd.*, 391 U.S. 430, 438 (1968) (holding that the formerly segregated New Kent County's “freedom-of-choice” plan, which allowed students to choose whether to attend the formerly all-black school or the formerly all-white school (and was, therefore, nominally race-neutral), had merely maintained the unconstitutional status quo of segregation).

12. *Green*, 391 U.S. at 437-38; see also *Freeman v. Pitts*, 503 U.S. 467, 472 (1992) (describing *Green* as a “turning point” in the Court's desegregation jurisprudence).

13. See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 28 (1971), (“‘Racially neutral’ assignment plans proposed by school authorities to a district court may be inadequate. . . . [A]n assignment plan is not acceptable simply because it appears to be neutral.”). Specifically, *Swann* approved of the “frank — and sometimes drastic — gerrymandering of school district and attendance zones,” even when these zones were “neither compact nor contiguous,” in an effort “to accomplish the transfer of Negro students out of formerly segregated Negro schools and transfer of white students to formerly all-Negro schools.” *Id.* at 27 (footnote omitted). In other words, *Swann* explicitly approved intradistrict transportation — or “busing,” as the practice became commonly known — as a desegregation remedy within the equitable discretion of a district court. See MARK G. YUDOF ET AL., *EDUCATION POLICY AND THE LAW* 495-96 (3d ed. 1992).

Swann also approved of an “optional majority-to-minority transfer provision” under which those in the racial majority at a particular school would be allowed to transfer to a school where they would be in the minority. *Swann*, 402 U.S. at 26-27.

14. Exactly *how* race was to be used, whether through explicit racial classifications of individual students or through facially neutral — but race-conscious — student assignment plans like busing, is not entirely clear in *Swann*. The Court clearly held the latter to be permissible, see *supra* note 13, but it seemed hesitant to endorse unequivocally the former. The Court noted that had the district court “require[d], as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse.” *Swann*, 402 U.S. at 24. But the Court's approval of the “majority-to-minority transfer provision,” see *supra* note 13 — a plan that would necessarily require classifying individual students by race — indicated its approval of at least some uses of racial classifications by district courts in fashioning their remedies.

Extrapolating from the Court's approval of race-consciousness in the context of remedying de jure discrimination, lower federal courts in the 1970s generally assumed, in the absence of Supreme Court precedent directly on point, that the voluntary use of racial classifications by unitary school districts for student assignment was constitutionally permissible.¹⁵ In doing so, these courts often cited Chief Justice Burger's influential dictum in *Swann*:

School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities¹⁶

In applying this dictum, the courts offered two interrelated compelling interests to justify the government's use of racial classifications, even under strict scrutiny. The first was the state's interest in preventing de facto segregation of its schools resulting from changing demographic patterns like white flight.¹⁷ The second, related justification was the state's interest in an integrated learning environment for its students, a justification akin to the "diversity" rationale recognized in Justice Powell's opinion in *Regents of the University of California v. Bakke*.¹⁸

Although the Supreme Court approved of the use of racial classifications to remedy de jure segregation in public education,¹⁹ and lower federal courts went so far as to approve of the voluntary use of racial classifications to achieve public school integration,²⁰ at around the

Furthermore, in applying the Court's desegregation jurisprudence, lower federal courts used racial classifications routinely and extensively, assuming them to be constitutionally permissible remedies for school districts found guilty of de jure segregation. See, e.g., *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, 576 F. Supp. 34, 53-54 (N.D. Cal. 1983), *rev'd on other grounds*, 896 F.2d 412 (9th Cir. 1990).

15. See *Johnson v. Bd. of Educ. of Chicago*, 604 F.2d 504 (7th Cir. 1979), *vacated mem.*, 449 U.S. 915 (1980); *Parent Ass'n of Andrew Jackson High Sch. v. Ambach*, 598 F.2d 705, 713-14 (2d Cir. 1979); *Higgins v. Bd. of Educ. of Grand Rapids*, 508 F.2d 779 (6th Cir. 1974).

16. See *Johnson*, 604 F.2d at 514 (quoting *Swann*, 402 U.S. at 16).

17. See *id.* at 516-17 (upholding Chicago's use of racial quotas as "a necessary means of arresting de facto segregation in the public schools"); *Ambach*, 598 F.2d at 720 ("[W]e may in the limited circumstances of purely voluntary action, accept the probability of white flight as a factor which the [School] Board was entitled to take into account in the integration equation.").

18. 438 U.S. 265 (1978) (opinion of Powell, J.); see *Johnson*, 604 F.2d at 514 (describing as "well-settled" the powers of a local school board to "voluntarily adopt plans . . . to promote integration," citing *Swann*'s dictum). For further discussion of the distinction between the state's interest in diversity and the state's interest in preventing de facto segregation, see *infra* notes 89-96 and accompanying text.

19. See *supra* note 14.

20. See *supra* notes 15-18 and accompanying text.

same time a conflicting body of jurisprudence was developing that expressed skepticism toward the government's use of racial classifications in any context. The Court had announced its discomfort with racial classifications as far back as the 1940s, in *Korematsu v. United States*²¹ and *Hirabayashi v. United States*.²² While some might have thought that the Court's discomfort in *Korematsu* and *Hirabayashi* was based solely on the fact that the government was using racial classifications to oppress a racial minority,²³ Justice Powell's 1978 *Bakke* opinion²⁴ announced strict scrutiny as the appropriate standard of review for any governmental policies relying on racial classifications, including those intended to benefit rather than oppress historically disadvantaged groups.²⁵

Although Justice Powell's opinion for the Court ultimately found the state's interest in educational diversity to be sufficiently compelling to justify a limited use of racial classifications by an institution of higher learning in its admissions policies,²⁶ the decision laid the foundation for subsequent opinions, such as *City of Richmond v. J.A.*

21. 323 U.S. 214, 216 (1944) ("It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. . . . [C]ourts must subject them to the most rigid scrutiny.").

22. 320 U.S. 81, 100 (1943) ("Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. . . . [R]acial discriminations are in most circumstances irrelevant and therefore prohibited . . .").

23. Indeed, in 1938, in its famous *Carolene Products* footnote 4, the Court had noted that "the review of statutes directed at particular religious or national or racial minorities . . . may call for a correspondingly more searching judicial inquiry." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (citations omitted).

24. Although Justice Powell authored a lone opinion, four other Justices concurred on narrower grounds. See *Bakke*, 438 U.S. at 415, 417-18 (Stevens, J., concurring in the judgment in part and dissenting in part) (construing the applicable statute, Title VI of the Civil Rights Act of 1964, to require "colorblind"-ness without deciding the "congruence — or lack of congruence — of the controlling statute and the Constitution").

25. See *id.* at 291 (opinion of Powell, J.) ("Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." (emphasis added) (citing *Hirabayashi* and *Korematsu*)). A majority of the Court rejected the university's argument that racial or ethnic classifications that disadvantage groups, like white males, who are not "discrete and insular minorit[ies]" should not be subjected to strict judicial scrutiny because no "extraordinary protection from the majoritarian political process" is required. *Id.* at 290 (opinion of Powell, J.) (quoting *Carolene Prods.*, 304 U.S. at 153 n.4 (internal quotation marks omitted)).

Bakke involved a state medical school admissions program that evaluated minority applicants in a separate applicant pool and reserved a number of admissions slots for minorities. *Id.* at 273-74 (opinion of Powell, J.). Using strict scrutiny, *Bakke* rejected the state's asserted remedial justification for its admissions policy since there had been no identified pattern of discrimination perpetrated by the medical school. *Id.* at 308-09 (opinion of Powell, J.). The state's asserted interest in remedying general "societal discrimination" — "an amorphous concept of injury that may be ageless in its reach into the past" — was not considered compelling. See 438 U.S. at 307.

26. See *id.* at 320 (opinion of Powell, J.)

*Croson Co.*²⁷ and *Adarand Constructors, Inc. v. Peña*,²⁸ that have cast serious doubt on the constitutionality of any governmental program that relies on racial classifications.²⁹ In particular, the Court has indicated its disapproval of government schemes that treat otherwise similarly situated individuals differently solely because of their race.³⁰ As Professor Jed Rubenfeld has observed, the *Croson* and *Adarand* opinions announced a doctrine of "classificationism," under which "[t]he [racial] classification itself is the constitutionally suspect feature of the law, the feature that triggers heightened scrutiny," regardless of any allegedly benign legislative motive.³¹ The Court's rigid "classificationism" in its post-*Bakke* opinions has led some lower federal courts to question the continued precedential vitality of Justice Powell's opinion in *Bakke*, concluding that even in the context of higher educa-

27. 488 U.S. 469 (1989). In *Croson*, the Court considered the constitutionality of Richmond's municipal minority set-aside plan, which required non-minority-owned prime contractors awarded city construction contracts to set aside a percentage of their subcontracts to minority-owned businesses. *Id.* at 477-78. Applying strict scrutiny, the Court concluded that the Richmond plan was not narrowly tailored to achieve the city's asserted interest of remedying past discrimination. *Id.* at 506.

28. 515 U.S. 200 (1995). In *Adarand*, the Court addressed the constitutionality of a federal subcontractor compensation clause that gave prime contractors a financial incentive to hire minority subcontractors. *Id.* at 205-06. A white subcontractor sued, claiming that he lost out on a subcontract he would have received but for the financial incentives offered by the federal compensation program. *Id.* at 210. Although the Court did not actually engage in the strict scrutiny analysis, remanding this task to the appellate court, *id.* at 237, it made clear that courts should always take a "skeptical view" of a government classification based on race, "which 'so seldom provide[s] a relevant basis for disparate treatment.' " *Id.* at 228 (alteration in original) (quoting *Fullilove v. Klutzuick*, 448 U.S. 448, 534 (1980) (Stevens, J., dissenting)).

29. See *Adarand*, 515 U.S. at 224 ("[A]ny person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny."); *Croson*, 488 U.S. at 493-94 (plurality opinion of O'Connor, J.) (noting that "the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification," and that the single standard of review for racial classifications is "strict scrutiny"); *Id.* at 520 (Scalia, J., concurring in the judgment) ("[S]trict scrutiny must be applied to all governmental classification by race . . ."); *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 273 (1986) (plurality opinion of Powell, J.) ("[T]he level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination.").

30. See *Adarand*, 515 U.S. at 224 ("[A]ny person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny."); see also *Hopwood v. Texas*, 78 F.3d 932, 941 (5th Cir. 1996) [hereinafter *Hopwood I*] (describing the Court's *Adarand* approach as recognizing that Fourteenth Amendment rights are "personal rights," "guaranteed to the individual" (quoting *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948) (internal quotation marks omitted))); *id.* ("[T]he Court consistently has rejected arguments conferring benefits on a person based solely upon his membership in a specific [racial] class of persons.").

31. Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 433-34 (1997).

tion diversity is not a sufficiently compelling interest to overcome the general suspicion of racial classifications.³²

32. In *Hopwood v. Texas*, the Fifth Circuit struck down the University of Texas Law School's admissions program, which gave preference to applicants from certain specified minority groups, concluding that the law school may not use race as a factor in admissions. *Hopwood I*, 78 F.3d at 935; see also *Hopwood v. Texas*, 236 F.3d 256, 274-75 (5th Cir. 2000) [hereinafter *Hopwood II*] (declining, on law-of-the-case grounds, to overturn the original *Hopwood* holding that diversity is not a compelling government interest as the ruling "did not rise to the level of clear error"), cert. denied, 69 U.S.L.W. 3702 (U.S. June 25, 2001) (No. 00-1609). In doing so, the *Hopwood* court observed that *Croson* and *Adarand* indicate that diversity is not an interest sufficiently compelling to justify racial classifications; only "remedying past wrongs" may suffice. *Hopwood I*, 78 F.3d at 944-45.

In a recent decision striking down the University of Georgia's admissions policy for unconstitutionally awarding bonus points to nonwhite applicants, the Court of Appeals for the Eleventh Circuit concluded that Justice Powell's *Bakke* opinion was not binding precedent. See *Johnson v. Bd. of Regents of the Univ. of Ga.*, 2001 U.S. App. LEXIS 19154, at *37 (11th Cir. Aug. 27, 2001) ("Simply put, Justice Powell's opinion does not establish student body diversity as a compelling interest for the purposes of this case."); *id.* at *38 ("We think it clear that the status of student body diversity as a compelling interest justifying racial preference in university admissions is an open question in the Supreme Court and in our Court."). The court nevertheless assumed that diversity was a compelling interest for the purposes of its opinion, but proceeded to find that the university's use of racial preferences in its admission policy was not narrowly tailored to achieve diversity. *Id.* at *82.

In another recent case striking down the University of Michigan Law School's admissions policy, a federal district court agreed with the *Hopwood* court and found that Justice Powell's opinion in *Bakke* was no longer good law. *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 849 (E.D. Mich. 2001) ("The court concludes that the Supreme Court in *Bakke* did not recognize the achievement of racial diversity in university admissions as a compelling state interest."). The *Grutter* court also concluded that even assuming arguendo that Powell's *Bakke* opinion were controlling, the law school's admissions policy could not be justified as "narrowly tailored." *Id.* at 850. The case, along with a companion case challenging the University of Michigan's undergraduate admissions policy's use of race, *Gratz v. Bollinger*, 122 F. Supp. 2d 811 (E.D. Mich. 2000), is currently pending appeal to the Sixth Circuit.

Other circuits have expressed skepticism as to whether diversity may serve as a compelling government interest, albeit in different contexts. See *Lutheran Church-Mo. Synod v. FCC*, 141 F.3d 344, 354 (D.C. Cir. 1998) (opining that the government's interest in "diversity can[not] be elevated to the 'compelling' level" in the context of broadcasting); see also *Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 233 F.3d 232, 309 n.13. (4th Cir. 2000) (Traxler, J., concurring in part, dissenting in part) (noting that in the Fourth Circuit "it is unsettled whether diversity may be a compelling state interest"), vacated and reh'g en banc granted (4th Cir. Jan. 17, 2001); *McNamara v. City of Chicago*, 138 F.3d 1219, 1222 (7th Cir. 1998) (observing that the question of whether there may be compelling interests other than remedying past discrimination remains "unsettled"), 525 U.S. 981 (1998).

Reports of *Bakke*'s death, however, may be both exaggerated and premature. In contrast to the Fifth Circuit's *Hopwood* decision, two recent federal court decisions have relied on Justice Powell's *Bakke* opinion to uphold university affirmative action policies that take account of an applicant's race. In *Smith v. University of Washington*, 233 F.3d 1188 (9th Cir. 2000), cert. denied, 2001 U.S. LEXIS 4011 (U.S. May 29, 2001) (No. 00-1341), the Ninth Circuit upheld the University of Washington Law School's affirmative action policy, declining to join the Fifth Circuit in finding *Bakke* to have been implicitly overruled. *Id.* at 1200-1201, ("We, therefore, leave it to the Supreme Court to declare that the *Bakke* rationale regarding university admissions policies has become moribund, if it has. We will not."). Similarly, in *Gratz*, the District Court for the Eastern District of Michigan upheld the University of Michigan's undergraduate admissions program that relied on racial classifications, also concluding that *Bakke* remains good law. *Gratz*, 122 F. Supp. 2d at 824 (noting that "diversity, in the context of higher education, constitutes a compelling governmental interest").

The increased judicial suspicion of racial classifications has recently filtered down to the level of public elementary and secondary schools, with courts now reconsidering the once-settled notion that a unitary school district may voluntarily use racial classifications to pursue the related goals of increasing educational diversity and reducing de facto segregation within the district's schools.³³ In reviewing these policies, courts are faced with two seemingly contradictory constitutional imperatives: on the one hand, the Supreme Court has approved of racial classifications as a tool to remedy de jure segregation; on the other hand, the Court has grown increasingly suspicious of any governmental use of racial classifications.³⁴

This Note attempts to provide an answer to this dilemma and explain what steps unitary public school districts may or may not take to increase diversity and reduce de facto segregation.³⁵ It argues that the

33. See Lewin, *supra* note 2 ("[T]he longstanding debate over affirmative action in education, for years centered on universities and professional schools, is shifting down to public school districts, where an increasing number of parents — mostly white — are complaining about policies they say are unfair to their children.").

34. See *Hampton v. Jefferson County Bd. of Educ.*, 102 F. Supp. 2d 358, 379 (W.D. Ky. 2000) ("It is incongruous that a federal court could at one moment require a school board to use race to prevent resegregation of the system, and at the very next moment prohibit that same policy.").

35. This Note focuses on the diversity and prevention-of-de-facto-segregation justifications for racial classifications and does not address the constitutionality of remedial justifications offered to support a unitary school district's use of racial classifications. Although lower courts themselves have required school districts to use racial classifications when issuing decrees to cure identified discrimination within a school district found to have segregated, see *supra* notes 12-14 and accompanying text, they have been quite skeptical of remedial justifications for racial classifications in unitary districts, see, e.g., *Wessmann v. Gittens*, 160 F.3d 790, 800 (1st Cir. 1998) (rejecting school's assertion that its use of racial classifications could be justified "as a means of redressing the vestiges of past discrimination"). This skepticism has been based on the Supreme Court's rigid requirements of identified discrimination to justify the remedial use of racial classifications, which have made it highly unlikely that a unitary school district is likely to succeed in defending its racial classifications on remedial grounds, see *Croson*, 488 U.S. at 498-508 (requiring detailed evidentiary findings of past discrimination for remedial justification to survive strict scrutiny), despite the contrary views of some commentators and judges, see, e.g., *Wessmann*, 160 F.3d at 810 (Lipez, J., dissenting) (accepting school board's remedial argument); Recent Case, 112 HARV. L. REV. 1789, 1792-93 (1999) (arguing that the First Circuit erred in rejecting remedial justification in *Wessmann*). Furthermore, while the lower courts have split on the precedential value of *Bakke*'s diversity justification, they have been more uniform in rejecting the state's interest in remedying discrimination as a sufficiently weighty justification for using racial classifications. See, e.g., *MD/DC/DE Broadcasters Ass'n v. FCC*, 236 F.3d 13, 21-22 (D.C. Cir. 2001) (finding that an FCC rule requiring broadcasters to increase minority recruitment was not narrowly tailored to achieve the government's asserted interest in remedying discrimination); *Podberesky v. Kirwan*, 38 F.3d 147, 151-52 (4th Cir. 1994) (holding a remedial race-based scholarship unconstitutional); *Md. Troopers Ass'n v. Evans*, 993 F.2d 1072, 1074 (4th Cir. 1993) (holding a remedial hiring program unconstitutional).

Indeed, almost all of the schools whose voluntary integration plans have come under legal attack in recent years have trumpeted the diversity or prevention of de facto segregation rationales to justify their use of racial classifications, and most have done so exclusively, not even bothering to assert remedial justifications; additionally, none have relied exclusively on the remedial justification. See *Brewer v. W. Irondequoit Cent. Sch. Dist.*, 212 F.3d 738 (2d Cir. 2000) (prevention of de facto segregation); *Eisenberg ex rel. Eisenberg v.*

Court's recent skepticism toward racial classifications means that classifications may play only a narrow role in student assignment plans. Nevertheless, race-conscious race-neutral student assignment plans — that is, facially colorblind programs enacted with the intention of increasing racial diversity — can be both a constitutional and effective method of integrating public schools.

Part I analyzes “selective” public schools where admission is competitive and determined by merit and argues that the vast majority of racial classifications in these schools’ admissions programs is unconstitutional. Because selective schools, with their competitive admissions processes, are more similar to the higher education context discussed in *Bakke*, many courts have concluded that a selective school may only use race as a “plus” in admissions decisions³⁶ in the manner permitted by Justice Powell’s *Bakke* opinion.³⁷ In “nonselective” schools, however, where merit is not a factor in admission, some courts have concluded that schools have the authority to use race in a less nuanced fashion.³⁸ Because courts have tended to treat selective and nonselective schools differently, this Note analyzes nonselective schools sepa-

Montgomery County Pub. Sch., 197 F.3d 123 (4th Cir. 1999) (diversity and prevention of de facto segregation), *cert. denied*, 529 U.S. 1019 (2000) (per curiam); Tuttle v. Arlington County Sch. Bd., 195 F.3d 698 (4th Cir. 1999) (diversity), *cert. dismissed*, 529 U.S. 1050 (2000); *Wessmann*, 160 F.3d at 796 (diversity and remedial justification); Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., 137 F. Supp. 2d 1224, 1235 (W.D. Wash. 2001) (diversity and curing de facto segregation); *Hampton*, 102 F. Supp. 2d at 378 (diversity and prevention of de facto segregation); *Comfort ex rel. Neumyer v. Lynn Sch. Comm.*, 100 F. Supp. 2d 57 (D. Mass. 2000) (diversity and prevention of de facto segregation); Equal Open Enrollment Ass’n v. Bd. of Educ., 937 F. Supp. 700, 704 (N.D. Ohio 1996) (prevention of de jure segregation). *But see* Hunter v. Regents of the Univ. of Cal., 190 F.3d 1061 (9th Cir. 1999) (educational research), *cert. denied*, 531 U.S. 877 (2000).

36. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 317 (1978) (opinion of Powell, J.) (concluding that “race or ethnic background may be deemed a ‘plus’ in a particular applicant’s file,” so long as “it does not insulate the individual from comparison with all other candidates for the available seats”).

37. *See, e.g., Wessmann*, 160 F.3d at 797-800 (applying the framework of Justice Powell’s *Bakke* opinion to a selective school’s admissions policy).

38. *See Eisenberg v. Montgomery County Pub. Sch.*, 19 F. Supp. 2d 454-55 (D. Md. 1998) (declining to apply the analytical framework of Justice Powell’s *Bakke* opinion to nonselective schools in part because they lack a competitive admissions process). As Part II will demonstrate, even nonselective public schools lacking a competitive admissions process, such as magnet schools, may confer unique educational benefits. Some have argued, however, that the fact that admission to these schools is not based on merit, but rather on chance (through lotteries, etc.), weakens the plaintiff’s claim to have suffered harm. In other words, the argument goes, “Even though you were denied a chance to attend a unique school at least in part because of your race, you were not denied the chance to attend a unique school you deserved to attend on the basis of your achievements, so you have not suffered any, or at least as much, harm.” *See, e.g., Note, The Constitutionality of Race-Conscious Admissions Programs in Public Elementary and Secondary Schools*, 112 HARV. L. REV. 940, 955-56 (1999) [hereinafter *Harvard Note*] (“Perhaps most importantly, students being denied admission to elementary and secondary schools often have a lesser claim to be entitled to admission based on ‘merit.’”). Although this Note ultimately disagrees with this contention, this distinction is sufficiently convincing to justify placing the analysis of unique nonselective public schools in Part II rather than Part I.

rately, in Part II. Among nonselective schools themselves, courts have treated differently those schools offering unique educational benefits, such as magnet schools, and those offering ostensibly equal, or “fungible,” educations.³⁹ Consequently, Part II addresses each type of school separately, concluding that school districts may almost never rely on racial classifications in the magnet school context, but officials may rely on racial classifications in assigning students to fungible schools when done to stem residential white flight. Part III then explains that despite the substantial constitutional restrictions on school districts’ ability to use racial classifications, districts are permitted to use race-neutral policies to increase diversity. It then explores a number of these race-conscious, race-neutral policies that may be both practical and effective in increasing integration in selective and nonselective schools.

I. RACIAL CLASSIFICATIONS IN SELECTIVE SCHOOLS

This Part argues that racial classifications may play a very limited role, at most, in the admissions policies of selective public schools. Section I.A explains why the same level of scrutiny ought to apply to a school’s use of classifications in furthering diversity as was applied in Justice Powell’s *Bakke* opinion. Under this approach, the most common uses of racial classifications by selective public schools fail to survive strict scrutiny. While assuming *Bakke* is good law would seem to allow for a limited use of racial classifications, the realities of public school administration make it highly unlikely that such limited use could ever be practical. Section I.B then explains why the alternative justification for a selective school’s use of racial classifications — preventing de facto segregation, as opposed to pursuing diversity in the *Bakke* sense of the word — similarly fails to survive strict scrutiny. Selective schools, therefore, are effectively precluded from relying on racial classifications in their admissions policies.

A. The “Diversity” Rationale

The relevance of *Bakke* is not entirely clear in the public school context because *Bakke* addressed the constitutionality of racial classifications in medical school, rather than elementary or secondary

39. See, e.g., *Hampton*, 102 F. Supp. 2d at 380 (concluding that for the purposes of strict scrutiny analysis, a school district’s assignment of a pupil to a fungible school “imposes no burden and confers no benefit” whereas assignment to a magnet school does); see also *Parents Involved in Cmty. Sch.*, 137 F. Supp. 2d at 1231 (quoting *Coalition for Econ. Equity v. Wilson*, 122 F.3d 692, 707 n.1 (9th Cir. 1997) (internal quotation marks omitted)) (concluding that assigning students among fungible schools is merely a “reshuffling” and not a granting of preferences that the state may give to some citizens but not all, and, therefore, does not “benefit” one group while “harm”-ing another).

school, admissions.⁴⁰ Although the facts of *Bakke* concerned a medical school admissions policy only, subsequent courts⁴¹ and commentators,⁴² as well as the *Bakke* opinion itself,⁴³ generally assumed that the holding of *Bakke* would apply to all university admissions processes.⁴⁴ Extending *Bakke*'s prohibition of racial set-asides to the public elementary and secondary school context has not been so generally assumed, however, as some courts and commentators have argued that diversity is an even more compelling justification for racial classifications in elementary and secondary schools than in higher education.⁴⁵ In particular, the Supreme Court's broad language in *Swann*⁴⁶ and other cases⁴⁷ has convinced some that the state's interest in diversity in public schools is more compelling than in the higher education context, therefore allowing for a broader use of racial classifications by public school officials than that allowed in *Bakke*.⁴⁸

Although the Court's language in *Swann* might have indicated a willingness to afford local school authorities more discretion than their counterparts in higher education in using racial classifications, Chief Justice Burger's *Swann* dictum was written in the context of student

40. See *Bakke*, 438 U.S. at 269 (opinion of Powell, J.).

41. See, e.g., *Smith v. Univ. of Wash. Law Sch.*, 2 F. Supp. 2d 1324, 1334 (1998) (reading *Bakke* as applying to "institution[s] of higher education," meaning a "university or graduate program" (emphasis added)).

42. See, e.g., LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-22, at 1529 (2d ed. 1988) ("The [*Bakke*] Court thus upheld the kind of affirmative action program used by most American colleges and universities . . .").

43. See *Bakke*, 438 U.S. at 316-19 (opinion of Powell, J.) (discussing "other university admissions programs," including those of undergraduate colleges).

44. But there is still some doubt as to whether the exact contours of the *Bakke* analysis might vary with the type of higher education institution whose admissions policy is being challenged. For instance, "[t]here is no clearly established law on the issue of whether the attainment of diversity in the legal profession is a goal that justifies the consideration of race in law school admissions." *Smith*, 2 F. Supp. 2d at 1335 (emphases added).

45. See *Brewer v. W. Irondequoit Cent. Sch. Dist.*, 212 F.3d 738, 751 (2d Cir. 2000) (noting that *Bakke* "is not directly on point as it expressed no opinion as to the compelling interest of reducing racial isolation in elementary public school education"); *Comfort ex rel. Neumyer v. Lynn Sch. Comm.*, 100 F. Supp. 2d 57, 65 n.12 (D. Mass. 2000) (noting that "*Bakke* was premised on assumptions about the unique contribution that people of one background or another would make to an institution of higher learning"); Harvard Note, *supra* note 38, at 950 ("In the case of elementary and secondary schools, the argument for applying the diversity rationale is even greater than in the case of higher education.").

46. See *supra* text accompanying note 16.

47. See, e.g., *Bustop, Inc. v. Bd. of Educ.*, 439 U.S. 1380, 1383 (Rehnquist, Circuit Justice 1978) (holding that Los Angeles was permitted to engage in an extensive voluntary busing program that sought to achieve racial balance throughout the school district).

48. See *Wessmann v. Gittens*, 160 F.3d 790, 797 n.3 (1st Cir. 1998) ("[T]he [Boston Public] School Committee suggests that [Boston Latin]'s status as a secondary school, as opposed to a university, materially alters the decisional calculus and warrants judicial deference to school officials' determinations anent the racial and ethnic composition of the student body."); see also sources cited *supra* note 45.

assignment among schools of nominally equal caliber. In other words, *Swann* did not concern selective schools.⁴⁹ Selective schools resemble in many ways the higher education setting in which *Bakke* was decided. Like the medical school in *Bakke*, a selective public school confers unique educational benefits upon its students, offering an educational experience unlikely to be matched by nonselective public schools.⁵⁰ Furthermore, rejection by a selective public school is likely to impose a significant burden on an applicant in a way similar to rejection by a medical school.⁵¹ A student denied admission to a selective school may have his chances of being selected by a prestigious university seriously impaired.⁵² Additionally, a student denied admission to a selective school may have invested years of work in attaining good grades and may have invested time in preparing for a selective school's entrance examination.⁵³ Selective schools' admissions processes and unique educational opportunities, therefore, make them more akin to the institutions of higher learning considered in *Bakke* than they are to ordinary, nonselective schools. Consequently, lower courts reviewing the admissions policies of selective schools have con-

49. See Wessmann, 160 F.3d at 797 n.3 (criticizing the school committee's attempt to distinguish *Bakke* through *Swann* as "rest[ing] on out-of-context dicta" and "entirely unpersuasive").

50. See Hampton v. Jefferson County Bd. of Educ., 102 F. Supp. 2d 358, 380-81 (W.D. Ky. 2000); see also Abby Goodnough, *A Plan to Offer High Schoolers Better Choices*, N.Y. TIMES, Oct. 20, 2000, at A1 (describing how New York City's 200 nonselective public schools pale in comparison to prestigious selective schools like the Bronx High School of Science and Stuyvesant High); Julian Guthrie, *Desegregation vs. Academic Merit*, S.F. EXAMINER, Feb. 15, 1999, at A1 (describing San Francisco's selective Lowell High School as "the Harvard of public schools").

51. See Hampton, 102 F. Supp. 2d at 381. Indeed, Justice Powell's *Bakke* opinion specifically distinguished the case of an elementary or secondary school student bused from his neighborhood school to a "comparable" school in another neighborhood as "wholly dissimilar" to the harm imposed on an applicant denied admission to a medical school. *Bakke*, 438 U.S. at 300 n.39 (opinion of Powell, J.).

52. See Elisabeth Bumiller, *Elite High School Is a Grueling Exam Away: Putting Dreams to the Test*, N.Y. TIMES, Apr. 2, 1998, at A1, B8 (quoting a student aspiring to attend New York City's elite Stuyvesant High as saying, "If I don't make it to Stuyvesant, I can't get into a good college . . ."). Indeed, of Stuyvesant's graduating seniors, 99.9% go on to college. *Id.*; see also Julian Guthrie, *50% Drop in Blacks, Latinos at Lowell*, S.F. EXAMINER, Mar. 16, 1999, at A1 ("Lowell, which is the only high school in the district to require an admissions test to gain access, is the top feeder school to UC [University of California] in the state."); Venise Wagner, *Students Oppose Lowell Suit Deal*, S.F. EXAMINER, Dec. 15, 1999, at D1 ("If you have a student from [nonselective San Francisco high school] Thurgood Marshall and a student from Lowell, and they both have a 4.0, then you take a college like Princeton, they'll probably take the student from Lowell." (quoting Thurgood Marshall High student)).

53. See Harvard Note, *supra* note 38, at 955-56 (using this factor to distinguish the stricter view of the use of race in college admissions from its proposed more lenient view of the use of race in elementary and secondary school assignment); Bumiller, *supra* note 52. (describing the grueling test preparation regimens of those aspiring to attend Stuyvesant).

cluded that they must abide by *Bakke*'s standards for using race in a constitutional fashion.⁵⁴

Justice Powell's *Bakke* opinion requires that schools consider race in admissions in a manner similar to that of the "Harvard Plan" cited approvingly.⁵⁵ Under this approach, one's racial or ethnic category may be deemed a "plus" in the admissions process, but all students must be evaluated in the same admissions pool.⁵⁶ Race or ethnicity may serve as one factor among many in illuminating how the particular qualifications of an applicant might add to the diversity of the student body,⁵⁷ but the essence of this approach is that it "treats each applicant as an individual."⁵⁸ It eschews irrebuttable presumptions as to whether a student of a particular ethnicity enhances an institution's diversity, demanding a more nuanced, individualized evaluation instead.⁵⁹

To comply with *Bakke*, a selective school must avoid using racial "set-asides" that are focused solely on ethnic diversity, which, as Justice Powell's opinion noted, may actually "hinder rather than further the attainment of *genuine* diversity."⁶⁰ Such set-asides were at issue in two recent cases addressing selective schools' uses of racial classifications. In *Wessmann v. Gitters*, the First Circuit struck down an admissions program to Boston Latin, one of Boston's selective public high schools, that required the racial composition of one-half of the incoming students to correspond to the racial composition of those students taking the entrance examination.⁶¹ In a similar, but broader, case that was ultimately settled before a federal court could rule on the merits, *Ho v. San Francisco Unified School District*,⁶² a group of Chinese-American plaintiffs challenged San Francisco's student as-

54. See, e.g., *Wessmann*, 160 F.3d at 797-800 (applying the framework of Justice Powell's *Bakke* opinion to a selective school's admissions policy).

55. *Bakke*, 438 U.S. at 317 (opinion of Powell, J.).

56. *Id.* (opinion of Powell, J.) ("[R]ace or ethnic background may be deemed a 'plus' in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats.").

57. *Id.* (opinion of Powell, J.) (noting that the "Harvard Plan" approach "is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight").

58. *Id.* at 318 (opinion of Powell, J.).

59. See *id.* at 317 (opinion of Powell, J.) ("The file of a particular black applicant may be examined for his potential contribution to diversity without the factor of race being decisive when compared, for example, with that of an applicant identified as Italian-American if the latter is thought to exhibit qualities more likely to promote beneficial educational pluralism.").

60. See *id.* at 315 (opinion of Powell, J.) (emphasis added).

61. 160 F.3d 790 (1st Cir.1998).

62. 147 F.3d 854 (9th Cir. 1998).

signment policy that limited the number of enrollees from a given racial or ethnic group to forty to forty-five percent of the student body.⁶³ In particular, the plaintiffs objected to the policy's effect on the admissions program for Lowell High School, San Francisco's premier public school and the only public school in the city that employed a highly selective admissions process.⁶⁴ There, a forty percent cap had the effect of holding Chinese applicants to a higher standard than other minority or white applicants.⁶⁵ Facing a court that was prepared to review the school board's racial classifications under a standard of strict scrutiny,⁶⁶ the school district reached a settlement with the plaintiffs that

63. The challenged policy was the result of the district's desegregation consent decree entered into in 1983. See *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, 576 F. Supp. 34, 53 (N.D. Cal. 1983), *rev'd*, 896 F.2d 412 (9th Cir. 1990). Because the challenged policy had been judicially approved, one might have thought it would have been immune to constitutional challenge. See *supra* note 4; *Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 233 F.3d 232, 249 (4th Cir. 2000) (noting that because district's race-classifying student assignment plan complied with a court order, it did "not violate the Constitution"), *vacated, en banc* (4th cir. Jan. 17, 2001). In other words, until a district is officially declared unitary, it would seem as if any court-approved action is necessarily constitutional. See *id.* at 267 (noting that because district had yet to be declared unitary, "the Board's obligation to obey . . . court orders insulates it from constitutional attack for actions taken in compliance with them").

A litigant may seek to have the school district declared unitary and simultaneously assert that should unitary status be declared, the district's actions are no longer constitutionally permissible. See *Hampton v. Jefferson County Bd. of Educ.*, 102 F. Supp. 2d 358, 359-60 (W.D. Ky. 2000). In *Ho*, however, the litigants did not seek to have the district declared unitary per se. Rather, they simply challenged the continued constitutional validity of the particular part of the consent decree ("paragraph 13") that set forth racial and ethnic guidelines for student assignment. See *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, 59 F. Supp. 2d 1021, 1024 (N.D. Cal. 1999). Both the District Court for the Northern District of California, see *id.*, and the Court of Appeals for the Ninth Circuit, see *Ho*, 147 F.3d 854 (9th Cir. 1998), recognized this as a legitimate cause of action and did not find the school district's actions to be insulated from constitutional attack because they had been taken pursuant to a judicially approved consent decree. Indeed, the Ninth Circuit noted, "The district court properly ruled that the consent decree of 1983 was res judicata binding the plaintiffs as to the decree's propriety in 1983, while leaving open the question of the propriety of paragraph 13 today." *Id.* at 865 (emphasis added). The Ninth Circuit, therefore, required the defendant school district to prove why racial classifications could still be justified today even if they were justified when the consent decree was entered into in 1983, despite the fact that neither the school district nor the plaintiffs were seeking a judicial declaration of "unitariness." See *id.* ("It will also be the task of the School District to demonstrate that paragraph 13 is still a remedy fitted to a wrong — to show that the racial classifications and quotas employed by paragraph 13 are tailored to the problems caused by vestiges of the earlier segregation.").

64. See Julian Guthrie, *S.F. School Plan Factors in Race*, S.F. EXAMINER, Sept. 28, 1999, at A1 ("The focal point of the lawsuit by the Chinese American families was Lowell High School, the City's premier academic high school, where an admissions policy based strictly on entrance exams would produce a student body overwhelmingly Asian."); Selena Dong, Note, "Too Many Asians": The Challenge of Fighting Discrimination Against Asian-Americans and Preserving Affirmative Action, 47 STAN L. REV. 1027, 1030 n.12 (1995) (citing Nanette Asimov, *Students Battle for Admission to Top S.F. School: Lowell High's Ethnic Limits Stir Charges of Discrimination*, S.F. CHRON., Apr. 19, 1993, at A13).

65. See Dong, *supra* note 64, at 1030 (citing Andrew Leonard, *Class Action: Chinese American Activists Come Out Swinging — but Divided — in the Battle over the SF School Desegregation Plan*, BAY GUARDIAN, Apr. 7, 1993, at 23, 23-24).

66. See *Ho*, 147 F.3d at 864.

required that “race or ethnicity may not be the primary or predominant consideration in . . . admission criteria.”⁶⁷

The First Circuit’s decision in *Wessmann* and the Ninth Circuit’s in *Ho* recognized that the school districts’ use of racial classifications for evaluating individual applicants to selective public schools ran afoul of *Bakke*’s norms. By employing a racial set-aside, the *Wessmann* court found that the Boston Latin policy did exactly what Justice Powell’s *Bakke* opinion condemned: “it effectively foreclosed some candidates from all consideration” for admission to Boston Latin simply because of their racial or ethnic category.⁶⁸ Furthermore, the policy’s ethnic guidelines were, as Judge Selya remarked in his opinion for the court, “less a means of attaining diversity in any constitutionally relevant sense and more a means for racial balancing.”⁶⁹ The Boston Latin admissions policy, by looking at only test scores and race, focused exclusively on racial and ethnic diversity,⁷⁰ hardly “consider[ing] all elements of diversity in light of the particular qualifications of each applicant,” as did the Harvard Plan that Justice Powell endorsed.⁷¹ Additionally, by taking into account only five ethnic groups, and doing so in a yes-no, check-box fashion, the Boston Latin policy violated *Bakke*’s denunciation of irrebuttable, generalized presumptions as to

67. *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, 59 F.Supp. 2d at 1025. Whether or not the settlement allows for racial classifications to be used *at all* by the district has been a subject of controversy. While the clause, “race or ethnicity may not be the primary or predominant consideration,” would seem to leave open some room for the use of race, the very next line of the settlement appears to indicate that race may not be used at all: “Further, the SFUSD will not assign or admit any student to a particular school, class or program on the basis of the race or ethnicity of that student” *Id.*

As a result of this ambiguity, the plaintiffs have insisted that the settlement ruled out *any* use of racial classifications in student assignment, whereas the school district has taken the position that the settlement leaves open the possibility of using race, so long as it is not the “primary or predominant consideration.” See Guthrie, *supra* note 64 (“The parties to the suit have different interpretations of whether the settlement . . . lets the district consider race as one factor in determining enrollment”); Julian Guthrie, *Judge Critical of S.F. Enroll Plan*, S.F. EXAMINER, Nov. 4, 1999, at A21 (describing parties’ different interpretations of settlement). The presiding judge in the settlement appears to have agreed with the plaintiffs, ruling that a proposal by the district to use race as one of four factors in admission violated the terms of the settlement. See Venise Wagner, *Judge Fails Plan for Enrollment*, S.F. EXAMINER, Dec. 18, 1999, at A1. Although the SFUSD still maintains that race may be used under the settlement, it has so far abandoned its plans to use race as one factor among many, see *infra* notes 74 and 85 (discussing these proposals), in favor of race-neutral alternatives. See Katherine Seligman, *S.F. Scraps Racial Enroll Plan*, S.F. EXAMINER, Jan. 7, 2000, at A1.

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

69. *Id.* at 798.

70. *Id.*

71. *Regents of the Univ. of Cal. v. Bakke*, 448 U.S. 265, 317 (1978) (opinion of Powell, J.).

whether a particular student enhances diversity;⁷² it treated each recognized racial or ethnic group as “monolithic.”⁷³

72. See *supra* note 59 and accompanying text.

73. See *Wessmann*, 160 F.3d at 798. Those advocating a more extensive use of racial classifications in selective school admissions have also argued that racial classifications are necessary to enhance diversity in order to achieve a certain “critical mass” of minority students, thereby avoiding racial isolation among those students from underrepresented groups. In *Wessmann*, the school board argued that, “[U]nless there is a certain representation of any given racial or ethnic group in a particular institution, members of that racial or ethnic group will find it difficult, if not impossible, to express themselves. Thus . . . some minimum number of black and Hispanic students . . . is required to prevent racial isolation.” *Id.* at 799; see also *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 832-33 (E.D. Mich. 2001) (discussing the University of Michigan Law School’s argument that a “critical mass” of minority students is needed “so that the minority students can contribute to classroom dialog and not feel isolated”).

Powell’s *Bakke* opinion never discussed the validity of this “critical mass” justification, but the Harvard Plan he cited approvingly did:

10 or 20 black students could not begin to bring to their classmates and to each other the variety of points of view, backgrounds and experiences of blacks in the United States. Their small numbers might also create a sense of isolation among the black students themselves and thus make it more difficult for them to develop and achieve their potential. Consequently, when making its decisions, the Committee on Admissions is aware that there is some relationship between numbers and achieving the benefits to be derived from a diverse student body, and between numbers and providing a reasonable environment for those students admitted.

438 U.S. app. at 323 (opinion of Powell, J.) Interestingly, Powell omitted this “critical mass” language from his long quotation of the Harvard Plan in his opinion. See *Id.* at 316-17 (opinion of Powell, J.). This omission may have been a conscious recognition by Powell of what the *Wessmann* court recognized as an inherent tension between the “critical mass” theory and the very view of constitutionally permissible diversity espoused by Powell. See *Wessmann*, 160 F.3d at 799 (“Insofar as the Policy promotes groups over individuals, it is starkly at variance with Justice Powell’s understanding of the proper manner in which a diverse student body may be gathered. See *Bakke*, 438 U.S. at 318.”). *Wessmann* also recognized the contradictory nature of the “critical mass” theory as described by the Harvard Plan itself: “Furthermore, if justified in terms of group identity, the Policy suggests that race or ethnic background determines how individuals think or behave — although the School Committee resists this conclusion by arguing that the greater the number of a particular group, the more others will realize that the group is not monolithic.” *Id.*

Despite this obvious tension between the “critical mass” theory and *Bakke*’s call for individualized determination of diversity, the *Wessmann* court was hesitant to reject the justification outright. Rather, it “assume[d] for argument’s sake — albeit with considerable skepticism — that there may be circumstances under which a form of racial balancing could be justified,” but that “a particularly strong showing of necessity would be required,” which would rely on “solid and compelling evidence” rather than “broad generalizations by a few witnesses.” *Id.* at 799-800. This requirement of a “particularly strong showing,” consistent with the Court’s demands of detailed legislative findings in *Croson*, is likely to be difficult, if not impossible, for a school district to meet, as any such showing would have to demonstrate that the racial classifications employed by the school are “limited and carefully defined” to achieve the school board’s asserted interests in a “sufficiently specific and verifiable” fashion. *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 613 (1990) (O’Connor, J., dissenting); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989) (“[W]hen a legislative body chooses to employ a suspect classification, it cannot rest upon a generalized assertion as to the classification’s relevance to its goals.”). As one court has noted, the “critical mass” theory has “proved to be an amorphous concept. . . . Narrow tailoring is difficult, if not impossible, to achieve when the contours of the interest being served are so ill-defined.” *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 850-51 (E.D. Mich. 2001).

A selective school might, however, seek to implement a policy that, in an attempt to comply with the letter, if not the spirit, of *Bakke*, uses race as one factor among many in determining admissions. For instance, in the wake of *Ho*, the San Francisco Board of Education considered using racial classifications as one factor among four or more other demographic factors, including socioeconomic status and native language, in an attempt to increase black and Latino enrollment at Lowell High.⁷⁴ Although the use of race as one factor among many might appear to abide by *Bakke*, the way in which race was used as one factor among many in the San Francisco proposals was not consistent with *Bakke*. Under each proposal, there was no individualized determination of whether a student's racial background contributed to the student body's diversity.⁷⁵ Rather, the policy simply classified each student as a member of a particular group and then assessed how the student's membership in that group contributed to the group's overall representation in the student body.⁷⁶

By assuming, without any individualized consideration of the many factors discussed in *Bakke*,⁷⁷ that membership in a particular racial group automatically contributed to diversity, the proposed plans violated *Bakke*'s prohibition of irrebuttable, generalized presumptions as to whether a particular student enhances diversity.⁷⁸ The proposed plans, like the Boston Latin plan struck down in *Wessmann*, impermissibly treated each recognized racial or ethnic group as "monolithic."⁷⁹ No matter how diluted the relevance of racial classifications in these proposed plans — whether race accounted for twenty-five percent of an admissions determination or even less — each impermissibly used a racial classification as an automatic indicator of diversity, instead of recognizing, as Justice Powell noted, that "the critical criteria are often individual qualities or experience not dependent upon race but some-

74. See Guthrie, *supra* note 64 (describing the district's proposal of using race as one of four factors, the other three being socioeconomic status, academic achievement, and language); Ryan Kim, *Foe Blasts Schools' New Admission Plan*, S.F. EXAMINER, Nov. 25, 1999, at A1 (describing a later proposal relying "on a variety of criteria including socioeconomic status, extracurricular activities and whether [students] come from an underrepresented minority group").

75. See *Bakke*, 438 U.S. at 319 n.53 (opinion of Powell, J.) (stating that a university must take account of race on an "individualized, case-by-case basis" in order to avoid "judicial interference").

76. See Guthrie, *supra* note 64 ("Students would receive a rating in one of 9 categories: black, white, Latino, Chinese American, American Indian, Filipino American, Japanese American, Korean American, and other nonwhite.").

77. See *Bakke*, 438 U.S. at 317 (opinion of Powell, J.) (discussing such qualities as "exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important").

78. See *supra* note 59 and accompanying text.

79. See *Wessmann*, 160 F.3d at 798.

times associated with it.”⁸⁰ In doing so, the plans impermissibly presumed that membership in a particular racial group automatically contributes to the diversity of an educational institution.⁸¹

By declining to adopt the Fifth Circuit’s conclusion in *Hopwood* that Powell’s *Bakke* opinion is no longer binding precedent, neither *Wessmann* nor *Ho* precluded the possibility of a selective school using racial classifications.⁸² Assuming that Justice Powell’s *Bakke* opinion is still good law, therefore, a selective school admissions policy that considers race in a manner similar to the Harvard Plan ought to pass constitutional muster. But the chances of a selective public school adopting an admission policy akin to the Harvard Plan are slim. At selective public schools, admissions decisions are generally based on test scores and grades.⁸³ The kind of individualized assessment of an applicant’s contribution to student body diversity required by *Bakke*, on the other

80. *Bakke*, 438 U.S. app. at 324 (opinion of Powell, J.) (quoting Harvard Plan); see also *Tuttle v. Arlington County Sch. Bd.*, 189 F.3d 431 (4th Cir. 1999) (per curiam) (striking down a nonselective magnet school admission program that considered race as one factor along with income and language).

81. In *Johnson v. Board of Regents of the University of Georgia*, 2001 U.S. App. LEXIS 19154, at *49-50 (11th Cir. Aug. 27, 2001), the court of appeals found that the University of Georgia’s policy of automatically awarding bonus points to nonwhite applicants solely on the basis of their membership in a racial or ethnic group violated *Bakke*’s requirement of an individualized approach. “If the goal in creating a diverse student body is to develop a university community where students are exposed to persons of different cultures, outlooks, and experiences,” the court observed, “a white applicant in some circumstances may make a greater contribution than a non-white applicant.” *Id.* “[A] white applicant from a disadvantaged rural area in Appalachia” may well offer more in terms of diversity, the court noted, “than a non-white applicant from an affluent family and a suburban Atlanta high school.” *Id.* Furthermore, a white applicant “raised in Athens, Greece may have a richer background and exposure to a much more unusual environment than a non-white applicant who has spent all his life in Athens, Georgia.” *Id.* But see *Gratz v. Bollinger*, 122 F. Supp. 2d 811, 827 (E.D. Mich. 2000) (upholding the University of Michigan’s undergraduate admissions policy under which “[u]nder-represented minority applicants automatically receive 20 points [on a 150-point scale] based upon their membership in one of the identified under-represented minority categories”). In approving the automatic twenty points added to a minority’s candidacy, the *Gratz* court misapplied Justice Powell’s *Bakke* opinion. By automatically granting certain designated minorities twenty points regardless of their individualized contribution to the diversity of the school, the Michigan plan hardly embodies the flexibility envisioned by Powell’s approved approach. See *Bakke*, 438 U.S. at 317 (opinion of Powell, J.).

82. See *Wessmann*, 160 F.3d at 796. Indeed, the Ninth Circuit in *Ho* did not even address the continued vitality of *Bakke* as it addressed only the question of whether the SFUSD’s use of racial classifications was necessary to remove the vestiges of discrimination the consent decree set out to eliminate. See *Ho*, 147 F.3d at 865. Although the Ninth Circuit never addressed the compelling nature of diversity as a justification for a school district’s use of racial classifications in *Ho*, the district court that approved the settlement appears to assume that *Bakke* is still good law. See *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, 59 F. Supp. 2d at 1033-34 (N.D. Cal. 1983) (noting that the settlement does not preclude the school district from attempting “to ensure that each school has a diverse student body” but only prohibits the district “from using race or ethnicity as the primary or predominant consideration in determining student admissions”).

83. See, e.g., Guthrie, *supra* note 50 (noting that San Francisco’s Lowell High School “traditionally admits students based on their grades alone”).

hand, usually entails an extensive review of a candidate's less quantifiable qualifications, elicited through personal statements and letters of recommendation, in a process similar to that employed by many colleges.⁸⁴ Using this sort of admissions process, however, is likely to be cost-prohibitive and administratively infeasible for a public school, requiring a very large investment of time and resources into reviewing applicants' files.⁸⁵ Although such an admissions process is certainly possible,⁸⁶ the actions of the Boston and San Francisco school boards in the wake of *Wessmann* and *Ho* — neither of which seriously considered an individualized approach to admissions — likely illustrate a hesitance among school districts to adopt admissions programs akin to the Harvard Plan.⁸⁷ Consequently, the debate over Justice Powell's *Bakke* opinion's continued vitality⁸⁸ is largely moot in the selective school context because it is unlikely that school districts will be able to

84. See *supra* note 77.

85. See Sylvia A. Law, *White Privilege and Affirmative Action*, 32 AKRON L. REV. 603, 627 (1999) ("Rich schools and small schools can follow the genteel model that Justice Power [sic] approves, giving full consideration to every applicant and making nuanced judgments. . . . But a school that is big or poor is under much more pressure to use numbers as a short hand for merit."); cf. Jacques Steinberg, *Redefining Diversity*, N.Y. TIMES, Aug. 29, 2001, at A14 (noting that because many public universities "process most applications by compressing students' SAT scores and grade point averages into numerical formulas that often account for race," requiring the type of individualized consideration of each applicant mandated by *Bakke* would be "debilitating" to their admissions processes).

The Boston school district attempted "to vindicate its focus on groups by enumerating the administrative burdens that would accompany an individualized admissions process," an argument the *Wessmann* court rejected. 160 F.3d at 799 n.5. Indeed, the fact that neither Boston Latin nor Lowell High has adopted or, from available evidence, even *considered* a *Bakke*-style individualized approach to admissions since the *Wessmann* and *Ho* decisions is evidence of the nearly insurmountable practical difficulties such an approach poses for a public school. See Beth Daley, *Exam School Data Show Mixed Results for Admissions Policy*, BOSTON GLOBE, Mar. 23, 2000, at B3 [hereinafter Daley, *Exam School Data*] (explaining that since *Wessmann*, Boston Latin has used only "race-blind admissions"); Beth Daley, *New Admission Options Sought for Entry to Exam Schools*, BOSTON GLOBE, Sept. 29, 1999, at B4 [hereinafter Daley, *New Admission Options*] ("The Boston School Committee will be asked tonight to consider holding a partial lottery or giving Boston Public School pupils preference over private school pupils in gaining admission to the city's prestigious exam schools.").

Similarly, neither of the two plans considered by the San Francisco School Board after its *Ho* settlement, see *supra* note 74 and accompanying text, nor under any others considered by the district, contemplated screening applicants in the *individualized* method of the Harvard Plan by reviewing personal statements, recommendations, or both.

86. Louisville's Central High, a magnet high school whose admissions policies were at issue in *Hampton v. Jefferson County Board of Education*, 102 F. Supp. 2d 358 (W.D. Ky. 2000), for instance, appears to have at least reserved the possibility of employing a Harvard-Plan approach to admissions. In particular, the application materials noted that applicants "may be asked to provide an essay, survey, recommendations, or work samples," in addition to "grades, standardized test scores, and attendance or behavior data." See *id.* at 377 n.40. To what degree the school actually exercised its right to request these materials of applicants is not clear from the *Hampton* opinion. See *id.*

87. See *supra* note 85.

88. See *supra* note 32.

use racial classifications in a way that comports with *Bakke*'s requirement of an individualized, nuanced approach to admissions. Selective schools are, therefore, practically, if not theoretically, prohibited from using racial classifications in their admissions policies.

B. *The "Prevention of De Facto Segregation" Rationale*

In addition to the pursuit of the kind of educational diversity recognized by Justice Powell's *Bakke* opinion, school districts have also asserted an interest in merely preventing the de facto segregation, or "racial imbalance," that might result if selective school admissions did not use racial preferences in their admissions process.⁸⁹ In doing so, these districts have relied heavily on Chief Justice Burger's *Swann* dictum discussing the power of local officials to pursue integration.⁹⁰ Because the government's interest in preventing de facto segregation is a distinct interest from "diversity," the argument goes, a different form of strict scrutiny analysis is required.⁹¹ Under this framework, *Bakke*'s concern for treating each applicant in an individualized way is inapposite, and racial classifications are permissible because, as one court stated, "there is no more effective means" to prevent de facto segregation "than to base decisions on race."⁹²

The assertion of the prevention of de facto segregation as a government interest sufficiently compelling to justify the use of racial classifications rests on a shaky foundation for two reasons. First, the distinction between the government's interest in pursuing diversity and the government's interest in preventing de facto segregation is conceptually very thin, and indeed one court has concluded that there is no difference at all.⁹³ After all, if de facto segregation is to be prevented "in order to prepare students to live in a pluralistic society," as

89. See *Wessmann*, 160 F.3d at 801 (noting that in addition to relying on the diversity argument, the Boston School Committee had asserted that "racial imbalance, without more, mandates action"); see also *Brewer v. Irondequoit*, 212 F.3d 738, 752-53 (2d Cir. 2000); *Comfort ex rel. Neumyer v. Lynn Sch. Comm.*, 100 F. Supp. 2d 57, 65 n.12 (D. Mass. 2000).

90. See notes 16-17 and accompanying text.

91. See *Brewer*, 212 F.3d at 752 (overruling lower court for having conducted its inquiry under the framework of "true diversity" when "the appropriate inquiry . . . is whether the Program is narrowly tailored to achieve its primary goal of reducing racial isolation resulting from *de facto* segregation").

92. *Id.*

93. See *Eisenberg ex rel. Eisenberg v. Montgomery County Pub. Sch.*, 197 F.3d 123, 130 (4th Cir. 1999), *cert. denied*, 529 U.S. 1019 (2000) (concluding that, "despite the different nomenclature, these interests [diversity and the prevention of de facto desegregation] are one and the same") (citing *Brewer v. Irondequoit*, 32 F. Supp. 2d 619, 627 (W.D.N.Y. 1999) (describing the avoidance of racial isolation as "a negatively-phrased expression for attaining the opposite of racial isolation which is racial diversity"), *rev'd*, 212 F.3d 738 (2000)).

Chief Justice Burger declared in his *Swann* dictum,⁹⁴ this interest is quite similar to the interest in exposure to different people and viewpoints recognized as compelling in Justice Powell's *Bakke* opinion.⁹⁵ Furthermore, as discussed earlier, selective public schools, because of their competitive admissions processes, resemble colleges and universities more than they resemble nonselective schools.⁹⁶ The Supreme Court has never recognized a distinction between the government interests in diversity and the prevention of de facto segregation in the context of higher education. Any attempt to distinguish these two interests is weakest, therefore, in the context of public schools, such as selective schools, that most resemble institutions of higher learning.

Second, reliance on the *Swann* dictum ignores how subsequent Supreme Court opinions have eroded the force of this language as a justification for governmental use of racial classifications. As discussed in the Introduction, the Supreme Court in *Bakke*, *Croson*, and *Adarand* expressed a deep skepticism about any governmental use of racial classifications.⁹⁷ Furthermore, the Court has recently expressed much less enthusiasm for the pursuit of racial balancing for balancing's sake, as opposed to the pursuit of racial balancing solely for the purpose of dismantling de jure segregation. In *Freeman v. Pitts*,⁹⁸ in which the Court was asked to decide whether a formerly segregated school district had achieved unitary status, the Court emphasized: "Racial balance is not to be achieved for its own sake. It is to be pursued when racial imbalance has been caused by a constitutional violation."⁹⁹ Although *Freeman* concerned the continuing propriety of a lower court's desegregation order, the Court's statements have been read to cast doubt on the constitutionality of the use of racial classifications to achieve voluntary school integration.¹⁰⁰

While the *Freeman* Court did not condemn racial balancing as an impermissible objective,¹⁰¹ it considered integration to be a rationale

94. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971); see also *Comfort*, 100 F. Supp. 2d at 65 n.12 (distinguishing the *Bakke* meaning of diversity from the state's interest in ensuring that its "children simply get used to being in classrooms with people different from themselves").

95. See *Bakke*, 438 U.S. at 311-14 (opinion of Powell, J.).

96. See *supra* notes 49-54 and accompanying text.

97. See *supra* notes 21-32 and accompanying text.

98. 503 U.S. 467 (1992).

99. *Id.* at 494.

100. See, e.g., *Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698, 705 & n.10 (4th Cir. 1999) (per curiam) ("[N]onremedial racial balancing is unconstitutional." (citing *Freeman*)); *Eisenberg*, 197 F.3d at 132 (noting, after discussing *Freeman*, that "[a] potential racial imbalance does not, however, justify the transfer policy's use of race as a factor to determine eligibility for transfers").

101. See *Brewer*, 212 F.3d at 752 (arguing that *Freeman* "sheds little light on the constitutionality of a voluntary attempt" to integrate).

insufficiently compelling to justify offending other constitutional norms — particularly; the traditional local control of school systems¹⁰² and the imperative to release school districts from federal court supervision at “the earliest practicable date.”¹⁰³ Integration, therefore, is a permissible objective of a school district when no independent constitutional norms are offended,¹⁰⁴ but relying on racial classifications to achieve integration offends what Professor Rubenfeld has described as the constitutional norm of “classificationism.”¹⁰⁵ *Freeman*, therefore, does not necessarily contradict the *Swann* dictum’s tacit approval of voluntary integration policies.¹⁰⁶ Rather, it simply means that school districts are free to pursue integration provided they do not run roughshod over other, independent constitutional values — such as the suspicion of racial classifications.¹⁰⁷

102. See *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 . . .”).

103. *Freeman*, 503 U.S. at 490.

104. See *infra* Part III (discussing race-neutral methods to integrate public schools).

105. See cases cited *supra* notes 30-31 and accompanying text.

106. It is most likely, after all, that Chief Justice Burger was contemplating race-neutral student assignment plans — particularly busing — as the type of integration policies that local officials were empowered to pursue, as the primary issue in *Swann* was the constitutionality of a race-neutral busing lower court order. See *Swann*, 402 U.S. at 27-28.

107. The *Hampton* court objected to reading *Freeman* as prohibiting the voluntary use of racial classifications because school districts under court supervision for remedying de jure discrimination may actually be *compelled* to rely on racial classifications by federal court decree; see cases cited *supra* note 14. Consequently, the *Hampton* court noted, “[i]t is incongruous that a federal court could at one moment require a school board to use race to prevent resegregation of the system, and at the very next moment prohibit that same policy.” *Hampton v. Jefferson County Bd. of Educ.*, 102 F. Supp. 2d 358, 379 (W.D. Ky. 2000); see also Memorandum on Recent Cases Imposing Constitutional Limits on Racial Classifications in K-12 Education, from Professor Roderick M. Hills to his Education Law Class, University of Michigan Law School at 2 (Winter 2000) (on file with author) (“[T]he requirement that racial classifications be subjected to strict scrutiny runs into an interesting complication: where the state (or its subdivision) has engaged in *de jure* segregation, the Court has held that the 14th Amendment can sometimes *require* the state to use racial classifications to eliminate the vestiges of past discrimination. (See, for instance, *Swann*.) Thus, the 14th Amendment sometimes requires school districts to use racial classifications and sometimes the 14th Amendment prohibits school districts from using racial classifications.”); *id.* at 2-3 (“[S]ometimes the judicial finding that a school district is ‘unitary’ actually results in the *loss* of local control, as the school district loses the power to use racial classifications in student assignments.”).

The *Hampton* court’s objection of “incongruous”-ness is unconvincing because it proves both too much and too little. It proves too much because even the *Hampton* court was willing to invalidate the school district’s use of racial classifications in the magnet school context, see *infra* note 127, an area in which the school district had been compelled to use racial classifications before the dissolution of the consent decree. The *Hampton* court, therefore, had no problem with at one moment requiring the school district to use race and at the next moment preventing it from doing so within the magnet school context. The objection proves too little because there are numerous cases outside the educational context, such as *Paradise v. United States*, 480 U.S. 149 (1987), where a state actor is permitted to use race in a manner in which it would not be at liberty to do so in the absence of a court order requiring such action. See *infra* text accompanying note 194 (describing the court order approved in *Paradise*).

A school district might assert that racial balancing for racial balancing's sake is a compelling government interest because the failure to achieve such a balance may result in the school being sued for unconstitutionally segregating its pupils. In other words, if a school district takes action, such as creating an elite public high school, that has the unintended effect of causing a racial imbalance in the city's schools, the district might be found liable for having facilitated segregation of its schools.¹⁰⁸ Under *Freeman*, however, de facto segregation, as opposed to racial imbalance resulting from conscious government action with an intent to discriminate, is not unconstitutional.¹⁰⁹ The mere fact that a school district's policy has the incidental effect of increasing racial imbalance does not put the school at risk of violating the Constitution.¹¹⁰ Consequently, a school district cannot plausibly claim that it needs to rely on voluntary racial classifications to prevent racial imbalance in order to avoid violating the Fourteenth Amendment itself.¹¹¹

In sum, because selective public schools offer unique educational benefits to students chosen on the basis of merit, they must abide by *Bakke*'s requirement of using race in an individualized fashion in making admissions decisions. As such, admissions schemes like those

108. See, e.g., *Eisenberg v. Montgomery County Pub. Sch.*, 19 F. Supp. 2d 449, 454 (D. Md. 1998) (noting that a school district that adopts a magnet school program has a compelling interest in ensuring that its student assignment plan does not "facilitat[e] . . . private conduct that leads to a discriminatory environment"), *rev'd* 197 F.3d 123 (4th Cir. 1999), *cert. denied*, 529 U.S. 1019 (2000); *id.* ("The District obviously has a compelling interest in not facilitating a discriminatory environment though [sic] state action.").

109. See *Eisenberg v. Montgomery County Pub. Sch.*, 197 F.3d at 132 (4th Cir. 1999) (discussing *Freeman*).

110. See *Washington v. Davis*, 426 U.S. 229, 241-42 (1976) ("[W]e have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another.").

In *Green v. County School Board*, 391 U.S. 430 (1968), the Supreme Court found a school district liable for violating the Fourteenth Amendment by facilitating discrimination through its race-neutral student assignment plan without specifically finding that the plan was adopted with a discriminatory purpose. In *Green*, the Court invalidated the New Kent County, Virginia, school board's "freedom-of-choice" plan, which allowed parents to choose the school to which to send their children. After three years of this plan the extreme racial imbalance in the district persisted. (Indeed, not one white child had chosen to attend the black school that 85% of the black children continued to attend.) *Green* is distinguishable, however, because it involved a school district that had been found to have engaged in blatant de jure discrimination for years and had done nothing to remedy it. The Court rejected the "freedom-of-choice" plan because the school board had shirked its "affirmative duty to take whatever steps might be necessary to convert [the district] to a unitary system in which racial discrimination would be eliminated root and branch." *Id.* at 437-38. In a unitary school district, however, schools are under no "affirmative duty" to dismantle a segregated system. Therefore, any racial imbalance resulting from a student assignment plan adopted for legitimate pedagogical reasons is constitutionally permissible as there exists no duty to disestablish state-imposed segregation as there was in *Green*.

111. See *Eisenberg*, 197 F.3d at 129-30 (concluding that when a school district is under no court-imposed duty to desegregate, racial classifications need not be "tolerated").

reviewed in *Wessmann* or *Ho* that rely on separate applicant pools or automatically grant preferences to students of particular racial or ethnic groups without any individualized determination of the student's contribution to the school's diversity are unconstitutional. Because selective public schools are unlikely to adopt admissions programs that engage in the kind of individualized candidate evaluation envisioned by *Bakke*, selective schools seeking to enhance diversity will need to rely on means other than racial classifications to accomplish this goal. Furthermore, the prevention of de facto segregation does not amount to a state interest sufficiently compelling to justify the use of racial classifications in selective school admissions, particularly because selective schools so resemble institutions of higher learning, a context in which the Supreme Court has never endorsed the prevention of de facto segregation as a compelling interest.

In addition, regardless of whether diversity or the prevention of de facto segregation is offered as a justification for the use of racial classifications in selective school student assignment, the availability of race-neutral alternatives to achieve either end, as Section III.B will demonstrate, further counsels against the constitutionality of any race-classifying scheme. In *United States v. Paradise*,¹¹² and later in *Croson*,¹¹³ the Supreme Court declared that in analyzing the constitutionality of a government measure relying on racial classifications, the Court would look to the availability and efficacy of "race-neutral means" — i.e., programs that do not rely on racial classifications — to effectuate the same "race-conscious" ends.¹¹⁴ Because such race-neutral alternatives are available to school officials, as Section III.A will explain, those that rely on the dangerous tool of racial classifications are much more suspect.

112. 480 U.S. 149, 171 (1987) (plurality opinion of Brennan, J.) (discussing the importance of evaluating "the efficacy of alternative remedies" in approving a race-classifying judicial decree).

113. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989) (inquiring into the availability of "race-neutral means" in examining the constitutionality of state and municipal legislation that relies on racial classifications); *see also* *Johnson v. Bd. of Regents of the Univ. of Ga.*, 2001 U.S. App. LEXIS 19154, at *52-53 (11th Cir. Aug. 27, 2001) (requiring a university defending an admissions policy relying on racial classifications to "show that it has genuinely considered, and rejected as inadequate, race-neutral alternatives for creating student body diversity"); *Hayes v. N. State Law Enforcement Officers Ass'n*, 10 F.3d 207, 216 (4th Cir. 1993) (inquiring into the availability of race-neutral alternatives).

114. The *Paradise* Court used the term "race-conscious" to describe a district court order requiring the Alabama state police to promote certain quotas of blacks to particular positions in an effort to remedy past discrimination in the department. 480 U.S. at 171 (plurality opinion). The Court's use of the term "race-conscious," at least in this case, however, is different from this Note's definition. This Note uses "race-conscious" to refer to state programs that take note of race but do not rely on racial classifications. A "race-conscious" program may also be "race-classifying," as was the decree being reviewed in *Paradise*, but it need not be. Rather, it may be "race-conscious," — adopted at least in part in order to benefit a certain race or races — yet "race-neutral," in that it avoids using racial classifications to accomplish its goals.

II. RACIAL CLASSIFICATIONS IN NONSELECTIVE SCHOOLS

Unlike selective public schools, nonselective schools do not consider an individual student's merit — test scores, grades, etc. — in making their admissions decisions.¹¹⁵ In the absence of a merit-based determination, therefore, some have argued that the government is free, or at least freer, to use racial classifications in determining pupil assignment.¹¹⁶ This Part rejects that assertion and argues that racial classifications may play only a limited role in the assignment of students to nonselective public schools. Section II.A explains why the use of racial classifications in schools that purport to offer unique educational benefits, often called “magnet schools,” is almost always unconstitutional. Although magnet schools do not consider merit in evaluating candidates, they nevertheless resemble the selective schools discussed in Part I by “offer[ing] a specialized curriculum or innovative instructional style not found in other schools” in the district.¹¹⁷ Consequently, school officials' ability to use race in designing admissions policies is similarly constrained. Section II.B then explains how school officials have some limited latitude to use racial classifications in controlling transfers between ostensibly equal, or “fungible,” schools within or without a district. Unlike selective or magnet schools, fungible schools do not purport to offer any specific pedagogical benefits. Nevertheless, school district officials do not enjoy *carte blanche* to employ racial classifications in assigning students among fungible schools. Rather, school officials may use racial classifications only when the need to do so is urgent, as in the case of massive residential white flight, but otherwise must choose race-neutral alternatives to promote integration.

A. Magnet Schools

In an effort to improve educational quality and increase parental and student choice, school districts have increasingly established mag-

115. See, e.g., *Eisenberg ex rel. Eisenberg v. Montgomery County Pub. Sch.*, 197 F.3d 123, 125 n.3 (4th Cir. 1999) (noting that admission to the magnet school at issue was “not based on merit”), *cert. denied*, 529 U.S. 1019 (2000).

116. See *Eisenberg v. Montgomery County Pub. Sch.*, 19 F. Supp. 2d 449, 454 (D. Md. 1998) (noting that unlike *Bakke*, which concerned admission to a medical school, first grade students will not have “extensive resumes which may be weighed and considered” in the admissions process), *rev'd*, 197 F.3d 123 (4th Cir. 1999), *cert denied*, 529 U.S. 1019 (2000); Harvard Note, *supra* note 38, at 955-56 (“Perhaps most importantly, students being denied admission to elementary and secondary schools often have a lesser claim to be entitled to admission based on ‘merit.’”).

117. *Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 233 F.3d 232, 302 (4th Cir. 2000) (Traxler, J., concurring in part, dissenting in part), *vacated and reh'g en banc granted* (4th Cir. Jan. 17, 2001).

net schools that offer unique pedagogical approaches.¹¹⁸ Some school districts have also adopted magnet schools in an effort to promote integration by enticing students away from their more segregated neighborhood or private schools.¹¹⁹ Enrollment in magnet schools is generally voluntary in that the district initially assigns students to an ordinary, nonmagnet school, but parents may attempt to opt out of this default assignment by applying for admission to a magnet school.¹²⁰ The geographic base of the magnet school is, therefore, usually district-wide, whereas the geographic base of the ordinary, non-magnet school is usually confined to a neighborhood or a collection of neighborhoods within the district.¹²¹

Because magnet schools offer unique educational benefits, the number of applicants often exceeds the number of slots available.¹²² As a result, magnet schools utilize lotteries to select among the excessive number of applicants.¹²³ In an effort to ensure a racially diverse student body, some school districts have adopted weighted lotteries that seek to ensure that the racial composition of the student body remains at or near a certain level — often a level equal to the racial composition of the school district as a whole.¹²⁴ Instead of weighted lotteries, some school districts have adopted entirely separate lotteries for different racial groups in order to ensure a certain racial composition,¹²⁵ a policy reminiscent of the Cal-Davis medical school's separate

118. *Id.* (describing magnet schools as those offering a “specialized curriculum or innovative instructional style not found in other schools in the system”).

119. *Missouri v. Jenkins*, 515 U.S. 70, 76 n.1 (1995); *id.* at 92 (“Magnet schools have the advantage of encouraging voluntary movement of students within a school district in a pattern that aids desegregation on a voluntary basis”); *see also Belk*, 233 F.3d at 267 (noting that “[s]ince the 1970s, school boards throughout the country have utilized magnet schools as part of desegregation plans”).

120. *See Jenkins*, 515 U.S. 76 n.1 (describing magnet schools as “public schools of voluntary enrollment”); *see, e.g., Belk*, 233 F.3d at 268-69 (explaining how the Charlotte-Mecklenburg magnet school system works).

121. *See, e.g., Hampton v. Jefferson County Bd. of Educ.*, 102 F. Supp. 2d 358, 377 (W.D. Ky. 2000) (noting that Louisville’s Central High Magnet Career Academy is “one of very few” schools in the district “with no geographic attendance base; all of its students apply for and participate in one of four special magnet programs”).

122. *See, e.g., Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698, 701 (4th Cir. 1999) (*per curiam*) (describing situation in which an Arlington, Va., magnet school had “185 applicants for only 69 available positions”), *cert. dismissed*, 529 U.S. 1050 (2000).

123. *See, e.g., Belk*, 233 F.3d at 269 (describing the Charlotte-Mecklenburg Schools’ use of lotteries to assign students to magnet schools).

124. In *Tuttle*, for instance, a magnet school used a weighted lottery for admission that weighted the “probabilities associated with each applicant’s lottery number . . . so that applicants from under-represented [racial or ethnic] groups . . . had an increased [chance of being] select[ed].” 195 F.3d at 702.

125. *See, e.g., Belk*, 233 F.3d at 269 (“CMS [Charlotte-Mecklenburg Schools] generally assigns students to its magnet schools using two parallel lotteries, one for black students and one for students of other races.”); *Hampton*, 102 F. Supp. 2d at 378 (noting that

admissions tracks struck down in *Bakke*.¹²⁶ Some of these districts have used these separate lotteries to exclude students of an over-represented race even when the school is operating under capacity.¹²⁷

Much like the selective public schools discussed in Part I, magnet schools, although nonselective, offer unique educational opportunities unavailable in nonmagnet schools.¹²⁸ Students denied admission to a magnet school lose an opportunity to learn in an environment that offers an enriched curriculum or a special learning environment.¹²⁹ Consequently, when a school district decides who may attend its magnet schools on the basis of racial classifications, it, as one court observed, “denies a benefit, causes a harm, and imposes a burden” on applicants of the over-represented race.¹³⁰

To survive strict scrutiny, magnet school admissions programs relying on racial classifications must be narrowly tailored measures furthering compelling government interests.¹³¹ As the Fourth Circuit noted in striking down Arlington’s weighted lottery magnet school

Louisville’s Central High magnet school “has two admissions tracks: one exclusively for blacks, and another for everyone else”).

126. See *supra* note 25 (discussing the admissions policy at issue in *Bakke*).

127. In *Hampton*, for instance, Louisville’s magnet Central High had a racial composition of fifty percent African-American in 1999, which equaled the target black enrollment set by the district’s racial guidelines. 102 F. Supp. 2d at 377. Although Central’s enrollment was about 300 or 400 students below capacity, black applicants were selected using a random lottery whereas white applicants were automatically admitted. See *id.* at 377. Under this system, at least 133, and possibly as many as 400, black applicants were rejected from Central despite its operating under capacity. See *id.* at 377 n.40 (noting conflicting testimony as to the number of African-American students excluded). The court ultimately rejected this plan as unconstitutional upon dissolution of the desegregation consent decree. See *id.* at 379.

Note that although Central appears to have relied primarily on its lottery system to select black applicants, black applicants also were told that they “may be asked to provide an essay, survey, recommendations, or work samples. Additionally, the school may review grades, standardized test scores, and attendance or behavior data.” *Id.* at 377 n.40. The court noted, however, that “[t]here is no evidence that any such materials are ever requested of white applicants.” *Id.* Central, therefore, was apparently operating as a hybrid selective-nonselective school. It operated nonselectively in its admission of white applicants, and it operated quasi-selectively in its admission of black applicants.

128. See *supra* note 118 and accompanying text.

129. See *Belk*, 233 F.3d at 302 (Traxler, J., concurring in part and dissenting in part).

130. *Hampton*, 102 F. Supp. 2d at 381. Because magnet schools often have more applicants than available slots, any admissions policy that relies on racial classifications constitutes what the Court of Appeals for the Ninth Circuit has called a “stacked deck” or “preference” program in that “the state specifically favors members of minorities in competition with members of the majority for benefits that the state can give to some citizens but not to all.” *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 137 F. Supp. 2d 1224, 1230 (W.D. Wash. 2001) (quoting *Associated Gen. Contractors v. San Francisco Unified Sch. Dist.*, 616 F.2d 1381 (9th Cir. 1980) (internal quotation marks omitted)). Such a program, consequently, imposes a “harm” on members of a particular race, *id.* at 1231 (quoting *Coalition for Econ. Equity v. Wilson*, 122 F.3d 692, 707 n.16 (9th Cir. 1997) (internal quotation marks omitted)), as opposed to a mere “deck shuffle” or “reshuffling,” which, according to the Ninth Circuit, imposes no such harm. See *id.*

131. See *Adarand Construction, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

admission program in *Tuttle v. Arlington County School Board*, such schemes fail strict scrutiny analysis because they do not consider “each applicant as an individual,” which is what *Bakke* requires of institutions that employ racial classifications to achieve diversity.¹³² Much like the racial set-asides discussed in Part I, these admissions procedures give a preference to certain applicants “solely because of their race.”¹³³ By focusing solely on racial or ethnic diversity, as did the admissions policy at Louisville’s magnet Central High struck down in *Hampton v. Jefferson County Board of Education*,¹³⁴ such programs do not further attainment of “genuine diversity” but rather hinder it.¹³⁵

Even when the use of race is one of a few factors used to weight the admissions lottery, such a policy is still likely to be unconstitutional. In *Tuttle*, the Arlington School District implemented a policy similar to those considered by the San Francisco Board of Education after *Ho* as discussed in Part I.¹³⁶ In particular, Arlington made race one of three equally weighted factors in its lottery, the other two being socioeconomic status and whether English was the applicant’s first or second language.¹³⁷ Despite diluting the importance of race in the lottery, such a scheme does not pass strict scrutiny under *Bakke* because there is no *individualized* determination of whether a student’s racial background contributes to the student body’s diversity.¹³⁸ While objective, nonracial factors like those used in *Tuttle* may certainly be part of a school’s assessment of an individual applicant’s contribution to diversity, any consideration of race, per *Bakke*, must take place in the context of a determination that also takes into account individualized factors like “extra-curricular interest, life experiences, or the myriad other educational or cultural axes.”¹³⁹

Because magnet schools do not employ merit-based admissions processes like those used by selective public schools, some have argued that *Bakke* is of limited relevance outside of the context of selective schools.¹⁴⁰ According to this argument, *Bakke* assumes that race

132. See 195 F.3d at 707 (quoting *Bakke*, 438 U.S. at 317).

133. *Id.*

134. 102 F. Supp. 2d at 377; see *supra* note 127 (describing Central High’s admissions policy).

135. See *Hampton*, 102 F. Supp. 2d at 378 (quoting *Bakke*, 438 U.S. at 315) (opinion of Powell, J.) (internal quotation marks omitted).

136. See *supra* notes 85 to 92 and accompanying text.

137. See *Tuttle*, 195 F.3d at 701.

138. See *supra* notes 86-92 and accompanying text.

139. *Hampton*, 102 F. Supp. 2d at 379.

140. See *Brewer v. W. Irondequoit Cent. Sch. Dist.*, 212 F.3d 738, 751 (2d Cir. 2000) (noting that *Bakke* “is not directly on point”); *Comfort ex rel. Neumyer v. Lynn Sch. Comm.*, 100 F. Supp. 2d 57, 67 (D. Mass. 2000); *Eisenberg v. Montgomery County Pub. Sch.*, 19 F. Supp. 2d 449, 454 (D. Md. 1998), *rev’d*, 197 F.3d 123 (4th Cir. 1999), *cert. denied*, 529 U.S. 1019 (2000); Harvard Note, *supra* note 38, at 955-56.

may be used as one of many factors in an effort to achieve diversity, but when these other individuated factors enumerated in *Bakke* — such as “work or service experience, leadership potential, maturity, [or] demonstrated compassion” — are practically nonexistent, as they are in the case of six-year-olds applying to a magnet school program,¹⁴¹ the school’s interest in pursuing diversity ought to trump *Bakke*’s concern for treating each applicant as an individual.¹⁴² In other words, if the premises of Justice Powell’s concern for treating each applicant as an individual in *Bakke* do not exist because young children have yet to constitute themselves as individuals, then a school seeking student body diversity that includes racial diversity has no choice but to consider race in a fashion that treats racial groups as monolithic.

The problem with this argument is that it misconceives the meaning of the diversity interest endorsed by Justice Powell. Although Justice Powell recognized the state’s compelling interest in achieving a diverse student body, ethnic diversity was considered “only one element in a range of factors” that a university may properly consider in its pursuit of the goal of heterogeneity.¹⁴³ Consequently, if students have yet to constitute themselves as individuals in a way that prevents a school from assembling a class that is a collection of truly diverse individuals, then the school would not be pursuing the kind of diversity envisioned by *Bakke*. Rather, the school would be pursuing something more like racial balancing — the pursuit of particular percentages of racial and ethnic groups for its own sake — which *Bakke* expressly forbade.¹⁴⁴

Even if their student assignment plans do not further “diversity” in the *Bakke* sense of the word, however, some school districts, as discussed earlier, have defended their race-classifying magnet school integration policies on the basis of their pursuit of the supposedly conceptually distinct government interest in preventing de facto segregation.¹⁴⁵ As discussed earlier, at least one court has decided that there is no conceptual distinction between these two interests.¹⁴⁶

141. See *Eisenberg*, 19 F. Supp. 2d at 454 (“But it must be remembered that *Bakke* dealt with admissions to medical school. . . . It is obviously unlikely that first graders will have extensive resumes which may be weighed and considered in addition to their race in the District’s formulation of how to craft diverse classrooms.”).

142. See *id.* at 455.

143. See *Bakke v. Regents of the Univ. of Cal.*, 438 U.S. 265, 314 (1978) (opinion of Powell, J.).

144. See *id.* at 307 (opinion of Powell, J.) (“If petitioner’s purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial but as facially invalid.”).

145. See *supra* notes 89-92 and accompanying text.

146. See *Eisenberg*, 197 F.3d at 130 (“[D]espite the different nomenclature, these interests [diversity and the prevention of de facto desegregation] are one and the same.”).

Nevertheless, assuming arguendo that diversity and the prevention of de facto segregation are distinct government interests, the question remains whether the latter amounts to a government interest sufficiently compelling to justify the use of racial classifications. As argued above, although Chief Justice Burger's *Swann* dictum may appear to provide support for the proposition that the prevention of de facto segregation is a compelling government interest, more recent Supreme Court opinions have seriously undercut the power of this dictum by taking a skeptical view of the use of racial classifications and by questioning the utility of achieving racial balancing for its own sake.¹⁴⁷

In creating selective school admissions plans that rely on racial classifications, school administrators are generally concerned with ensuring a minimum amount of minority students so that the one or two selective schools in the district do not have predominantly white or Asian populations or both.¹⁴⁸ By contrast, in designing their nonselective school student assignment plans, district officials are sometimes concerned with ensuring that no school in the district becomes too associated with any particular minority group, such as black or Hispanic. In *Hampton*, for instance, the school district was concerned that without a racial balancing plan, certain schools would become identifiably black and "racially isolated," thereby sending a message of racial inferiority.¹⁴⁹

The Supreme Court's recent decisions have made clear, however, that no such message of inferiority should be inferred, and that the government's interest in ensuring that schools do not become identifiably black or Hispanic is not particularly strong. In *Freeman*, the Court affirmed a lower court's dissolution of a desegregation decree even though there was racial imbalance among the district's schools,¹⁵⁰ one school in the district, for instance, had become seventy-six percent black.¹⁵¹ The *Freeman* Court concluded, however, that imbalance re-

147. See *supra* notes 97-111 and accompanying text.

148. See, e.g., *Wessmann v. Gittens*, 160 F.3d 790, 792-94 (1st Cir. 1998) (describing how Boston Latin's admissions scheme was adopted because of a "[c]oncern[] that the number of African-American and Hispanic students . . . might drop precipitously without a predetermined set-aside"); Julian Guthrie, *Race Gap to Widen Further at Lowell Next Year; Fewer Blacks and Latinos, More Asians and Whites*, S.F. EXAMINER, Mar. 10, 2000, at A1 (describing how without the race-classifying admissions scheme defended by the school board in the *Ho* litigation, the number of blacks and Latinos accepted to Lowell dropped precipitously).

149. See *Hampton v. Jefferson County Bd. of Educ.*, 102 F. Supp. 2d at 371, 375-76 (W.D. Ky. 2000).

150. *Freeman v. Pitts*, 503 U.S. 467, 494-95 (1992).

151. *Id.* at 477-78.

sulting from private residential choices rather than from de jure discrimination does not amount to unconstitutional segregation.¹⁵²

The Court took a similar approach in its 1995 *Missouri v. Jenkins* decision, in which it struck down as overbroad the attempt of a federal district court to fashion an interdistrict remedy to cure intradistrict segregation.¹⁵³ In particular, the Court rejected the lower court's conclusion that because the violating school district (Kansas City, Mo.) was 68.3% black, a purely intradistrict remedy would be inadequate at sufficiently integrating the schools.¹⁵⁴ Rather, the lower court fashioned a remedy that required the city and state to pay for new magnet schools designed to attract nonminority students to the Kansas City schools.¹⁵⁵ Although Chief Justice Rehnquist's majority opinion did not directly discuss the claim, accepted by the district court, that racially identifiable schools create a stigma of inferiority, Justice Thomas's concurrence attacked this claim.¹⁵⁶ Justice Thomas noted that such a claim "not only relies upon questionable social science research rather than constitutional principle, but it also rests on an assumption of black inferiority."¹⁵⁷ Justice Thomas's views echo those of accomplished scholars like Professor Derrick A. Bell, Jr., who have argued that educational equality for blacks can be better achieved through the improvement of majority-black schools than through racial balance remedies.¹⁵⁸ Indeed, many blacks increasingly share this belief.¹⁵⁹ These considerations support the *Hampton* court's decision that

152. *Id.* at 496 ("It is simply not always the case that demographic forces causing population change bear any real and substantial relation to a *de jure* violation. And the law need not proceed on that premise.").

153. 515 U.S. 70 (1995).

154. *Id.* at 91.

155. *Id.*

156. *See id.* at 114 (Thomas, J., concurring).

157. *Id.* (Thomas, J., concurring).

158. *See* Derrick A. Bell, Jr., *A School Desegregation Post-Mortem*, 62 TEX. L. REV. 175, 189 (1983) (reviewing DAVID L. KIRP, *JUST SCHOOLS: THE IDEA OF RACIAL EQUALITY IN AMERICAN EDUCATION* (1982)).

159. *See* Leon Stafford, *Ga. Schools Becoming Resegregated; Immigration, Living Patterns, Parental Desire for Neighborhood Schools Are Bringing Change*, ATL. CONST., June 17, 1999, at 1a ("Longtime proponents of integration, such as the National Association for the Advancement of Colored People, have had a change of heart concerning schools that are predominantly minority . . . sa[ying] the time has come for schools with predominantly black student bodies to become centers of academic excellence."); Jeffrey Rosen, *The Lost Promise of School Integration*, N.Y. TIMES, Apr. 2, 2000, § 4, at 1, 5 (noting that "[f]orced to choose between racial diversity and educational quality, most African-American parents seem to agree with Justice Thomas. In a 1998 survey . . . 82 percent of the black parents said that raising academic standards was more important than achieving more diversity and integration"); *see also* sources cited *infra* note 303 and accompanying text.

Louisville's Central High ought not to be denying admission to black applicants for fear of the school becoming too black.¹⁶⁰

In sum, although they do not make their admissions determinations on the basis of test scores, grades, or other indications of merit, magnet schools nevertheless offer unique educational benefits and, consequently, any student assignment plan using race must do so in a manner that abides by *Bakke's* requirement of an individualized evaluation. Consequently, as in the selective school context, because such an individualized approach to admissions is costly and time-consuming, public schools would likely abandon the use of racial classifications altogether.¹⁶¹ An attempt to justify the use of race as a tool for preventing de facto segregation, rather than simply as a measure for achieving *Bakke*-style diversity, also fails because the Supreme Court's recent decisions have taken a skeptical view of pursuing racial balancing for the sake of racial balancing when other constitutional values — in this case, "classificationism"¹⁶² — are offended.¹⁶³ Furthermore, as Section III.B will demonstrate, the availability of race-neutral methods to increase racial diversity counsels against the constitutional approval of schemes that rely on racial classifications.¹⁶⁴

B. *Fungible Schools*

In most school districts, students are assigned to a particular school based on the neighborhood in which they live and are generally not allowed to choose another school.¹⁶⁵ An increasing number of districts, however, have adopted open enrollment policies of some sort, which allow for students to transfer between ostensibly equal schools within (or, less frequently, outside of) the district.¹⁶⁶ Many of these open-enrollment districts have utilized racial classifications in an attempt to achieve or maintain a desired racial composition for the schools

160. See *supra* note 127 (explaining how Central High placed a cap on black students).

161. See *supra* notes 82-88 and accompanying text.

162. See *supra* note 31 and accompanying text.

163. See *supra* notes 101-107 and accompanying text.

164. See *supra* notes 112-114 and accompanying text (discussing the *Paradise* and *Croson* inquiry into the availability and efficacy of race-neutral methods as a part of the analysis of the constitutionality of a race-classifying government program).

165. See Richard F. Elmore, *Choice in Public Education*, in *THE POLITICS OF EXCELLENCE AND CHOICE IN EDUCATION* 79, 79-86, 93-95 (William Lowe Boyd & Charles Taylor Kerchner, eds., 1988), reprinted in YUDOF ET AL., *supra* note 13, at 424-29, 429-31 (describing the limited amount of choice among schools within a district normally offered to parents).

166. See Jodi Wilgoren, *Schools Are Now Marketers Where Choice Is Taking Hold*, N.Y. TIMES, Apr. 20, 2001, at A1 (describing the rapid growth of public school choice). As of 2000, "twenty states [had] open enrollment laws that allow children to transfer from district to district." Rosen, *supra* note 159, at 5.

throughout the district.¹⁶⁷ Under these policies, students are prohibited from transferring into or out of a particular school if such a transfer would adversely affect either school's racial balance.¹⁶⁸ Some have argued that using race is more acceptable in these circumstances than in the selective or magnet school contexts because the student is not being denied the opportunity to attend a school that offers any special educational benefits.¹⁶⁹ This Section argues that school districts generally may not employ racial classifications in apportioning transfers among ostensibly equal schools, except in cases of rampant white flight in the community.

A number of lower courts have recognized that the interests of a student in attending a magnet or selective school are greater than those of a student in attending a particular nonmagnet school because the education offered is ostensibly "equivalent" to that offered at other nonmagnet schools either within or without the district.¹⁷⁰ Unlike magnet schools, which offer students a unique, specialized education, nonmagnet schools are considered to offer a comparable or "fungible" education because they do not use a specialized pedagogical method.¹⁷¹ Consequently, the argument goes, schools ought to be free to use racial classifications to distribute students among these fungible schools since no burden is imposed nor benefit conferred.¹⁷² While acknowledging that parents may have strong "subjective" preferences

167. See, e.g., *Equal Open Enrollment Assoc. v. Bd. of Educ.*, 937 F.Supp. 700, 702 (N.D. Ohio 1996) (striking down Akron's use of racial classifications in prohibiting transfers by white students out of a school with a high percentage of minorities).

168. See *id.*

169. See, e.g., *Hampton v. Jefferson County Bd. of Educ.*, 102 F. Supp. 2d 358, 380 (W.D. Ky. 2000) ("conclud[ing] that as between two regular elementary schools, assignment to one or another imposes no burden and confers no benefit").

170. See *Brewer v. W. Irondequoit Cent. Sch. Dist.*, 212 F.3d 738, 752 (2d Cir. 2000) (noting that the white plaintiff denied a transfer to an ordinary high school in a different district was still being offered "an equivalent alternative education"); *Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 233 F.3d 232, 306 (4th Cir. 2000) (Traxler, J., concurring in part and dissenting in part), *vacated and reh'g en banc granted* (4th Cir. Jan. 17, 2001). ("While a child denied a transfer from one conventional school to another still receives the same general education, a child denied admission to a specialized magnet program does not receive a similar benefit in a conventional school."); *Johnson v. Bd. of Educ.*, 604 F.2d 504, 518 (7th Cir. 1979) (noting that the black plaintiffs denied transfers were still attending "comparable" schools), *vacated mem.*, 449 U.S. 915 (1980); *Comfort ex rel. Neumyer v. Lynn Sch. Comm.*, 100 F. Supp. 2d 57, 67 (D. Mass. 2000) (noting that the schools to which white students have been denied transfers under the district's voluntary integration plan are "more fungible" than Boston Latin in *Wessmann*); *Hampton*, 102 F. Supp. 2d at 380 (concluding that "as between two regular elementary schools, assignment to one or another imposes no burden and confers no benefit").

171. See *Hampton*, 102 F. Supp. 2d at 380 (noting that "as between two regular elementary schools . . . [t]he same education is offered at each school, so assignment to one or another is basically fungible").

172. See *id.*

for their children to attend one fungible school over another,¹⁷³ some lower courts have dismissed these preferences as “constitutionally [in]significant”¹⁷⁴ because “there is no clear *objective* benefit to attending any one school over another.”¹⁷⁵

While these lower courts may be right that the lack of any “objective” benefit offered by attendance at a fungible school means that less of a harm has been imposed, they are incorrect to conclude that no harm of any “constitutionally significant” dimension has been suffered. Although the Supreme Court placed much emphasis on the “importance” of the right to education in *Brown*,¹⁷⁶ later commentators have criticized this approach as disingenuous or just off-the-mark for, as Professor Michael McConnell has noted, “[n]ot everything that is ‘important’ is a civil right and . . . not everything that is a civil right is ‘important.’”¹⁷⁷ Rather, the essential constitutional principle is complete equality in all civil rights, irrespective of the importance of the right asserted.¹⁷⁸ Indeed, the Court’s reliance on the importance of education, rather than the simple notion of equality, was belied by its subsequent per curiam opinions that relied on *Brown* to order the desegregation of seemingly un-“important” government services like golf courses and beaches.¹⁷⁹

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

174. *Hampton*, 102 F. Supp. 2d at 380 n.43.

175. *Comfort*, 100 F. Supp. 2d at 67 (emphasis added); see also *Hampton*, 102 F. Supp. 2d at 380 n.43 (“[S]tudents and their parents might prefer one [“fungible”] school over another. The preference may even arise from a perception that one school is better than others due to its location, its teachers and principal, or its classroom environment. However, these matters of personal preference do not distinguish those schools in a constitutionally significant sense.”); *Belk*, 233 F.3d at 306 n.10 (Traxler, J., concurring in part, dissenting in part) (recognizing “that parents [may] perceive that one ‘fungible’ conventional school is superior to another because of a number of intangibles such as the reputation of teachers or the newness of facilities. However, these ‘personal preferences’ do not rise to a level of constitutional significance.” (citing *Hampton*, 102 F. Supp. 2d at 380 n.43)).

176. *Brown I*, 347 U.S. 483, 492-93 (1954) (describing education as “perhaps the most important function of state and local governments” and recognizing “the importance of education to our democratic society” (emphases added)).

177. Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 1135 (1995) (quoting *Brown I*, 342 U.S. at 493); see also Edmond Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150, 167 (1955) (criticizing the Court’s reliance on social science data in establishing the importance of a right to education as allowing “our fundamental rights [to] rise, fall, or change along with the latest fashions of psychological literature”).

178. McConnell, *supra* note 177, at 1135 (emphasis added) (quoting *Brown I*, 347 U.S. at 493 (internal quotation marks omitted)).

179. See *Schiro v. Bynum*, 375 U.S. 395 (1964) (per curiam) (municipal auditorium seating); *Johnson v. Virginia*, 373 U.S. 61 (1963) (per curiam) (courtroom seating); *Turner v. City of Memphis*, 369 U.S. 350 (1962) (per curiam) (airport restaurant); *State Athletic Comm’n v. Dorsey*, 359 U.S. 533 (1959) (per curiam) (athletic contests); *New Orleans City Park Improvement Ass’n v. Detiege*, 358 U.S. 54 (1958) (per curiam) (public parks and golf course); *Gayle v. Browder*, 352 U.S. 903 (1956) (per curiam) (segregation of busses); *Mayor of Baltimore City v. Dawson*, 350 U.S. 877 (1955) (per curiam) (public beaches and bath-houses); *Holmes v. Atlanta*, 350 U.S. 879 (1955) (per curiam) (municipal golf courses).

Consequently, school districts that condition the right to transfer to another school on a student's race do impose a harm of some constitutional significance.¹⁸⁰ Even if a parent's desire to send her child to a different school is based on purely subjective preferences, which may arise, as one court noted, from "a perception that one school is better than another due to its location, its teachers and principal, or its classroom environment,"¹⁸¹ a constitutional harm is imposed because an educational choice is being denied to a parent of one race while being extended to the parent of another.¹⁸² Although there is no constitutional right to attend the school of one's choice — or even to attend public school altogether¹⁸³ — once a school district creates such a privilege, it must mete it out in a way that treats the races equally.¹⁸⁴ The mere fact that the government has no obligation to create the privilege in the first place does not mean that once it creates the privilege, it may attach whatever racial conditions it pleases to the exercise of that privilege.¹⁸⁵ The denial, therefore, of even a parent's subjective preference for her child to attend a particular school imposes a constitutional harm when such a denial is made on the basis of the suspect classification of race.

180. See *Equal Open Enrollment Assoc. v. Bd. of Educ.*, 937 F. Supp. 700, 708 (N.D. Ohio 1996) (granting a white plaintiff's motion for a preliminary injunction challenging denial of transfer to a fungible school on racial grounds for the plan denied certain students "the benefit of the law solely because of the color of their skin").

181. *Hampton*, 102 F. Supp. 2d at 380 n.43 (describing a parent's desire for her child to attend one fungible school over another as based on "perception" and as solely a matter of "personal preference").

182. See *Equal Open Enrollment Assoc.*, 937 F. Supp. at 708.

183. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37-38 (1973) (concluding that education is not a "fundamental right or liberty").

184. See *supra* text accompanying note 178. Although the *Rodriguez* Court refused to recognize the "fundamentality" of the right to an education in declining to strike down Texas's unequal school funding system, it reaffirmed its commitment to educational equality "in the context of racial discrimination." *Rodriguez*, 411 U.S. at 29. The Court also refused to recognize poverty as a suspect class, noting that "at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages." *Id.* at 23-24. Consequently, the Court applied rational basis scrutiny to Texas's funding scheme. Because race is a suspect classification, however, strict scrutiny must be applied to any educational system that discriminates on the basis of race, and, therefore, the "absolute equality or precisely equal advantages" that the *Rodriguez* Court found was not necessary in the wealth context is required when racial classifications are employed. *Id.* at 24. Indeed, the *Brown* Court itself had declared that although the State was under no obligation to provide an education to all of its citizens in the first place, "where the state has undertaken to provide it, . . . [it] must be made available to all on equal terms." *Brown I*, 347 U.S. 483, 493 (1954).

185. See *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) ("[E]ven though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely."); *Speiser v. Randall*, 357 U.S. 513, 518 (1958) (holding that although California was not obligated to create a tax exemption for veterans, once it did so it was obliged to extend it to all who qualified without attaching unconstitutional conditions).

Additionally, a parent's desire for her child to attend one school over another because of location, teachers, principal, or classroom environment can hardly be dismissed as a merely "subjective" or personal preference.¹⁸⁶ In particular, a student denied an opportunity to transfer to a school in a different district, as in *Equal Open Enrollment Association v. Board of Education*,¹⁸⁷ and *Brewer v. West Irondequoit Central School District*,¹⁸⁸ may be deprived of a significant educational opportunity. After all, in most states there are wide disparities among school districts in terms of funding,¹⁸⁹ and funding disparities may, of course, affect educational quality.¹⁹⁰ Furthermore, even within a school district, there may be significant differences among supposedly "fungible" schools in terms of curricular offerings, extracurricular activities, facilities, and other educational amenities.¹⁹¹ While such criteria of selection may be "subjective" or personal in that the parent has to decide which aspects of a school are personally important to her, they are not so idiosyncratic as to be dismissed as constitutionally insignificant.

In *Paradise v. United States*, Justice Brennan's plurality opinion described several criteria to be considered when reviewing government programs that use racial classifications in ameliorating past discrimination in hiring practices:¹⁹² "the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties."¹⁹³ In *Paradise*, the Court affirmed

186. *Hampton*, 102 F. Supp. 2d at 380 n.43.

187. 937 F. Supp. 700 (N.D. Ohio 1996).

188. 212 F.3d 738 (2d Cir. 2000).

189. See YUDOF ET AL., *supra* note 13, at 599.

190. See *id.* at 599-601.

191. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 137 F. Supp. 2d 1224, 1231 n.7 (W.D. Wash. 2001) (recognizing that students denied the chance to attend the supposedly fungible school of their choice under an intra-district open enrollment plan "are deprived of curriculum advantages not necessarily available at other schools"); *id.* at 1239 (noting that some of the supposedly fungible schools "continue to offer less attractive programming and facilities"); see also Wilgoren, *supra* note 166, at A1 (describing how in school districts with open enrollment plans parents and their children choose schools on the basis of criteria like "start times, uniform policies, educational programs, even cafeteria menus").

192. 480 U.S. 149 (1987). Although the opinion stated that these criteria would be applied in reviewing any "race-conscious" government program, it is clear from the opinion itself, which named "the relief and the efficacy of alternative remedies" as one of the relevant evaluative criteria, *id.* at 171 (plurality opinion), and subsequent Court decisions like *Croson*, which also looked to the efficacy of "race-neutral means," *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (quoting *Paradise*, 480 U.S. at 171), that this analysis is to be limited to race-conscious race-classifying measures rather than those that are race-conscious yet race-neutral. See also *supra* note 114.

193. *Paradise*, 480 U.S. at 171. In his concurrence, Justice Powell listed five similar criteria:

a lower court order requiring the Alabama Department of Public Safety to promote one qualified black candidate for every white candidate promoted in order to remedy decades of discrimination by the department.¹⁹⁴ In approving the lower court order, Justice Brennan stressed that “[t]he one-for-one requirement did not impose an unacceptable burden on innocent third parties” — the qualified white employees who would be passed over in favor of black candidates — for the order merely denied or delayed a promotion, but did not result in any white employee losing his job altogether.¹⁹⁵

In particular, Justice Brennan noted that the order did not “disproportionately harm the interests of . . . innocent individuals.”¹⁹⁶ The Court’s concern for proportionality in *Paradise* and elsewhere¹⁹⁷ has been characterized by Professor Jed Rubenfeld as a “cost-benefit justificatory test” for racial classifications.¹⁹⁸ Under this test, strict scrutiny “determine[s] whether a law that causes acknowledged constitutional harms is justified by sufficiently important benefits that a less constitutionally costly (‘better tailored’ or ‘less restrictive’) law could not have achieved.”¹⁹⁹

(i) the efficacy of alternative remedies; (ii) the planned duration of the remedy; (iii) the relationship between the percentage of minority workers to be employed and the percentage of minority group members in the relevant population or work force; (iv) the availability of waiver provisions if the hiring plan could not be met; and (v) the effect of the remedy upon innocent third parties.

Id. at 187 (Powell, J., concurring). In *Croson*, the Supreme Court extended the application of the *Paradise* criteria outside the hiring context to other race-classifying government programs, see *Croson*, 488 U.S. at 507, and at least one lower court has followed suit by applying the *Paradise* criteria to student assignment plans that rely on racial classifications. *Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698, 706 (1999) (per curiam), cert. dismissed, 529 U.S. 1050 (2000); see also *Brewer*, 212 F.3d at 756-57 (Miner, J., dissenting) (using the *Paradise* factors to analyze a race-classifying open enrollment plan); *Wessmann v. Gittens*, 160 F.3d 790, 828-31 (1st Cir. 1998) (Lipez, J., dissenting) (same).

Additionally, another federal appellate court has considered the *Paradise* factors relevant in assessing the constitutionality of racial preferences in university admissions. See *Johnson v. Bd. of Regents of the Univ. of Ga.*, 2001 U.S. App. LEXIS 19154, at *45-49 (11th Cir. Aug. 27, 2001) (viewing “the *Paradise* factors as providing general guidance, but tailoring those factors slightly to fit these types of cases”).

194. See *Paradise*, 480 U.S. at 163-64.

195. *Id.* at 182-83 (plurality opinion of Brennan, J.); see also *id.* at 188 (Powell, J., concurring) (noting that “the effect of the order on innocent white troopers is likely to be relatively diffuse”).

196. *Id.* at 183 (plurality opinion) (emphasis added).

197. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 230 (1995) (“[T]he application of strict scrutiny . . . determines whether a compelling governmental interest justifies the infliction of that injury.”).

198. Rubenfeld, *supra* note 31, at 438.

199. *Id.*; see also Kim Forde-Mazrui, *The Constitutional Implications of Race-Neutral Affirmative Action*, 88 GEO. L. J. 2331, 2361 (2000) (“Strict scrutiny serves to ensure that the potentially harmful effects of racial classifications are outweighed by the interests they serve.”).

Applying *Paradise's* "cost-benefit justificatory test" to the use of racial classifications in assigning students among fungible schools, such plans do not ordinarily pass constitutional muster. By denying educational opportunities to students on the basis of color these programs inflict a harm of constitutional dimension on "innocent third parties."²⁰⁰ The harm cannot be justified because effective race-neutral means are ordinarily available to school officials to achieve integration, as Section III.C will explain. The "duration" *Paradise* factor also counsels against open-ended race-classifying schemes with no end date in sight.²⁰¹ Furthermore, as this Note has argued earlier, the Supreme Court has deemed integration for integration's sake to be an insufficiently weighty government interest to overcome offending other constitutional norms,²⁰² using racial classifications to accomplish integration deeply offends the Court's norm of "classificationism."²⁰³

When a district is faced with rampant white flight in the wake of school integration, however, race-classifying transfer policies may be justified under *Paradise's* cost-benefit test. For instance, in *Johnson v. Board of Education of Chicago*,²⁰⁴ the Court of Appeals for the Seventh Circuit upheld racial quotas voluntarily imposed by the Chicago school system in an effort to stem white flight.²⁰⁵ In *Johnson*, black students had been denied transfers to schools with large black populations solely on the basis of their race; had they been white, they would have been allowed to transfer.²⁰⁶ Applying strict scrutiny, the court nevertheless upheld the plan due to the school board's compelling interest in arresting de facto segregation.²⁰⁷ The court relied heavily on

200. See *supra* notes 176-191 and accompanying text.

201. 480 U.S. at 171 (plurality opinion); see *Tuttle*, 195 F.3d at 706 (considering the *Paradise* factor of "the planned duration of the policy"); *Brewer*, 212 F.3d at 757 (Miner, J., dissenting) (urging application of this *Paradise* factor). Indeed, in *Brewer*, dissenting judge Miner pointed out that despite the fact that Rochester's inter-district controlled choice plan had been around for thirty-five years, it had not had "any apparent success in reducing racial isolation." *Id.* at 757 (Miner, J., dissenting). The concentration of minority students in the Rochester District increased from twenty-five percent in 1963 to about eighty percent in 1996-97, while the suburban districts reported an overall minority population of less than ten percent (the controlled choice plan was adopted in 1965). See *id.* at 743.

But see *Johnson v. Bd. of Regents of the Univ. of Ga.*, 2001 U.S. App. LEXIS 19154, at *46-47 (11th Cir. Aug. 27, 2001) (concluding that the *Paradise* duration factor is less relevant in the diversity context because "by definition, the goal of remedying past discrimination has a logical end-point, the goal of exposing students to a diverse student body may not").

202. See *supra* notes 97-111 and accompanying text.

203. See cases cited *supra* note 30.

204. 604 F.2d 504 (7th Cir. 1979), *vacated mem.*, 449 U.S. 915 (1980).

205. See also *Parent Ass'n of Andrew Jackson High Sch. v. Ambach*, 598 F.2d 705, 710-11 (2d Cir. 1979); *Higgins v. Bd. of Educ.*, 508 F.2d 779 (6th Cir. 1974).

206. *Johnson*, 604 F.2d at 508.

207. *Id.* at 517.

the bleak statistics of white flight in Chicago's public schools²⁰⁸ and in its residential patterns.²⁰⁹ The startling demographic changes present in *Johnson* help explain the holding and limit its general applicability.

A white flight exception to the general prohibition of race-classifying schemes can be justified under *Paradise* because the benefits outweigh the costs. Although denying a student the chance to transfer to another fungible school on the basis of race certainly imposes some constitutional harm on an innocent third party, the costs of such a plan are less than those present in the case of denying admission to a magnet or selective school.²¹⁰ In *Paradise*, the Court stressed that the one-for-one promotion requirement did not deny any innocent third party an employment opportunity altogether,²¹¹ much like a student denied a transfer to a fungible school is not denied a chance for an education at a roughly comparable public school altogether.²¹²

208. See *id.* at 510 (noting in particular that in three Chicago high schools in which no action had been taken, white attendance dropped from 46.6% to 1.0%, 30.6% to 5.0%, and 36.2% to 6.6% from 1970 to 1975).

209. See *id.* at 516 (discussing the "accelerated change in residential occupancy from white to black" in Chicago neighborhoods and concluding that "the Board may properly consider the unpleasant realities of demographic change and the phenomenon of 'white flight'").

210. See cases cited *supra* note 170 and accompanying text.

211. 480 U.S. at 182-83 (plurality opinion of Brennan, J.).

212. See *Johnson*, 604 F.2d at 518 (noting that a student denied his first choice of enrollment is guaranteed "a viable opportunity to attend an integrated high school"); see also *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 137 F. Supp. 2d 1224, 1239 (W.D. Wash. 2001) (noting that under Seattle's enrollment plan that gives preferences to students of certain races, "children of all races may attend at least one of the district's popular schools").

Some have argued that a student denied enrollment at a selective or magnet school suffers a similarly lesser degree of constitutional harm for he is permitted to attend at least some other school in the district. See *Wessmann v. Gittens*, 160 F.3d 790, 830 (Lipez, J., dissenting) (noting that the denial of admission of the white plaintiff student to Boston Latin "resembles denial of a promotion with retention of current job status" and is therefore not sufficiently harmful to defeat the constitutionality of the district's racial preference plan). While it is true that such a student is not denied an education altogether, just as the white policemen in *Paradise* were not laid off, 480 U.S. at 182-83 (plurality opinion), the *Paradise* Court also noted that a qualified white police officer's opportunity for promotion had only been postponed by the plan, not foreclosed outright. *Id.* at 183 (plurality opinion). To the contrary, a student denied admission to a magnet or selective school is likely to be permanently deprived of the chance to attend such a school. See *Wessmann*, 160 F.3d at 830 (Lipez, J., dissenting) (noting that the white plaintiff, "unlike the non-promoted police officers . . . will not have another chance to enter Boston Latin").

A white flight exception to a prohibition on the use of racial classifications in the magnet and selective school contexts is also unwarranted because there is no additional benefit of preventing residential segregation as there is in the fungible school context. Selective and magnet schools have a district-wide geographic base, see *supra* note 121 and accompanying text, whereas fungible schools draw their student populations from a more narrow geographic base (such as a neighborhood). Consequently, magnet and selective schools simply present additional educational options to students, but do not "force" white students to attend school with blacks, and, therefore, do not trigger the sort of prejudice and hysteria that can lead to white flight out of the district.

More importantly, however, the government is asserting an interest greater than the mere attainment of an integrated student body, which standing alone would not be sufficient to justify the use of racial classifications.²¹³ Rather, in a case like *Johnson*, the government is also asserting an interest in combating the harmful effects of residential white flight,²¹⁴ and thereby seeking to promote what the Supreme Court has recognized as the “important governmental objective” of maintaining stable, racially integrated communities.²¹⁵ Massive and swift white flight, after all, can devastate a community, leading to impoverished, crime-infested slums, constituting something akin to a “social emergency.”²¹⁶

213. See *supra* notes 200-203 and accompanying text.

214. See *Johnson*, 604 F.2d at 516-17 (discussing the authority of school officials to respond to “the unpleasant realities of demographic change and the phenomenon of ‘white flight’”).

215. *Linmark Assocs., Inc. v. Willingboro*, 431 U.S. 85, 94-95 (1977) (declaring that “[t]here can be no question about the importance of achieving” stable, racially integrated housing as “th[e] Court has expressly recognized that substantial benefits flow to both whites and blacks from interracial association and that Congress has made a strong national commitment to promote integrated housing”); see also *Barrick Realty, Inc. v. City of Gary*, 491 F.2d 161, 164-65 (7th Cir. 1974) (upholding a prohibition on for-sale signs in the wake of white flight as “[i]t is clearly consistent with the Constitution . . . to pursue a policy of encouraging stable integrated neighborhoods”). But see *United States v. Starrett City Assocs.*, 840 F.2d 1096, (2d Cir. 1988) (striking down under the Fair Housing Act a public housing project’s reliance on racial quotas to prevent white flight where such quotas were “inflexible” and not “temporary in nature”).

Although the Court in *Linmark* struck down a municipal ordinance prohibiting “for sale” signs that had been justified as a tool to prevent white flight, the Court specifically noted that the defendant town failed to present evidence that there was “a substantial incidence of panic selling by white homeowners.” *Linmark*, 431 U.S. at 95. To the contrary, although the *Johnson* court did not specifically mention that Chicago had presented any evidence of “panic selling,” the court seemed to be acutely aware that such a phenomenon had been widespread in Chicago. See *supra* note 209; see also ADAM COHEN & ELIZABETH TAYLOR, *AMERICAN PHARAOH* 220-22 (2000) (explaining the rampant residential white flight fueled by panic selling in Chicago).

216. Even Justice Scalia, one of the most ardent opponents of any use of racial classifications, has indicated that he would countenance the use of race in the case of a “social emergency rising to the level of imminent danger to life and limb — for example, a prison race riot.” *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 521 (1989) (Scalia, J., concurring in the judgment). Although rampant white flight certainly does not rise to the level of “imminent danger to life and limb,” the *Johnson* court clearly considered the white flight at issue to constitute a type of “social emergency.” See *Johnson*, 604 F.2d at 516 (observing the “accelerated change in residential occupancy from white to black” and the need for “stabiliz[ation]”).

For a description of the devastating effects of white flight on a community, see COHEN & TAYLOR, *supra* note 215, at 220-22 (discussing how white flight “caused many stable working-class neighborhoods to transform into slums” in Chicago). See generally WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS* (1997) (describing the endless cycle of inner-city poverty in the wake of white flight to the suburbs).

Because school integration is often a factor in causing residential white flight,²¹⁷ a district may seek to ensure that some of its schools do not tip too much toward one race, as Chicago did in *Johnson*, in order to prevent the flight of whites to the suburbs.²¹⁸ Alternative, race-neutral measures may be inadequate to prevent de facto segregation until some sort of stabilization is achieved, as the *Johnson* court noted.²¹⁹ Consequently, a school district facing white flight may react by adopting a strategy similar to that adopted by the Chicago School Board in *Johnson*: allow for open enrollment among fungible schools but place caps on the percentage of students of a particular race who may transfer in or out of particular schools in order to maintain racial balance.²²⁰

While schools may rely on racial classifications to combat white flight, the *Paradise* criteria of “the necessity for the relief and . . . the flexibility and duration of the relief” counsel against permitting a school board to do so indefinitely; rather, the racial classifications ought to be relied on only temporarily while they are necessary to stabilize residential patterns.²²¹ Once residential patterns have stabilized, school districts will be able to achieve integration through race-neutral means, as Section III.C will explain.²²² Racial classifications, therefore, can be relied on to prevent rapid residential segregation, but if and when such segregation has occurred, the use of racial classifications is no longer justified.²²³

217. See, e.g., David J. Armor, *White Flight and the Future of School Desegregation*, in *School Desegregation* 187, 196-97 (Waller G. Stephan & Joe R. Feagin eds., 1980) (“[T]he fact that white loss is associated with desegregation in some instances is not in dispute.”).

218. See *id.* (discussing how white flight often occurs when schools are composed of a “substantial proportion” of black students and when “there is a significant shift in the racial balance of schools”).

219. See *Johnson*, 604 F.2d at 519 (“We are not persuaded . . . that these alternatives offer a viable means of preventing *de facto* segregation . . .”).

220. See *id.* at 507-08.

221. Compare *Paradise v. United States*, 480 U.S. at 183 (1987) (plurality opinion) (noting that the approved race-classifying decree “is only temporary”), with *Croson*, 488 U.S. at 498 (expressing skepticism about any race-based program that is “essentially limitless in . . . duration”) and *United States v. Starrett City Assocs.*, 840 F.2d 1096, 1102 (2d Cir. 1988) (noting that although combating white flight may be considered “a factor” in assessing the constitutionality of a race-based program, “it cannot serve to justify attempts to maintain integration . . . that are n[ot] temporary in nature”).

222. See *Brewer v. W. Irondequoit Cent. Sch. Dist.*, 212 F.3d 738, 757 (2d Cir. 2000) (Miner, J., dissenting) (finding racial restrictions on an inter-district open enrollment plan to be unnecessary given their thirty-five year existence, lack of apparent success in reducing racial isolation, and the lack of exploration of race-neutral alternatives).

223. For a recent opinion taking an opposite view, see *Parents Involved in Community Schools v. Seattle School District No. 1*, 137 F. Supp. 2d 1224 (W.D. Wash. 2001), which upheld Seattle’s voluntary integration plan that relied on racial classifications to integrate the city’s ten fungible high schools. The court noted that in addition to its asserted interest in promoting diversity, the school board had an interest in “ameliorat[ing] the *de facto* effects of residential segregation.” *Id.* at 1237. The court found that without a scheme relying on

In conclusion, school districts must generally avoid the use of racial classifications in assigning students to nonselective schools. Although racial classifications are almost always prohibited in the magnet school context, school officials may rely on them in responding to white flight when assigning students to fungible schools. In the absence of such extenuating circumstances, however, fungible school assignment must be race-neutral.

III. THE CONSTITUTIONAL ALTERNATIVE OF RACE-CONSCIOUS RACE-NEUTRALITY

Although Parts I and II argued that race-conscious measures that rely on racial classifications are generally unconstitutional, this Part explains why race-conscious race-neutral measures designed to further the same end — racial integration — are constitutionally permissible. In concluding that racial classifications are generally impermissible, Parts I and II noted that school officials have at their disposal a variety of race-neutral means to increase racial diversity within their schools.²²⁴ As such, the government's interest in using racial classifications to pursue integration is less compelling because there exist effective race-neutral alternatives to accomplishing the same end.²²⁵ This Part identifies and discusses a number of these effective race-neutral measures in each of the educational contexts considered above. Section III.A examines race-neutral ways in which selective public schools may increase racial diversity, such as through the use of socioeconomic and geographic factors. Section III.B examines race-neutral options available to magnet schools, including the use of economic and geographic factors as well as restructured lotteries for admission. Section III.C then examines race-neutral ways in which school districts may achieve racially balanced student bodies in their fungible schools, including the old standby of busing in addition to more modern techniques.

The policies discussed throughout this Part have largely the same intent as the race-classifying schemes condemned as unconstitutional in Parts I and II: increasing racial diversity in the student body population. As such, they are race-conscious policies in that school boards

racial classifications, the city's "demographic distribution strongly suggests that were geography alone to determine school assignment, the district would be highly segregated into white and nonwhite schools." *Id.* As Section III.C will demonstrate, the court was wrong to conclude that the school district "must take race into account" in order to achieve integration. *Id.* at 1238. Rather, were the district to rely on geography in ways different from the way envisioned by the court (the court seems to have in mind a strict neighborhood-feeding student assignment plan), it could achieve integration in a race-neutral manner. *See infra* notes 311-314 and accompanying text.

224. *See supra* notes 112-114, 164, 200 and accompanying text.

225. *See supra* notes 112-114 and accompanying text.

adopting them do so "conscious" of the fact that the schemes are intended to increase racial diversity.²²⁶ But they are race-neutral in that no individual student is ever required to identify himself as a member of a particular "race," nor is any school administrator ever forced to certify whether such an identification is correct.²²⁷ Despite sharing the same goal as race-classifying policies, race-conscious race-neutral policies avoid the pitfall of offending the doctrine of "classificationism,"²²⁸ thereby saving them from constitutional infirmity.

One might object to the constitutionality of race-conscious race-neutral policies by noting that the Supreme Court has struck down laws that are facially race-neutral when deemed to have a discriminatory purpose.²²⁹ A race-conscious race-neutral policy designed to increase minority enrollment in a limited-capacity selective school, for instance, would have the inevitable effect of decreasing white enrollment and, therefore, could be considered to embody a discriminatory purpose against whites. Because the Supreme Court appears to have adopted a symmetrical view of Equal Protection analysis in *Croson*²³⁰ and *Adarand*²³¹ — i.e., policies that burden whites ought to be scrutinized with the same care as those that burden minorities — such discrimination, even though cloaked in the guise of race-neutrality, is perhaps unconstitutional.²³²

226. See *Boston's Children First v. City of Boston*, 62 F. Supp. 2d 247, 249 (D. Mass. 1999) (defining "race conscious" government action as that which merely "takes into account the impact on minorities" as opposed to giving preference to members of one race over another).

227. See, e.g., *Brewer v. W. Irondequoit Cent. Sch. Dist.*, 212 F.3d 738, 742-43 (2d Cir. 2000) (noting that in West Irondequoit's race-classifying open enrollment program, "once the applicant is met in person by a Program Administrator, a question may be raised as to the student's race as a result of the student's name, manner of speech and phrasing, and the personal appearance of the child as observed during an interview or orientation meeting" (quoting defendants (internal quotation marks omitted))).

228. See cases cited *supra* note 30 and accompanying text.

229. See *Washington v. Davis*, 426 U.S. 229, 241-42 (1976) (noting that "the necessary discriminatory racial purpose [need not] be express or appear on the face of the statute," and that, "[a] statute, otherwise neutral on its face," may yet be unconstitutional if discriminatory (citing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886))).

230. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494-95 (1989) (plurality opinion) (rejecting notion that "race-conscious classifications designed to further remedial goals" ought to be subject to anything less than strict scrutiny analysis (quoting *Croson*, 488 U.S. at 535 (Marshall, J., dissenting) (internal quotation marks omitted))).

231. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 222 (1996) ("With *Croson*, the Court finally agreed that the Fourteenth Amendment requires strict scrutiny of *all* race-based action . . ." (emphasis added)).

232. See *Shaw v. Reno*, 509 U.S. 630, 644 (1993) [hereinafter *Shaw I*] (noting that the rule that racial classifications are presumptively unconstitutional "applies as well to a classification that is ostensibly neutral but is an obvious pretext for racial discrimination" (quoting *Personnel Adm'n v. Feeney*, 442 U.S. 256, 272 (1979) (internal quotation marks omitted))); Chapin Cimino, Comment, *Class-Based Preferences in Affirmative Action Programs After Miller v. Johnson: A Race-Neutral Option, or Subterfuge?*, 64 U. CHI. L. REV. 1289 (1997) (arguing that race-neutral affirmative action amounts to unconstitutional "subterfuge").

The Supreme Court itself, however, appears to have implicitly rejected this symmetrical approach to the Equal Protection Clause for review of race-neutral programs, as Professor Kim-Forde Mazrui has observed.²³³ Rather, even while the Court struck down the use of racial classifications in a program designed to increase opportunities for minority-owned businesses in *Croson*, both Justice O'Connor's plurality opinion and Justice Scalia's concurrence simultaneously endorsed race-neutral efforts to accomplish the same goal.²³⁴ In this sense, *Croson* followed the logic of Justice Brennan's plurality opinion in *Paradise*, which expressed a preference for helping minorities through methods that do not rely on racial classifications, allowing for racial classifications only when race-neutral methods are likely to be ineffective.²³⁵ Lower federal courts have likewise viewed race-conscious race-neutral programs approvingly, requiring government institutions to consider them first before relying on racial classifications.²³⁶ Conse-

Somewhat surprisingly, the legal and political communities have largely failed to recognize even the possibility that race-conscious race-neutral policies might be unconstitutional. See Forde-Mazrui, *supra* note 199, at 2334 ("Curiously, both sides of the affirmative action debate in the political arena have generally failed to recognize the constitutional difficulties inherent in race-neutral affirmative action and, moreover, so have the courts."); *id.* at 2349 (noting that "the implications of *Croson* and *Adarand* for race-neutral affirmative action have gone largely unrecognized, even by strong opponents of existing affirmative action programs" and "even courts invalidating affirmative action programs have generally failed to acknowledge the constitutional difficulties inherent in race-neutral affirmative action").

Some, however, have objected to the constitutionality of race-conscious race-neutral programs. The plaintiffs in *Boston's Children First v. City of Boston*, 62 F. Supp. 2d 247, 249-50 (D. Mass. 1999) — parents of white Boston school-aged children — unsuccessfully challenged the constitutionality of a student assignment plan that did not classify by race but was simply "race conscious" — "official action that takes into account the impact on minorities." See also Cimino, *supra* (using the Court's recent redistricting opinions to argue that race-conscious race-neutrality is an unconstitutional subterfuge).

233. See Forde-Mazrui, *supra* note 199, at 2349-50.

234. See *Croson*, 488 U.S. at 509-10 (plurality opinion of O'Connor, J.) ("Even in the absence of evidence of discrimination, the city has at its disposal a whole array of race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all races . . . [Such devices] would serve to increase the opportunities available to minority business without classifying on the basis of race."); *id.* at 526 (Scalia, J., concurring in the judgment) (noting that a state may adopt a contracting policy designed to "make it easier for those previously excluded by discrimination to enter the field," which "may well have racially disproportionate impact," but is constitutionally permissible because it is "not based on race"); *id.* at 528 (Scalia, J., concurring in the judgment) ("[A]ny race-neutral remedial program aimed at the disadvantaged *as such* will have a disproportionately beneficial impact on blacks. Only such a program, and not one that operates on the basis of race, is in accord with the letter and spirit of our Constitution."), discussed in Forde-Mazrui, *supra* note 199, at 2349-50.

235. See *Croson*, 488 U.S. at 507 (noting in striking down Richmond's minority set-aside program that "there does not appear to have been any consideration of the use of race-neutral means to increase minority business participation in city contracting") (citing *Paradise*, 480 U.S. at 171 (plurality opinion of Brennan, J.)).

236. See *Johnson v. Bd. of Regents of the Univ. of Ga.*, 2001 U.S. App. LEXIS 19154, at *52-53 (11th Cir. Aug. 27, 2001) ("[A] university defending a race-conscious admissions policy must show that it has genuinely considered, and rejected as inadequate, race-neutral alternatives for creating student body diversity."); *id.* at *69 ("The requirement that govern-

quently, the Court's dicta, and the statements of lower courts, seem to allow for programs that have the effect of favoring minority groups so long as they do not use racial classifications to achieve this preferential treatment.

Of course, any race-neutral government program is presumptively constitutional even if it disproportionately benefits or harms a particular race, so perhaps the Court's intimation of approval for race-neutral programs that benefit minorities disproportionately is simply a restatement of this view and nothing more.²³⁷ If so, then if a white plaintiff were able to prove that a purpose to discriminate against whites by helping minorities was a "motivating factor" behind the government's action, such a program would be unconstitutionally discriminatory.²³⁸ Any attempt to peer into the collective mind of a legislature, city council, or school board, and distill a motive animating its actions, however, is notoriously difficult.²³⁹ Furthermore, in all likelihood, any race-neutral program that benefits minorities will likely also

ment consider the efficacy of race-neutral alternatives to programs that allocate valuable public benefits based on race is extremely important."); *Grutter v. Bollinger*, 137 F.Supp. 2d 822, 870-71 (E.D. Mich. 2001) (noting the failure of the University of Michigan Law School's administrators to consider race-neutral alternatives to increase minority enrollment); Forde-Mazrui, *supra* note 199, at 2350 (discussing *Podberesky v. Kirwan*, 38 F.3d 147, 161 (4th Cir. 1994) and *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 351 (D.C. Cir. 1998)).

237. See *Washington v. Davis*, 426 U.S. 229 at 241-42 (1996) ("[W]e have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another.").

The mere fact that a race-neutral policy's nonracial factors correlate with race does not necessarily render them discriminatory. See *Hopwood I*, 78 F.3d 932, 947 n.31 (5th Cir. 1996) (noting that although "some factors such as economic or educational background of one's parents may be somewhat correlated with race," "[t]his correlation . . . will not render the use of the factor unconstitutional if it is not adopted for the purpose of discriminating on the basis of race"). Furthermore, the mere foreseeability that nonracial classifications might have disproportionate racial effects is not enough to prove unconstitutionality. See *Feeney*, 442 U.S. at 279 n.25 (upholding Massachusetts's veteran-preference hiring policy against a gender-based equal protection challenge even though the disparate impact was "essentially an unavoidable consequence" of the policy).

238. See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270 (1977) (noting that plaintiffs challenging race-neutral government action alleged to be discriminatory had the burden of proving "that discriminatory purpose was a motivating factor").

239. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 558 (1993) (Scalia, J., concurring in part and concurring in the judgment) ("[I]t is virtually impossible to determine the singular 'motive' of a collective legislative body. . .").

Proving that discriminatory intent was a motivating factor behind a legislative body's action is notoriously difficult. See Kenneth L. Karst, *The Costs of Motive-Centered Inquiry*, 15 SAN DIEGO L. REV. 1163, 1165 (1978) (arguing that because "behavior results from the interaction of a multitude of motives, and because racial attitudes often operate at the margin of consciousness," there will almost always be an opportunity for the government to argue that its "action was prompted by racially neutral considerations," particularly when the decision has been made by a group, like a school board, rather than by a single individual; consequently, "a motive-centered doctrine of racial discrimination . . . places a 'very heavy burden' of persuasion" on the plaintiff (citing *Loving v. Virginia*, 388 U.S. 1, 9 (1967))).

have legitimate non-race-conscious reasons for its adoption,²⁴⁰ so it is possible that a reviewing court might find that while race-consciousness was a factor in the program's passage, it was not a "motivating factor."²⁴¹

Assuming, however, that a plaintiff could demonstrate that an intent to help disadvantaged minorities was a "motivating factor" behind a race-neutral policy, such a policy would generally still be constitutional. In other words, while the Court has taken a symmetrical approach to review of programs relying on racial classifications that are designed to benefit minorities (eschewing the notion of "benign" classifications and applying strict scrutiny to all) an asymmetrical approach ought to apply to race-neutral measures — i.e., policies designed to help disadvantaged minorities that do not rely on racial classifications should generally pass constitutional muster, whereas race-neutral policies passed with an intent to subordinate such minorities should not.²⁴²

An asymmetrical approach to race-neutral policies is justified because such policies do not implicate the primary concern pervading the Court's "classificationist"²⁴³ jurisprudence: that racial classifications are intrinsically dangerous and divisive, regardless of the end for which they are used.²⁴⁴ Race-neutral policies do not implicate the ex-

240. For instance, in his *Croson* concurrence, Justice Scalia noted that "[i]n the particular field of state contracting, for example, [a state] may adopt a preference for small businesses, or even for new businesses," which may well have the incidental effect of disproportionately benefiting minorities. 488 U.S. at 526. Such a preference would likely be motivated, at least in part, by a desire to help small businessmen.

241. See *Arlington Heights*, 429 U.S. at 265 ("Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one."); *McGinnis v. Royster*, 410 U.S. 263, 276-77 (1973) ("The search for legislative purpose is often elusive enough, without a requirement that primacy be ascertained. Legislation is frequently multipurposed: the removal of even a 'subordinate' purpose may shift altogether the consensus of legislative judgment supporting the statute." (citation omitted)); Karst, *supra* note 239.

242. See Kathleen M. Sullivan, *The Future of Affirmative Action: After Affirmative Action*, 59 OHIO ST. L.J. 1039, 1047-52 (1998) (explaining why race-neutral measures to increase diversity that have the incidental effect of burdening whites are constitutional). See generally Forde-Mazrui, *supra* note 199 (arguing for such an asymmetrical approach when race-neutral programs are designed to remedy past societal discrimination).

243. See text accompanying note 31.

244. See *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943) ("Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. . . . [R]acial discriminations are in most circumstances irrelevant and therefore prohibited. . . ." (emphasis added)); *Bakke v. Regents of the Univ. of Cal.*, 438 U.S. 265, 291 (1978) (opinion of Powell, J.) ("Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." (emphasis added)); *Croson*, 488 U.S. at 493-94 (noting that racial classifications are a "highly suspect tool" and that "[c]lassifications based on race carry a danger of stigmatic harm"); *Shaw I*, 509 U.S. 630, 657 (1993) ("Racial classifications of any sort pose the risk of lasting harm to our society. They reinforce the belief, held by too many for too much of our history, that individuals should be judged by the by the color of their skin");

pressive harm of dividing the populace into socially constructed groups as racial classifications do.²⁴⁵ Although enacted with a race-conscious purpose, they do not perpetuate racial divisions in the law, and therefore do not further delay the day when “race no longer matters,” a normative proposition embraced by the Court.²⁴⁶ Also signifi-

Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 223 (1996) (expressing deep “skepticism” toward the use of any racial classifications).

245. By “expressive harm,” this Note refers to Professors Richard Pildes and Richard Niemi’s definition of a constitutional harm “that results from the ideas or attitudes expressed through a governmental action, rather than from the more tangible or material consequences the action brings about.” Richard H. Pildes & Richard G. Niemi, *Expressive Harms, “Bizarre Districts,” and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 506-07 (1993). “Concern for expressive harm focuses on the interpretive dimension of public action. . . . [They] are therefore, in general, social rather than individual.” *Id.* at 507.

The expressive harm of race-classifying government action, therefore, is that it reinforces the notion that race matters and ought to be a salient factor in defining individuals in our society. See *Belk v. Charlotte-Meckleburg Bd. of Educ.*, 233 F.3d 232, 309 (4th Cir. 2000) (Traxler, J., concurring in part and dissenting in part) (“Teaching young children that admission to a specialized academic program with available seats is contingent on their race is indeed pernicious . . .”), *vacated and reh’g en banc granted* (4th Cir. 2001); *Tito v. Arlington County Sch. Bd.*, No. 97-540-A, 1997 U.S. Dist. LEXIS 7932, at *18 n.9 (finding it “both unfortunate and potentially pernicious that four year old children . . . categorize themselves according to race in a manner that will follow them throughout their education and, often, professional life,” as such is “the first step in the state-sponsored perpetuation of an educational system which continues to rely on racial distinctions”), *aff’d in part and vacated in part sub nom.* *Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698 (4th Cir. 1999), *cert. dismissed*, 529 U.S. 1050 (2000); cf. Steve Olson, *The Genetic Archaeology of Race*, ATL. MONTHLY, Apr. 2001, at 69, 70 (noting that although genetic researchers “might claim that the genetic differences they identify among groups have no biological significance . . . simply by dividing human beings into categories — whether sub-Saharan Africans, Jews, Germans, or Australian aborigines — [the researchers] reinforce the distinctions they would seek to minimize”).

The expressive harm implicit in forcing people to identify themselves as members of certain socially constructed racial or ethnic groups is compounded when the government reserves the power to determine whether such self-identification is correct or not, as in *Brewer*. See *supra* note 227 and accompanying text. In such a situation, the government has the unseemly authority to correct how an individual chooses to define himself, and exerts the power to force an individual to submit to social constructions of “racial” and “ethnic” groups to which he might not subscribe. Such governmental authority is anathema to the Constitution’s protection of an individual’s power of self-definition. See *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (majority opinion of Jackson, J.) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . .”).

246. *Shaw I*, 509 U.S. at 657 (noting that “the goal of a political system in which race no longer matters” is “a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire”); *Croson*, 488 U.S. at 520 (Scalia, J., concurring in the judgment) (emphasizing the need for “eradicating from our society . . . the tendency — fatal to a Nation such as ours — to classify and judge men and women on the basis of their country of origin or the color of their skin”).

As Professor Kim Forde-Mazrui has noted:

To the extent that race-neutral classifications have a *racial* message, it is that blacks and whites who suffer from similar disadvantages share a common condition, while whites and blacks who do not suffer such disadvantages share a relative privilege. Race is not, by the terms of the classification, a common denominator. Rather, the classification finds commonalities between members of different (and the same) races and finds differences between persons of the same (and different) races. The classification, in other words, by its very si-

cant is the fact that even the most ardent opponents of race-classifying affirmative action have generally voiced no opposition to, and indeed have actually voiced support for, the race-conscious race-neutral variety.²⁴⁷

Because race-conscious race-neutral policies do not rely on the intrinsically dangerous tool of racial classifications to accomplish their otherwise legitimate ends,²⁴⁸ they are entitled to significant constitutional deference. However, that a race-neutral policy is designed to help historically disadvantaged “minorities” is not in and of itself a legitimate end; indeed, it is theoretically possible that in a city where traditional racial “minorities” constitute a majority of the population and control the city government, a race-neutral policy designed to help minorities may in fact be designed to subordinate whites in a way that might offend constitutional principles of equal protection.²⁴⁹ Race-

lence on race, sends the message that “race does not matter,” a normative proposition that the Court and opponents of racial preferences purport to embrace.

Forde-Mazrui, *supra* note 199, at 2372.

247. See Jodi Wilgoren, *New Law in Texas Preserves Racial Mix in State's Colleges*, N.Y. TIMES, Nov. 24, 1999, at A1 (“Even the strongest opponents of racial preferences — both on [the University of Texas] campus and around the country — have little criticism of the [race-neutral] top 10 percent rule . . .”). In the *Ho* litigation, for instance, the Chinese-American litigants consistently opposed the school's use of racial classifications in assigning students to elite Lowell High, but indicated they would support *any* race-neutral alternative, no matter how harmful to Chinese-American students. See Wagner, *supra* note 52, at D1 (citing the attorney for the Chinese-American plaintiffs, David Levine, as stating that it's “fine” for a school's “aim” to be to achieve “racial balance,” as long as they don't “use race as the means”); Kim, *supra* note 74, at A1 (“We are perfectly fine with diversity as a goal, it's just a matter of how you get there We think that if they put race in here, it violates the agreement and the Constitution.” (quoting Levine)); Wagner, *supra* note 67, at A1 (“We're not saying that racial and ethnic diversity should not be a goal, but race should not be the means by which to get there.” (quoting Levine)). See also Forde-Mazrui, *supra* note 199, at 2349 & n.75 (citing the many opponents of race-based affirmative action who nevertheless support the race-neutral variety).

Interestingly, the lack of opposition to race-neutral affirmative action in the United States does not seem to be shared by many in France, where a proposal akin to Texas's Ten Percent Plan, see *infra* text accompanying notes 264-265, that calls for reserving spaces in one of the country's elite universities for the top graduates of economically disadvantaged high schools, has aroused the ire of the French press and many French academics. See Suzanne Daley, *Elite French College Tackles Affirmative Action*, N.Y. TIMES, May 4, 2001, at A4.

248. See Forde-Mazrui, *supra* note 199, at 2373 n.144 (concluding that “the principal concern of the Justices who voted to invalidate the affirmative action program in *Bakke* was its race-operative character rather than its motivating objectives”).

249. See TRIBE, *supra* note 42, § 16-21, 1515 (describing the “antisubjugation” principle of the Equal Protection Clause as one “which aims to break down legally created or legally reinforced systems of subordination that treat some people as second-class citizens”).

In *Croson*, after all, the Court thought it relevant that blacks constituted fifty percent of the population of Richmond and held a majority of the city council. Consequently, “[t]he concern that a political majority will more easily act to the disadvantage of a minority . . . would seem to militate for, not against, the application of heightened judicial scrutiny in this case.” *Croson*, 488 U.S. at 495-96 (plurality opinion of O'Connor, J.) (citing John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 739 n.58

neutral policies enacted to further public school integration, however, generally pose no such risk as they are not intended to subordinate a particular race but rather are designed for the benefit of all students, majority and minority, as Chief Justice Burger noted in his influential *Swann* dictum,²⁵⁰ and as many lower courts have explained.²⁵¹ Assuming that a school district is not merely using integration as a subterfuge, therefore, to subordinate a particular race,²⁵² a race-neutral plan designed to increase public school integration is constitutional because it avoids using the dangerous tool of racial classifications to accomplish its otherwise legitimate goal.²⁵³

(1974) ("Of course it works both ways: a law that favors Blacks over Whites would be suspect if it were enacted by a predominantly Black legislature.")).

250. See *supra* text accompanying note 16.

251. See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 137 F. Supp. 2d 1224, 1236 (W.D. Wash. 2001) ("There is general agreement by both experts and the general public that integration is a desirable policy goal mainly for the social benefit of increased information and understanding about the cultural and social differences among the various racial and ethnic groups." (quoting plaintiff's expert witness, Dr. Armour)); *Comfort ex rel. Neumyer v. Lynn Sch. Comm.*, 100 F. Supp. 2d 57, 65 n.12 (D. Mass. 2000) (noting that the pursuit of public school integration "reflects a concern that elementary school children get used to being in classrooms with people different from themselves," as "the more diverse a classroom is, the more likely students will learn that all people are different, no matter what their color or ethnic background"; furthermore, integration is "a method to prevent the formation of stereotypes"); cf. *Gratz v. Bollinger*, 122 F. Supp. 2d 811, 822, 824 (E.D. Mich. 2000) (discussing, in the university context, the "solid evidence regarding the educational benefits that flow from a racially and ethnically diverse student body" and concluding "that a racially and ethnically diverse student body produces significant educational benefits").

252. See *Parents Involved in Cmty. Sch.*, 137 F. Supp. 2d at 1232-32 (noting that "[t]here is no evidence, nor do plaintiffs claim, that the school board adopted [its integration] plan for any other reason" than to benefit students of all colors). Even assuming the unlikely scenario that a school district were using integration as a subterfuge to subjugate a particular race, proving this would be extremely difficult. See *supra* note 239.

253. Although this Note has argued that the Supreme Court has cast doubt on the value of integration for integration's sake, it has done so in the context of arguing that integration is not a sufficiently compelling justification to overcome the presumption against the use of racial classifications. See *supra* Section I.B. Chief Justice Burger's *Swann* dictum is still relevant, however, in explaining why integration is a legitimate option for school officials to pursue so long as they do not offend any other constitutional norms. In *Freeman*, the independent constitutional norm being offended by the school district's pursuit of integration was the traditional local control of schools and the imperative to release schools from federal court supervision at "the earliest practicable date." *Freeman v. Pitts*, 503 U.S. 467, 490 (1992). Consequently, when no independent constitutional norm is being offended, as is the case when race-neutral means are adopted, integration remains a viable option for school officials to pursue.

At least one commentator has relied on the Court's recent redistricting cases to argue against the constitutionality of race-conscious race-neutral policies in education. See Cimino, *supra* note 232. Cimino has argued that the redistricting cases, beginning with *Shaw I*, 509 U.S. 630 (1993), and continuing with *Miller v. Johnson*, 515 U.S. 900 (1995); *Shaw v. Hunt*, 517 U.S. 899 (1996) ("Shaw II"); and *Bush v. Vera*, 517 U.S. 952 (1996), which invalidated bizarrely shaped congressional districts used to create districts with a majority-minority population, cast doubt on the constitutionality of race-neutral affirmative action plans. See Cimino, *supra* note 232, at 1291. In the redistricting cases, Cimino points out, the majority-minority districts were facially race-neutral, yet the Court invalidated them anyway because they were shown to have a racially motivated purpose. *Id.* at 1298. This violated the

A. Race-Neutral Alternatives for Selective Schools

Numerous nonracial classifications are available to school officials seeking to integrate selective schools better. Officials may incorporate demographic characteristics into the admissions formula in an attempt to increase minority representation, although the record of success in this area is mixed. A more effective technique for achieving integration is relying on geographic characteristics in the admissions calculus, such as a student's neighborhood or feeding junior high school.

Three race-neutral demographic factors in particular may disproportionately benefit minorities underrepresented in selective schools: socioeconomic status,²⁵⁴ whether English is the student's first or second language,²⁵⁵ and family status — i.e., whether the student is from a

"subterfuge principle" set forth in cases like *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886), which requires that any race-neutral state action motivated by a racial purpose be subjected to strict scrutiny. Cimino, *supra* note 232, at 1298. Race-neutral affirmative action plans act as a similarly unconstitutional subterfuge, Cimino contends. *Id.*

The redistricting cases can be distinguished from integration cases because of the *end* being pursued in each instance. Although the majority-minority districts did not rely on the dangerous tool of racial classifications to achieve their goal, the Court objected to the very goal being pursued through race-neutral means: The bizarre-shaped districts could "be understood only as an effort to segregate voters into separate voting districts because of their race." *Shaw I*, 509 U.S. at 657. The Court, therefore, condemned "[r]acial gerry-mandering" as an illegitimate goal, for it "may balkanize us into competing factions; it threatens to carry us further from the goal of a political system in which race no longer matters." *Id.* Programs designed to increase integration, however, implicate no such concerns of racial factionalism. To the contrary, integration plans attempt to unify, rather than divide, the races. See Sullivan, *supra* note 242, at 1051 (arguing that the redistricting cases do not spell constitutional doom for race-neutral measures designed to increase diversity because whereas majority-minority districts "assume[d] that black voters vote monolithically . . . rais[ing] a specter of group-based stereotyping," race-neutral affirmative action presents no such risks); *Comfort*, 100 F. Supp. 2d at 65 n.12 (noting that the pursuit of public school integration "reflects a concern that elementary school children get used to being in classrooms with people different from themselves," as "the more diverse a classroom is, the more likely students will learn that all people are different, no matter what their color or ethnic background"; furthermore, integration is "a method to prevent the formation of stereotypes").

254. See U.S. Census Bureau, *Income 1999 — Table B*, <http://www.census.gov/hhes/income/income99/99tableb.html> (last revised Sept. 26, 2000) (indicating that the three-year-average median household incomes for 1997-1999 were \$43,287 for non-Hispanic whites and \$48,614 for Asians as compared to \$26,608 for blacks, \$29,110 for Hispanics, and \$30,784 for Native Americans); see also Rebekah Denn, *The New Face of School Integration: Board Debates Assigning Students on Basis of Socioeconomic Background Rather than Race*, SEATTLE POST-INTELLIGENCER, Oct. 17, 2000, at B1 (observing that "socioeconomic integration often has the side effect of promoting racial integration . . . as poverty rates are often higher among ethnic minorities") (citing Richard Kahlenberg, Century Foundation fellow). Indeed, both the San Francisco and Arlington, Va., school boards attempted to use socioeconomic status as a nonracial factor to increase diversity in certain schools. See *Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698, 701 (4th Cir. 1999) (*per curiam*), *cert. dismissed*, 529 U.S. 1050 (2000) (noting that "whether the applicant was from a low-income or special family background" served as one factor in admissions to a magnet school); Guthrie, *supra* note 52 (noting that Lowell used a system of points that took economic hardship into account).

255. See *Tuttle*, 195 F.3d at 701 (noting that in its effort to construct an admissions program that relied less on race and more on nonracial factors in an effort to increase diversity in its magnet schools, the Arlington School District used English-as-a-second-language

single- or two-parent home.²⁵⁶ Although public schools generally do not have the resources to engage in the kind of individualized diversity determination required by *Bakke*,²⁵⁷ using these demographic characteristics is likely to be quite feasible, as it simply requires number-crunching, as opposed to the time-consuming and labor-intensive process necessary for qualitatively evaluating essays and recommendations.²⁵⁸

status as one of its two nonracial selection criteria); Ryan Kim, *S.F. Schools Downplay Race Further in New Proposal*, S.F. EXAMINER, Nov. 24, 1999, at A1 (noting that in an attempt to increase diversity in city schools San Francisco was considering taking language abilities into account).

The use of language proficiency as a proxy for race may raise some constitutional problems in that proficiency in a certain language may constitute one of the characteristics by which an ethnic group defines itself. In *Hernandez v. New York*, 500 U.S. 352 (1991), the Court held that a prosecutor's use of peremptory strikes to dismiss prospective jurors who spoke Spanish for the asserted reason that they might have difficulty accepting the translator's rendition of Spanish-language testimony did not constitute a per se violation of the Equal Protection Clause. The justification asserted was considered sufficiently legitimate and race-neutral as not to warrant overturning the trial judge's finding of no constitutional violation. *Id.* at 369. Nevertheless, Justice Kennedy, writing for a plurality, noted without deciding that, "[i]t may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis." *Id.* at 371. Consequently, were a school district to enact a policy that favored native Spanish-speakers only, such a plan might be considered to employ a racial or ethnic classification, thereby triggering strict scrutiny. But a plan that simply favors all non-English speakers, like the one used by the Arlington School District, could hardly be said to single out any single racial or ethnic group.

Although language-preference schemes may be successful in boosting Latino and Asian representation, they are unlikely to help — and may even work against — African-American applicants. *Cf.* Steven A. Holmes, *Leveling the Playing Field, but for Whom?*, N.Y. TIMES, July 1, 2001, § 4, at 6 (noting that "[t]he impressive increase among Hispanic and Asian students [at California's state universities] coincided with a decision by university officials . . . to give more weight to the SAT-II test," which tests for foreign languages and has allowed children of immigrants to test well in Spanish, Chinese, and Korean, but "is doing little or nothing for African-Americans, the group affirmative action was designed for in the first place"); Daniel Golden, *Language Test Gives Hispanic Students a Leg Up in California*, WALL ST. J., June 26, 2001, at A1 ("[T]he native-speaker advantage doesn't help African-Americans, for whom affirmative action was originally intended. Moreover, it also tends to benefit Asian-American students, who are already well-represented in higher education.").

256. The most recent census statistics indicate that among white families with children under eighteen years old, 77.3% are married, 5.3% are headed by a single adult male, and 17.3% are headed by a single adult female. For African-Americans, 42.4% are married, 4.6% are headed by a single male, and 53% are headed by a single female. Among Hispanics, the numbers are 69.7%, 5.2%, and 25%. (No statistics were available for Asians or Native Americans from this source.) See U.S. Census Bureau, *Household and Family Characteristics, March 1998 (Update)* — Table 1, <http://www.census.gov/prod/3/98pubs/p20-515u.pdf> (last visited Aug. 27, 2001); Guthrie, *supra* note 52 (describing how San Francisco's Lowell Academy gave bonus points to applicants from single parent families in an effort to boost minority enrollment).

257. See *supra* note 85 and accompanying text.

258. This assertion is supported by the fact that in the wake of court rulings prohibiting the use of race as a factor in student assignment, both the San Francisco and Arlington school boards quickly introduced student assignment systems that took these demographic characteristics into account. See *supra* notes 255-256. Lowell, in particular, apparently had already been awarding extra points to students from low-income families before *Ho*. See Guthrie, *supra* note 52. School officials already deal with parental income statistics in coor-

The ability of nonracial demographic characteristics to ensure racial diversity in selective schools, however, ought not to be overstated.²⁵⁹ While such methods may ensure a higher level of racial diversity than would exist if only grades or test scores were taken into account, the case of San Francisco's Lowell High illustrates that it is questionable whether they can ensure the same level of minority representation as a system that relies on racial classifications. In the wake of *Ho*, Lowell implemented a system giving bonus points to applicants coming from single-parent families, augmenting a system that already took economic hardship into account, in an effort to boost Latino and black enrollment.²⁶⁰ The new policy, however, actually increased white and Chinese enrollment at the expense of black and Latino applicants.²⁶¹

Of course, the effectiveness of using these characteristics in boosting the representation of certain minority groups will depend on how much weight is given to each in the admissions process. School officials will have to tinker with the weights assigned to each admissions criterion in order to achieve a student body with which they are satisfied both demographically and academically.²⁶² Indeed, one option officials may consider is whether to minimize or eliminate entirely the use of standardized tests in the selective school admissions process, a criterion that tends to help white and Asian applicants while hurting black and Hispanic applicants.²⁶³

minating the federal school lunch program. See 7 C.F.R. § 245.6 (2001) (describing procedures for the collection and verification of income statistics for school lunch purposes by school officials).

259. Cf., e.g., Deborah C. Malamud, *Assessing Class-Based Affirmative Action*, 47 J. LEGAL EDUC. 452, 471 (1997) (concluding that affirmative action based on economic class is "a poor substitute for race-based affirmative action" in the university context); Richard H. Fallon, Jr., *Affirmative Action Based on Economic Disadvantage*, 43 UCLA L. REV. 1913, 1947-51 (1996) (concluding that although "there is something to be gained from well-designed programs of economically based affirmative action," they are a "distant second-best" from the race-based variety in the university context).

260. See Guthrie, *supra* note 52.

261. See *id.*

262. See generally Richard H. Sander, *Experimenting with Class-Based Affirmative Action*, 47 J. LEGAL EDUC. 472 (1997) (explaining UCLA's experimentation with race-neutral admissions criteria in an effort to increase minority representation in the wake of California's passage of Proposition 209, which prohibited taking race into account in admissions decisions).

263. Cf. Diana Jean Schemo, *Head of U. of California Seeks to End SAT Use in Admissions*, N.Y. TIMES, Feb. 17, 2001, at A1 (discussing a proposal to make taking the SAT's optional for applicants to the University of California in order to "increase the number of black and Hispanic students gaining admission" as the SAT's, "on which blacks and Hispanics generally score lower than whites, have also come under severe criticism by those who contend they reflect and aggravate racial inequalities"); Jacques Steinberg, *Most Colleges Are Expected to Continue to Use the SAT*, N.Y. TIMES, Feb. 24, 2001, at A6 (noting that "[d]oing away with the SAT's as a requirement would eliminate a measurement on which the performances of black and Hispanic students have trailed significantly behind white and Asian students"); cf. also *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 853 (E.D. Mich. 2001) (noting

Relying on geography rather than, or in addition to, demographic factors is likely to be the most effective method for selective public schools to achieve racial diversity. In particular, school officials could implement a small-scale version of the new race-neutral affirmative action policies being employed, with much success, in Texas and Florida. In response to the Fifth Circuit's ruling in *Hopwood* prohibiting the use of race as a factor in university admissions, the Texas legislature passed what is popularly known as the "Ten Percent Plan" in an effort to increase minority enrollment.²⁶⁴ The Plan provides that Texas students in the top ten percent of their graduating high school classes shall be admitted automatically to any Texas state university without consideration of their standardized test scores or any other criteria.²⁶⁵ Although critics initially claimed that the Plan did little to counteract the decrease in minority enrollment after the end of race-based affirmative action,²⁶⁶ recent statistics indicate that the plan has actually increased minority enrollment at most of the state's selective institutions relative to when race-based affirmative action was in place.²⁶⁷ Indeed, even the most dogged defenders of race-based affirmative action have acknowledged the success of the Ten Percent Plan.²⁶⁸ Similarly, Florida, which also recently abandoned race-based affirmative action in its college admissions, enacted the "One Florida" plan, guaranteeing state university admission to the top twenty percent of graduating seniors of each state high school.²⁶⁹ Like the Texas Ten Percent Plan, the race-neutral One Florida plan has led to an increase in minority enrollment in the state university system in its first year.²⁷⁰ Indeed, in its recent opinion striking down the race-classifying

that "decreasing the emphasis for all applicants . . . on LSAT scores" is one race-neutral technique the University of Michigan Law School might consider to boost underrepresented minority admissions).

264. See TEX. EDUC. CODE ANN. § 51.803(a) (West Supp. 2001).

265. See *id.*

266. See, e.g., Danielle Holley & Delia Spencer, Note, *The Texas Ten Percent Plan*, 34 HARV. C.R.-C.L. L. REV. 245, 277 (1999) ("Despite its promise, the Ten Percent Plan has failed to increase significantly the minority freshman enrollment at either UT-Austin or A&M.").

267. See Wilgoren, *supra* note 247, at A1.

268. See Lani Guinier & Gerald Torres, Editorial, *Credit Bush Doesn't Deserve*, N.Y. TIMES, Aug. 8, 2000, at A29 (describing the Texas Ten Percent Plan as "remarkably successful"); Wilgoren, *supra* note 267 (noting that "some of affirmative action's ardent advocates favor the current program because it eliminates suspicion that students may have been admitted solely on the basis of race").

269. See Rick Bragg, Editorial, *Minority Enrollment Rises in Florida College System*, N.Y. TIMES, Aug. 30, 2000, at A18; Jeb Bush, Editorial, *Better Than Affirmative*, N.Y. TIMES, Sept. 15, 2000, at A35.

270. See Bragg, *supra* note 269; Bush, *supra* note 269.

In the wake of Proposition 209's ban on racial preferences, California also adopted a set-aside for those graduating at the top of their high school classes. California, however, adopted a much lower threshold of four percent, fearing that any higher percentage would

affirmative action policy of the University of Georgia, *Johnson v. Board of Regents of the University of Georgia*,²⁷¹ the Court of Appeals for the Eleventh Circuit implicitly recognized the success of these plans by noting that “guaranteeing admission to the top percentage of graduating seniors in every high school in the state” may serve as an “innovative strateg[y]” to create a more diverse student body.²⁷²

A conceptually similar plan could be implemented in selective public schools. A selective high school might, for instance, guarantee admission to the top ten percent of each feeding junior high school in the district. If the junior high schools are neighborhood schools that are segregated due to patterns of residential segregation,²⁷³ such a plan would operate much like the Texas and Florida plans by guaranteeing slots at elite schools to students from mostly minority junior high schools. Admittedly, for this plan to boost integration successfully, the feeding junior high schools would have to be substantially segregated,²⁷⁴ but such is the case in many school districts.²⁷⁵

The San Francisco School Board actually considered such a policy for its elite Lowell High School after *Ho*, but ultimately rejected it after many parents complained.²⁷⁶ Critics objected on the grounds that guaranteeing slots to children from under-performing middle schools would “dismantle Lowell as a merit-based school.”²⁷⁷ Whether such a

result in admitting inadequately prepared students to its universities. See Editorial, *The Diversity Project in Texas*, N.Y. TIMES, Nov. 27, 1999, at A14. Nevertheless, California's four-percent guarantee has had limited success, increasing minority enrollment in its second-tier colleges but failing to restore black and Latino representation at the flagship colleges to pre-Proposition 209 levels. See Editorial, *After Affirmative Action*, N.Y. TIMES, May 20, 2000, at A14.

271. 2001 U.S. App. LEXIS 19154 (11th Cir. Aug. 27, 2001).

272. *Id.* at *68.

273. Indeed, residential segregation is quite common in the United States. In most of the country's metropolitan areas, seventy-nine percent of whites and thirty-three percent of blacks live exclusively among members of their own racial groups. See Lise Funderburg, *Integration Anxiety*, N.Y. TIMES, Nov. 7, 1999 (Magazine), at 84.

274. See Wilgoren, *supra* note 267 (noting that the success of Texas's Ten Percent Plan “depends in part on the continuing segregation of the state's high schools”).

275. Indeed, the very fact that San Francisco school officials were considering implementing such a plan in an effort to boost diversity indicates that the feeding junior high schools were significantly racially segregated. See *infra* notes 276-277 and accompanying text. Furthermore, merely by favoring students from public junior high schools over those from private ones, a selective school might increase minority enrollment as public junior high schools often have a higher concentration of blacks and Hispanics than private junior high schools within the district. See, e.g., Daley, *New Admission Options*, *supra* note 85, (noting that Boston was considering “giving Boston Public School pupils preference over private school pupils in gaining admission to the city's elite prestigious exam schools” after *Wessmann* for “[w]hile most Boston Public School students are black or Hispanic, more than half the students at Boston Latin are white and 56 percent come from private schools”).

276. See Ray Delgado, *Parents Not Happy with Lowell Policy; Plan to Take Highest-Ranking Middle School Students Draws Fire*, S.F. EXAMINER, Oct. 1, 1999, at A4.

277. See *id.* (quoting Marybeth Wallace of Parent Advocates for Youth).

plan would actually dilute the academic quality of Lowell depends on weighing the benefits of increased diversity²⁷⁸ against the costs of admitting otherwise unqualified students on the basis of a middle-school-preference plan,²⁷⁹ a decision for the local school board to make. Texas's experience with the Ten Percent Plan, however, illustrates that academic quality is not necessarily sacrificed by efforts to increase diversity as students admitted under the Plan have excelled academically.²⁸⁰

Furthermore, guaranteeing admission to students from feeding middle schools, or granting preference to students from under-performing middle schools,²⁸¹ need not hurt the academic quality of selective schools if the feeding middle schools can be improved. Indeed, such a slot-guarantee program could provide a political incentive to invest more time and energy in improving the under-performing middle schools, as has happened with under-performing high schools in Texas²⁸² and Florida.²⁸³ Even without any middle school preference or slot-guarantee, a decline in minority enrollment at selective schools could still provide political incentives to invest more in under-achieving, minority-majority schools by highlighting the educational inequities among such schools.²⁸⁴ This is what has happened with California's high schools since voters outlawed race-based af-

278. See *supra* notes 250-251 and accompanying text.

279. See Julian Guthrie, *Lowell Admissions Vote Delayed; Race vs. Grades Controversy Rages at Board Meeting*, S.F. EXAMINER, Oct. 13, 1999, at A1 (noting that the proposed middle-school set-aside plan had been attacked "because the highest ranked students at an academically inferior middle school may not be comparable to the top-ranked students at a more rigorous middle school").

280. See Guinier & Torres, *supra* note 268 ("Contrary to the fears that they would be unqualified, the 10 percenters exceeded expectations; their collective grade point average in their first year of college was higher than the freshman average for all students before the Hopwood decision.").

281. This is analogous to an additional admissions criterion of the One Florida plan that gives a preference to students coming from under-performing public high schools. See Bush, *supra* note 269.

282. See *The Diversity Project in Texas*, *supra* note 270, at A14 (observing that the Texas Ten Percent Plan has led university administrators to become involved in public school reform efforts that have "made a good bit of headway").

283. See Bush, *supra* note 269 (noting that in conjunction with the One Florida plan, the state is "devoting unprecedented resources and attention to our lowest-performing primary and secondary schools, where 85 percent of the students are African American, Hispanic, or other minorities").

284. See Brent Staples, Editorial Observer, *California Schools, After Affirmative Action*, N.Y. TIMES, Aug. 23, 1999, at A14 ("[T]he death of affirmative action has thrown a klieg light onto educational inequality. With minority students who would once have graduated from California's elite universities being shut out, political pressure is building for the state to use its budgetary and regulatory powers to bring urban schools into line with those in more affluent communities.").

firmative action under Proposition 209 in 1996,²⁸⁵ and it appears to be happening in San Francisco and Boston after *Ho* and *Wessmann* as community leaders are focusing on improving the competitiveness of minority applicants through academic achievement rather than racial preferences.²⁸⁶

In a district with well-integrated feeding junior high schools, but fairly segregated neighborhoods, the neighborhoods themselves, rather than feeding schools, could serve as an important factor in admission to selective schools. A certain number of slots could be allotted to students in each neighborhood, using a proxy like zip code. Once again, owing to the widespread patterns of residential segregation in America's urban communities,²⁸⁷ such a scheme would have the effect of offering more slots to minority students.

The above proposals are merely suggestions, of course, as no single policy will best suit a particular school district. Rather, it is, as Chief Justice Burger noted in his *Swann* dictum, within the "broad discretionary powers" of local school officials "to formulate and implement" any combination of these race-neutral proposals in the pursuit of greater integration.²⁸⁸ The important point is that these race-neutral alternatives do exist, and it is up to school officials to experiment with

285. See *id.*; see generally James Traub, *The Class of Prop. 209*, N.Y. TIMES, May 2, 1999 (Magazine), at 44 (describing California's efforts to improve pre-college education in order to boost minority enrollment in the state university system in the wake of Proposition 209's prohibition of race-based affirmative action); Editorial, *supra* note 270 (describing the efforts of California, Texas, and Florida to increase the quality of education for minority students in the wake of abandoning race-based affirmative action).

One specific manifestation of this increased political pressure for better academic standards was the lawsuit filed by the ACLU against the State of California seeking more advanced placement courses for students in poorer, mostly black and Hispanic high schools. See Staples, *supra* note 284. Even Ward Connerly, the California regent who was an outspoken foe of race-based affirmative action and a driving force behind Proposition 209, voiced loud support for this effort. *Id.* Indeed, the effort has caught the attention of California lawmakers who have considered drafting legislation to address this disparity. *Id.* Yet another broader lawsuit was filed by the ACLU and other civil rights groups more recently alleging vast disparities throughout all of California's public education system. See Todd S. Purdum, *Rights Groups Sue California Public Schools*, N.Y. TIMES, May 18, 2000, at A16.

286. See Venise Wagner, *End of Race Decree Sparks Ideas to Aid Black Youths*; S.F. *After-School Programs, Parent Involvement Touted*, S.F. EXAMINER, Apr. 19, 1999, at A1 (noting that in the wake of *Ho*, African Americans in San Francisco began considering "increased parent involvement . . . establishing private and charter schools, bolstering neighborhood schools, asserting more political force and creating after-school programs"); Daley, *Exam School Data*, *supra* note 85, at B3 (describing a \$1.4 million initiative to improve public school education in Boston in an effort to increase minority enrollment).

287. See Funderburg, *supra* note 273, at 84.

288. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971); see *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.").

them if they wish to increase racial and ethnic diversity in selective schools.²⁸⁹

B. *Race-Neutral Alternatives for Magnet Schools*

Many of the proposals described in Section III.A could also assist school districts seeking to integrate their magnet schools. In particular, focusing on demographic and neighborhood characteristics is likely to be most effective.²⁹⁰ Indeed, two of the proposals considered, but ultimately rejected, by the Arlington School Board before it enacted its race-classifying scheme for magnet school integration, which was ultimately struck down by the Fourth Circuit in *Tuttle*, relied on neighborhood quotas to ensure integration.²⁹¹

Another method of increasing diversity in magnet schools relies on restructuring the parental choice system. The Arlington School Board's unmanipulated parental choice system — simply allowing parents who were interested in magnet school enrollment for their children to enter an admissions lottery — resulted in an excess of white applicants and a dearth of Latino and black applicants.²⁹² Before adopting the unmanipulated parental choice system, the Arlington School Board also considered but ultimately rejected different lottery structures:

[H]ave all names of an entering class in the county automatically put into the lottery. All students are then selected at random and offered admission until the class is full. Another method would be to offer randomly selected families the opportunity to have their child's name placed in a second lottery from which those students selected would be offered admission. This method would require all families, even those not interested in alternative schools, to make an active choice.²⁹³

289. Cf. *Johnson v. Bd. of Regents of the Univ. of Ga.*, 2001 U.S. App. LEXIS 19154, at *68-69 (11th Cir. Aug. 27, 2001) (requiring universities to experiment with "innovative [race-neutral] strategies" to increase student body diversity).

290. See *supra* notes 254-258, 287 and accompanying text.

291. The first rejected proposal stated:

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

Tuttle v. Arlington County Sch. Bd., 195 F.3d 698, 706 n.11. The other rejected neighborhood-based proposal stated:

Each neighborhood school would be allotted a certain number of slots at each alternative school. The number of slots per school would be determined either by the percentage of that school's population relative to [the magnet school's] student population or by the extent of overcrowding at the school

Id.

292. See *infra* note 294 and accompanying text.

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

By changing the student's default assignment, these proposals attempt to overcome the inertia toward entering the magnet school lottery that, for whatever reason, was more prevalent among blacks and Hispanics than among whites and Asians in *Tuttle*.²⁹⁴ In a sense, this approach echoes *Green*'s recognition of the need for "affirmative duty" to combat the self-segregation that can result from "freedom of choice."²⁹⁵

As with selective schools, unitary school district officials are free to experiment with any and all variations of these race-neutral options if they deem magnet school diversity a worthy pedagogical goal. Because magnet schools do not rely on a competitive admissions process, one would expect school administrators to have more success in achieving their desired racial balance through race-neutral means in magnet schools than in selective schools, where, as acknowledged above, doing so may be more difficult.²⁹⁶

C. Race-Neutral Alternatives for Fungible Schools

Despite Section II.B's argument that plans relying on racial classifications in distributing students among ostensibly fungible schools may sometimes be unconstitutional, a board of education may constitutionally consider race in deciding how to draw up the boundaries of neighborhoods that will feed into each fungible school.²⁹⁷ The district

294. See *id.* tbl.4 (providing the ratio of countywide public school students to number of magnet school applicants by race and ethnicity: blacks, 17%/8.6%; Hispanics, 31%/10.8%; whites, 41%/67%; Asian/Pacific Islander, 10%/13.5%). The first proposal, described *supra* note 291, also attempts to combat parental inertia by changing the default assignment.

295. *Green v. County Sch. Bd.*, 391 U.S. 430, 437 (1968); see also *supra* note 110 and accompanying text.

296. See *supra* notes 259-261 and accompanying text.

297. As explained in note 253, *supra*, race-conscious school district drawing is fundamentally different from race-conscious congressional-district gerrymandering in that it seeks to integrate the races rather than balkanize them. Furthermore, the Supreme Court's most recent racial gerrymandering opinion, *Hunt v. Cromartie*, 121 S. Ct. 1452 (2001), while purporting to maintain *Shaw*'s holding that a congressional district drawn for predominantly racial reasons is unconstitutional, gave the state legislature much discretion in drawing districts by adopting a stringent evidentiary standard that must be met by plaintiffs to prove predominant racial motivation. *Id.* at 1466.

Even assuming arguendo that Chapin Cimino is correct in arguing that the principles from the redistricting cases cast doubt on the constitutionality of race-conscious race-neutral methods to boost integration, see *supra* note 253, *Hunt* indicates that the Court will interfere with the decisions of democratically elected officials only upon an extremely strong evidentiary showing of racial motivation — one that the Court found the plaintiffs failed to present in *Hunt*. See Pamela S. Karlan, Editorial, *The Court Finds Room for Racial Candor*, N.Y. TIMES, Apr. 23, 2001, at A15 (reading *Hunt* as indicating that the Court is perhaps less likely now to interfere in cases where race plays a role in a state actor's decision); Linda Greenhouse, *Hints of a Change*, N.Y. TIMES, Apr. 20, 2001, at A12 (opining that *Hunt* might indicate that the Court is looking to pull back from politically contentious racial issues and let the political branches of government handle them). Consequently, in the school context, plaintiffs would likely have similar difficulty proving that race was a predominant factor behind a school board's decision to draw attendance zones in a particular manner.

may draw the borders of a school's feeding neighborhoods, and even rely on busing to mix noncontiguous neighborhoods, in a race-conscious effort to maximize racial integration.²⁹⁸ Such a policy is still race-neutral in that it avoids classifying students by race, and treats similarly situated students of different races equally.²⁹⁹ For example, if the district assigns students in neighborhood *A* (overwhelmingly white) and neighborhood *B* (overwhelmingly black) to a certain school, a black student in *A* and a white student in *B* will still be sent to this school.

Such plans can be very effective, at least initially, in substantially reducing the number of racially imbalanced schools in the district.³⁰⁰ Over time, however, particularly in geographically small urban school districts surrounded by independent suburban districts, busing can exacerbate white flight, ultimately resulting in majority-minority urban schools.³⁰¹ Furthermore, busing students far from home has proved to be politically unpopular,³⁰² even among blacks, as many have advocated a return to neighborhood schools.³⁰³ Additionally, the success of

298. See, e.g., *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 461 (1982) (discussing approvingly "the Seattle Plan," "which ma[de] extensive use of busing and mandatory reassignments" in order to "desegregate elementary schools by 'pairing' and 'triading' predominantly minority with predominantly white attendance areas, and by basing student assignments on attendance zones rather than on race"); *Bustop, Inc. v. Bd. of Educ.*, 439 U.S. 1380, 1382-83 (Rehnquist, Circuit Justice 1978) (denying an application for stay of a state court order requiring a school district to desegregate based upon a lesser showing of discrimination than that required by federal law because plaintiffs' "novel" argument that they have a "federal right" to be free from the state's voluntary integration-promoting busing efforts was without merit); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 9-10 (1971) (discussing the famous "Finger plan" that relied on "zoning, pairing, and grouping" feeding neighborhoods to achieve integration in Charlotte).

299. See *Seattle Sch. Dist.*, 458 U.S. at 461 (noting that the "Seattle Plan" "bas[es] student assignments on attendance zones rather than on race").

300. See, e.g., *id.*

301. See Carolyn Barta, *End of the Line*, DALLAS MORNING NEWS, Sept. 5, 1999, at 1A (describing the decline of busing in Boston and across the nation); Armor, *supra* note 217, at 196-97 (describing how white flight occurs most frequently in "central-city districts surrounded by easily accessible White suburbs (e.g., Boston)" and least frequently in "large metropolitan school districts surrounded by minimally developed areas (e.g., Charlotte, North Carolina)").

302. See, e.g., Barta, *supra* note 301 (describing the decline of busing in Boston and across the nation); Robert Strauss, *The Dilemma of Desegregation*, N.Y. TIMES, Mar. 11, 2001, at § 14 (New Jersey), at 1 (describing how the otherwise self-described "progressive" parents of Cherry Hill, N.J., have staunchly opposed a proposal to send children to elementary schools farther from their homes).

303. See ALAN EHRENHALT, *The Radical Idea of Neighborhood Schools*, in ALAN EHRENHALT, *DEMOCRACY IN THE MIRROR: POLITICS, REFORM, AND REALITY IN GRASSROOTS AMERICA* 169 (1998) ("In many places, it is African Americans who are asking whether years of court-ordered busing for racial balance have brought them anything as valuable as the community solidarity that prevailed before it."); see also Editorial, *A Challenge for Schools Chief*, S.F. CHRON., Aug. 10, 2000, at A24 (describing how black parents in particular have "routinely complained" that San Francisco's crosstown busing of students "stifled parental involvement"); Stafford, *supra* note 159.

race-conscious geographic assignment patterns can be jeopardized when such a system is complemented by school choice, which can often lead to white parents opting out of schools with large minority populations.³⁰⁴ Consequently, *limiting* choice by not allowing students to opt out of the schools to which they are initially assigned may be essential to preserving racially integrated schools.³⁰⁵

Of course, proponents of racial classifications might point out that limiting choice with a view to preserving integration is precisely what race-classifying open enrollment policies attempt to do.³⁰⁶ Nevertheless, it is not at all clear that race-classifying open enrollment policies are any more effective in reducing racial isolation than those that do not classify by race.³⁰⁷ If whites strongly prefer not to attend school with minorities, one would expect them to express this preference through resisting controlled choice by moving out of the district entirely,³⁰⁸ and indeed this is what has happened in many school districts.³⁰⁹ Such demographic forces can likely be battled equally effec-

304. See Rosen, *supra* note 159, at 1 ("You can't reconcile choice with diversity, and that's the tragedy.") (quoting Samuel Issacharoff, Columbia Law Professor); cf. Ehrenhalt, *supra* note 303, at 170 (noting that "the virtues of neighborhood schools and unlimited choice . . . don't fit together").

305. Limited choice or no choice at all is actually the norm in American school districts. See Elmore, *supra* note 165; see also Strauss, *supra* note 302 (describing how in New Jersey "most school districts in the state have only one high school and many have only one middle school"). But see Wilgoren, *supra* note 166 (describing how public school choice is growing rapidly in American schools).

Of course, parents afraid of integration always have the constitutionally protected option to pull their children out of the public schools altogether and enroll them in private schools. See *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 519 (1925). Indeed, the private school option often allows parents to choose a less integrated school without having to move to a more distant suburb, and can serve as a significant impediment to integration. See, e.g., Funderburg, *supra* note 273, at 85 (describing how an increasing number of mostly white students in racially integrated Montclair, N.J., have been leaving the public schools for private and parochial schools).

306. See, e.g., *Brewer v. W. Irondequoit Cent. Sch. Dist.*, 212 F.3d 738, 741-42 (describing Rochester's race-classifying controlled choice program and its integration-promoting goals).

307. For instance, in *Brewer*, dissenting Judge Miner pointed out that despite the fact that Rochester's inter-district controlled choice plan had been around for thirty-five years, it had not had "any apparent success in reducing racial isolation." *Id.* at 757 (Miner, J., dissenting). Indeed, the concentration of minority students in the Rochester District increased from twenty-five percent in 1963 to about eighty percent in 1996-97, while the suburban districts reported an overall minority population of less than ten percent (the controlled choice plan was adopted in 1965). See *id.* at 743.

308. See generally Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956) (presenting the now-classic "Tiebout Theory"). White flight to surrounding districts with low minority populations is more likely to occur, of course, when the central-city district is surrounded by accessible white suburbs (as in Boston) than in the case of large metropolitan school districts surrounded by minimally developed rural areas (as in Charlotte, N.C.). See Armor, *supra* note 217, at 197.

309. See, e.g., Barta, *supra* note 301 (explaining how Boston's white public school student population declined from sixty percent in 1974 to fifteen percent today).

tively (or, unfortunately, ineffectively) with race-neutral school choice — allowing *all* students in urban school districts with high minority populations to transfer to the largely white suburban schools — as with race-classifying schemes.

In a school district with a high degree of residential segregation, officials need not sacrifice school choice for integration. Rather, officials could use neighborhood, rather than racial, classifications to limit choice in an open enrollment plan to boost integration. For instance, Seattle's controlled high school open enrollment plan, recently upheld as constitutional by a federal district court in *Parents Involved in Community Schools v. Seattle School District No. 1*,³¹⁰ allows students to choose which high school to attend but apportions slots for over-subscribed schools to students of the underrepresented race(s); i.e., if more students wish to attend a predominantly white school than there is capacity, the school will give underrepresented blacks students preference in admission in an effort to achieve a racial composition that reflects the overall population of the district.³¹¹

Although the court found that Seattle "must" rely on racial classifications to offer integrated schools,³¹² school officials could have used the patterns of residential segregation throughout the city to their advantage by adopting a residential, rather than racial, preference scheme, under which students from the mostly minority southern part of the district could be given preference to attend schools in the mostly white northern part of the district. Relying on geography alone would not, therefore, necessarily lead to highly segregated schools, as predicted by the court,³¹³ provided that the factor of geography was used in this manner. Of course, it is possible that under the geography-preference scheme proposed, the races would tend toward self-segregation, with many more white than minority students from the high-minority southern part of the district seeking to enroll in schools in the northern part. But if the schools in the mostly white northern part of the district really do offer more attractive programming and facilities, as the court recognized,³¹⁴ one would expect both white *and* minority students to be attracted to them.

More importantly, if the geography preference scheme were designed to maximize the benefits of residential segregation, the neighborhoods given preference for attending the mostly white schools in the northern part of the district would be those containing minimal white populations, thereby reducing the possibility of self-segregation.

310. 137 F. Supp. 2d 1224 (W.D. Wash. 2001).

311. *See id.* at 1226.

312. *See id.* at 1238.

313. *See id.* at 1237.

314. *See id.* at 1239.

In sum, race-conscious race-neutral student assignment plans offer a constitutional way for school officials to increase racial diversity throughout the district. Relying on nonracial characteristics such as geography and demographic criteria allow officials to integrate selective, magnet, and fungible schools. Furthermore, magnet schools may wish to consider altering the operation of their lotteries in a way that attracts more underrepresented minority applicants. Finally, in the fungible school context, school officials may draw attendance zones in a race-conscious manner so as to maximize the racial diversity of student body populations.

CONCLUSION

As the Supreme Court has repeatedly noted, the political branches of local government, rather than the judicial branch of the federal government, are best able to fashion and implement educational policy.³¹⁵ Nevertheless, in doing so, certain federal constitutional norms must be observed. The constitutional norm of race-neutrality, or “classificationism”³¹⁶ — scrutinizing all programs relying on racial classifications regardless of whether the classification is used in a benign or malignant manner — requires that school officials generally avoid classifying students by race in designing student assignment plans, even where integration is the goal.

Nevertheless, within the confines of race-neutrality, school officials retain substantial discretion to adopt measures that would boost racial diversity among schools within their districts. While it is the opinion of this Note’s author that racial integration does indeed provide substantial pedagogical and societal benefits, school officials must weigh these benefits against other, sometimes contradictory, benefits offered by neighborhood schools, school choice, and elite, selective schools. The conclusions they reach will vary from district to district, and school officials will undoubtedly discover additional ways to achieve integration without relying on the intrinsically dangerous tool of racial classifications.

315. See, e.g., *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.”).

316. See *supra* text accompanying note 31.