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Equal Protection Challenges to the Use of Racial Classifications to Promote Integrated Public Elementary and Secondary Student Enrollments

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EQUAL PROTECTION CHALLENGES TO THE USE OF RACIAL CLASSIFICATIONS TO PROMOTE INTEGRATED PUBLIC ELEMENTARY AND SECONDARY STUDENT ENROLLMENTS

by

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I. INTRODUCTION

This essay is entitled *Equal Protection Challenges to the Use of Racial Classifications to Promote Integrated Public Elementary and Secondary Student Enrollments.* I delivered this essay as a speech in Akron, Ohio, at a conference titled "Education and the Constitution: Shaping Each Other and the Next Century" in March of 2000. The topic of this essay is particularly relevant for a conference with this title because it addresses one of the most significant issues in race and public education since the Supreme Court started America on the path of desegregation. Discussion of this topic in Akron, Ohio, is also particularly appropriate. It was the federal district court decision in the case of *Equal Open Enrollment Association v. Board of Education of the Akron City School District*[1] that abruptly changed the deference granted to state and local education officials to use racial classifications to further integrated education.[2] Thus, this is the place where a new trend in the law was born.

Driven by the requirements of federal court decrees, political beliefs that an integrated society was a better society than a segregated one, and educational policy fostering multiculturalism, during the 1960s, 1970s, 1980s, and 1990s, many public school systems

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1 Equal Open Enrollment Ass'n v. Board of Educ., 937 F. Supp. 700 (N.D. Ohio 1996).

2 The scope of this paper is limited to the use of racial classifications in public elementary and secondary education. Unless otherwise noted, when I discuss public education, public schools, schools, or education, I am only referring to public elementary and secondary education.

adopted policies that actively fostered integrated education. Over the past four years, a number of lower federal courts have addressed equal protection challenges to the use of racial classifications of students in the admissions policies of public elementary and secondary schools that promote voluntary integration.[3] The courts have analyzed the constitutionality of these policies by applying strict scrutiny. Most, though not all, of the court decisions concluded either that the state or local school officials failed to articulate a compelling state interest to justify their use of racial classifications in admissions policies, or that the policies were not narrowly tailored.

Because effective integration of student bodies probably requires the use of racial classifications, the decisions by these lower federal courts suggest that the ability of public schools to foster voluntary integration of student bodies is extremely limited. Combined with the termination of existing school desegregation decrees, the implications for the future of school integration in our country are dramatic. If this trend by lower federal courts is not abated, within a few years all mandatory and voluntary integration efforts of public schools will cease.

In a number of different opinions, the Supreme Court has recognized that constitutional rights must be adapted to the special nature of public education. While students do not leave their constitutional rights at the schoolhouse gate, they clearly change into a different set of constitutional clothing. The special environment of public education derives from the fact that the objective of public education is the inculcation to minors of fundamental values necessary to the maintenance of a democratic political system. Public education is *sui generis* because it is the one governmental service that selectively conveys ideas to the young.

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3 Eisenberg v. Montgomery Pub. Sch., 197 F. 3d 123 (4th Cir. 1999), *cert. denied*, 120 S. Ct. 1420 (2000); Hunter *ex rel.* Brandt v. Regents of Univ. of California, 190 F. 3d 1061 (9th Cir. 1999); Tuttle v. Arlington County Sch. Bd., 195 F. 3d 698 (4th Cir. 1999), *cert. dismissed*, 120 S. Ct. 1552 (2000); Wessmann v. Gittens, 160 F.3d 790 (1st Cir. 1998); Brewer v. West Irondequoit Central Sch. Dist., 32 F. Supp. 2d 619 (W.D.N.Y. 1999); Capacchione v. Charlotte-Mecklenburg Sch., 57 F. Supp. 2d 228 (W.D.N.C. 1999); *see* Equal Open Enrollment Ass'n v. Board of Educ. 937 F. Supp. 700 (N.D. Ohio 1996).

In this essay, I will argue that the recent lower federal court decisions addressing equal protection challenges to the use of racial classifications in public education have not paid adequate attention to the Supreme Court cases in the field of education. It is a mistake to examine the use of racial classifications in public schools in the same way that this issue would be analyzed outside of the context of public education. When courts address equal protection challenges to the use of racial classifications of public school students, they should focus on the messages conveyed by the use of such classifications. The messages conveyed constitute the values being inculcated to the young by the use of racial classifications.

II. Opinions Recognizing Broad Powers of States and Local School Officials to Use Racial Classifications to Promote Integrated Public Education

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

A. The Supreme Court's School Desegregation Jurisprudence

The Supreme Court's unanimous 1971 opinion in the case of *Swann v. Charlotte-Mecklenburg Board of Education*[4] set out the guidelines for integrating schools, including

4 Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

approving busing as a tool to further that end. Writing for the Court, Chief Justice Burger indicated that the remedial power of federal courts extends only to the basis of a constitutional violation. This authority does not put judges automatically in the shoes of school authorities whose powers are plenary. According to the Court, state and school authorities:

> are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court. . . .[5]

The Supreme Court's opinion in *Washington v. Seattle School District No. 1*[6] also assumes that the power of state and local school boards to use racial classifications to foster integrated student bodies is broad. The Seattle School District adopted a resolution intended to eliminate racially imbalanced schools. There was no allegation of *de jure* segregation. To eliminate racially imbalanced schools, the District concluded that it was necessary to engage in mandatory reassignment of students. The desegregation plan adopted was first implemented for the 1978-1979 academic year. Even if the school and state officials had intentionally caused the segregation, the plan went substantially beyond the remedial requirements under the Equal Protection Clause.[7]

In late 1977, opponents of desegregation drafted a state-wide ballot initiative, known as Initiative 350. Initiative 350 was designed to terminate the use of mandatory busing for purposes of racial integration. Absent certain special exceptions enumerated therein, it generally required

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5 *Id*. at 16.

6 Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982).

7 Arval A. Morris, *Whither the Neighborhood School?–Comments on* Washington v. Seattle School District *and* Crawford v. Board of Education, 6 ED. LAW REP. 429, 435 (1983).

students to attend a school geographically nearest or next nearest the student's place of residence. On November 8, 1978, two months after the District's desegregation plan went into effect, Initiative 350 was approved by almost 66% of the voters. Within a month the District, along with two other school districts that had implemented desegregation plans, filed suit challenging the constitutionality of Initiative 350 under the Equal Protection Clause. The Supreme Court agreed that Initiative 350 violated the Equal Protection Clause. Thus, the Court left Seattle with a school desegregation program that exceeded that which could be ordered by federal district courts, even if it was necessary to remedy an equal protection violation.[8] In doing so, the Supreme Court also reasoned that, as a matter of educational policy, school authorities may well conclude that some kind of racial balance in the schools is desirable quite apart from any constitutional requirements.

Two other opinions by individual members of the Supreme Court are also worth mentioning. Justice Powell dissented from the Supreme Court's opinion in two 1979 companion cases, *Columbus Board of Education v. Penick*[9] and *Dayton Board of Education v. Brinkman.*[10] Justice Powell took this opportunity to criticize federal courts for prescribing mandatory measures to desegregate student bodies as the constitutionally required remedy.[11] Justice Powell

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8 *See also, e.g.*, Board of Educ. v. Dowell, 498 U.S. 237, 248 (1991) (holding that desegregation orders were intended as temporary measures to remedy past discrimination); Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976) (limiting the ability of federal courts to order annual adjustment to school desegregation decree in order to ensure that no school ever had a majority of minority students, because such a remedial order was not responding to the constitutional violation).

9 Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 479 (1979) (Powell, J., dissenting).

10 Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979). Justice Powell's dissent in *Brinkman* is combined with his dissent in Penick. *See Penick*, 443 U.S. at 479 (Powell J., dissenting).

11 Part of Justice Powell's criticism was aimed at the belief that there was inadequate evidence that the segregation in these cases was the result of discriminatory purposes by state officials. Powell noted that the condition of segregated schools in these cities results primarily from familiar segregated housing patterns, which, in turn, are caused by social, economic, and demographic forces for which no school board is responsible. *Penick*, 443 U.S. at

went on to note that "the ultimate goal is to have quality school systems in which racial discrimination is neither practiced nor tolerated. It has been thought that ethnic and racial diversity in the classroom is a desirable component of sound education in our country of diverse populations, a view to which I subscribe."[12]

Even Justice Rehnquist, in a 1978 opinion, accepted the fact that the states could engage in broad measures to integrate student bodies. In *Bustop, Inc. v. Board of Education of the City of Los Angeles*,[13] Justice Rehnquist denied an application for a stay that sought to delay the implementation of a school desegregation order issued by the Superior Court of Los Angeles County. That order required the reassignment of over 60,000 students in Los Angeles public schools. Bustop, Inc., argued on behalf of the students to be transported that the desegregation order was at odds with the Supreme Court's school desegregation jurisprudence. In rejecting the application, Justice Rehnquist noted that the desegregation plan rested on decisions in which the Supreme Court of California interpreted of the California State Constitution.[14] Those opinions concluded that proponents seeking a court-ordered busing decree were required to show less than what the United States Supreme Court has required for those seeking similar relief under the

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480-81 (Powell, J., dissenting). Powell criticized the Court for holding these two school boards responsible for all of the segregation that had occurred in each of the cities' schools, as opposed to attributing it to factors beyond the control of the school officials. *Id.*

Justice Powell also joined the separate dissenting opinion of Justice Rehnquist. *Id.* at 489 (Rehnquist, J., dissenting). Justice Rehnquist noted that "[t]he school desegregation remedy imposed on the Columbus school system by this Court's affirmation of the Court of Appeals is as complete and dramatic a displacement of local authority by the federal judiciary as is possible in our federal system. Pursuant to the District Court's order, 42,000 of the system's 96,000 students are reassigned to new schools. There are like reassignment of teachers, staff, and administrators, reorganization of the grade structure of virtually every elementary school in the system, the closing of 33 schools, and the additional transportation of 37,000 students." *Id.* at 489-90.

12 *Id.* at 486 (Powell, J., dissenting).

13 Bustop, Inc. v. Board of Educ., 439 U.S. 1380 (1978).

14 Crawford v. Board of Educ., 551 P.2d 28 (Cal. 1976); Jackson v. Pasadena City Sch. Dist., 382 P.2d 878 (Cal. 1963).

United States Constitution. Justice Rehnquist went on to note that the only authority that a federal court has to order desegregation or busing in a local school district arises from the United States Constitution. But the same is not true of state courts. So far as the United States Supreme Court is concerned, state courts are free to interpret their state constitutions to impose more stringent restrictions on the operations of local school boards.

In conclusion, Justice Rehnquist points out that the novel aspect of Bustop, Inc.'s contention is the argument that:

> each citizen of a State who is either a parent or a schoolchild has a "federal right" to be "free from racial quotas and to be free from extensive pupil transportation that destroys fundamental rights of liberty and privacy." While I have the gravest doubts that the Supreme Court of California was required by the United States Constitution to take the action that it has taken in this case, I have very little doubt that it was permitted by that Constitution to take such action.[15]

B. Decisions by Lower Federal Courts Recognizing the Broad Discretion of School Officials to Use Racial Classifications to Maintain Integrated Schools

Prior to the District Court opinion in *Equal Open Enrollment Association v. Board of Education of the Akron City School District* in 1996,[16] lower federal courts and state courts that addressed the use of racial classifications to promote integration took their lead from the Supreme Court's school desegregation jurisprudence. These courts recognized that school districts had broad powers to implement measures directed towards producing racially and ethnically integrated student bodies and faculties, even in the absence of an equal protection violation.

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15 *Bustop, Inc.,* 439 U.S. at 1383.

16 Equal Open Enrollment Ass'n v. Board of Educ., 937 F. Supp. 700 (N.D. Ohio 1996).

In *Parent Association of Andrew Jackson High School v. Ambach*,[17] the Second Circuit addressed a challenge raised by minority students to a desegregation plan for Andrew Jackson High School in Queens in New York City. Despite efforts by the Board of Education of the City of New York to prevent it, the student body at Jackson High School had gone from a population that was 80% white in the 1950s to one that was only 2% white in the 1970s.[18] The high school student population in the borough of Queens had also fallen to only 48% white and was predicted to decline to about 36% white in 1981.[19]

In the 1970s, the Board adopted a choice plan for the students who were in the Jackson High School attendance zone. The Board concluded that there was a tipping point -- which it determined to be when the percentage of white students dropped below 50% -- at which there was an acceleration of the number of white students who would leave a given school. White enrollment in the system as a whole was inadequate to keep all schools above the tipping point. Thus, the Board's plan sought to balance the goal of placing Jackson High School's minority students in integrated schools of their choice against the perceived reality that if the minority enrollment in an individual receiving school increased too rapidly or reached the tipping point, white students would leave the receiving school at an increasing rate.

The Plan, therefore, sought to control both the rate and the extent of change in the racial composition in the receiving school.[20] The impact of the limitations on the ability of students in

17 Parent Assoc. of Andrew Jackson High Sch. v. Ambach, 598 F.2d 705 (2d Cir. 1979) (*Andrew Jackson I*).

18 Parent Assoc. of Andrew Jackson High School v. Ambach, 738 F.2d 574, 576 (2d Cir. 1983) (*Andrew Jackson II*).

19 *Andrew Jackson I*, 598 F.2d at 710.

20 Under the Plan, Black and Hispanic students could elect to attend any New York City high school not already over-enrolled in which (1) the percentage of white students in the school exceeds either 50% of the school population or the borough-wide average in the borough in which the receiving school is located (whichever is higher); provided further that (2) the admission of such students, coupled with the admission of minority students

the Jackson High School attendance zone to transfer meant that some minority children would not be able to attend integrated schools. In effect, one group of minority students could be kept in stable integrated schools only at the cost of requiring another group of minority students to remain in largely exclusively all minority schools.[21] The Second Circuit indicated a willingness to uphold the Plan if the Board could provide evidence for its use of the tipping-point calculations. The Second Circuit found that the Plan's aim to promote more lasting integration is a sufficiently compelling purpose to justify, as a matter of law, the exclusion of some minority students from the school of their choice under the obviously race-conscious Plan.[22]

In *Willan v. Menomonee Falls School Board,*[23] a minority pupil and his parents brought a suit challenging the constitutionality of a Wisconsin statute authorizing school districts to enter into voluntary agreements providing for interdistrict transfers of pupils to promote racial integration. In addressing this issue, the District Court noted that "it is well-settled in federal law that state and local school authorities may voluntarily adopt plans to promote integration even in the absence of a specific finding of past discrimination."[24] The District Court specifically noted in its opinion that Justice Powell had lauded the Wisconsin statute that was at the center of the

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from other integration programs and/or through demographic changes in the attendance area servicing the school, will not (a) decrease the receiving facility's white/minority ethnic balance by 4% or more in any one school year, or (b) produce a rate of change in any one year that exceeds one-fourth the difference between the school's current white enrollment and a 50% white enrollment, whichever is less. *See Andrew Jackson II*, 738 F.2d at 576-77.

21 *Id*. at 717-19.

22 *Andrew Jackson I*, 598 F.2d at 719. The Court remanded the case to the District Court for several factual determinations concerning specific provisions of the Plan, including (1) whether the Board had shown a factual justification for its choice of a 50% tipping point; and (2) whether demographic projections supported the Board's determination that the maximum allowable rate of change in racial composition of a school should be set at the lesser of 4% or 1/4 of the difference between the current white enrollment and 50% white enrollment. *Id*. at 720-21.

23 Willan v. Menomonee Falls Sch. Bd., 658 F. Supp. 1416 (E.D. Wis. 1987).

24 *Id*. at 1422 (citing McDaniel v. Barresi, 402 U.S. 39 (1971)).

controversy in this case in his dissenting opinion in *Columbus Board of Education v. Penick*:[25] "[t]his implicit endorsement of the constitutionality of chapter 220 persuades me that the plaintiffs' extant collateral attack on an individual aspect of the plan must fail."[26]

In *Martin v. School District of Philadelphia,*[27] the plaintiffs filed a complaint on behalf of their children on September 6, 1995, alleging that the School District of Philadelphia violated the Equal Protection Clause. The district court rejected the challenge to Philadelphia's use of racial classifications in its voluntary desegregation plan enacted in the absence of a finding of intentional segregation. The compelling interest relied upon by the district court was the elimination of *de facto* segregation.

Efforts by public schools to integrate their faculties raises issues similar to those raised by efforts to promote integrated student bodies. A number of federal court cases arose in situations where, absent a finding of intentional segregation, a school system sought to reassign its public school teachers to produce integrated faculties. Affected teachers challenged these programs as violations of the Equal Protection Clause. In rejecting these kinds of challenges, the Third Circuit, in a 1984 case, *Kromnick v. School District of Philadelphia,*[28] and the Sixth Circuit, in a post-*Croson* 1992 case -- *Jacobson v. Cincinnati Board of Education*[29] -- applied a standard

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25 Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 488-89 n.7 (1979) (Powell, J., dissenting).

26 *Willan*, 658 F. Supp. at 1424. *See also* Jenkins v. Township of Morris Sch. Dist., 279 A.2d 619 (N.J. 1971); Lee v. Nyquist, 318 F. Supp. 710, 714 (W.D.N.Y 1970), *aff'd without opinion*, 402 U.S. 935 (1971) (stating that it is well recognized that children who attend ethnically isolated schools do not enjoy the opportunity to know or embrace those of other races. The elimination of such educational isolation may well be the key (or at least a large step) to racial harmony in this country.).

27 Martin v. School Dist. of Philadelphia, No. CIV.A. 95-5650, 1995 WL 564344 (E.D. Pa. Sept. 21, 1995).

28 Kromnick v. School Dist. of Philadelphia, 739 F.2d 894 (3d Cir. 1984).

29 Jacobson v. Cincinnati Bd. of Educ., 961 F.2d 100 (6th Cir. 1992).

lower than strict scrutiny to the teachers' challenges.[30]

III. RECENT LOWER FEDERAL COURT CASES

The recent lower federal court cases stand in stark contrast to the earlier decisions. Most of the decisions that were not subsequently overturned -- though not all -- have struck down racial balancing plans in elementary and secondary schools. The courts that have struck down these plans have applied strict scrutiny and have found either that the use of racial classifications to promote integration were not justified by a compelling state interest, or that the means used were not narrowly tailored to advance that interest.

The first lower federal court opinion to reject the use of racial classifications to promote integration dealt with a policy of the Akron School Board.[31] In 1993, the Ohio legislature enacted the Open Enrollment Laws. These laws permitted students in one public school district to transfer to an adjacent school district if the adjacent district adopted a resolution allowing such transfers. The state would provide a portion of the funds allocated to the transferring student to the receiving school district. School districts generally could not prevent their "native" students from transferring, unless the transfer interfered with the ability of the district to maintain an appropriate racial balance in its schools. Prior to the enactment of the Open Enrollment Laws, the Akron School Board had been concerned about the changing ratio of white to non-white students. The Board feared that the availability of transfers outside of the Akron public schools

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30 *See also* Zaslawsky v. Board of Educ. 610 F.2d 661 (9th Cir. 1979) (holding that neither the Fourteenth Amendment nor Title VI precluded school system from taking voluntary action to obtain better racial balance in its teaching faculty); Vaughns v. Board of Educ., 742 F. Supp. 1275 (D. Md. 1990) (justifying the efforts to maintain integrated faculty assignments).

Commentators as well seem to believe that school boards had broad discretion to take account of race in order maintain racially and ethnically balanced student bodies. *See, e.g.*, Arval A. Morris, *New Light on Racial Affirmative Action*, 20 U.C. DAVIS L. REV. 219, 221-24 (1987); Douglas D. Scherer, *Affirmative Action Doctrine and the Conflicting Messages of* Croson, 38 U. KAN. L. REV. 281, 299-301 (1990).

would reduce the number of white students in the Akron school system. Thus, the Board adopted a policy prohibiting any white student from enrolling in an adjacent district. Later, the Akron School Board adopted a resolution proscribing any non-white student from being accepted as a transfer student into the Akron Public Schools.

Equal Open Enrollment Association (EOEA), an association of parents suing on behalf of themselves and the interests of their children who are white students wishing to transfer out of the Akron district, challenged the Board's policy as an unconstitutional race-based classification. In striking down the policy, the District Court relied on Supreme Court opinions in *City of Richmond v. J.A. Croson Company*[32] and in *Adarand Constructors, Inc. v. Pena*,[33] and applied strict scrutiny. Apparently, the Akron School District only argued that its policy of not allowing interdistrict transfers of white students out of Akron was justified by the compelling state interest of preventing *de jure* segregation. As the District Court correctly pointed out, the policy did not advance this compelling state interest. *De jure* segregation, which results from government conduct motivated by a desire to segregate students, can be distinguished from *de facto* segregation. The increasing racial and ethnic segregation in the Akron schools that would result from interdistrict transfers made available under the Open Enrollment Laws would not have resulted from governmental conduct intended to segregate the schools. Thus, it would not have triggered a determination of *de jure* segregation.[34]

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31 Equal Open Enrollment Ass'n v. Board of Educ., 937 F. Supp. 700 (N.D. Ohio 1996).

32 City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493-94, 520 (1989) (five justices endorsing the application of strict scrutiny to all racial classifications).

33 Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 224 (1995).

34 When I read the district court opinion, I could not find any other argument made by the school board for the program, such as preventing racial isolation, promoting racial or ethnic integration, or preventing *de facto* segregation. Thus, it appears as if the School Board failed to advance any compelling justification that other earlier

A review of the integration plans in the other cases reveals some similarities in the plans. None of the plans required mandatory reassignment of students to different schools or forced busing. Students were only affected by the use of racial classifications because they chose to apply to a different school than the one to which they were originally assigned. The integration plans employed diverse methods of achieving racially balanced student bodies. Some plans prohibited the enrollment of students because of their race and ethnicity if their enrollment would either decrease racial and ethnic balancing in the schools the applicants wanted to attend, or the balancing in the schools to which they were otherwise assigned. Other integration plans were not as rigid; they would allow all students to apply to a given school. Then, successful applicants would be determined by a lottery. But the lottery would be weighted in such a way as to produce the type of racial and ethnic balancing in the school that the school administrators desired. As a result, no student was excluded from the possibility of being admitted to any of the open positions. However, those whose enrollment in a given school would increase racial and ethnic diversity had a greater chance of being selected for a given seat.

Even though the programs were all voluntary, the lower federal courts focused on the fact that the programs required public schools to engage in some form of racial classification. At some point during the admissions process, the student's race or ethnicity became an important factor. Drawing on the Supreme Court cases of *Adarand Constructors, Inc. v. Pena*[35] and *City of*

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federal courts have accepted. The District Court, however, went on to note that even if the policy adopted by the Akron School Board did advance a compelling state interest, it was not narrowly tailored. This suggests that the failure to articulate a plausible compelling interest may not have changed the result.

35 Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 224 (1995) *cited by* Tuttle v. Arlington County Sch. Bd., 195 F.3d 698, 704 (4th Cir. 1999), *cert. dismissed*, 120 S. Ct. 1552 (2000); Eisenberg v. Montgomery County Pub. Sch., 197 F.3d 123, 129 (4th Cir. 1999), *cert. denied*, 120 S. Ct. 1420 (2000); Wessmann v. Gittens, 160 F.3d 790, 794 (1st Cir. 1998); Brewer v. West Irondequoit Cent. Sch. Dist., 32 F. Supp. 2d 619, 626 (W.D.N.Y. 1999).

Richmond v. J.A. Croson Company,[36] these lower courts concluded that strict scrutiny applies to the use of racial classifications in all of the desegregation plans.

In cases in which the courts upheld challenges to the admissions plans, the opinions discuss two compelling state interests. Most of these courts apparently assumed that Justice Powell's opinion in *Bakke* is still valid law. Thus, the First Circuit, in *Wessmann v. Gittens*;[37] the Fourth Circuit, in both *Tuttle v. Arlington County School Board*[38] and *Eisenberg v. Montgomery County Public Schools*;[39] and the District Court in *Brewer v. West Irondequoit Central School District*[40] all analyzed whether the respective integration plan was justified by a compelling state interest in diversity.[41] These lower courts, however, struck down these racial balancing plans. They concluded that, because the plans seek to obtain racial balancing, they are not narrowly tailored to the compelling interest of diversity. Diversity is viewed as being based on differences of individuals, but racial balancing is viewed as being based on differences between racial and ethnic groups.

The lower federal courts also noted that remedying identified acts of discrimination could be another compelling interest. However, only the First Circuit opinion in the *Wessmann* case

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36 *J.A. Croson Co*., 488 U.S. at 491 (1989), *cited by* Brewer v. West Irondequoit Cent. Sch. Dist., 32 F. Supp. 2d. 619, 626 (W.D.N.Y. 1999); Capacchione v. Charlotte-Mecklenburg Sch., 57 F. Supp. 2d 228, 241 (W.D.N.C. 1999); Wessmann v. Gittens 160 F.3d 790, 794 (1st Cir. 1998).

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

38 *Tuttle,* 195 F.3d at 704.

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

40 *Brewer*, 32 F. Supp. 2d at 631-32.

41 The issue, however, apparently was not raised in *Equal Open Enrollment Ass'n v. Board of Educ.*, 937 F. Supp. 700 (N.D. Ohio 1996). In *Capacchione*, it appears as if the District Court may have rejected diversity as a compelling state interest.

and the District Court opinion in *Capacchione v. Charlotte-Mecklenburg Schools*[42] addressed these issues. A number of school systems are not going to be in a position to assert that remedying the effects of identified acts of discrimination is a compelling interest. However, for those that can, the *Wessmann* case is particularly instructional on this point.

In 1998, in the case of *Wessmann v. Gittens*,[43] the First Circuit became the first federal appellate court to reject the use of racial classifications to promote the integration of public schools. The First Circuit upheld a challenge to the student assignment policy adopted by the Boston School Committee that governed its three examination high schools: Boston Latin School (BLS), Boston Latin Academy, and O'Bryant.

In the 1970s, Boston was subjected to a federal desegregation decree. While there was no specific evidence of discrimination at BLS, it was included in the desegregation plan. BLS was required to ensure that at least 35% of its enrollment would be black and Hispanic. In 1987, the federal court released supervision over the student assignment policies for Boston public schools.[44] Nevertheless, the School Committee continued to maintain the student assignment policy that existed under the desegregation plan for its three examination high schools. In 1995, this policy was challenged by a disappointed white applicant. The District Court granted the

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42 Capacchione v. Charlotte-Mecklenburg Schs., 57 F. Supp. 2d 228 (W.D.N.C. 1999) (concluding that once a school system had eliminated the vestiges of its prior *de jure* conduct the remedial justification can no longer apply).

43 Wessmann v. Gittens, 160 F.3d 790 (1st Cir. 1998). The Boston School Committee decided against appealing the decision by the First Circuit. Several groups, including the National Association for the Advancement of Colored People (NAACP) and the United States Department of Education, exerted pressure on the Committee. They feared that this case could provide a majority of members of the Supreme Court with the opportunity to render a decision that would have disastrous consequences for affirmative action nationwide. Beth Daley & Andy Dabilis, *In Switch, City Won't Appeal the Latin Case; Wary of Hurting Efforts Nationally*, BOSTON GLOBE, Feb. 14, 1999, at A1.

44 Morgan v. Nucci, 831 F.2d 313 (1st Cir. 1987).

white student injunctive relief and ordered that the applicant be admitted.[45] The School Committee then discontinued the 35% set-aside.

The school officials researched alternative admissions policies in hopes of finding one that might prevent a precipitous drop in the number of black and brown students enrolled in the schools. These efforts can only adequately be understood with the realization that over 70% of Boston's public school students are African-American or Hispanic.[46] Eventually, the School Committee adopted Option N50 because this minimized the diminution of black and Hispanic student enrollment. The plan was to go into effect for the 1997-1998 school year.

Under the plan, all students must take a standardized test. They are then ranked based on a mathematical formula that purports to predict academic perfo rmance. The applicant's test score is combined with the applicant's grade-point average to derive a composite score. Students are then numerically ranked based on their composite score. Half of the available seats are determined based on a strict application of the rankings from the composite score. The other half are allocated based on flexible racial and ethnic guidelines. This is done by determining the relative proportions of five different groups: African-Americans, Asians, Caucasians, Hispanics, and Native Americans in the remaining qualified applicant pool (RQAP) -- which is the top 50% of the applicant pool less the students admitted based on test scores and grades. Once each group's percentage is determined, then the top students in rank order of a particular group are admitted accordingly. Because the racial and ethnic distribution of the second group of successful applicants must mirror their corresponding percentages in the RQAP, a member of a designated racial and ethnic group may be passed over in favor of a lower-ranking applicant

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45 *See* McLaughlin v. Boston Sch. Comm., 938 F. Supp. 1001, 1016 (D. Mass. 1996).

46 Over the past decade , the relevant proportions of the five groups have been more or less 48% black, 25%

from another group.

In 1997, there were 90 available seats in BLS. The first 45 seats were awarded based on the composite score.[47] The percentage of the different racial and ethnic groups in the RQAP was 27.83% black, 40.41% white, 19.21% Asian, 11.64% Hispanic, and .31% Native American. Accordingly, there were 13 blacks, 18 whites, 9 Asians, and 5 Hispanics admitted. Sarah Wessmann was 91st in the rankings, but this method allowed blacks and Hispanics who ranked between 95th and 150th to be admitted ahead of her.

Acting on Sarah's behalf, her father sued the School Committee, challenging the constitutionality of the policy. The District Court entered judgment for the school officials,[48] but the First Circuit reversed. After rejecting the diversity arguments advanced by the School Committee, the First Circuit then went on to address the arguments for the compelling state interest of remedying vestiges of past discrimination. The First Circuit noted that, for this to be a compelling state interest, government actors must be able to muster a strong basis in evidence showing that a current social ill has, in fact, been caused by such past discrimination.[49]

The School Committee argued that a provision in a decree issued in its desegregation litigation required it to remedy any racial imbalance that occurred in the school system. The provision in question enjoined the School Committee "from discriminating on the basis of race in the operation of public schools of the City of Boston and from creating, promoting, or maintaining racial segregation in any school or other facility in the Boston public school

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Hispanic, 8% Asian, and 17% white. *Wessmann*, 160 F. 3d at 799 n.4.

47 In order to get 45, 47 students were actually admitted. *Id*. at 793.

48 Wessmann v. Boston Sch. Comm., 996 F. Supp. 120 (D. Mass. 1998), *rev'd sub. nom.* Wessmann v. Gittens, 160 F.3d 790 (1st Cir. 1998).

49 Wessmann v. Gittens, 160 F.3d 790, 800 (1st Cir. 1998) (citing City of Richmond v. J. A. Croson Co., 488 U.S. 469, 500 (1989)).

system."[50] The First Circuit rejected this argument. It noted, that over ten years ago, there had been a finding that the Boston public schools had obtained unitariness with regard to student assignments. Once there was such a finding of unitariness, the affirmative duty to desegregate had been accomplished. School authorities were not expected to make year-to-year adjustments to the racial composition of student bodies, absent a showing that either the school authorities or some other agency of the state had deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools. Thus, the provision contained in the decree did not require the school officials to take affirmative action. This was a negative injunction, forbidding the School Committee from engaging in acts that supported the original cause of action in order to prevent resegregation.

The School Committee also argued that the achievement gap between black and Hispanic students, on the one hand, and white and Asian students, on the other, are rooted in the discriminatory regime of the 1970s and before. The School Committee pointed to the statistical evidence demonstrating a persistent achievement gap in terms of relative performance on standardized tests at the elementary school level between white and Asian students, on the one hand, and black and Hispanic students, on the other. The First Circuit accepted, *arguendo*, that a documented achievement gap may be a vestige of past discrimination. It asserted, however, that there must be satisfactory evidence of a causal connection between the achievement gap and discriminatory state conduct. Achievement gap statistics, standing alone, do not eliminate the possibility that the gap is caused by societal discrimination. The fact that an institution once was found to have practiced discrimination is insufficient, in and of itself, to satisfy a state actor's burden of producing reliable evidence linking the achievement gap to discriminatory state

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50 *Id*. at 801.

conduct.

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

Even though the First Circuit concluded that the School Committee failed to establish a remedial purpose, it went on to address the narrowly tailored aspect as well. Even if there is a system-wide achievement gap because of low teacher expectations, the First Circuit noted that Option N50 does not address those low teacher expectations. It could be argued that Option N50 is intended to be partial compensation for injustices done at the elementary school level. Given the minority students who benefit from Option N50, however, this argument did not logically follow. Option N50 is not limited to black and Hispanic students who attended Boston's public elementary schools. Many of the black and Hispanic students who would be admitted under Option N50 came from private or parochial elementary schools. Because these students were not harmed by lower teacher expectations in Boston's public elementary schools, Option N50 was not narrowly tailored to curing the harm done to the class of actual victims. The Court also noted that the inclusion of Asians – two of whom were admitted over Sarah Wessmann – was

problematic, because there was no evidence of low teacher expectations regarding them. Finally, the First Circuit noted that the policy could lead to the exclusion of black or Hispanic students in favor of whites in certain anomalous situations. In fact, this happened in 1997 when two Hispanics were excluded in favor of a white student.

The only recent case not to be overturned and that upheld the use of racial classifications to promote a voluntary integration plan in a non-remedial context is the Ninth Circuit opinion in *Hunter ex rel. v. Regents of the University of California*.[51] The Ninth Circuit upheld the use of racial classifications over the dissent of Judge Beezer.[52] In a narrow opinion, the Court upheld a District Court determination that the use of race and ethnicity in determining the student make-up at the Corinne A. Seeds University Elementary School (UES) did not run afoul of the Equal Protection Clause. UES is an elementary school operated as a research laboratory by UCLA's Graduate School of Education and Information Studies.

In upholding the admissions policy, the Ninth Circuit found that improving the quality of education was a compelling interest. The Court noted the challenges posed by California's increasingly diverse population. Cultural and economic differences in the classroom pose special problems for public school teachers. Among these challenges are limited language proficiency; different learning styles; involvement of parents from diverse cultures with different

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

52 While he did not explicitly state it, Judge Beezer seemed to believe that the only compelling state interest that should justify the use of racial classifications was remedial. *Id.* at 1067. Beezer also found that the consideration of race was not narrowly tailored. *Id.* at 1076 (arguing that the University based its use of race and ethnicity on the belief that children with different ethnic backgrounds often have different learning styles). The University had not, however, established that these particular children from their particular racial or ethnic backgrounds had different learning styles. *Id.* at 1076-7. In addition, the University had failed to consider race-neutral ways of accomplishing its objective, specifically, the establishment of one or more additional laboratory elementary schools in areas of California where the demographic diversity would naturally produce applicant pools with any desired racial or ethnic mix. *Id.* at 1077-8. Finally, Judge Beezer criticized the inclusion of a category for mixed-race children, stating that if what the University was trying to define were the learning styles of different racial and ethnic groups, the inclusion of a mixed-race group of students did not make any sense. *Id.* at 1080-81.

expectations and values; and racial and ethnic conflict among families and children. In determining that the use of race and ethnicity in the admissions process was narrowly tailored, the Ninth Circuit relied heavily upon the judgment of the academic researchers. The Ninth Circuit noted that the Supreme Court has stressed the importance of not second-guessing the legitimate academic judgments. The Ninth Circuit itself had cautioned that "judges . . . asked to review the substance of a genuinely academic decision . . . should show great respect for the faculty's professional judgment."[53] The Ninth Circuit noted, however, that its decision was based on the fact that the school was a laboratory school with a research mission. This research mission makes UES both an exceptional school and a valuable resource to California's public education system.

IV. THE SUPREME COURT'S PUBLIC SCHOOL JURISPRUDENCE

The only Supreme Court opinion in the last 20 years that speaks to the use of racial classifications in public elementary and secondary education absent a need to remedy an allegation of *de jure* segregation is *Wygant v. Jackson Board of Education*.[54] In that case, the Supreme Court rejected the use of race as the determinative factor in laying off a white teacher. This decision appears to be one that is limited to the substantial rights that an individual possesses in his or her employment, rather than a rejection of the use of racial classifications to promote integration.[55]

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53 *Id*. at 1067 (citing University of Pennsylvania v. EEOC, 493 U.S. 182, 199 (1990)).

54 Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986).

55 *See also* Taxman v. Board of Educ., 91 F.3d 1547, 1563 (3d Cir. 1996). This conclusion is strengthened by the fact that the Court split five to four in *Wygant*. Justice White, who was in the majority, wrote a separate opinion in which he stated that:

> [w]hatever the legitimacy of hiring goals or quotas may be, the discharge of white teachers to make room for blacks, none of whom has been shown to be a victim of any racial discrimination, is quite a different

Understanding *Wygant* as a case that speaks more to the issue of the vested rights that a public school teacher has in his or her continued employment -- as opposed to the use of racial classifications to encourage integrated education -- is consistent with the case law. The Sixth Circuit rejected equal protection challenges by public school teachers who were reassigned to different public schools in order to foster integrated faculties after the Supreme Court's decision in *Wygant*.[56] The transfers were not dictated by a need to remedy *de jure* segregation. The lower federal courts have found that, despite *Wygant*, public school officials still maintain broad powers to foster integrated faculties.

None of the recent federal court decisions considered the Supreme Court's school desegregation jurisprudence as applicable. Only the First Circuit, in its opinion in *Wessmann v. Gittens*, specifically discussed the apparent recognition of broad powers of state and local school authorities mentioned by the Supreme Court in its school desegregation jurisprudence. The First Circuit dismissed this language by concluding that those statements were mere dicta. These cases also demonstrate that application of the normal strict scrutiny analysis will generally prevent the use of racial classifications to further integrated student bodies.

The most obvious argument justifying the position of recent federal court decisions rejecting the broad power of state and local school officials to use racial classifications to promote integration is that the Supreme Court's interpretation of the Equal Protection Clause has changed. A potent argument could be advanced that, even if the Supreme Court of the 1950s,

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> matter. I cannot believe that in order to integrate a work force, it would be permissible to discharge whites and hire blacks until the latter comprised a suitable percentage of the work force.

Wygant, 476 U.S. at 295 (White, J., concurring).

56 Jacobson v. Cincinnati Bd. of Educ., 961 F.2d 100 (6th Cir. 1992), *cert. denied*, 506 U.S. 1051 (1993). *See also* Board of Educ. of Prince George's County v. Board of Educ. of Prince George's County, 742 F. Supp. 1275 (D. Md. 1991) (justifying the efforts to maintain integrated faculty assignments by stating "[I]t is well settled in federal law that state and local school authorities may voluntarily adopt plans to promote integration even in the absence of a

1960s, 1970s, and 1980s would have deferred to the decisions of state and local school officials, that deference no longer exists. The Supreme Court's equal protection decisions over the past 20 years clearly indicate that government's ability -- at least outside of the context of public education -- to use racial classifications is extremely limited. This development culminated with the Court's opinions in *City of Richmond v. J.A. Croson Co.*,[57] *Miller v. Johnson*,[58] and *Adarand Constructors, Inc. v. Pena*.[59] As the argument would go, just as in the 1950s, when the Supreme Court's equal protection jurisprudence changed and came to reject the doctrine of "separate but equal" that jurisprudence has changed again.

If the use of racial classifications for the purpose of fostering integrated student bodies does not offend the Equal Protection Clause, there must be something in the nature of public education that differentiates it from other governmental services. While the Supreme Court's equal protection jurisprudence has undoubtedly developed over the past 30 years, so has its jurisprudence regarding the role and purpose of public education. Many of the Court's opinions, applying a number of different constitutional provisions, have recognized that constitutional rights must be adapted to the special characteristics of the school environment. The special characteristics of public education that justify the modification of constitutional rights are derived from the fact that public schools are transmitters of societal values to the young. As the Supreme Court has stated, the primary objective of public education is the inculcation of fundamental values for the maintenance of a democratic political system. Thus, when the government is acting as an educator of the young, it is performing a *sui generis* governmental

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specific finding of past discrimination.").

57 City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

58 Miller v. Johnson, 515 U.S. 900 (1995).

59 Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

service.

The Supreme Court based its decision to vary constitutional rights to take into account the special characteristics of public education on three overlapping concerns. First, when it addresses the constitutional rights of students, the Court is dealing with the rights of minors. The rights of minors are different from the rights of adults. Second, the Supreme Court has recognized that, for public schools to teach effectively the lessons that students must learn, it is necessary that they be able to maintain appropriate discipline. Third, the Court has recognized that the primary purpose of public education is the inculcation of fundamental values necessary for the maintenance of our democratic society. Therefore, in determining the application of constitutional rights in public schools, the values being socialized are of utmost concern.

In this Section, I will discuss the Supreme Court's jurisprudence dealing with the application of constitutional rights to the public schools. In the next section, I will put forth an alternative interpretation to the use of racial classifications to further integrated student bodies. I will argue that their use should be seen more from the perspective of the Supreme Court's recent education jurisprudence, than from the perspective of its recent equal protection jurisprudence.

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

In *Lee v. Weisman*,[60] the Supreme Court concluded that a non-sectarian prayer delivered by a rabbi at a public school graduation ceremony violated the Establishment Clause. Nine years earlier, in *Marsh v. Chambers*,[61] the Supreme Court approved the opening of a session of a state legislature with a prayer. In response to the argument that the Court in *Marsh* applied, the Court noted that Establishment Clause jurisprudence is fact-sensitive. Therefore, it could not accept

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60 Lee v. Weisman, 505 U.S. 577 (1992).

the argument that the Court's decision in *Marsh* applied in the public school context. The Court rested its decision on the assertion that even remaining silent during the religious ceremony carried the risk of indirect coercion. While silence may seem to most believers to be nothing more than a reasonable request that the nonbeliever respect the religious practices of others, in a school context, this "request" may appear to be an attempt to employ the machinery of the state to enforce religious orthodoxy. The Court concluded that "for many, if not most, of the students at the graduation, the act of standing or remaining silent was an expression of participation in the rabbi's prayer."[62]

In *Vernonia School District v. Acton*,[63] the Court upheld a drug testing policy adopted by the Vernonia School Board that applied to all students participating in interscholastic athletics. While the Court had upheld drug testing of employees in certain industries, it had not gone so far as to uphold drug testing as a requirement for participating in any particular governmental program. In justifying the Court's decision, Justice Scalia noted that "traditionally at common law, and still today, unemancipated minors lack some of the most fundamental rights of self-determination -- including even the right of liberty in its narrow sense, i.e., the right to come and go at will. They are subject, even as to their physical freedom, to the control of their parents or

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61 Marsh v. Chambers, 463 U.S. 783 (1983).

62 *Lee*, 505 U.S. at 593.

63 Vernonia Sch. Dist. v. Acton, 515 U.S. 646 (1995). In this case, the Court held:

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

Id. at 650.

guardians."[64] Justice Scalia went on to note that "Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere; the 'reasonableness' inquiry [of the Fourth Amendment] cannot disregard the schools' custodial and tutelary responsibility for children."[65]

B. Supreme Court Decisions Varying Students' Rights Based on Requirements for Appropriate Discipline

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

The Supreme Court first addressed the application of the Free Speech Clause in public schools in *Tinker v. Des Moines Independent Community School District*.[66] In *Tinker*, a group of adults and students in Des Moines, Iowa, publicized their objections to the hostilities in Vietnam by wearing black armbands. After becoming aware of this plan, principals of the Des Moines public schools adopted a regulation that would prevent students from wearing the armbands. The Court, in addressing a freedom-of-speech challenge to this policy, noted that it has "repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control

64 *Id*. at 654.

65 *Id*. at 656.

66 Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969).

conduct in the schools."[67] Thus, those "first amendment rights must be applied in light of the special characteristics of the school environment."[68] The Court then laid down a special rule to apply to the free speech rights of students in public schools: school officials must demonstrate that the speech either "would materially and substantially interfere with the requirements of appropriate discipline in the operation of the schools" or infringe upon the rights of others.[69]

In 1985, in the case of *New Jersey v. T.L.O.,*[70] the Supreme Court faced for the first time the application of the Fourth Amendment to public schools. After noting the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds, Justice White, writing for the Court, stated that "it is evident that the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject."[71] In articulating the standard to be applied in school searches, White stated that:

> the accommodation of the privacy interests of schoolchildren with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that the searches be based on probable cause to believe that the subject of the search has violated or is violating the law. Rather, the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search.[72]

In a 1975 opinion, *Goss v. Lopez,*[73] the Supreme Court first addressed the issue of the application of the Due Process Clause to public education. The case involved suspensions of students from public schools for a period not exceeding ten days. The Court agreed with the

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67 *Id*. at 507.

68 *Id*. at 506.
69 *Id.* at 509.

70 New Jersey v. T.L.O., 469 U.S. 325 (1985).

71 *Id.* at 340.

72 *Id*. at 341.

73 Goss v. Lopez, 419 U.S. 565 (1975).

students that they possessed a state-created property interest and a liberty interest to which the Due Process Clause applied. In determining what process was due, the Court noted that "some modicum of discipline and order is essential if the educational function is to be performed. Events calling for discipline are frequent occurrences and sometimes require immediate, effective action. Suspension is considered not only to be a necessary tool to maintain order but a valuable educational device."[74] The Court held that students facing suspensions of less than ten days be given oral or written notice of the charges against them and if they deny them, there must be an explanation of the evidence the authorities have and an opportunity to present their side of the story. The Court, however, stopped short of requiring that students be given the opportunity to secure counsel, to confront and cross-examine witness supporting the charges, or to call witnesses on their own behalf. The Court noted that to do so would not only be too costly, but would destroy suspensions as an effective part of the teaching process.[75]

Two years after its decision in *Goss*, the Supreme Court once again addressed the application of the Due Process Clause to discipline procedures by public schools. In *Ingraham v. Wright*,[76] students argued that the Due Process Clause required they be presented with notice and an opportunity to be heard before corporal punishment was inflicted.[77] The Court refused to find a right to a pre-paddling hearing in the Due Process Clause. In justifying its decision, the Court pointed to the fact that granting such a hearing would interfere with the school authorities'

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74 *Id*. at 580.

75 *Id*. at 583. The Court did suggest that longer suspensions might require extra procedural requirements. *Id*. at 584.

76 Ingraham v. Wright, 430 U.S. 651 (1977).

77 The students also argued that the Eighth Amendment's prohibition against cruel and inhuman punishment applied to school officials. *Id*. at 664. Thus, corporal punishment violated the student's Eighth Amendment rights. *Id.* The Court rejected this argument stating that an examination of the history of the Eighth Amendment made it clear that it

disciplinary measures; they might be forced to use less effective measures to maintain appropriate discipline.

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

The Supreme Court has repeatedly acknowledged "the objectives of public education as the inculcation of fundamental values necessary for the maintenance of a democratic political system."[78] The Court specifically referred to the socializing aspect of public education as the basis of its two decisions addressing the free speech rights of students after *Tinker*. In determining that an equal protection challenge by an alien should be analyzed by applying the rational relationship test instead of strict scrutiny, the Court also relied on the value-inculcating function of public education. The concern about the values being inculcated to public school students also explains why the Supreme Court often focuses on the motives of school officials to determine the constitutionality of a given action. The best way to determine the message being

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was designed only to protect those who were convicted of a crime. *Id*. at 664.

78 *See* Ambach v. Norwick, 441 U.S. 68, 75 (1979) ("The importance of public [elementary and secondary] schools . . . in the preservation of the values on which our society rests, long has been recognized by our decisions."); Board of Educ. v. Pico, 457 U.S. 853, 871-72 (1982) ("[the Court has] acknowledged that public [elementary and secondary] schools are vitally important . . . vehicles for inculcating fundamental values necessary to the maintenance of a democratic political system."); *Pico*, 457 U.S. at 876 (Blackmun, J., concurring) ("[T]he Court has acknowledged the importance of the public [elementary and secondary] schools in the preservation of values on which our society rests. Because of the essential socializing function of schools, local school officials . . . awaken the child to cultural values."); *Pico*, 457 U.S. at 914-15. Justice Rehnquist dissented, stating that:

> [T]he idea that students have a right to access in the school to information other than that thought by their educators to be necessary is contrary to the very nature of an inculcative education. Education consists of the selective presentation and explanation of ideas. . . . Thus Justice Brennan cannot rely upon the nature of school libraries to escape the fact that the First Amendment right to receive information simply has no application to *the one public institution which, by its very nature, is a place for the selective conveyance of ideas.*

Id. (emphasis added); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272, 274-75 (1988) (Justice White repeatedly noted the importance of public elementary and secondary schools in awakening children to cultural values); *Kuhlmeier*, 484 U.S. at 278 (Brennan, J., dissenting: "[public elementary and secondary schools] inculcate in tomorrow's leaders the fundamental values necessary to the maintenance of a democratic political system. All the while, the public educator nurtures the student's social and moral development by transmitting the official dogma of community values.").

conveyed by a given act, statute, or regulation adopted by state or local school officials -- and therefore the values being inculcated -- is to focus on the precipitating motives.

In *Bethel School District No. 403 v. Fraser*,[79] the Court upheld – against a free speech challenge – the authority of school officials to discipline a student for delivering an address at a student assembly making suggestive use of vulgar and offensive terms. Chief Justice Burger noted that the student's freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against society's countervailing interest in teaching students the boundaries of socially appropriate behavior. Justice Burger noted:

> the role and purpose of the American public school system was well described by two historians, saying public education must prepare students for citizenship . . . . It must inculcate habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and nation . . . . In *Ambach v. Norwick* we echoed the essence of this statement of the objectives of public education as the "inculcation of fundamental values necessary to the maintenance of a democratic political system."[80]

Justice Burger rested his opinion upon an assertion that the fundamental values necessary to the maintenance of a democratic political system disfavor the use of terms of debate highly offensive or highly threatening to others. Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions. The inculcation of these values is truly the work of the schools.

In another free speech case, *Hazelwood School District v. Kuhlmeier*,[81] the Court addressed content-based censorship by a school principal of articles that were to appear in a student newspaper. Justice White noted that the school newspaper involved an activity that

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79 *Fraser*, 478 U.S. 675.

80 *Id*. at 681 (internal citation omitted).

81 Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

might fairly be characterized as part of the school curriculum. Educators are entitled to control student expression in these activities in order to ensure that participants learn whatever lessons they are designed to teach. Thus "the school must retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with 'shared values of a civilized social order' or to associate the school with any position other than neutrality on matters of political controversy."[82] In upholding the principal's decision to censor the articles, the Court articulated the following test: "It is only when a decision to censor a school-sponsored publication, theatrical production, or other vehicle of student expression has no valid educational purpose that the First Amendment is so directly and sharply implicated as to require judicial intervention to protect students' constitutional rights."[83]

In *Ambach v. Norwick*,[84] the Court addressed an equal protection challenge to a New York law that forbade certification as a public school teacher of any person who was not a United States citizen, unless that person manifested an intention to apply for citizenship. Although classifications based on alienage are normally inherently suspect, there are exceptions for state functions that are intimately tied to the operation of the state as a governmental entity. Relying on the importance of public education in socializing students, the Court determined that teaching in public schools constitutes a governmental function intimately tied to the operation of the state as a governmental entity. As such, the challenge by resident aliens was not to be

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82 *Id.* at 272. The Court also rested its opinion on the fact that schools must also be able to take account of the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics.

83 *Kuhlmeier*, 484 U.S. at 273.

84 Ambach v. Norwick, 441 U.S. 68 (1979).

analyzed under strict scrutiny, but under the more relaxed rational relationship test.[85]

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

The Supreme Court has long noted that governmental action can be struck down as violating the Establishment Clause when there is no secular motive.[86] The first four cases in which the Supreme Court relied solely on the lack of a secular purpose to strike a given governmental action, however, all occurred in the context of disputes involving public education.[87] In *Board of Education v. Pico*,[88] the Court addressed the removal of controversial

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85 The Court also noted the importance of the value-inculcating function of public schools in *Plyler v. Doe*, 457 U.S. 202, 221 (1982). In *Plyler*, the Court noted "the significance of education to our society is not limited to its political and cultural fruits. The public schools are an important socializing institution, imparting those shared values through which social order and stability are maintained." *Id*. at 222 n.20.

86 *See* Lemon v. Kurtzman 403 U.S. 602 (1971).

87 LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1206 (2d ed. 1988); Edwards v. Aguillard, 482 U.S. 578 (1987) (striking down a statute requiring teachers to teach creation science whenever they taught theory of evolution); Wallace v. Jaffree, 472 U.S. 38 (1985) (striking down Alabama statute authorizing moment of silence for meditation or prayer); Stone v. Graham, 449 U.S. 39 (1980), *reh'g denied*, 449 U.S. 1104 (1981) (striking down a statute providing for posting of the Ten Commandments on wall in public schools paid for by private funds); Epperson v. Arkansas, 393 U.S. 97 (1968) (striking down a statute that prohibited teaching of evolution in Arkansas

books from a public school library by school officials. Justice Brennan, writing for a three-justice plurality, acknowledged that students had a right to receive information that was derived from the First Amendment. He went on to conclude that this right is violated when the school officials use their discretion to remove books in a narrowly partisan or political manner.[89] In *Keyes v. School District No. 1,*[90] the Supreme Court drew the line between *de facto* school segregation that did not offend the constitution and *de jure* segregation, which did. The difference between *de facto* segregation and *de jure* segregation is that, under the latter, the current condition of segregation resulted from intentional state action directed specifically to segregate the schools.

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

In *Brown v. Board of Education*, the Supreme Court concluded that the use of racial classifications to segregate students violated the Equal Protection Clause. But in *Green v.*

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public schools).

In its recent decision in *Sante Fe Independent School District v. Doe*, 120 S. Ct. 2266 (2000), the Court struck down a regulation that allowed student-initiated prayer at high school football games as a violation of the Establishment Clause. The Court specifically analyzed the case under the "coercive participation" analysis it articulated in *Lee v. Weisman*, 505 U.S. 577 (1992). *Id.* at 2275. The Court noted that the "policy is invalid on its face because it establishes an improper majoritarian election on religion, and unquestionably has the purpose and creates the perception of encouraging the delivery of prayer at a series of important school events." *Id.* at 2283. However, the Court also noted in its analysis "in light of the school's history of regular delivery of a student-led prayer at athletic events, it is reasonable to infer that the specific purpose of the policy was to preserve a popular 'state-sponsored religious practice.'" *Id.* at 2279.

88 Board of Educ. v. Pico, 457 U.S. 853 (1982).

89 If the school officials' decision to remove the books is based on the conclusion that the books are pervasively vulgar or that the books are not to be educationally suitable, then the motives are not unconstitutional. *Cf. id*. at 870-71. In a concurring opinion, Justice Blackmun also adopted a similar motive test. For him, certain forms of state discrimination between ideas are improper. *Id.* at 878-79 Thus the state may not deny access to an idea simply because state officials disapprove of it for political or partisan reason. *Id.* The primary difference between the student right recognized by Brennan and that recognized by Blackmun is that Brennan's right to receive information was limited to removal of books from the school library; Blackmun's would apply to decisions by school officials through the entire educational process. *Pico*, 457 U.S. at 876 (Blackmun, J., concurring).

90 Keyes v. School Dist. No. 1, 413 U.S. 189 (1979).

County School Board of New Kent County,[91] the Court required public schools to use racial classifications in order to eliminate the vestiges of its prior discriminatory conduct. The Court rejected the argument that non-racial means could be instituted to remedy the harm of *de jure* segregation. Thus, the Supreme Court cases that have directly addressed the use of racial classifications by public schools have found that their use to further segregation is unconstitutional, but that their use is required in order to remedy an equal protection violation. From this, it is clear that the use by public schools of racial classifications does not amount to a *per se* equal protection violation.

The special characteristics of public education should change the equal protection analysis of the use of racial classifications of public school students. The fundamental question should be, whether the messages being sent – and thereby the values being inculcated – by the use of racial classifications are consistent with the values derived from the Equal Protection Clause. Two issues must be addressed in order to determine whether the use of racial classifications in a given situation violates the Equal Protection Clause. First, we must understand the fundamental values derived from the Equal Protection Clause that should be inculcated to public school students. Second, we must determine if the messages being sent by the use of racial classifications in a particular context -- to promote integrated student bodies -- is consistent with those values.

A. Values Derived From the Equal Protection Clause

The Supreme Court's equal protection jurisprudence has often focused on the harms associated with a violation of the Equal Protection Clause. Examining the harms produced by equal protection violations the values derived from the Equal Protection Clause.

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91 Green v. County Sch. Bd., 391 U.S. 430 (1968).

Justice Powell, in his opinion in *Regents of the University of California v. Bakke*,[92] noted that the use of racial classifications may validate burdens imposed upon individual members of particular groups in order to advance the group's general interest. He also noted that racial classifications may force innocent persons to bear the burden of redressing grievances which they did not cause.[93]

Another harm that Justice Powell noted was that the use of racial classifications may reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth.[94] This harm has been mentioned by a number of justices. Justice Thomas, in his concurring opinion in *Adarand Constructors, Inc. v. Pena*,[95] called this "racial paternalism." According to Justice Thomas, racial paternalism teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence. Justice O'Connor's opinion in *Croson* noted that "classifications based on race carry a danger of stigmatic harm. . . . They may in fact promote notions of racial inferiority."[96] Thus, the use of racial classifications can stamp minorities with a badge of inferiority.

A number of justices have pointed to the harm of racial hostility that can be caused by the use of racial classifications. Justice O'Connor's opinion in *City of Richmond v. J. A. Croson Company* noted that "classifications based on race . . . may in fact . . . lead to a politics of racial

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92 Regents of the Univ. of California v. Bakke, 438 U.S. 265 (1978).

93 *Id.* at 310.

94 *Id.* at 298.

95 Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 240-41 (1995) (Thomas, J., concurring).

96 City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

hostility."[97] In *Shaw v. Reno*, a majority of the Court stated that "racial and ethnic classifications have a tendency to stigmatize individuals, polarize society, and incite racial hostilities."[98]

The use of racial classifications can also create the abstract harm of a denial of individuality. When individuals are treated as members of a racial or ethnic group, they are stereotyped. In *Miller v. Johnson*,[99] Justice Kennedy, writing for the Court, states that "race-based assignments embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts – their very worth as citizens – according to a criterion barred to the Government by history and the Constitution."[100] In *Adarand Constructors Inc. v. Pena*, Justice O'Connor, writing for the Court, stated that "persons disadvantaged by such racial or ethnic categorizations necessarily suffer a cognizable injury."[101]

All of the potential harms that occur from racial classifications occur because of the government's failure to respect individuality. The core values that come from the Equal Protection Clause that should be inculcated to public elementary and secondary students is the importance of respecting and recognizing everyone as an individual, not as a member of racial or ethnic groups. In order to understand how this translates into the value that should be inculcated in public schools, we must understand what it is to respect and treat someone as an individual.

Knowing Individuals – as distinguished from minors – are presumed to be rational,

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97 *Id.*

98 Shaw v. Reno, 509 U.S. 630, 643 (1993).

99 Miller v. Johnson, 515 U.S. 900 (1995). The Court addressed Georgia's intentional creation of a third majority-minority congressional district at the behest of the Justice Department. The Justice Department had interpreted the Voting Rights Act to require that states, under its supervision maximize the number of minority representatives. Pursuant to demands by the Justice Department, Georgia intentionally redrew its congressional districts to assure the creation of three majority minority districts.

100 *Id.* at 912.

101 Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 229-30 (1995).

autonomous, self-generating, and free-willed people who are capable of pursuing their self-formulated goals and objectives.[102] Thus, respect for individuality requires respecting the decisions that Knowing Individuals make to pursue their own goals and objectives. To maximize the ability of Knowing Individuals to pursue their self-determined goals and objectives, however, requires that all people exercise self-restraint over their inclinations that would, if satisfied, directly interfere or create a substantial risk of interference with their fellow Knowing Individuals' ability to pursue their goals and objectives. Living in a society that provides people with the freedom to pursue their own goals and objectives requires the imposition of a burden that restrains such freedom so as not to interfere with the right of others to do the same. Thus, Knowing Individuals have an interest in their fellow citizens' development of values that will allow them to be self-determining. Toleration for those who pursue different goals and objectives provides as fundamental a core set of values for a society of Knowing Individuals as does the freedom to pursue one's own goals and objectives.

Respect for the right of the self-determination of Knowing Individuals does not lead to the abolition of racial and ethnic differences. Knowing Individuals should not be treated as a member of their race or ethnicity against their will. Some Knowing Individuals, however, will choose to make their racial or ethnic identity a salient part of their individuality and to celebrate their racial or ethnic heritage. In order to respect their individuality, it is necessary to respect their choices to celebrate their racial or ethnic heritage. As contradictory as it sounds, the notion of respecting the rights of individuals to be self-determining does not lead to an abolition of racial or ethnic distinctions. Rather, voluntary affiliations derived from race or ethnicity should be treated as matters of personal preference on the same level of voluntariness that we associate

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with political, associational, or other lifestyle choices.

When a Knowing Individual chooses to make his or her race or ethnicity a salient part of his or her identity or to celebrate his or her racial or ethnic heritage, recognizing this individual as a member of a racial or ethnic group does not deny individuality. To deny the importance of race or ethnicity would be to disrespect an individual choice. If a Knowing Individual chooses to sacrifice an individual interest for the interest of a racial or ethnic group, that does not deny individuality either. Rather, that also respects the choice that this particular Knowing Individual has made.

A necessary aspect of respecting individuality regarding race and ethnicity is the need for others to tolerate choices. Just as with chosen political affiliations, associational memberships, or other lifestyle choices, others do not have to condone or agree with the choice of given persons to celebrate their racial or ethnic heritages or to make race or ethnicity an important aspect of their individuality. They simply have to recognize that the particular individual has a right to make such a choice and not to unduly interfere with it.

B. How the Use of Racial and Ethnic Classifications to Promote Integrated Student Bodies Advances Values Relating to Respecting Individuality

Public elementary and secondary education does not seek to socialize Knowing Individuals. Rather, it is an institution actively involved in the socialization of the next generation of Knowing Individuals. The minor must learn to become a self-determining chooser. However, equally important is the need for minors to learn to constrain their choices in order to allow others the same right of self-determination. Thus, schools must strive to further the values of independence and toleration. They must both advance and constrain the capacity for self-determination. This process of socialization requires that the government stress two inconsistent

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(1985).

sets of beliefs. Education must increase the capacity of minors to determine and choose what is best for themselves. At the same time, education must constrain certain choices in order to allow others to pursue their own self-determined goals and objectives.

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

While it may be ironic that, in an effort to teach students to see themselves and others as individuals, it is necessary to classify them as members of racial and ethnic groups,[103] it is also ironic to expect a white child going to school only with other whites or a black child going to school only with other blacks, or a Latino child going to school only with other Latinos, to come to see people from different racial or ethnic groups as individuals. In racially and/or ethnically isolated schools, education officials face a situation where their ability to teach students the values of respecting everyone's individuality will be difficult, if not impossible. As Justice Blackmun noted in his opinion in *Bakke*, sometimes "in order to get beyond racism, we must take account of race."[104] This is particularly true in public education, the one governmental institution charged with the selective conveyance of ideas to the young.

Justifications for the use of racial classifications to promote integrated education can be

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103 Tuttle v. Arlington County Sch. Bd., 195 F.3d 698, 707 (4th Cir. 1999) ("We find it ironic that a Policy that seeks to teach young children to view people as individuals rather than members of certain racial and ethnic groups classifies those same children as members of certain racial and ethnic groups.").

104 Regents of the Univ. of California v. Bakke 438 U.S. 265, 407 (1978) (Blackmun, J., concurring).

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

Exposing students to people from diverse racial and ethnic backgrounds provides them with a broader and richer educational experience. Through interaction with students from different racial and ethnic backgrounds, all students are more likely to be exposed to different types of music, different kinds of movies and television programs, different styles of dress, different forms of verbal communication, different forms of entertainment, and different foods. A racially and ethnically diverse student body increases the atmosphere of speculation and experimentation for all students that can help to "expand their knowledge, broaden their sensibilities, kindle their imagination, foster a spirit of free inquiry, and increase their human understanding."[105] This broader and richer educational experience provides students with more diverse experiences from which, in the future, they can draw in order to determine what is best for themselves.

Some blacks, whites, Asians, and Latinos will choose to celebrate their racial or ethnic heritage, make it a salient part of their individual identity, or choose to associate primarily with others who share their racial or ethnic backgrounds. Others, however, will find none of this personally appealing. Not all members of a given racial or ethnic group will celebrate their racial or ethnic heritage, make their race or ethnicity a salient part of their personal identity, or limit their primary associations to those of their racial or ethnic group.

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105 Wisconsin v. Yoder, 406 U.S. 205, 239 (1972) (Stewart, J., concurring).

Integrated education allows students to see that members of their own racial or ethnic groups can choose to associate primarily with racial or ethnic group members or non-group members. Thus, African-American students will see other black students choose to associate primarily with other blacks, as well as black students who choose to associate primarily with non-blacks. White students will get to see other white students who associate primarily with other whites, as well as white students who associate primarily with non-whites. This provides all students with an understanding that they have some control over whether they primarily associate with members of their own racial or ethnic group.

Exposing students to those from different racial and ethnic backgrounds also gives all students an opportunity to see that individuals who do not share their racial or ethnic background make their own choices regarding whether to celebrate their racial or ethnic heritage, make that heritage an important part of their individual identity, or associate primarily with members of their own race or ethnicity. In other words, Latino students are provided the opportunity to observe that not all Asians attach a particular importance to being Asian or to associating primarily with other Asians. And black students will see that not all white students attach a particular importance to being Caucasians or to associating primarily with other whites. Thus, the students have an opportunity to observe first-hand the fact that the importance of race and ethnic affiliation depends upon individual choices.

Many people continue to judge others with reference to stereotypes attached to their skin color. When people act towards others based upon stereotypes, they deny those persons their individuality and interfere with their ability to be self-determining. Rather than have their individual personality traits and characteristics recognized, these individuals' personality traits and characteristics are presumed to correspond to those that are normally associated with their

race or ethnicity. Integrated education can help to overcome racial and ethnic stereotyping. To move beyond attaching significance to skin color, it is necessary for children to come together at a time when their attitudes about people from diverse racial and ethnic backgrounds are in the process of forming. By getting to know people from different racial and ethnic groups, children can come to see others as individuals, rather than as members of racial and ethnic groups.

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

C. Conclusion

From the perspective of the special environment of public education, the use of racial classifications to segregate students, teachers, staff, and administrators along racial and ethnic lines clearly violated the Equal Protection Clause. The primary message of *de jure* segregation was the stigmatic message that blacks and other minorities were inferior to whites.[106] Thus, the values that were inculcated by public schools engaged in *de jure* segregation were a clear rejection of the importance of respecting and recognizing everyone as an individual.

The use of racial classifications to foster integration to remedy *de jure* segregation, however, advances the values of respecting and recognizing everyone as an individual. For the

106 For a detailed analysis of this idea, see Kevin Brown, *Termination of Public School Desegregation: Determination of Unitary Status Based on the Elimination of Invidious Value Inculcation*, 58 GEO. WASH. L. REV. 1105 (1990).

federal courts, the reason to integrate schools was to teach racial and ethnic equality.[107] Compelling public schools that believed in the inferiority of minorities to mix racial and ethnic groups carried the message of equality of all. Thus, using racial classifications to remedy the harm of *de jure* segregation promoted respect for and recognition of everyone as an individual.

While it is true that race and ethnicity matter less today than they did in the 1950s, 1960s, 1970s, and 1980s, the use of racial classifications to promote integration still carries a message of respecting and recognizing everyone as an individual. This is particularly true where the measures adopted by schools are voluntary.[108] When public schools use racial classifications to foster voluntarily integrated student bodies, the only people who are affected are individuals who choose to apply to schools where these classifications are being used. Thus, if the parents or students prefer not be affected by governmental use of racial classifications to promote integrated student bodies, they simply need not apply to the affected school.

VI. CONCLUSION

Over the past few years, a number of lower federal courts have addressed equal protection challenges to the use of racial classifications of students in order to foster voluntary integration. These courts have analyzed the constitutionality of these policies by applying strict scrutiny. Most of these decisions concluded that the school officials either failed to articulate a compelling state interest to justify their policies, or that their policies were not narrowly tailored.

In a number of different contexts, Supreme Court opinions have recognized that

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107 I believe that the federal courts employing desegregation remedies believed that they were advancing a belief in racial and ethnic equality. I have argued and continue to believe and assert that the Supreme Court opinions justifying desegregation carried a stigmatic message of black inferiority. *See* Kevin Brown, *Has the Supreme Court Allowed the Cure for De Jure Segregation to Replicate the Disease?*, 78 CORNELL L. REV. 1 (1992).

108 I have, however, contended that mandatory measures would also be consistent with the Equal Protection Clause. *See* Kevin Brown, *The Implications of the Equal Protection Clause for the Mandatory Integration of Public School Students*, 29 CONN. L. REV. 999 (1997).

constitutional rights must be adapted to the special characteristics of the school environment. While the students do not leave their constitutional rights at the schoolhouse gate, they clearly change into a different set of constitutional clothing. The special environment of public education derives the fact that the objective of public education is the inculcation to the young the fundamental values necessary to the maintenance of a democratic political system.

In this essay, I have argued that recent lower federal court decisions have not paid adequate attention to the Supreme Court cases in the field of public education. It is a mistake to view the use of racial classifications in public schools the same way that their use would be viewed outside the context of public education. When courts address these challenges, they should focus on whether the values being inculcated to the young by the use of racial classifications to foster integrated student bodies are consistent with those derived from the Equal Protection Clause. The value derived from the Equal Protection Clause that should be inculcated by public schools is the importance of respecting everyone as an individual.

During the 1960s and 1970s, it was easy to see how using racial classifications to foster integrated schools would have furthered respect for individuality. With the dawn of the twenty-first century, the main question is whether conditions in America have changed to such an extent that the use of racial classifications to foster integrated education actually retards the appreciation and understanding that persons should be treated as individuals. I believe that students are much more likely to learn to treat members from racial and ethnic backgrounds differently from their own as individuals if they attend integrated schools than if they attend racially isolated schools. If state and school officials make it very clear that their purpose in taking account of race and ethnicity to produce integrated student bodies is not for the purpose of cultural pluralism, but for respecting and promoting respect for individuality, then there should

be no equal protection violation.