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Voluntary Desegregation Measures Aimed at Achieving a Diverse Student Body Lose Ground in *Wessmann v. Gittens*, 160 F.3d 790 (1st Cir. 1998)

Karey A. Vering
University of Nebraska College of Law

Note*

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* Karey A. Vering, University of Nebraska-Lincoln, B.A., 1998; University of Nebraska College of Law, J.D. expected, May 2001 (NEBRASKA LAW REVIEW, Editor-in-chief, 2000). The author would like to thank Professor Susan Poser for suggesting this intriguing topic and providing many helpful insights and discussions.

I. INTRODUCTION

Public school desegregation, initiated over fifty years ago, has had a profound impact on American schools and students. Although *de jure* segregation is largely a thing of the past, a problem remains with *de facto* segregation in public schools. Achievement gaps and socioeconomic differences between students of different racial and ethnic backgrounds may indicate that eliminating *de jure* segregation did not eradicate the overall problem of segregation. These concerns, coupled with a desire to achieve racial and ethnic diversity in public schools, have compelled many school districts to enact measures intended to help minority students by controlling the ratio of minority students in schools through admissions and transfer policies. Courts have struck down many of these policies, however, as violations of the Fourteenth Amendment's Equal Protection clause. According to these courts, the goal of creating diversity alone does not provide the required compelling interest to support the use of race as a determinative factor in accepting or rejecting a student.

Wessmann v. Gittens[1] demonstrates the current judicial trend away from affirmative measures intended to racially and ethnically integrate public elementary and secondary schools. *Wessmann* found that the Boston Latin School's ("BLS") admissions policy offended the Fourteenth Amendment's Equal Protection guarantee by using race as a determining factor in the admission standards for half of each entering class.[2] Despite a documented achievement gap between students of different races, the *Wessmann* court found that affirmative measures to ensure diversity among the student body and remedy vestiges of past discrimination did not justify the BLS admissions policy. Additionally, a series of recent federal court decisions appear to greatly limit and diminish the movement toward voluntary public school desegregation that started with *Brown v. Board of Education*.[3]

The Supreme Court applies strict scrutiny when reviewing federal, state, or local affirmative action programs by requiring race-conscious policies to further a compelling governmental interest and be nar-

1. 160 F.3d 790 (1st Cir. 1998).
2. *See* Wessmann v. Gittens, 160 F.3d 790, 808-09 (1st Cir. 1998); *see also* U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").
3. 347 U.S. 483 (1954).

rowly tailored to serve that interest.[4] Though the Court has issued no majority decision on whether diversity qualifies as a compelling governmental interest, it does impose a high threshold evidentiary requirement to prove the necessity of race-conscious school policies when the policies are in place to remedy vestiges of past discrimination.

In the face of courts' rulings in favor of white plaintiffs claiming equal protection violations, public schools may have to relinquish attempts to affirmatively desegregate and diversify their schools. Although a more intermediate level of judicial scrutiny could be the answer, "diversity" can be defined too many ways to be narrowly tailored without finding specific *de jure* segregation. School boards searching for solutions to achievement gap and *de facto* resegregation problems, may in the future have to use student economic status rather than race as an element in admissions and transfer policy decisions.

Section II.A of this Note provides the legal background of desegregation law, affirmative action law, and the strict scrutiny standard. Sections II.B and II.C summarize the facts of *Wessmann v. Gittens* and analyze the First Circuit Court of Appeals opinion. Section III.A outlines and analyzes the impact of recent court decisions that have ruled primarily against voluntary affirmative measures to desegregate public schools, while section III.B examines the future of affirmative measures to desegregate and the possible alternatives for public schools. Section IV concludes the Note.

II. *WESSMANN V. GITTENS*

A. Background

1. Affirmative Duties to Desegregate

The "separate but equal" doctrine mentioned by the Supreme Court in *Plessy v. Ferguson*[5] stated that when different races are provided with substantially equal facilities, equality of treatment is accorded even though the facilities are separate. *Brown v. Board of Education (Brown I)*[6] overruled this doctrine in the public school context, concluding that

> in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated . . . are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.[7]

4. *See infra* notes 26-34 and accompanying text.
5. 163 U.S. 537 (1896).
6. 347 U.S. 483 (1954).
7. *Id.* at 495.

Brown v. Board of Education (*Brown II*)[8] required school districts found to be intentionally segregated to desegregate by admitting all students on a "racially nondiscriminatory basis with all deliberate speed."[9] *Brown II* required every school board operating a segregated school to "effectuate a transition to a racially nondiscriminatory school system."[10]

The Supreme Court strengthened this mandate with its decision in *Green v. County School Board.*[11] The New Kent County School Board claimed to have discharged its obligation to desegregate by adopting a plan in which students could freely choose which school in the district to attend.[12] The Court found, however, that this plan "[ignored] the thrust of *Brown II*," which was intended as "a call for the dismantling of well-entrenched dual systems tempered by an awareness that complex and multifaceted problems would arise which would require time and flexibility for a successful resolution."[13] The free transfer system implemented by New Kent County's school board was not enough because *Brown II* charged school systems "with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."[14]

Swann v. Charlotte-Mecklenburg Board of Education[15] dealt with a school district's difficulties in implementing a court-ordered remedy fashioned to desegregate the school district. The Court stated that "problems encountered by the district courts and courts of appeals make plain that we should now try to amplify guidelines, however incomplete and imperfect, for the assistance of school authorities and courts."[16] Citing *Green*, the Court found that "[i]f school authorities fail in their affirmative obligations under [*Green*], judicial authority may be invoked. Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."[17] *Swann* noted that school authorities have the autonomy to formulate and implement educational policies and could decide, for example, that classrooms with a prescribed ratio of white to black students reflecting the district-wide proportion would help prepare

8. 349 U.S. 294 (1955).
9. *Id.* at 301.
10. *Id.*
11. 391 U.S. 430 (1968).
12. *See id.* at 437.
13. *Id.*
14. *Id.* at 437-38.
15. 402 U.S. 1 (1971).
16. *Id.* at 14.
17. *Id.* at 15.

students to live in a pluralistic society.[18] Implementing a policy like this "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."[19]

The *Swann* Court, attempting to more specifically define the responsibilities of school authorities in desegregating schools, dealt with student assignment and racial quotas. Noting the focused concern in eliminating the inherent discrimination in dual school systems, the Court stated that they were not attempting to deal with the "myriad factors of human existence which can cause discrimination in a multitude of ways on racial, religious, or ethnic grounds."[20] Instead, the elimination of racial discrimination in public schools "should not be retarded by efforts to achieve broader purposes lying beyond the jurisdiction of school authorities."[21] Though the Court approved of the idea of racial quotas as a way to eliminate racial segregation, it found that "[t]he constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole."[22] As an interim corrective measure, the *Swann* Court ordered a remedial altering of school zones and busing of students to hasten desegregation.[23] Court-monitored desegregation was to continue in the Charlotte-Mecklenburg School District, as well as other racially segregated school districts until a court found that the district had achieved unitary status.

2. *Constitutional Analysis of Voluntary Affirmative Desegregation Measures*

a. *Strict Scrutiny*

The First Circuit in *Wessmann v. Gittens*[24] applied a standard of strict scrutiny to their review, requiring that the BLS admissions policy serve a compelling governmental interest and be narrowly tailored to serve that interest.[25] The Supreme Court first addressed affirmative action policies in *Regents of the University of California v. Bakke*.[26] Although no majority existed to define an appropriate level of judicial review, Justice Powell's oft-cited opinion encouraged an application of strict scrutiny when examining race-conscious policies.[27]

18. *See id.* at 16.
19. *Id.*
20. *Id.* at 22.
21. *Id.*
22. *Id.* at 24.
23. *See id.* at 27-31.
24. 160 F.3d 790 (1998).
25. *See id.* at 794.
26. 438 U.S. 265 (1978).
27. *See id.* at 291 (opinion of Powell, J.) ("Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.").

In two subsequent cases, *Fullilove v. Klutznick*[28] and *Wygant v. Jackson Board of Education*,[29] the Court failed to issue a majority opinion stating an appropriate standard of review, but did have plurality opinions stating that "'[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees.'"[30]

A majority of the Court in *City of Richmond v. J. A. Croson Co.*[31] finally agreed that, based on the Fourteenth Amendment's guarantee of equal protection, all race-based action by state and local governments, including affirmative action programs, required a strict scrutiny review. "Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility."[32] The majority opinion in *Adarand Constructors, Inc. v. Pena*[33] strengthened the strict scrutiny standard by making it applicable to all race-conscious affirmative actions taken by the federal government. It also set forth a two-part test to employ strict scrutiny:

> "A free people whose institutions are founded upon the doctrine of equality" should tolerate no retreat from the principle that government may treat people differently because of their race only for the most compelling reasons. Accordingly, we hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.[34]

b. Compelling Governmental Interest: Diversity?

Justice Powell's opinion in *Bakke*[35] first introduced the idea of diversity as a potentially compelling governmental interest. In a fragmented opinion, the Supreme Court struck down an admissions program at the University of California-Davis that considered minority applications separately for a prescribed number of seats in the class.[36] Though Justice Powell found inherent constitutional problems with the notion of preferential racial quotas and balanc-

28. 448 U.S. 448 (1980).
29. 476 U.S. 267 (1986).
30. *Wygant*, 476 U.S. at 273-74 (opinion of Powell, J.) (quoting *Fullilove*, 448 U.S. at 491 (opinion of Burger, C.J.)).
31. 488 U.S. 469 (1989).
32. *Id.* at 493.
33. 515 U.S. 200 (1995).
34. *Id.* at 227 (citations omitted) (quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943)).
35. 438 U.S. 265 (1978).
36. *See id.* at 274-75, 319-20.

ing,[37] he proposed that "racial or ethnic origin is but a single though important element" in assessing an applicant.[38] Focusing on maintaining the individuality of applicants, Powell recommended that racial diversity could be considered a "plus" on an application, but it could not be used to insulate the racially diverse applicant from other applicants based on their combined qualifications.[39] Powell's opinion, although frequently quoted as authority for diversity as a compelling governmental interest, was his alone and did not reflect the majority opinion of the Court. Four other Justices agreed with him that the admissions program was unconstitutional, but none joined him on his diversity views.[40] Thus, some questions have been raised as to whether Powell's *Bakke* opinion about diversity remains a viable precedent or if it ever even set one.[41]

Some courts have suggested that diversity may qualify as a compelling governmental interest to justify racial classifications only when used to remedy vestiges of past discrimination.[42] In *Hopwood v. Texas*,[43] the Fifth Circuit soundly rejected Justice Powell's opinion from *Bakke* proposing diversity as a compelling governmental interest,[44] noting that "the state's use of remedial racial classifications is limited to the harm caused by a specific state actor."[45] *Hopwood* pointed out that, while no Supreme Court majority has supported di-

37. *See id.* at 298, 305-09.
38. *Id.* at 315.
39. *Id.* at 317.
40. *See id.* at 408. Justices Stevens, Stewart, Rehnquist, and Chief Justice Burger agreed with Powell that the admissions program at UC-Davis was unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.
41. *Wessmann* assumed *arguendo* "that *Bakke* remains good law and that some iterations of 'diversity'" may be compelling governmental interests. 160 F.3d at 796. *Hopwood v. Texas*, however, stated that "Justice Powell's argument in *Bakke* garnered only his own vote and has never represented the view of a majority of the Court in *Bakke* or any other case . . . . Justice Powell's view in *Bakke* is not binding precedent on this issue." 78 F.3d 932, 944 (5th Cir. 1996); *see also* Philip T. K. Daniel and Kyle Edward Timken, *The Rumors of My Death Have Been Exaggerated: Hopwood's Error in "Discarding" Bakke*, 28 J.L. & EDUC. 391, 417-18 (1999) (arguing that *Hopwood* overstepped its authority in rejecting Justice Powell's opinion in *Bakke* and warning of the danger of using Supreme Court decisions about employment-related "remedial" affirmative action cases to decide issues in the context of higher education).
42. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (stating that unless race-based classifications are reserved strictly for remedial settings, these classifications may promote, rather than ease, notions of racial inferiority and hostility).
43. 78 F.3d 932 (5th Cir. 1996). In *Hopwood*, a white applicant to the University of Texas Law School challenged the school's use of racial/ethnic diversity in its admissions process. The Court ruled the policy unconstitutional under equal protection and held that diversity cannot be used as a compelling governmental interest to justify the state's use of race-based classifications.
44. *See supra* note 41 and accompanying text.
45. *Hopwood*, 78 F.3d at 950.

versity as a compelling governmental interest, a plaintiff must present a "strong basis in the evidence" showing a causal link between the alleged vestige of past discrimination and state action.[46] *Hopwood* and *Lutheran Church-Missouri Synod v. Federal Communications Commission*[47] are the only opinions from the Circuit Courts of Appeal to reject diversity as a compelling governmental interest under the strict scrutiny standard. Other Circuit Courts of Appeal, however, have never held definitively that diversity could not serve a compelling governmental interest, though they have rejected specific sets of facts on that basis, usually for failure to establish a causal link between the specific problem and the race-based remedy.[48] Overall, there is no consensus as to whether diversity in a remedial context (or any other context) constitutes a compelling governmental interest under strict scrutiny.

c. Narrow Tailoring

United States v. Paradise[49] presented the leading test applied by most courts to assess narrow tailoring, the second element under strict scrutiny. *Paradise* examined the use of race-conscious policies in an Alabama police department's affirmative action hiring and promotion process. In reviewing whether a state's racial classification was narrowly tailored, the Court considered (1) the efficacy of alternative race-neutral policies, (2) the planned duration of the policy, (3) the relationship between the numerical goal and the percentage of minority group members in the relevant population or work force, (4) the flexibility of the policy, including the provision of waivers if the goal could not be met, and (5) the burden of the policy on innocent third parties.[50] *Wessmann* did not specifically use the *Paradise* test since the policy had already been eliminated under the compelling governmental interest test of strict scrutiny, but *Wessmann* did provide general guidelines to analyze narrow tailoring.

46. *Id.* at 949-50 (quoting *Croson*, 488 U.S. at 500).

47. 141 F.3d 344 (D.C. Cir. 1998). *Lutheran Church-Missouri Synod* decided that fostering "diverse" radio programming content through hiring minorities did not rise to the level of a compelling governmental interest.

48. *See, e.g.*, Tuttle v. Arlington County Sch. Bd., 195 F.3d 698 (4th Cir. 1999), *cert. dismissed*, 120 S. Ct. 1552 (2000); Eisenberg v. Montgomery County Pub. Sch., 197 F.3d 123 (4th Cir. 1999), *cert. denied*, 120 S. Ct. 1420 (2000); *Wessmann*, 160 F.3d 790 (1st Cir. 1998). None of these Circuit Court cases decided whether or not diversity could serve a compelling governmental interest under strict scrutiny. The Fourth Circuit rejected the race-based policies in question because they were not narrowly tailored, while the First Circuit determined that the necessary causal link between the policy and vestiges of past discrimination was not established in *Wessmann*.

49. 480 U.S. 149 (1987).

50. *See id.* at 171.

B. Facts

The Boston school system operates three examination high schools. Though generally referred to as public high schools, the examination schools connote not just public secondary education, but college preparation. BLS, the most prestigious of the three, operates as a college preparatory school whose graduates compete with nationally-known preparatory schools for admission into the most competitive and distinguished colleges and universities in America.[51] BLS's impressive history began in 1635, and its graduates include Cotton Mather, Samuel Adams, Charles Sumner, and John Hancock.[52] It has an alumni association established 150 years ago that has labored to protect the school's reputation as Boston's finest public secondary school.[53] Several district elementary school programs tailor their curricula to prepare students for the examination school's entrance examination, and applications exceed seats for admission at BLS.[54]

In 1974, a federal district court found that the City of Boston, through its School Committee, violated black students' equal protection rights by promoting and maintaining a dual school system.[55] The district court found the entire school system liable for *de jure* segregation and required BLS to ensure that at least 35% of each entering class would be composed of Hispanic and African-American students.[56] The First Circuit Court of Appeals affirmed the 35% "set-aside as part of a comprehensive plan to ameliorate pervasive and persistent constitutional infirmities throughout the Boston public schools."[57] By 1987, the First Circuit found that systematic progress had been made to desegregate the Boston school system and, "for all practical purposes, the School Committee had achieved unitariness in the area of student assignments."[58] Though the district court relinquished control over student assignments, other aspects of the school system remained under court supervision.[59]

Although Boston's three examination schools were no longer required by a court-supervised mandate to maintain a 35% set-aside, they continued the program until Julia McLaughlin challenged the set-aside's constitutionality in 1995. The district court granted her in-

51. *See* McLaughlin v. Boston Sch. Comm., 938 F. Supp. 1001, 1004 (D. Mass. 1996).
52. *See id.*
53. *See id.*
54. *See id.*
55. *See* Wessmann v. Gittens, 160 F.3d 790, 792 (1st Cir. 1998) (citing Morgan v. Hennigan, 379 F. Supp. 410, 480-81 (D. Mass. 1974)).
56. *See Wessmann*, 160 F.3d at 792.
57. *Id.* (citing Morgan v. Kerrigan, 530 F.2d 401, 425 (1st Cir. 1976)).
58. *Wessmann*, 160 F.3d at 792 (citing Morgan v. Nucci, 831 F.2d 313, 326 (1st Cir. 1987)).
59. *See Wessmann*, 160 F.3d at 792.

junctive relief in *McLaughlin v. Boston School Committee*[60] and ordered Julia's admission to BLS.[61] Though the *McLaughlin* court did not overturn the 35% set-aside, they found McLaughlin's case would likely succeed on the merits.[62] The district court also suggested restructuring the examination schools' admission process to "assign a certain percentage of seats in each examination school to each racial and ethnic group, tailoring the percentages to the relevant qualified applicant populations and revisiting the policy periodically."[63] The *McLaughlin* court claimed that the "Supreme Court has endorsed the [Boston School Committee's] prerogative in this regard,"[64] and supported this assertion with the Supreme Court's mandate in *Swann v. Charlotte-Mecklenburg Board of Education*[65] for schools to affirmatively act to end segregation.[66]

After *McLaughlin*, the Boston School Committee discontinued the 35% set-aside. Concerned that the number of African-American and Hispanic children enrolled in examination schools would drop without a predetermined set-aside, the School Committee sought to create a policy that would address these concerns without violating the constitutional rights of potential applicants.[67] Thomas Payzant, superintendent of the Boston public schools, commissioned a consulting firm to research various admissions policies that would affect the racial and ethnic composition of the examination schools' entering classes.[68] Based on the consulting firm's initial findings, School Committee Chairman Robert Gittens appointed a task force to research and recommend an admissions policy. After meetings and public hearings, the task force recommended "Option N50," which the School Committee ultimately adopted as the examination schools' admissions policy ("the Policy") effective for the 1997-98 school year.[69]

Under the Policy, students began the examination schools' admissions process by taking a standardized test. A mathematical formula combined applicants' test scores and grade point average into a composite score. Once ranked by composite score, applicants were assigned to the overall applicant pool for the examination schools in which they indicated interest. To be considered for examination school admission, a student had to be in the qualified applicant pool (QAP), which consisted of the top 50% of scores in the overall appli-

60. 938 F. Supp. 1001 (D. Mass. 1996).
61. *See Wessmann*, 160 F.3d at 792; *McLaughlin*, 938 F. Supp. at 1018.
62. *See McLaughlin*, 938 F. Supp. at 1017.
63. *Id.* at 1016.
64. *Id.*
65. 402 U.S. 1, 13-14 (1971).
66. *See McLaughlin*, 938 F. Supp. at 1016.
67. *See Wessmann*, 160 F.3d at 793.
68. *See id.*
69. *See id.*

cant pool for each examination school. Half of the available seats for an examination school's entering class were allocated strictly on merit in accordance with composite score rank order. The other half were allocated using "flexible racial/ethnic guidelines." After assigning the students admitted solely on the basis of composite score rank order, school officials determined the relative proportions of five racial/ethnic categories in the remaining pool of qualified applicants (RQAP): white, black, Hispanic, Asian, and Native American. The remaining seats in each examination school's entering class were then filled in rank order from the RQAP, with the number of students from each racial/ethnic category matching the proportion of that category in the RQAP. The Policy guidelines were such that a member of a certain racial/ethnic group could be bypassed in favor of a lower-ranking applicant if the seats allotted for the lower-ranking applicant's racial/ethnic group had not been filled.[70]

When Sarah Wessmann applied to enter Boston Latin School in the fall of 1997 as a ninth-grader, BLS had ninety seats available for the 1997 ninth grade entering class. Sarah's composite score ranked ninety-first out of 705 students in the QAP. To fill the first forty-five seats, BLS expended the top forty-seven applicants on the list, since two applicants chose to attend different examination schools. Sarah would have qualified for admission had the rest of the BLS entering class been selected on composite scores alone. Based on the racial/ethnic distribution of the RQAP, however, the Policy dictated that the remaining forty-five seats be allocated to eighteen white students, thirteen black students, nine Asian students, and five Hispanic students. Eleven Black and Hispanic students whose composite scores ranged between ninety-fifth to 150th displaced Sarah Wessmann and ten other white students who had higher composite rank scores.[71]

Henry Robert Wessmann, Sarah's father, sued the Boston School Committee on her behalf in *Wessmann v. Boston School Committee*,[72] alleging that the Policy's racial/ethnic guidelines violated Sarah's Fourteenth Amendment right of equal protection when it prevented her from gaining admission to BLS.[73] The federal district court held that the School Committee promoted a compelling governmental interest in engineering a diverse student body and remedying vestiges of past discrimination, and that the Policy created to implement these interests was tailored specifically enough so as to not offend the Constitution.[74] Wessmann appealed to the First Circuit Court of Appeals.

70. *See id.*

71. *See id.* at 793-94.

72. 996 F. Supp. 120 (D. Mass. 1998).

73. *See Wessmann*, 160 F.3d at 794.

74. *See id.*; Wessmann v. Boston Sch. Comm., 996 F. Supp. at 132.

C. First Circuit Court of Appeals Opinion

1. *Strict Scrutiny*

First Circuit Judge Selya wrote the majority opinion in *Wessmann* and began his analysis by establishing the standard of review. Applying *Adarand*'s strict scrutiny standard when examining "'any racial classification subjecting [a] person to unequal treatment,'" the majority determined that the BLS admissions policy must serve a compelling governmental interest and be narrowly tailored to serve that interest in order to justify the use of racial classifications.[75] The Boston School Committee argued that its Policy deserved a more lenient standard of scrutiny because it did not constitute a racial quota *per se* and the policy neither benefited nor burdened a specific racial group. The majority answered these arguments by stating, respectively, that "[a]ttractive labeling cannot alter the fact that any program which induces schools to grant preferences based on race and ethnicity is constitutionally suspect,"[76] and "policies cannot be made to depend 'on the race of those burdened or benefited by a particular classification.'"[77]

2. *Compelling Governmental Interests*

a. *Diversity*

Compelling governmental interests are not readily identifiable or definable. The Supreme Court found that race-conscious state action to eliminate a "continuing legacy of an institution's past discrimination" comprises a compelling governmental interest,[78] but the "role model" theory does not.[79] The School Committee attempted to justify its policy on the basis of diversity as a compelling governmental interest. After reviewing case decisions suggesting both that "remedying past discrimination is the *only* permissible justification for race-conscious action"[80] and that diversity can never be a compelling governmental interest,[81] the majority determined that no solid consensus exists on the diversity issue. Thus, assuming *arguendo* that "some iterations of 'diversity' might be sufficiently compelling, in specific cir-

75. *Wessmann*, 160 F.3d at 794 (quoting *Adarand*, 515 U.S. at 224).
76. *Wessmann*, 160 F.3d at 794 (citing *Bakke*, 438 U.S. at 289 (opinion of Powell, J.)).
77. *Wessmann*, 160 F.3d at 795 (quoting *Croson*, 488 U.S. at 494 (plurality opinion)).
78. *Wessmann*, 160 F.3d at 795 (citing Miller v. Johnson, 515 U.S. 900, 920 (1995)).
79. *Wessmann*, 160 F.3d at 795 (citing *Croson*, 488 U.S. at 497-98).
80. *Wessmann*, 160 F.3d at 795 (noting that suggestions that diversity is compelling when used to relieve the effects of past discrimination have been in dictum).
81. *See id.* (citing *Hopwood*, 78 F.3d at 948 (ruling out diversity as a compelling governmental interest in the educational context); *Lutheran Church-Missouri Synod*, 141 F.3d at 354 (ruling out diversity as a compelling governmental interest in the employment context)).

cumstances," the majority examined the Policy to determine its propriety as a means to remedy vestiges of past discrimination.[82]

The majority grappled with the School Committee's alleged justifications for the Policy on diversity grounds before analyzing the Policy as a remedy to ease vestiges of past discrimination. The abstract term "diversity" can be defined in a variety of ways, depending on the context of its use, and the court refused to accept this "malleable" word alone as a justification for governmentally sponsored race-based classifications.[83] The School Committee argued that, based on the affirmative desegregation power granted to school boards in *Swann*, courts should defer to school administrators' judgment and discretion to create and implement educational policies within this broad power. The majority rejected this argument, noting that *Swann*'s context differed greatly because "dual education systems were a reality [at that time] and efforts to dismantle them were being frustrated by school officials."[84] Additionally, *Swann*'s mandate dealt with remedying constitutional violations; a court must find a constitutional violation before it can begin dispensing remedies. The majority thus concluded that the School Committee must offer more than an assertion of its discretion in deciding school policy, namely a constitutional violation for which race-conscious remedies are justifiable.[85]

The School Committee's attempted justification of the Policy consisted of "lauding benefits that it ascribes to diversity," such as preparation for students entering an ethnically and racially diverse society and an increasingly global interaction between cultures.[86] This explanation lacked merit, however, because, despite the potential abstract benefits of a diverse student body, the court must "inquire whether the concrete workings of the Policy merit constitutional sanction" in order to determine "whether the Policy bears any necessary relation to the noble ends it espouses."[87]

The Policy considered the second half of BLS' entering class exclusively on the basis of five racial and ethnic groups,[88] flying in the face of Justice Powell's assertion in *Bakke* that "'diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.'"[89] The School Committee argued that the Policy's race specificity was necessary because diversity at BLS had

82. *Wessmann*, 160 F.3d at 796 (assuming that *Bakke* remains good law).
83. *See id.*
84. *Id.* at 796-97.
85. *See id.* at 797.
86. *Id.*
87. *Id.* at 798.
88. *See id.* at 798. The five groups were black, white, Hispanic, Asian, and Native American.
89. *Id.* (quoting *Bakke*, 438 U.S. at 315).

been achieved in all areas except for race and ethnicity.[90] But, should that assertion be true, "the School Committee's argument implodes" as statistics compiled over a ten-year period showed that under strict merit-based selection, black and Hispanic students would have comprised fifteen to twenty percent of each BLS entering class, and the total minority percentage would have been substantially greater.[91] Without an acute variation in minority admissions between a merit-based approach and the Policy's approach, the majority found that the Policy "intended mainly to achieve a racial/ethnic 'mix' that is considered desirable," a technique otherwise known as "racial balancing."[92] Despite the School Committee's good intentions to alleviate underrepresentation, approving a racial balancing policy "risks setting a precedent that is both dangerous to our democratic ideals and almost always constitutionally forbidden."[93]

The School Committee attempted to link the admirable ideals set forth in the Policy with racial balancing through the concept of "racial isolation," the idea that without a certain representation of a particular racial or ethnic group in any given institution, members of that racial or ethnic group will find it difficult to express themselves sufficiently.[94] The majority regarded this justification suspiciously because "it assumes that students cannot function or express themselves unless they are surrounded by a sufficient number of persons of like race or ethnicity." This position also conceded that the Policy stereotyped individual students as products of their race.[95] Furthermore, the School Committee could not establish a link between the Policy's proportional representation and the "vigorous exchange of ideas" such representation supposedly promotes. In sum, the majority rejected the racial isolation theory because, in light of the Constitution's "general prohibition against racial balancing and the potential dangers of

90. *See Wessmann*, 160 F.3d at 798. The consultant hired to analyze and create potential admissions policies suggested that "all the options would result in substantial gender, neighborhood, and socioeconomic diversity, but that, unless race and ethnicity were explicitly factored into the admissions calculus, attainment of racial and ethnic diversity might be jeopardized." *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 799 (citing Freeman v. Pitts, 503 U.S. 467 (1992)).

94. *See Wessmann*, 160 F.3d at 799; *see also* Brewer v. West Irondequoit Cent. Sch. Dist., 32 F. Supp. 2d 619, 627 (W.D.N.Y. 1999) (The West Irondequoit Central School District argued that its race-based transfer policy attempted to reduce or prevent 'racial isolation,' which state regulations defined as occurring whenever 'a school or school district enrollment consists of a predominant number or percentage of students of a particular racial/ethnic group.' The School District claimed that reducing racial isolation is desirable because it prepares students to function in adult society where they will meet people from varied backgrounds, it promotes tolerance and understanding of others, and governments have a compelling interest in eliminating *de facto* segregation.).

95. *Wessmann*, 160 F.3d at 799 (citing Miller v. Johnson, 515 U.S. 900, 912 (1995)).

stereotyping," school authorities cannot be given the subjective power to determine what percentage of any given racial or ethnic group must be present for students of that race or ethnicity to fully express themselves.[96] The First Circuit thus did not reject diversity as a compelling governmental interest in general, as did *Hopwood* and *Lutheran Church-Missouri Synod*, but it determined only that the concept of diversity as implemented through the Policy did not justify a race-based classification.[97]

b. Remedying Past Discrimination

The district court accepted the School Committee's argument justifying the Policy as a way to redress vestiges of past discrimination, but the First Circuit overruled that determination.[98] Though governmental bodies have a substantial interest in eradicating the effects of past discrimination, they must show a strong basis in evidence to show that past discrimination has resulted in "a current social ill."[99] The School Committee, however, disclaimed a need for a strong evidentiary basis because of a permanent injunction issued by the district court in 1994, which enjoined the School Committee from "discriminating on the basis of race in the operation of the public schools . . . and from creating, promoting, or maintaining racial segregation in any school or other facility."[100] The School Committee argued that this injunction mandated it to remedy racial imbalances and eliminated the need for "an independent showing of causation."[101] The majority disagreed that the injunction required affirmative action on the part of the School Committee; instead, the injunction operated in a negative manner, forbidding the School Committee from engaging in discriminatory practices.[102] The School Committee's affirmative duty to desegregate ended in 1987 when the district court found that Boston schools had achieved unitary status in student assignments,[103] and no duty exists to maintain certain racial or ethnic percentages in school populations.[104]

96. *Wessmann*, 160 F.3d at 800.
97. *See id.*
98. *See id.*; *Wessmann*, 996 F. Supp. at 131.
99. *Wessmann*, 160 F.3d at 800; *see Croson*, 488 U.S. at 500.
100. *Wessmann*, 160 F.3d at 800-801. The permanent injunction was issued in 1994 pursuant to the First Circuit's instructions in *Morgan v. Nucci*, 831 F.2d 313 (1st Cir. 1987).
101. *Wessmann*, 160 F.3d at 800.
102. *See id.* at 801.
103. *See id.*
104. *See id.*; *see also Swann*, 402 U.S. at 32 (stating that school districts have an affirmative duty to take action to desegregate schools upon a court finding of *de jure* or intentional segregation); Morgan v. Nucci, 831 F.2d at 319-26 (finding that the Boston city schools had achieved unitary status under court-ordered desegregation).

With the permanent injunction argument having failed, the School Committee had to identify a vestige of past discrimination remaining in the Boston school system and provide convincing evidence that this vestige resulted from past *de jure* segregation. What legally constitutes a vestige of past discrimination remains unsettled.[105] The many presumptive vestiges found by the Supreme Court in *Green*[106] have been adapted into less specific elements, including "quality of education."[107] The School Committee presented a documented "achievement gap" between black and Hispanic students on one hand and white and Asian students on the other as its vestige of past discrimination. The Court, making a fact-sensitive inquiry into the argument,[108] required evidence of a causal connection between the achievement gap and past discrimination, assuming *arguendo* that such a gap "may act as an indicator of a diminution in the quality of education."[109]

The achievement gap, presented in terms of relative performance on standardized tests over the years, showed that white and Asian students had scored significantly higher, on average, than black and Hispanic students. According to the School Committee's theory, the achievement gap had led to fewer black and Hispanic applicants to BLS than if the gap did not exist and, further, those black and Hispanic students that did apply qualified for admission in "abnormally small" numbers.[110] The Court eliminated the School Committee's attempted parallel between employment discrimination cases and the education arena, stating that no "barrier to entry" argument upon which employment discrimination cases rely existed with the BLS Policy.[111] The achievement gap statistics themselves must "specifically point to other allegedly discriminatory conduct in order to suggest a causal link between those discriminatory acts and the achievement gap."[112] The majority noted that the achievement gap documentation alone did not eliminate the possibility of causation from societal discrimination and cited *Croson* in its observation that low minority membership, "standing alone, cannot establish a prima facie case of discrimination."[113]

To support its achievement gap argument, the School Committee utilized testimony from Dr. William Trent, a sociologist who per-

105. *See Wessmann*, 160 F.3d at 801.
106. 391 U.S. at 435. The "*Green* factors" include student assignments, faculty, staff, facilities, transportation, and extra-curricular activities. *See id.*
107. *Wessmann*, 160 F.3d at 801 (citing Freeman v. Pitts, 503 U.S. 467, 492 (1992)).
108. *See Wessmann*, 160 F.3d at 802.
109. *Id.* at 801.
110. *See id.* at 803.
111. *Id.*
112. *Id.*
113. *Id.* at 803-04 (quoting *Croson*, 488 U.S. at 503).

formed extensive studies regarding teacher attitudes and student achievement in the Kansas City school system.[114] Dr. Trent claimed that low teacher expectations with regard to black and Hispanic students are attitudinal remnants of the segregation era and create a systematic phenomenon that relegates these minority students to lower achievement scores. Despite Dr. Trent's "consistent" findings between patterns in Kansas City and Boston, the majority struggled with his reliance on evidence from one locality to establish conclusions about the lingering effects of discrimination in another.[115] The majority cited *Croson*'s warning to "resist attempts to substitute speculation about correlation for evidence of causation," and noted that, before adopting a remedy, the discrimination must be identified with specificity.[116] Dr. Trent admitted on cross-examination that his conclusions about teacher expectations in the Boston school system were not scientifically gathered, but they were based instead on his review of achievement gap statistics, teacher seniority statistics, and anecdotal evidence from school officials about teacher attitudes.[117] Social scientists are required to apply the same intellectual rigor to the task of testifying in court that they bring to other professional settings,[118] and the court found that Dr. Trent failed to do so in this case.[119]

Dr. Trent's reliance on anecdotal evidence presented an additional dilemma because anecdotal evidence does not lend itself to proving the pervasiveness of a problem.[120] Deputy Superintendent Janice Jackson provided the most specific expert testimony as to low teacher expectations. Her findings were based on her classroom observations as a "blind researcher" before joining the school system and on additional observations made once she became deputy superintendent. Ms. Jackson testified that she noticed teachers treating minority and non-minority students differently by, among other things, calling on one set of pupils but not another, giving disparate reprimands for the same behavior, and failing to push for "higher order thinking."[121] The First Circuit found that, based on Ms. Jackson's failure to quantify her ob-

114. *See Wessmann*, 160 F.3d at 804. Dr. Trent concluded from his Kansas City study that teacher efficacy (success in encouraging students to learn and succeed) correlated with higher test scores. *See id.*

115. *See id.*

116. *Id.* (citing *Croson*, 488 U.S. at 504); *see also* Milliken v. Bradley, 418 U.S. 717, 746 (1974) ("We have never approved the extrapolation of discrimination in one jurisdiction from the experience of another.")

117. *See Wessmann*, 160 F.3d at 804-05.

118. *See id.* at 805 (citing Daubert v. Merrill Dow Pharms., Inc., 509 U.S. 579 (1993)).

119. *See Wessmann*, 160 F.3d at 805.

120. *See id.* (citing Coral Constr. Co. v. King County, 941 F.2d 910, 919 (9th Cir. 1991) ("While anecdotal evidence may suffice to prove individual claims of discrimination, rarely, if ever, can such evidence show a systematic pattern of discrimination necessary for the adoption of an affirmative action plan.")).

121. *Wessmann*, 160 F.3d at 806.

servations, "the district court could not validly conclude that the number of 'problem' teachers she observed was statistically significant" and that anecdotal evidence of that nature rarely provides a sufficiently strong basis in evidence.[122]

The majority dismissed additional anecdotal evidence upon which the dissent heavily relied because "[o]ne cannot conclude from the isolated instances that these witnesses recounted that low teacher expectations constitute a systematic problem . . . or that they necessarily relate to the *de jure* segregation of the past."[123] Generalizations about socialization, as exemplified by the testimony of Superintendent Thomas Payzant, also failed to persuade the majority. Payzant testified that since twenty-eight percent of the Boston school system faculty had begun teaching in the era of dual school systems, they had been "socialized and shaped" by the prevalent attitudes of that time regarding minority students.[124] The majority conceded the potential truthfulness of this statement, but they found it, like other causal factors or indications of discrimination cited by the School Committee, "insufficient either to show ongoing vestiges of system-wide discrimination or to justify a race-conscious remedy."[125] The majority concluded that the School Committee provided no evidence to show that the achievement gap evolved from past school discrimination, since the gap failed to specify and substantiate the Committee's arguments and failed to eliminate other potential causal factors.[126]

3. *Narrow Tailoring*

The majority asserted that even if the School Committee could establish a causal connection between the Policy and vestiges of past discrimination, the Policy could not stand because it swept too broadly. Race-conscious policies must not only respond to a compelling governmental interest, they must also be narrowly tailored "to rectify the specific harms in question."[127] Rather than utilizing the factors of the *Paradise* test, the Court made three points concerning the Policy and its lack of narrow tailoring.

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122. *Id.* Ms. Jackson, during her first set of observations, visited six or seven schools but could only recall the names of two of them. She visited numerous schools during her second visit as well, but she did not state whether these visits were to observe teacher treatment of minority and non-minority students or for another purpose. *See id.*

123. *Id.* at 806-07.

124. *Id.*

125. *Id.*

126. *See id.*

127. *Id.* (citing *Croson*, 488 U.S. at 493 (stating that race-conscious remedies must be so narrowly tailored that there is "little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype")).

First, since the majority found no barrier to entry at the examination school level, it failed to see "how the adoption of an admissions policy that espouses a brand of proportional representation is designed to ameliorate . . . a system-wide achievement gap *at the primary school level.*"[128] The elementary age achievement gap, allegedly caused by low teacher expectations, bore no connection to flexible racial/ethnic guidelines in the school system's most prestigious high schools' admissions policies.

Second, the majority found that "increased admission of black and Hispanic students cannot be viewed as partial compensation for injustices done at the primary school level."[129] The achievement gap affected public school students, yet the Policy applied its racial and ethnic guidelines to all students seeking BLS admission, including those black and Hispanic students from private or parochial schools where there was no evidence of an achievement gap. The Policy did not suffice to "cur[e] the harm done to the class of actual victims," the black and Hispanic public school students.[130]

Finally, the Policy did not fulfill its own goals in remedying vestiges of past discrimination against historical victims of discrimination because of its setup. Depending on the distribution of student scores and racial/ethnic proportions in a given year, a minority student could be excluded in favor of a student whose racial group needs balancing. For example, in 1997, the O'Bryant examination school rejected two Hispanic applicants from its ninth-grade class in favor of a white student.[131] Additionally, the majority was "unable to comprehend the remedial purpose" of admitting Asian students, who have not historically been subject to discrimination, over higher-ranking white students.[132] These findings reinforced the majority's view that "in structure and operation, the Policy indicates that it was not devised to assuage past harms, but . . . it was simply a way of assuring racial/ethnic balance . . . in each examination school class."[133]

Based on the factual findings, the highly skeptical judicial attitude towards racial preferences, and the high threshold of evidence required to sustain racial classifications, the majority found the Policy unconstitutional on equal protection grounds and ordered the district court to order Sarah Wessmann's immediate admission to BLS.[134]

128. *Wessmann*, 160 F.3d 807 (emphasis in original).
129. *Id.* at 808.
130. *Id.*
131. *See id.*
132. *Id.*
133. *Id.*
134. *See id.* at 808-09.

4. Circuit Judge Boudin's Concurrence

Regarding narrow tailoring, the concurrence pointed out the overbroad and inexplicable granting of preferences to minority groups that were never discriminated against in the Boston school system, specifically Asian students and black students from private and parochial schools.[135] The concurrence also noted that the Policy bears little, if any, effect on teacher expectations, the supposed origin of residual discrimination, suggesting a "misfit between plan and remedy."[136] Since the Policy fails to address the problem of discriminatory teacher attitudes, it perpetuates the argument that teacher expectations cause the achievement gap since "[t]eachers retire slowly and themselves teach those who succeed them."[137] This does not lend itself to the limited time and scope of the remedy prescribed by the narrow tailoring standard. The concurrence did not find these defects of fit surprising because

> the plan is not seriously suited to be a temporary measure to remedy low teacher expectations. . . . It is instead a thoughtful effort to assist minorities historically disadvantaged while, at the same time, preserving the essentially competitive character of the schools in question. So viewed, there is no misfit between problem and remedy; the only misfit is with *Croson*'s requirements for the use of racial preferences, requirements that only the Supreme Court can relax.[138]

Viewing the narrow tailoring requirement in light of its intent to assist minorities and preserve the academic integrity of BLS, the concurrence found that the Policy could have been interpreted to properly serve those desires. The Policy's use of racial preferences to do this, however, still did not pass constitutional muster and so the Policy could not stand.

5. Circuit Judge Lipez's Dissent

In his dissent, Circuit Judge Lipez stated his agreement with the district court's finding that the Boston School Committee provided enough evidence to support a compelling governmental interest through BLS' admissions policy.[139] In a lengthy discussion, the dissent argued that the majority misapplied the standard of review[140] and erred in concluding that the School Committee did not offer sufficient evidence to exhibit the continuing effects of past discrimination that would justify a compelling governmental interest.[141] The dissent asserted that the proper evidentiary standard of review should be a

135. *See id.* at 809-10 (Boudin, J., concurring).
136. *Id.* at 810 (Boudin, J., concurring).
137. *Id.*
138. *Id.*
139. *See id.* (Lipez, J., dissenting).
140. *See id.* at 814-820.
141. *See id.* at 820-828.

presentation of a prima facie/strong basis in evidence by the defendant, with the burden of persuasion on the plaintiff to rebut the prima facie case.[142] With this evidentiary setup in mind, the dissent argued that the plaintiff did not provide satisfactory evidence to rebut the prima facie case, and the School Committee had met its burden of establishing a causal link between the achievement gap and past discrimination in the Boston school system.[143] Noting the Policy's flexibility and duration,[144] fairly insignificant effect on third parties,[145] and propriety as a measure to remedy the impact of lowered teacher expectations without addressing the expectations themselves,[146] the dissent argued that the Policy meets the narrow tailoring requirement as well. The dissent stated that its interpretation of the standard of review and evidentiary burden should not be characterized as "wishful thinking" by the majority, but instead, it should be viewed as the proper and accurate interpretation of the evidence presented to the district court.[147]

III. ANALYSIS: THE TREND AWAY FROM VOLUNTARY AFFIRMATIVE MEASURES TO DESEGREGATE PUBLIC SCHOOLS

A. *Wessmann*'s Impact on Voluntary Affirmative Desegregation Measures

The First Circuit correctly found that under the strict standard of review, the BLS admissions policy did not serve a compelling governmental interest, nor was it narrowly tailored. The Boston School Committee, though it may have presented evidence of vestiges of past discrimination through the documented achievement gap, failed to eliminate other socioeconomic factors as possible causes. The Policy's proponents contradicted their interest in remedying vestiges of past public school discrimination by failing to narrowly tailor the Policy. A policy that admits minority private school students or excludes minority students in favor of white students can hardly serve to remedy a public school achievement gap. The achievement gap in *Wessmann* presents a problem pervasive in American schools that is easy to diagnose but difficult to cure because of its complex origins. Though teacher expectations undoubtedly influence a student's performance,

142. *See id.* at 818.
143. *See id.* at 827-828.
144. *See id.* at 829.
145. *See id.* at 830.
146. *See id.* at 833.
147. *Id.* at 833 (Lipez, J., dissenting); *see also id.* at 808 ("Our dissenting brother's valiant effort to read into *Croson* a broad discretion for government entities purporting to ameliorate past discrimination strikes [the majority] as wishful thinking.").

the School Committee's failure to establish causation or vestiges of past discrimination makes policies based on racial distinctions potentially unconstitutional under the Fourteenth Amendment. How can a court determine causation for an achievement gap for the purposes of desegregation and affirmative action jurisprudence? The amount of evidence necessary to prove a connection while eliminating outside factors has not been defined and appears almost unattainable under strict scrutiny standards.

Wessmann's foray into the constitutionality of voluntary desegregation measures combines factors from both desegregation law and affirmative action. Desegregation law, while relevant to *Wessmann*'s situation, does not apply well because no *de jure* segregation or court-ordered desegregation exists to justify racial classification policies. While a court can and must order school desegregation where necessary, the issue becomes much murkier when no intentional segregation or discrimination can be proved. Affirmative action law, derived from the employment context, supports the idea of bringing in students of different racial backgrounds to achieve a diverse population. The courts, however, have shunned affirmative action of late, except where clear discrimination or vestiges of past discrimination are readily apparent and supported by a strong basis in evidence. The constitutional standards in this area can be easily articulated, but applying those principles to a set of facts proves difficult because

> by their very nature, racial classifications that treat members of one race differently from those of another lend themselves to opposing characterizations; a benefit that is given to members of one race but not another, no matter how well-intentioned, can almost always be seen as discriminatory with respect to the latter group.[148]

Interpreting Supreme Court cases in this area is difficult because the cases are fragmented by many opinions, and conflicting opinions exist even as to the remaining validity of certain decisions or statements within those decisions.[149]

Over forty years ago, starting with *Brown* and *Brown II*, courts began mandating desegregation of schools based on findings of equal protection violations against minority students under the Fourteenth Amendment. Courts ordered school districts maintaining a dual school system to affirmatively desegregate and bring the black and white populations of their school districts together. Now, however, non-minority students are the plaintiffs when unitary school districts, without court orders, maintain race-conscious admissions and transfer policies in an affirmative attempt to achieve *de facto* desegregation and diversity in school districts. A series of recent cases illustrate a

148. Brewer v. West Irondequoit Cent. Sch. Dist., 32 F. Supp. 2d 619, 627 (W.D.N.Y. 1999).

149. *See id.*

trend of which *Wessmann* is a part – schools that, without desegregation orders, are implementing policies under the auspices of increasing school district-wide diversity. Courts have found, however, that most of these policies rely too heavily on race as a determining factor and thus violate equal protection rights of excluded white student-plaintiffs. Many of these cases share the issue of determining the constitutionality of race-based classifications in a school district not under court orders to desegregate. Although the facts in each case differ, the courts have, until recently in the Second Circuit,[150] consistently struck down these policies or granted permanent injunctions to the excluded students because, under the strict scrutiny standard, the race-based classifications did not serve a compelling governmental interest, nor were they narrowly tailored.

Capacchione v. Charlotte-Mecklenburg Schools[151] dealt with a magnet school's race-based admissions policy implemented under the famous *Swann* desegregation orders, albeit without the requisite judicial approval. The court, after finding that Charlotte-Mecklenburg Schools ("CMS") had achieved unitary status and no longer needed to operate pursuant to the district court's supervision, found that the magnet school could not sustain its admissions policy without the court desegregation order. The policy had been implemented while under court supervision, and thus the court did not examine CMS's alternative theory that racial diversity qualifies as a compelling governmental interest. Instead, it found that the program lacked narrow tailoring. The court stated that since "the remedial justification for using race-conscious policies is gone, and the district must reevaluate any continuing use of race in school policy,"[152] "CMS's pursuit of diversity is . . . nothing more than a means for racial balancing."[153]

The Fourth Circuit in *Tuttle v. Arlington County School Board*[154] found that a weighted lottery took unconstitutional measures in an attempt to promote racial diversity among kindergartners admitted into the school system's three alternative schools. The court assumed without holding that diversity could be a compelling governmental interest. Since the lottery did not attempt to remedy vestiges of past discrimination, however, the court went on to determine that the lottery was not narrowly tailored. The court found 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

150. *See infra* notes 165-167 and accompanying text.

151. 57 F. Supp. 2d 228 (W.D.N.C. 1999).

152. *Id.* at 290.

153. *Id.* at 292.

154. 195 F.3d 698 (4th Cir. 1999), *cert. dismissed*, 2000 WL 175460 (U.S. March 28, 2000).

same children as members of certain racial and ethnic groups."[155] Less than a month later, the Fourth Circuit decided in *Eisenberg v. Montgomery County Public Schools*[156] that a school board could not deny a student's request to transfer to a magnet school because of his race. Like *Tuttle* and *Wessmann*, the court assumed *arguendo* that diversity could be a compelling governmental interest. The court only struck down the racial diversity considerations in the transfer policy[157] and admitted the student on a preliminary injunction, finding that since "transfers that negatively affect diversity are usually denied"[158] and the school was not attempting to remedy vestiges of past discrimination, "such nonremedial racial balancing is unconstitutional."[159]

In addition, the conflicts over voluntary desegregation measures in Boston go beyond *Wessmann* and the BLS admissions policy. In *Boston's Children First v. City of Boston*,[160] the District Court of Massachusetts refused to grant a preliminary injunction immediately eliminating the use of race as a factor in determining student assignments. The court considered the great disruption that would result in the school system were the injunction to be granted, as well as the fact that race-based student policies were only in effect through the 1999-2000 school year. In finding that neither side could conclusively prove a likelihood of success on the merits, the court noted that "[d]iversity may well be more important at [an early] stage than at any other – Kindergarten is when first friendships are formed and important attitudes shaped . . . [w]here children first begin to forge social relationships and interactions with their peers, in the view of the Court, the need of diversity is at its greatest."[161] Despite the court's idealism, strict scrutiny and the *Wessmann* analysis make it likely that a high evidentiary burden would have been imposed to prove that diversity served a compelling governmental interest. The Boston School Committee decided later to eliminate busing as a way of racially integrating students, and "beginning in fall 2000, Boston's public school students entering so-called transition grades – kindergarten and first, sixth and ninth grades – will no longer be denied access to a school in their neighborhoods based solely on the color of their skin."[162]

155. *Tuttle*, at 707.
156. 197 F.3d 123 (4th Cir. 1999), *cert. denied*, 120 S. Ct. 1420 (2000).
157. *See Eisenberg*, at 125. The transfer policy elements that remained intact were school stability, utilization and enrollment at each school, and the student's reason for the transfer request.
158. *Id.* at 126.
159. *Id.* at 131.
160. 62 F. Supp. 2d 247 (D. Mass. 1999).
161. *Id.* at 259.
162. Tom Mashberg, *Busing Comes to End of the Road – Race Mix, Economics Change Hub Since 1974*, BOSTON HERALD, Sept. 5, 1999, *available in* 1999 WL 3407270.

The preceding cases demonstrate that, as in *Wessmann*, white parents and students across the country are suing school districts to overcome the use of racial considerations in school policies designed to implement diversity or remedy vestiges of past discrimination. By applying strict scrutiny and generally striking down these policies, the cases illustrate a trend away from voluntary desegregation measures implemented by school districts without a court desegregation order. Because many of these school systems like the one in *Wessmann* use policies that are ultimately racial balancing in an attempt to increase school diversity, the courts strike them down because they do indeed violate equal protection, no matter how high-minded the intentions to integrate are. Courts are asking for better, more concrete justifications of these policies, while parents and students are asking for equal protection of their constitutional rights.

One Circuit Court of Appeals has questioned the *Wessmann* decision and the trend cited above. In *Brewer v. West Irondequoit Central School District*,[163] the Western District of New York found unconstitutional a state-funded transfer program that relied exclusively on race to determine a student's eligibility for transfer. The court left the transfer policy open for change by the school district, but it granted a preliminary injunction admitting the student-plaintiff on the likelihood that there was no compelling governmental interest in the program's goal of reducing "racial isolation," nor was the program narrowly tailored to reach such a goal.[164] On appeal, however, the Second Circuit found that the student failed to demonstrate the requisite clear likelihood of success at trial to justify a mandatory injunction, and vacated the district court's order, remanding for a trial on the merits.[165] The Second Circuit criticized the First Circuit's *Wessmann* decision because *Wessmann* relied on the Supreme Court precedent "which holds merely that absent a finding of a constitutional violation, a school district is under no obligation, enforceable by a federal court, to remedy the imbalance."[166] An additional factor contributing to the Second Circuit's *Brewer* decision was that it, unlike the First Circuit, had previously held that combating *de facto* segregation served a compelling governmental interest.[167] The outcome of *Brewer*'s trial on the merits in the district court, with the Second Cir-

163. 32 F.Supp. 2d 619 (W.D.N.Y. 1999).

164. *See id.* at 631 ("What emerges from the case law, especially the more recent case law, is the principle that classifications based SOLELY on race, in the absence of past identifiable discrimination, are almost – if not absolutely – never permissible.")

165. *See* Brewer v. West Irondequoit Sch. Dist., 212 F.3d 738, 753 (2d Cir. 2000).

166. *Id.* at 751-52.

167. *See id.* at 752 (citing Parent Ass'n of Andrew Jackson High School v. Ambach, 598 F.2d 705 (2d Cir. 1979) ("*Andrew Jackson I*") and Parent Ass'n of Andrew Jackson High School v. Ambach, 738 F.2d 574 (2d Cir. 1984) ("*Andrew Jackson II*") as

cuit's precedent in mind, could potentially divide the First and Second Circuit on the issue of voluntary desegregation measures.

Another interesting exception to the judicial trend against voluntary desegregation policies occurred in *Hunter ex rel. Brandt v. Regents of the University of California*,[168] where the Ninth Circuit examined the constitutionality of a research school's race-based admissions policy. The research school, funded by UCLA's Graduate School of Education and Information Studies, justified its admissions process with its research goal of improving the quality of education in California's urban public schools. Under strict scrutiny, the majority found this to be a compelling governmental interest,[169] and they likewise found the admissions policy to be narrowly tailored because of the research necessities for a highly controlled group of students, the potentially beneficial research results, and the court's deference to the researchers' needs.[170] A vehement dissent stated that the Ninth Circuit majority failed to "take heed of the Supreme Court's repeated warnings against allowing the use of racial classifications in non-remedial contexts,"[171] and pointed out that "[a] majority of the Supreme Court has never accepted a non-remedial justification for a racial classification."[172] The dissent further denounced the research school's setup as lacking narrow tailoring and suggested several race-neutral ways to obtain data about education in urban elementary schools without discriminating for or against certain students on the basis of race.[173]

The Ninth Circuit's narrow finding in *Hunter* that research schools can constitutionally use race as a factor in their admissions process, despite the interesting contrast it provides, sheds little light on racial integration of schools as a continuation of desegregation policy. The current trend of public schools' use of race for mere diversity purposes or to remedy vestiges of past discrimination holds the spotlight as courts lift desegregation orders and schools revamp voluntary measures to achieve a higher level of integration. Schools are ending their school busing programs and eliminating race-based transfer and ad-

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the Second Circuit precedents explicitly establishing that reducing *de facto* segregation serves a compelling governmental interest).

168. 190 F.3d 1061 (9th Cir. 1999).

169. *See id.* at 1063-64 (Because "[t]he challenges posed by California's increasingly diverse population intensify the state's interest in improving public schools," California's interest in operating "a research-oriented elementary school dedicated to improving the quality of education in urban public schools [serves] a compelling state interest.").

170. *See id.* at 1064-67.

171. 190 F.3d at 1067 (Beezer, J., dissenting).

172. *Id.* at 1071.

173. *See id.* at 1078.

missions policies to comply with court orders or to avoid equal protection challenges.

As the Boston school system ends its busing program and students begin attending their walk-to neighborhood schools, school officials and parents in poorer city neighborhoods worry about a falloff in academic performance.[174] Additional concern has been expressed that, without busing or other race-conscious policies, one-race schools will reappear with a vengeance because of racial or ethnic concentrations in certain neighborhoods. After *Wessmann*, the Boston School Committee struggled with suggestions for examination school admissions and general student assignment programs that "ensure diversity in schools while using formulas that cannot mention race."[175] The school system appears to desire a racially balanced student body, but it must achieve it through constitutional voluntary desegregation measures. Superintendent Thomas Payzant has drawn criticism from both minority and non-minority parents for his proposed student assignment plan, which gives students a proximity preference in their school of choice, while eliminating racial and ethnic guidelines. A race-neutral admissions process to the Boston examination schools has also been proposed and criticized.[176]

Federal courts and school districts are gradually abandoning their mandates for voluntary desegregation. While policies like the one in *Wessmann* produce a facially ideal amount of diversity in the student body, courts strike them down either because they rely too heavily on race as a factor or because they do not address the source of the problems which the policies are designed to alleviate. Without a causal connection between past discrimination and remedy, and without a finding of intentional or *de jure* segregation, the lower courts' hands are tied by strict scrutiny. *De facto* segregation appears imminent in some areas, and this time it is not justified by a "separate but equal" doctrine that the courts can control. A new solution must be found, and it must involve more people and resources than a court by itself can muster and supervise.

B. The Future of Affirmative Desegregation Measures

A rift exists among educators and parents alike over whether *de facto* resegregation of public schools needs to be a primary concern remedied by affirmative measures insuring racial and ethnic integration. Though "[b]lack parents have become much more skeptical that [busing] is the way of attacking the problem," internal discord of opin-

174. *See* Mashberg, *supra* note 162.

175. Beth Daley, *New Admission Options Sought for Entry to Exam Schools*, BOSTON GLOBE, Sept. 29, 1999, at B4, *available in* 1999 WL 6082826.

176. *See* Ed Hayward, *Critics Blast Payzant Schools Proposal*, BOSTON HERALD, Oct. 21, 1999, *available in* 1999 WL 3411252.

ion in the NAACP has led to the dismissal of two prominent members "for taking the position that good schools for black students is a higher priority than racial integration."[177] A "new reality" is emerging as schools abandon their attempts to voluntarily desegregate: "[e]fforts to maintain a balance of white and minority students are running aground on the twin shoals of eroding legal support for such remedies and dramatically altered demographics."[178] Though integration does not lack general approval, courts and governments have recently been limited by strict scrutiny from taking desegregation measures, and "ethnic segregation now increasingly masks the real story: class segregation."[179] Ideas from each side are drawing fire, but many critics, parents, and educators are encouraging economic and neighborhood integration policies in schools rather than constitutionally touchy racial/ethnic integration policies.

In public primary and secondary education, the strict scrutiny standard appears to be stifling earlier Supreme Court orders for school districts to take affirmative action to desegregate their schools and eliminate vestiges of past discrimination. Justice O'Connor attempted in *Adarand* to "dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact' . . . [t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it."[180] Despite the Supreme Court's intent, the necessity of providing equal opportunities and equal protection to primary school students of all races makes strict scrutiny much more difficult to overcome in the public education context than in an employment or even higher education context.[181]

Now that courts are lifting desegregation orders and becoming more conservative about voluntary race-based integration policies, strict scrutiny seems to set an impossibly high threshold for public schools to overcome if they want to implement racial diversity policies. Though the First Circuit appropriately struck down the BLS Policy,

177. Dirk Johnson, *Busing Fading Away as a Means of Integration*, THE PATRIOT LEDGER (Quincy, Mass.), Sept. 28, 1999, *available in* 1999 WL 8474684.

178. *One by One, Nation's Schools Find New Way to Achieve Diversity: 25 Years After Busing, 'Economic Integration' Gains Ground*, USA TODAY, Sept. 9, 1999, at 14A, *available in* 1999 WL 6853004.

179. Orlando Patterson, *Op-Ed: What to Do When Busing Becomes Irrelevant*, N.Y. TIMES, July 18, 1999, § 4, at 17.

180. 515 U.S. at 237 (citations omitted). Justice O'Connor went on to note that in 1987, the Supreme Court did find a narrowly tailored race-based remedy that served a compelling governmental interest in *United States v. Paradise*, 480 U.S. 149 (1987).

181. *See generally* Leland Ware, *Tales From the Crypt: Does Strict Scrutiny Sound the Death Knell for Affirmative Action in Higher Education?*, 23 J.C. & U.L. 43 (1996) (describing the history of strict scrutiny, its effects on higher education admissions policies, and the costs of affirmative action).

the dissent's tortuous interpretation of O'Connor's concurrence in *Croson*, struggling to prove that strict scrutiny is too strict in *Wessmann*, does not lack merit. The public school context differs greatly from the employment arena and even from colleges and universities with developed affirmative action standards, perhaps even to a point that a different, lesser standard of scrutiny would be appropriate.[182]

Courts' narrow focus on the specific issues in each case does not permit them to resolve the diversity and integration issues encompassing public elementary and secondary schools, and not just because of strict scrutiny. Courts merely glimpse the issues through specific fact patterns of cases. Limited by the overlapping principles of desegregation, affirmative action, and strict scrutiny, they are forced to deal with questions better left to school administrations, communities, and legislators. How can schools racially integrate students without violating equal protection? Will greater racial integration among students solve *de facto* segregation problems? How do you remedy a minority achievement gap without discriminating against students not affected by the gap? As long as school districts continue to implement policies that classify students on the basis of race, and as long as plaintiffs sue the school districts, courts will to have to answer under the strict scrutiny test. Many courts, in cases like *Wessmann*, declined to decide whether diversity could serve a compelling governmental interest, assumed diversity was compelling absent a contrary decision, and found either no provable vestiges of past discrimination or that the policy in question was not narrowly tailored.

Waiting for the judiciary to decide whether or not diversity qualifies as a compelling governmental interest or waiting for a less strict standard of review to emerge will take too long. As the courts battle among these issues and strike down policies brought into question by students claiming equal protection violations, greater limitations are placed upon what school districts can do to level the field between students on either side of the issue. Courts do not possess the resources or the power to make the immediate changes needed to salvage the education of students currently in the system and on the down side of an achievement gap. Supreme Court Justice Thomas has articulated this idea:

> Federal courts do not possess the capabilities of state and local governments in addressing difficult educational problems. State and local school officials not only bear the responsibility for educational decisions, they also are better equipped than a single federal judge to make the day-to-day policy, curricular, and funding choices necessary to bring a school district in compliance with the Constitution. Federal courts simply cannot gather sufficient information to

182. An exploration of the possibilities for intermediate scrutiny is, unfortunately, beyond the scope of this note.

> render an effective decree, have limited resources to induce compliance, and cannot seek political and public support for their remedies.[183]

Perhaps desegregation and integration are not the most appropriate ways to deal with integration and achievement gap problems. As mentioned above, many school officials, parents, and social scientists favor economic integration over racial integration, in part because it poses fewer constitutional problems. Justice Thomas stated that since "desegregation has not produced the predicted leaps forward in black educational achievement, there is no reason to think that black students cannot learn as well when surrounded by members of their own race as when they are in an integrated environment."[184]

But schools, parents, and students will not be so quick to sacrifice the intrinsic benefits that stem from interactions between students of different races, ethnicities, and backgrounds. Thomas' position also fails to consider the potential long-term societal problems of regression into *de facto* segregated schools. Perhaps a focus on eliminating poverty and socioeconomic differences among schools, if not students, would better assure that schools are doing all they can to equalize opportunities for students attending different schools. It appears that at some point, some students will have to be favored over others in order to give disadvantaged students full ability to maximize their potential to learn and succeed. But courts will not favor those students based merely on their race. Even with this country's embarrassing and invidious history of slavery, prejudice, discrimination, and segregation, a court's capacity to assist minority students is limited by previous interpretations of the Fourteenth Amendment's equal protection clause. Whether socioeconomic differentiation of students will be subject to a lower level of judicial scrutiny remains to be seen, but it appears acceptable based on the durability of need-based financial aid programs and programs allowing discounted or free school lunches for economically disadvantaged students.

The late Judge A. Leon Higginbotham, a Third Circuit Court of Appeals judge, noted in response to the political and judicial assault on affirmative action and equal educational opportunity that "this country seems intent on returning to the foolishness of the past."[185] How can a school district strike a balance between remedying an achievement gap while not denying equal protection to those students who are not affected by the gap? The Policy at issue in *Wessmann* misplaced its emphasis on BLS admission rather than going to the

183. Missouri v. Jenkins, 515 U.S. 70, 131-32 (1995) (Thomas, J., concurring) (citations omitted).

184. *Id.* at 121-22 (Thomas, J., concurring).

185. Pace Jefferson McConkie, *Race and Higher Education: A Rallying-Cry for Racial Justice and Equal Educational Opportunity*, 21 U. ARK. LITTLE ROCK L. REV. 979, 992 (1999).

source of the alleged vestiges of past discrimination. Suggestions that the School Committee parcel out examination school admissions to historically underrepresented public elementary schools may pass constitutional muster but still fail to address the achievement gap problem appropriately.[186] Courts have the ability to provide a quick fix with intermediate scrutiny, but constitutional *de facto* segregation solutions will have to start at the school district and neighborhood level. In light of the judicial trend away from voluntary desegregative measures, school boards must develop more complex and creative policies to improve the quality of education for all students. Attempts to achieve facial diversity within the schools and hopes that integration will solve problems like the achievement gap have not produced the desired results.

Affirmative desegregation measures need to focus away from race to remain within constitutional bounds. Basing school district policies on economic status rather than race may help in alleviating many school problems while not unconstitutionally focusing on a student's race or ethnicity. Since problems like the achievement gap still exist despite years of desegregation, perhaps schools need to try something new. The evidentiary standards imposed under strict scrutiny in cases like *Wessmann* make it nearly impossible for schools to constitutionally use racial classifications in their policies. Though a lower standard of scrutiny may be appropriate, this solution cannot be immediately achieved – courts must decide as this area of law grows. Courts must recognize that, when dealing with affirmative desegregation measures in public elementary and secondary schools, neither desegregation law nor affirmative action law applies in a fully relevant manner. With the current conservative trend in the judiciary, courts may avoid making activist decisions, and students may pass through increasingly segregated public school systems that cannot implement race-based policies to alleviate potential problems, such as achievement gaps between black and Hispanic students and white and Asian students. School systems like the one in *Wessmann* should implement policies that address the sources of these problems rather than their later manifestation. One way to do this is by implementing economic integration policies into student assignment, transfer, and admissions policies.

IV. CONCLUSION

The problems in education are too complex and indefinite to be attributed only to schools and their treatment of students, especially as the reality of dual school systems and *de jure* segregation recede into

186. *See* Preston Green, *May Examination Schools Use Racial Preferences in Their Admissions Process?: Wessmann v. Gittens*, 135 ED. LAW. REP. 873 (1999).

the past. Attempts by school districts to give historically disadvantaged students a boost and encourage interaction between students of all races are admirable but overly idealistic and potentially unfair to those students not historically disadvantaged. Though achievement gaps may be attributable to past discrimination, a school system will, after *Wessmann*, have a difficult time tying the plan of remedy to the ultimate problem. Unless these attempts to overcome vestiges of past discrimination are fully justifiable as mandated by *Wessmann* and decisions like it, they are not constitutionally appropriate and unfairly restrain the rights of students who have not been discriminated against in the past. "Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution, there can be no such thing as either a creditor or debtor race."[187]

In light of these equal protection issues, courts should realize that decisions dealing with voluntary desegregation policies are neither desegregation nor affirmative action cases, and decide accordingly. But changing the tide will take time; school districts need a solution now. With the current judicial trend away from upholding race-based measures to affirmatively integrate schools, school districts must attempt to implement more creative policies to make each student's schooling truly equal on a substantive, not merely facial, level. Treating students as individuals speaks to the ultimate purpose of *Brown v. Board of Education*; schools should thus avoid basing decisions about students on the particular student's race or ethnicity. Until the Supreme Court rules whether diversity can be a compelling governmental issue under strict scrutiny, or until the judiciary relaxes the strict scrutiny standard in the context of public schools that implement affirmative desegregative measures, school districts should consider administering policies that take a student's economic background into consideration. The ultimate goal of these policies will still be to give equal opportunity to students of all races in the spirit of desegregation that has, as of yet, failed to produce the desired results.

Karey A. Vering

187. *Adarand*, 515 U.S. at 239 (Scalia, J., concurring).