

THE KEY TO UNLOCKING THE SCHOOLHOUSE DOORS:
INTERMEDIATE SCRUTINY, THE APPROPRIATE
STANDARD OF REVIEW FOR RACE-CONSCIOUS
DESEGREGATION POLICIES

[*CAPACCHIONE V. CHARLOTTE-MECKLENBERG
SCHOOLS*, 57 F. SUPP. 2D 228 (W.D.N.C. 1999)]

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I. INTRODUCTION

“In order to get beyond racism, we must
first take account of race.”¹

Since the Supreme Court’s ruling in 1954 that separate and unequal schools were unconstitutional,² segregation has begun slowly and painfully disintegrating in public schools. Throughout the last forty-six years, the Supreme Court has ordered school districts to utilize different tactics to integrate schools. In spite of this progress, the Court has never specifically addressed which standard of review is appropriate when reviewing race-conscious policies instituted by school systems that are subject to a remedial court-ordered desegregation decree.

In this school desegregation case, the district court held that the Charlotte-Mecklenberg School System (CMS) had achieved unitary status, and, therefore, the thirty-year-old desegregation court order was dissolved. Further, the court held that CMS’s magnet school admissions policy unconstitutionally extended the scope of permissible affirmative action programs under the Equal Protection Clause.³ This comment will take a critical look at the decision regarding the magnet school’s admission policy, focusing on the district court’s error in using a strict scrutiny standard of review.⁴ It will be established that the appropriate

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1. *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 407 (1978)(separate opinion of Blackmun, J.).

2. *See Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (“Brown I”)(distinguished from *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955)(“Brown II”)).

3. *See id.*

4. *See id.*

standard of review for a school board's race-conscious policy is intermediate scrutiny, rather than strict scrutiny, when the school system has been subject to a remedial court-ordered desegregation decree.

II. CASE DESCRIPTION

A. *Swann v. Charlotte-Mecklenberg Board of Education*⁵

There is a lengthy history of school board and community resistance to desegregation in the Charlotte-Mecklenberg school system. In response to this resistance, the United States Supreme Court, in the 1971 decision of *Swann v. Charlotte-Mecklenberg Board of Education*⁶, ordered local school systems to bus children away from neighborhood schools when needed.⁷ The ruling provided district courts with a constitutional vehicle to remedy past vestiges of unlawful discrimination.⁸ This decision began with the Court's historic announcement in *Brown v. Board of Education*⁹, that the indoctrination of "separate but equal"¹⁰ policies was unconstitutional.¹¹ Therefore, any racial separation that is state-sponsored in public schools is forbidden.¹² Furthermore, in *Brown II*,¹³ the Court mandated that desegregation be attacked "with all deliberate speed."¹⁴

Prior to the *Brown* decisions, the CMS school district in North Carolina had segregated its public schools on the basis of race as mandated by state law and its own board's policy.¹⁵ As a result of the school board's unwillingness to destroy the dual school system, the *Swann* plaintiffs filed a complaint for injunctive relief in 1965.¹⁶ Throughout the next five years, the school board continually dragged its feet¹⁷ as the district court approved a "litany of plans to expedite more aggressive desegregation."¹⁸

The court concluded that the school system had placed an unfair burden, in regard to the desegregation process, on black children,¹⁹ and that the board had "shown no intention to comply... with the

5. 402 U.S. 1 (1971).

6. *See id.*

7. *See Capachione*, 57 F. Supp. 2d at 232.

8. *See id.*

9. 347 U.S. 483 (1954) ("Brown I").

10. *Id.* at 495; *see also Plessy v. Ferguson*, 163 U.S. 537, 550-51 (1896).

11. *See Capachione*, 57 F. Supp. 2d at 232.

12. *See id.*

13. *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955) ("Brown II").

14. *Capachione*, 57 F. Supp. 2d at 233 (citing *Brown II*, 349 U.S. at 301)..

15. *See id.*

16. *See id.*

17. *See Swann v. Charlotte-Mecklenberg Bd. of Educ.*, 300 F. Supp. 1381, 1382 (W.D.N.C. 1969).

18. *See Capachione*, 57 F. Supp. 2d at 234.

19. *See Swann v. Charlotte-Mecklenberg Bd. of Educ.*, 306 F. Supp. 1291, 1298-99 (W.D.N.C. 1969).

constitutional mandate to desegregate the schools.”²⁰ Therefore, the court ordered the school board to immediately adhere to a plan designed by an outside consultant.²¹ This became known as the “Finger Plan,”²² and was the only court-mandated strategy for the CMS system.²³ The school board appealed the district court’s ruling, of which the Fourth Circuit affirmed in part and reversed in part.²⁴ The United States Supreme Court reinstated the district court’s decision and remanded the case for further proceedings.²⁵ After reviewing the options, the district court decided that the “Finger Plan” was fair and did not impose an undue burden on the school board.²⁶

The Supreme Court reviewed the *Swann* case again in 1971²⁷ to determine the range of authority a federal court possesses in enforcing the constitutional mandates set out in the *Brown* decisions and *Green v. County School Board*.²⁸ The Court affirmed the district court’s order by holding that “if school authorities fail in their affirmative obligations” to eliminate public school segregation, “the scope of a district court’s equitable power to remedy past wrongs is broad.”²⁹

The district court continued supervision of CMS.³⁰ At times, difficulties arose and the court was forced to intercede.³¹ During certain periods, the court gave the school board full reign in hopes of positive desegregation action.³² Eventually, the school board and the community embraced desegregation and began to take an active role in making it successful. In July 1975, the district court closed the *Swann* case from active litigation, based on the successful institution of new guidelines and policies by the school board.³³ The court noted that the case would be re-opened only upon a showing that the orders were not being

20. *Swann v. Charlotte-Mecklenberg Bd. of Educ.*, 306 F. Supp. 1299, 1306 (W.D.N.C. 1969).

21. *See Swann v. Charlotte-Mecklenberg Bd. of Educ.*, 311 F. Supp. 265, 268-70 (W.D.N.C. 1970).

22. *Capacchione*, 57 F. Supp. 2d at 234-35. Dr. John A. Finger, Jr. was an expert in education administration. *See id.* at 234. He studied the school system and recommended a desegregation plan. *See id.* Dr. Finger’s plan for elementary schools was utilized, as well as his modifications for the school board’s plan for secondary schools. *See id.* at 234-35.

23. *See id.* at 234.

24. The Fourth Circuit vacated the plan for the elementary school declaring that it caused too great of a burden on the school board, but affirmed the district court’s decision on faculty desegregation and the plan for the secondary schools. *See id.* at 235.

25. *See Swann v. Charlotte-Mecklenberg Bd. of Educ.*, 399 U.S. 926 (1970).

26. *See Swann v. Charlotte-Mecklenberg Bd. of Educ.*, 318 F. Supp. 786, 788 (W.D.N.C. 1971).

27. *See Swann v. Charlotte-Mecklenberg Bd. of Educ.*, 402 U.S. 1 (1971).

28. 391 U.S. 430, 440 (1968) (holding that “‘freedom of choice’ is not an end in itself;” rather, “it is only a means to a constitutionally required end.”). Thus, *Green* established that a school system which had been enforcing de jure segregation at the time of *Brown I*, had an “affirmative duty” to desegregate, not merely an obligation to implement race-neutral policies. *Id.* at 437-38; *see also Capacchione*, 57 F. Supp. 2d at 233. *See infra* note 95 and 96 for an explanation of the difference between de jure and de facto segregation.

29. *Swann* 402 U.S. at 15.

30. *See Capacchione*, 57 F. Supp. 2d at 236.

31. *See id.*

32. *See id.*

33. *See Swann v. Charlotte-Mecklenberg Bd. of Educ.*, 67 F.R.D. 648, 649 (W.D.N.C. 1975).

observed.³⁴ The *Swann* case was not re-opened again until the *Capacchione* litigation in 1998.³⁵

In the period between 1975 and the *Capacchione* case in 1998, the city of Charlotte and Mecklenberg County experienced tremendous population growth and demographic changes.³⁶ As in most major cities, Charlotte grew from the inner city into the outward areas of the county,³⁷ losing many white residents through this suburbanization trend.³⁸ Blacks became more concentrated in the inner city.³⁹ The CMS system became the twenty-third largest school system in the United States.⁴⁰ In the 1997-98 school year, just over fourteen percent of the county's students, mostly Caucasian, attended private or home schooling.⁴¹ This was almost double the national average.⁴²

As demographic changes began to occur, CMS modified student assignment plans in an attempt to continue desegregation of the school system and provide diversity within the schools.⁴³ Due to the growing black population in the public elementary schools of CMS, the court permitted CMS to operate the elementary schools with a black student population that was fifteen percent greater than the district average.⁴⁴ The district court also re-stated that remedial race-based measures were permissible due to the persisting effects of past discrimination.⁴⁵

In 1992, CMS implemented a new assignment program that utilized magnet schools.⁴⁶ Along with the use of "stand-alone" and "mid-point" schools,⁴⁷ magnet schools allowed CMS to phase out "grouping and pairing,"⁴⁸ which had become unpopular and unstable methods of

34. *See id.*

35. *See Capacchione*, 57 F. Supp. 2d at 236.

36. *See id.* The population grew from 354,656 people in 1970 to 613,310 in 1997. *See also* U.S. Census Bureau Population Estimates for Cities with Populations of 100,000 and Greater (released June 30, 1999), available at <http://www.census.gov/population/www/estimates/citypop.html>.

37. *See Capacchione*, 57 F. Supp. 2d at 237.

38. *See id.* This is commonly referred to as "white flight." *See* JEFFREY A. RAFFEL, HISTORICAL DICTIONARY OF SCHOOL SEGREGATION AND DESEGREGATION: THE AMERICAN EXPERIENCE at 279-281 (1998).

39. *See Capacchione*, 57 F. Supp. 2d at 237.

40. *See id.*

41. *See id.* at 238 (citing North Carolina Division of Non-Public Education Report). Most of these students are white, while the racial composition of the students in the CMS system is approximately fifty percent white, forty-two percent black and eight percent other. *See id.*

42. *See id.* at 237.

43. *See id.* at 238.

44. *See id.* at 238-39.

45. *See* *Martin v. Charlotte-Mecklenberg Bd. of Educ.*, 475 F. Supp. 1318, 1341, 1343-44 (W.D.N.C. 1979).

46. *See Capacchione*, 57 F. Supp. 2d at 239. A magnet school is one "that offers a special curriculum capable of attracting substantial numbers of students of different racial backgrounds." 20 U.S.C. § 7204 (1994); *see also* CLAIRE SMREKAR AND ELLEN GOLDRING, SCHOOL CHOICE IN URBAN AMERICA: MAGNET SCHOOLS AND THE PURSUIT OF EQUALITY (1999).

47. A "stand-alone" school is located in a naturally integrated neighborhood, while a "mid-point" school is located halfway between black and white neighborhoods and draws students from both. *Capacchione*, 57 F. Supp. 2d at 239.

48. "Grouping and pairing" are used when one school is predominately black and another is white. *Id.* at 235. Half of the grades are bussed to one school, while the other half are bussed to the

desegregating schools.⁴⁹ For the authority to create the magnet schools, CMS relied on the district court's provision for "optional schools" in the court's order of July 30, 1974.⁵⁰

*B. Capacchione v. Charlotte-Mecklenberg Schools*⁵¹

In September 1997, William Capacchione, representing his daughter, Christina, filed a complaint against CMS.⁵² He sued CMS after his daughter was denied entrance into a specialized magnet school.⁵³ His daughter, Caucasian and Hispanic, fell into the "non-black" category the school used to allot seats in the magnet school.⁵⁴ He claimed that Christina was unconstitutionally denied admission to the magnet school due to "rigid racial enrollment quotas."⁵⁵ In October 1997, as CMS moved for dismissal, the original *Swann* plaintiffs moved to have the *Swann* case re-activated and consolidated with the *Capacchione* litigation.⁵⁶ They asserted, as did CMS in their motion for dismissal, that "past vestiges of the dual school system remained unremedied."⁵⁷ In March 1998, the court denied CMS's motion to dismiss and granted the *Swann* plaintiffs' motion.⁵⁸ In CMS's answer to the *Capacchione* complaint, it asserted that the program was "instituted in an attempt to comply with the court's orders"⁵⁹ from the *Swann* case. Mr. Capacchione then filed an amended complaint asserting that the discrimination in question was not justified by the desegregation plan laid out in *Swann*, because CMS had achieved unitary status long ago.⁶⁰

other school. *See id.*

49. *See id.* at 239.

50. *Swann v. Charlotte-Mecklenberg Bd. of Educ.*, 379 F. Supp 1102, 1103-04, 1106, 1108 (1974); *see also Capacchione*, 57 F. Supp. 2d at 239.

51. 57 F. Supp. 2d 228 (1999).

52. *See id.* at 239.

53. *See id.*

54. *Id.* CMS filled seats for the magnet school by selecting students from a "black" lottery and a "non-black" lottery to achieve racial balance. *Id.* at 287. The "black" spaces were allocated to a percentage of black students that equaled the system-wide percentage of black students; furthermore, there was an attempt to maintain racial balance within the grade levels. *See id.* For further analysis of the magnet school admissions policy, *see infra* text pp. 115-17.

55. *Id.* at 239. "Non-black," is one of three racial categories established by CMS, the other two being Caucasian and Hispanic. *Id.*

56. *See id.*

57. *Id.*

58. *See id.* at 239-40.

59. *Id.* at 240.

60. *See id.* In May of 1998, the court allowed Mr. Capacchione to intervene in the *Swann* action along with a concerned group of students' parents within the CMS system. *See id.* The Capacchiones moved to California with no intent to return to Charlotte in August of 1998. *See id.* Following this, the court in November of that same year ruled that Mr. Capacchione could not assert injunctive or declaratory relief because he lacked standing. *See id.* However, the court ruled that he had standing to pursue compensatory relief. *See id.*

III. BACKGROUND

A. *Desegregation Programs*

With the Supreme Court's abandonment of "separate but equal" educational facilities in *Brown I*, every school system was faced with the challenge of desegregating its schools.⁶¹ The Court was not satisfied that the de-jure laws instituting segregative conditions were abolished.⁶² It further mandated school systems "to eliminate the conditions and redress the injuries caused by the 'dual school system'."⁶³ In doing so, the Supreme Court recognized six areas of operation within a school system that must be freed of racial discrimination for the school to desegregate: student assignment, faculty, staff, transportation, facilities and extracurricular activities.⁶⁴

At first, the majority of school systems attempted to operate "freedom of choice" plans.⁶⁵ The theory behind these programs is that each child chooses a school they want to attend, and that the school system desegregates naturally.⁶⁶ In reality, white children did not choose to go to the former "negro" schools, and only a few black children would attempt to leap the societal hurdles in order to attend the former "white" schools.⁶⁷

In addressing the school boards' responsibilities in the failure of freedom of choice plans, the Supreme Court and the federal district courts installed various desegregation programs to effectuate change.⁶⁸ The courts have ordered the school boards to utilize non-racial attendance zones,⁶⁹ grouping and pairing,⁷⁰ stand-alone and mid-point schools,⁷¹ bussing,⁷² the closing of inadequate facilities, and the building of new schools in race-neutral areas. The Supreme Court also affirmed

61. *Brown I*, 347 U.S. 483; *see also* *Brown II*, 349 U.S. 294 (1955).

62. *See Green v. County Sch. Bd.*, 391 U.S. 430, 437 (1968). To read more on de jure laws, *see infra* note 95.

63. *Cappachione*, 57 F. Supp. 2d at 232.

64. *See Green*, 391 U.S. at 435. These are now known as the "Green Factors." *See Cappachione*, 57 F. Supp. 2d at 233.

65. James R. Dunn, *Title VI, The Guidelines and School Desegregation in the South*, 53 VA. L. REV. 42, 44 (1967). Although this article is centered on Title VI, it provides background information on early school desegregation programs.

66. *See id.*

67. *See id.*; *see also Green v. County Sch. Bd.*, 391 U.S. 430 (1968) (holding that "freedom of choice" does not end segregation, rather that it is a means to desegregation). The Court in *Green* stated that if "freedom of choice" schools were effective in desegregating the schools, then it was an acceptable means to desegregate. *See id.* at 440. However, if it failed, then other means must be utilized. *See id.*

68. Among its decrees, the courts have held that the burden of desegregation should not fall unfairly on black children. *See Swann*, 306 F. Supp. 1291, 1298 (W.D.N.C. 1969).

69. *See Swann v. Charlotte-Mecklenberg Bd. of Educ.*, 300 F. Supp. 1358, 1373 (W.D.N.C. 1969).

70. *See supra* note 48.

71. *See supra* note 47.

72. *See Swann v. Charlotte-Mecklenberg Bd. of Educ.*, 402 U.S. 1, 30 (1971).

the use of magnet schools as acceptable desegregation programs.⁷³

B. Local Control of Education

The Supreme Court has clearly spelled out that federal supervision of desegregation programs in local school systems was intended to be a temporary measure, and was not to operate in perpetuity.⁷⁴ As envisioned by the founders of this nation, local control of education permits the citizens of that area to participate in the decision-making process to ensure that school programs meet the needs of the local people.⁷⁵ Traditionally, school authorities have broad power to create and implement educational policies.⁷⁶ Once a school district has been released from a court-ordered desegregation injunction, it is not required to receive court authorization to institute policies addressing assignment of students and other related matters.⁷⁷

The Supreme Court has expressly stated that the school board has the power to design assignment programs that ensure diversity within its schools.⁷⁸ Further, the Supreme Court has decreed that it is the responsibility of the local school authorities to ensure that educational policies do not re-establish segregative conditions.⁷⁹ Moreover, the Supreme Court has repeatedly reaffirmed the importance of integration in education.⁸⁰

However, while a school board has broad power, its policies are

73. See *Milliken v. Bradley*, 433 U.S. 267, 272 (1977). See also *supra* note 46.

74. See *Bd. of Educ. of Oklahoma City Pub. Sch. v. Dowell*, 498 U.S. 237, 247-48 (1991) (holding that a federal court's regulatory control over previously de jure segregated school system is limited to the time necessary to remedy the effects of past intentional discrimination).

75. See *id.* at 248; see also *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 410 (1977) (stating that "[l]ocal autonomy of schools districts is a vital national tradition."). Local control of education comes from the Constitution: "The powers not delegated to the United States by the Constitution, not prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. The power to control education was not delegated to the federal government, rather it was left to the States to oversee.

76. See *Swann*, 402 U.S. at 16.

77. See *Dowell*, 498 U.S. at 250. "Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary. Judicial authority enters only when local authority defaults." *Swann*, 402 U.S. at 16.

78. See *id.* "School authorities are . . . charged with broad power to formulate and implement educational policy and might well conclude . . . 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." *Id.*; see also *Vaughns v. Bd. of Educ. of Prince George's County*, 742 F. Supp. 1275, 1298 (1990), *aff'd*, 977 F.2d 574 (1992), *cert. denied*, 506 U.S. 1051 (1993).

79. See *Swann*, 402 U.S. at 21; see also *Freeman v. Pitts*, 503 U.S. 467, 490 (1992). "Yet it must be acknowledged that the potential for discrimination and racial hostility is still present in our country, and its manifestations may emerge in new and subtle forms after the effects of de jure segregation have been eliminated. It is the duty of the State and its subdivisions to ensure that such forces do not shape or control the policies of its school systems." *Id.* at 490.

80. See generally, *Swann*, 402 U.S. 1. As the Court stated in *Freeman*, a historical fact that remains and continues is that "vestiges of past segregation by state decree" remain in both our society and school systems, as do "past wrongs to the black race" committed by both in the name of the State, and the State itself. *Freeman* 503 U.S. at 495. See also *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 286 (1986) (O'Connor, J. concurring). "It is one thing . . . to be taught . . . that color, like beauty is only 'skin deep'; it is far more convincing to experience that truth on a day to day basis, during routine, ongoing learning processes." *Id.* at 314-15 (Stevens, J.).

still subject to the Equal Protection Clause of the Fourteenth Amendment.⁸¹ As the Supreme Court has stated, a district court should evaluate any school board's decision under the appropriate equal protection analysis.⁸²

C. Equal Protection⁸³

The Equal Protection Clause of the Fourteenth Amendment provides, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."⁸⁴ The primary purpose of the clause "is to prevent the states from purposefully discriminating between individuals on the basis of race."⁸⁵ It commands the states to take affirmative actions to equally protect all persons' natural and inalienable rights.⁸⁶ It has evolved into a doctrine that not only is a demand for the equal enforcement of all laws, but also is an assertion of equality within the law itself.⁸⁷

The Equal Protection Clause does not imply that people who are different in fact need to be treated as if they were the same.⁸⁸ However, for equality's sake, it is required that those in comparable situations be treated similarly.⁸⁹ Furthermore, when classifications are used in law, they must be reasonable.⁹⁰ In determining the reasonableness of a classification, the court must look to the purpose of the law.⁹¹ Therefore, a classification is reasonable when it "includes all persons who are similarly situated with respect to the purpose of the law."⁹²

The Equal Protection Clause has taken two major roles: one of limiting permissible classifications in legislation, and the other in

81. See *Freeman*, 503 U.S. at 494-95; see also *Swann*, 402 U.S. at 16. "[I]t is important to remember that judicial powers may be exercised only on the basis of a constitutional violation." *Id.* at 16.

82. See *id.*; see also *Washington v. Davis*, 426 U.S. 229 (1976)(discussing the appropriate Equal Protection analysis).

83. What follows is a brief look at the Equal Protection Clause of the Fourteenth Amendment, and the standards of review used in equal protection analysis. For a deeper analysis see generally LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (2d ed. 1988); CHESTER JAMES ANTIEAU & WILLIAM J. RICH, *MODERN CONSTITUTIONAL LAW* § 25, 27, 30.04 (2d ed. 1997); RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* (2d ed. 1992); ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* § 9.1 -9.7 (1997).

84. U.S. CONST. amend. XIV, § 1. The Due Process Clauses of the Fifth and Fourteenth Amendment have been held to also protect the right of equal treatment to individuals as the Equal Protection Clause does. See TRIBE, *supra* note 83, § 16-1, at 1437.

85. *Shaw v. Reno*, 509 U.S. 630, 642 (1993); see also *Washington*, 426 U.S. at 239.

86. See Joseph Tussman and Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 341 (1949).

87. See *id.* at 342. "The equal protection of the laws is a pledge of the protection of equal laws." *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (Matthews, J.).

88. See Tussman & tenBroek, *supra* note 86, at 343.

89. See *id.* at 345.

90. See *id.* "A reasonable classification is one which includes all who are similarly situated and none who are not." *Id.*

91. See *id.* at 346.

92. *Id.*

counteracting “discriminatory” legislation.⁹³ The Clause is violated when a government entity treats similarly situated people differently based on a classification.⁹⁴ This is commonly referred to as de jure discrimination.⁹⁵ Conversely, when government fails to classify, or distinguish between persons differently situated in its rules or programs, this “non-classification” is known as de facto discrimination.⁹⁶ De facto discrimination is extremely difficult to prove and remedy through the Equal Protection Clause because it has social and economic causes that are established outside of the constitutional system.⁹⁷

D. Levels of Scrutiny in Equal Protection Theory

To determine if a school board’s policy violates the Equal Protection Clause, one must first determine the appropriate standard of review. At first glance, equal protection analysis seems to have developed into a rigid three tiered system: minimum rationality, intermediate scrutiny and strict scrutiny.⁹⁸ However, such formalism is not always followed, and the majority of the Justices on the Supreme Court advocate a flexible model.⁹⁹ Although a formal system provides guidance, a rigid formalistic interpretation would destroy any development of the Equal Protection Clause and impose on all future courts the current value system.¹⁰⁰ The Fourteenth Amendment was written to be intentionally ambiguous,¹⁰¹ allowing its growth over time to

93. *Id.* at 342.

94. See TRIBE, *supra* note 83, § 16-1, at 1438.

95. See *id.* at 1439. De jure is a latin term meaning “by right.” De jure segregation is segregation mandated by law. PETER G. RENSTROM, CONSTITUTIONAL RIGHTS SOURCEBOOK 638 (1999); see also RAFFEL *supra* note 38, at 233-35.

96. See TRIBE, *supra* note 83, § 16-1, at 1438-39. De facto means “in fact,” a condition that has status as a function of its existence or through established practice. RENSTROM, *supra* note 95, at 638; see also RAFFEL, *supra* note 38, at 233.

97. RENSTROM, *supra* note 95, at 638. Even so, the Supreme Court has stated that “sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike.” *Jenness v. Fortson*, 403 U.S. 431, 442 (1971).

98. See ANTIEAU & RICH, *supra* note 83, § 25.05, at 16. The tiered approach is traceable to *The Slaughter House Cases*, 83 U.S. 36 (1872). It was here that the Court decided that racial discrimination should be held to a different standard than economic regulatory issues. Justice Stone’s opinion in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), further complicated equal protection analysis. See *id.* at 153 n.4; see also ANTIEAU & RICH, *supra* note 83, § 25.02.

99. See ANTIEAU & RICH, *supra* note 83, § 25.05, at 16; see also *Plyler v. Doe*, 457 U.S. 202 (1982) (finding that although education does not qualify as a fundamental interest, the complete denial of public school education should trigger heightened scrutiny).

100. See ANTIEAU & RICH, *supra* note 83, § 25.05, at 16-17.

The concept of equal protection is inherently vague and, like other grand concepts embodied in the Constitution, it leaves room for flexibility and development as specific conceptions of equality change from one generation to the next. Too much formalism represents an urge to limit that development and to bind future courts to current values.

Id.

101. See *id.*, § 25.01, at 3-4.

The Equal Protection Clause of the Fourteenth Amendment contains a level of intentional ambiguity that courts must inevitably work to resolve . . . [b]ut the framers chose general language rather than words which focused on issues of race.

Id.

adhere to the population's needs. Any efforts made to curtail that growth should not survive.¹⁰²

The most deferential of the three standards of review is termed "minimum rationality."¹⁰³ This standard of review requires that the law in question have a rational relationship to a legitimate public purpose or government interest.¹⁰⁴ Under this standard of review, the court will consider the reasons proposed by the state, but may also determine upon its own reasoning why a law is rationally linked to a valid government interest.¹⁰⁵ In other words, there is a presumption that the law is constitutional.¹⁰⁶

An additional test has spun off from the minimum rationality test. During the 1980s, the Supreme Court began to make a more penetrating inquiry when utilizing the "rational basis" standard.¹⁰⁷ Justice Marshall labeled this type of review as "second order rational basis."¹⁰⁸ Under this review, courts consider only the reasons supplied as defenses by the State.¹⁰⁹ Also, the scrutiny used in reviewing the means and ends of achieving a governmental goal are of a higher level.¹¹⁰ Although it is said that second order rational basis grew out of minimum rationality, its traits are akin to intermediate scrutiny, the next level of review.¹¹¹

Intermediate scrutiny requires that a law must have a substantial relationship to the achievement of important governmental objectives.¹¹² Broadly, there are two circumstances that activate intermediate scrutiny.¹¹³ First, intermediate scrutiny is triggered when an important (but not fundamental) right, such as education, medical services, shelter, or food is involved.¹¹⁴ Secondly, intermediate scrutiny is activated when the government uses sensitive, or quasi-suspect, rather than suspect, criteria in classification.¹¹⁵

102. See *id.* §25.05, at 17.

103. TRIBE, *supra* note 83, § 16-2, at 1439-40. See generally ROTUNDA & NOWAK, *supra* note 83, § 18.3, at 14.

104. See TRIBE, *supra* note 83, § 16-2, at 1440. See also ROTUNDA & NOWAK, *supra* note 83, § 18.3, at 14.

105. See TRIBE, *supra* note 83, § 16-2, at 1440.

106. See *id.* at 1442-43.

107. *Id.* at 1444.

108. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 458 (1985) (Marshall, J., concurring in the judgment in part and dissenting in part) ("[P]erhaps the method employed [in *Cleburne*] must hereafter be called 'second order' rational basis review . . .").

109. See TRIBE, *supra* note 83, § 16-2, at 1444-5.

110. See *id.*

111. See generally Gayle Lynn Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 800-03 (1986-87) (stating that second order rational review is in essence intermediate scrutiny used by the courts to disguise the imposition of their personal morals on the Equal Protection Clause).

112. See *Craig v. Boren*, 429 U.S. 190, 197 (1976). See generally ANTIEAU & RICH, *supra* note 83, § 30.04; ROTUNDA & NOWAK, *supra* note 83, § 18.3, at 18.

113. See TRIBE, *supra* note 83, § 16-32, at 1612-13.

114. See generally ROTUNDA & NOWAK, *supra* note 83, § 18.3, at 12-22, § 18.14-18.24.

115. See TRIBE, *supra* note 83, § 16-32, at 1602; §16-33, at 1613. The factors, which determine quasi-suspect classifications, are complicated and vague. The Supreme Court has used intermediate

The highest level of judicial examination, and least deferential, is strict scrutiny.¹¹⁶ To be deemed constitutional, strict scrutiny requires that the law in question serve a “compelling governmental interest and [is] narrowly tailored” to meet that goal.¹¹⁷ This level is applied when a fundamental right or a suspect class is involved.¹¹⁸ Conceptually, if the court finds that the classification is not needed to achieve a particular goal, the law will be held to violate the Equal Protection Clause.¹¹⁹ Courts applying strict scrutiny rarely find a law constitutional.¹²⁰

IV. ANALYSIS

What remains is the question of what level of scrutiny the courts should apply to a school board’s race-conscious policy when the school system has been subject to a remedial court-ordered desegregation decree.¹²¹

A. Analysis of the *CAPACCHIONE* Decision

The court began its analysis of the magnet school admissions policy by determining that the appropriate standard of review was strict scrutiny.¹²² The court stated that the policy’s use of racial classifications was clear, and that the magnet school program granted “preferences based on race.”¹²³ The court relied on the holding in *Adarand v. Peña*,¹²⁴ that all “racial classifications” are subject to strict scrutiny, and therefore must further a compelling government interest and be narrowly tailored to pass constitutional muster.¹²⁵

The court accepted CMS’s argument that it was under a court-ordered desegregation decree, and was therefore acting to further the

scrutiny specifically in cases involving gender and illegitimacy, but has not stated clearly in other cases exactly which standard it was utilizing.

116. See *TRIBE*, *supra* note 83, § 16-6, at 1451-52. See generally *ROTUNDA & NOWAK*, *supra* note 83, § 18.3, at 15.

117. *Capacchione v. Charlotte-Mecklenberg*, 57 F. Supp. 2d 228, 287 (W.D.N.C. 1999); see also *TRIBE*, *supra* note 83, § 16-6, at 1451-52.

118. When race or national origin is the basis for a classification, a suspect class has been utilized and the court will apply strict scrutiny. See *ROTUNDA & NOWAK*, *supra* note 83, § 18.5-18.8, at 67-112; see also *TRIBE*, *supra* note 83, § 16-6, at 1451-52.

119. See *ROTUNDA & NOWAK*, *supra* note 83, § 18.3, at 15.

120. “When expressed as a standard for judicial review, strict scrutiny is, in Professor Gunther’s formulation, ‘strict’ in theory and usually ‘fatal’ in fact.” *TRIBE*, *supra* note 83, § 16-6, at 1451-52. See also, Gerald Gunther, *The Supreme Court, 1971 Term – Foreword: In Search of Evolving Doctrine on a Changing Court: A Model For a Newer Equal Protection*, 86 *HARV. L. REV.* 1, 8 (1972).

121. The answer to this question has not been made clear by the Supreme Court. Race-conscious remedies arising out of court-ordered desegregation decrees may escape the strict scrutiny given to voluntary plans on the theory that they are less likely to constitute disguised political prejudice.

122. See *Capacchione*, 57 F. Supp. 2d at 287.

123. *Id.* at 287-88. See also *Bakke*, 438 U.S. at 289 (1978).

124. 515 U.S. 200, 215-16 (1995) (holding that strict scrutiny should be applied to all race-based governmental classifications) (emphasis added).

125. *Capacchione*, 57 F. Supp. 2d at 287.

government's compelling interest.¹²⁶ Next, the court addressed whether the magnet school admissions policy was narrowly tailored. As stated in *United States v. Paradise*,¹²⁷ there are five factors used in determining whether a race-based affirmative action program is narrowly tailored.¹²⁸ Upon review of these factors, the court found that the admissions policy for the magnet schools was not narrowly tailored.¹²⁹ Furthermore, the court stated that CMS was in effect "standing in the schoolhouse door," turning students away on the basis of race, which was inconsistent with *Brown I*'s mandate for race neutrality.¹³⁰

B. Race-Conscious Programs v. Race-Based Programs

This article posits that there is a fundamental difference between race-conscious programs and race-based programs. Race-based programs have been described as providing preferential treatment to one racial group purely on the basis of race.¹³¹ In other words, race-based programs are racial classifications that subject a person to unequal treatment.¹³² In comparison, race-conscious plans neither bestow a specific racial group with an advantage, nor do they foist a burden on another racial group.¹³³ Race-conscious programs are policies that consider race, but equally impact all racial groups.¹³⁴

An example may help solidify the distinction posited by this article. Suppose a school district created a magnet school program for 100

126. See *id.* at 288-89.

127. 480 U.S. 149 (1987).

128. "(1) [T]he necessity of the policy; (2) the flexibility of the policy, including the availability of waiver provisions; (3) the relationship of the numerical goal to the relevant population; (4) the burden of the policy on innocent third parties; and (5) the duration of the policy." *Capacchione*, 57 F. Supp. 2d at 289; see also *Paradise* 480 U.S. at 171.

129. See *Capacchione*, 57 F. Supp. 2d at 290.

130. *Id.* This raises the question of how a school board's policy could not take race into account when the subject is race.

131. See *Stanley v. Darlington County Sch. Dist.*, 915 F. Supp. 764, 774 (1996).

132. See *Miller v. Johnson*, 515 U.S. 900 (1995). "Laws classifying citizens on the basis of race cannot be upheld unless they are narrowly tailored to achiev[e] a compelling state interest." *Id.* at 904.

When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The "injury in fact" in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit. . . [a]nd in the context of a challenge to a set-aside program, the "injury in fact" is the inability to compete on an equal footing . . .

Northeastern Florida Ch. Assoc. Gen. Contractors of Am. v. City of Jacksonville, Fla., 508 U.S. 656, 666 (1993).

133. See *Stanley*, 915 F. Supp. at 775.

134. See *id.* See also *Martin v. Sch. Dist. of Philadelphia*, 1995 WL 564344 *1, *2 (E.D. Pa. 1995) (distinguishing race-conscious plans from the race preferential programs in *Adarand* and *Croson*); *McLaughlin v. Boston Sch. Comm.*, 938 F. Supp. 1001, 1008-09 (Mass. 1996) (distinguishing race-conscious and race-neutral programs from the race-preferential programs in *Adarand* and *Croson*, and stating further that intermediate scrutiny should be applied to those programs that utilize race in a non-preferential way.)

students with superior academic achievement. Other factors, such as community service, background and diverse experiences were considered, but the thrust of the admission process was driven by school performance and entrance examinations.¹³⁵ Suppose further that there were not enough academically eligible Caucasian students to racially balance the new magnet school, even when considerations were made for other factors. If the school were to set aside forty percent of the seats for Caucasian students based on their race alone this would be racially preferential towards one racial group and detrimental for others. Thus, strict scrutiny would apply.¹³⁶

On the other hand, a non-academic performance driven magnet school that utilized a race-conscious plan would be created entirely differently. Suppose the school system was twenty-five percent Caucasian, thirty-five percent Hispanic and forty percent Black. To keep a racial balance that reflected the community as a whole, the admissions process could create twenty-five seats to be filled by Caucasians, thirty-five seats for Hispanics, and forty seats for Blacks. No preference or detriment would be created because each racial group is afforded an equal opportunity for available seats within the school district's racial make-up. Furthermore, this type of program would ensure a diverse student body that could benefit from its various experiences and backgrounds.

C. *Adarand Constructors v. Pena*¹³⁷

In *Adarand*, the Supreme Court considered a Fifth Amendment equal protection challenge to a federal program designed to provide preferential hiring of minority subcontractors.¹³⁸ In 1989, a division of the United States Department of Transportation awarded a construction project to Mountain Gravel & Construction Company.¹³⁹ The contract provided for additional compensation if Mountain Gravel hired subcontractors that were certified as "socially and economically disadvantaged individuals."¹⁴⁰ Although Adarand Construction was the lowest bidder for the subcontract, Mountain Gravel awarded it to a company that qualified Mountain Gravel for the additional compensation.¹⁴¹

The Supreme Court ruled in *Adarand* that the guarantees of equal protection imposed by the Fifth and Fourteenth Amendments were

135. See generally, *McLaughlin v. Boston Sch. Comm.*, 938 F. Supp. 1001 (Mass. 1996).

136. See *Miller*, 515 U.S. at 904; see also *Stanley*, 915 F. Supp. at 774; *Martin*, 1995 WL 564344 at *2.

137. 515 U.S. 200 (1995).

138. See *id.* at 204. see also *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

139. See *Adarand*, 515 U.S. at 205.

140. *Iid.*

141. See *id.* The company stated that they would have otherwise given the contract to Adarand.

indistinguishable.¹⁴² Further, the Court held all voluntary race-based affirmative action programs should be reviewed under strict scrutiny and that all racial classifications imposed by any federal, state or local government entity must be analyzed under a strict scrutiny analysis.¹⁴³ The Court also recognized that remedial measures that are created to compensate victims of proven governmental discrimination are still necessary, and may survive a strict analysis.¹⁴⁴ This is a break in tradition from the Court's past formalism and displays the Court's approval of a more flexible model.¹⁴⁵ Thus, the Court in *Adarand* reaffirmed that equal protection analysis should be viewed as pliable rather than static.

D. Intermediate Scrutiny to be Applied in Race-Conscious Policies

The Supreme Court has never specifically addressed the appropriate level of scrutiny to apply to race-conscious programs designed to desegregate what have historically been racially discriminating schools.¹⁴⁶ However, several lower courts have held that the appropriate standard of review is intermediate scrutiny for these types of race-conscious policies. The Sixth Circuit, in *Jacobson v. Cincinnati Board of Education*,¹⁴⁷ affirmed the district court's decision that a school board's race-conscious program should be reviewed under intermediate scrutiny, while strict scrutiny should apply to race-preferential policies.¹⁴⁸

In *Jacobson*, teachers challenged a race-conscious transfer policy adopted by the school board.¹⁴⁹ To establish a specific racial balance, the

142. See *id.* at 217-18 (citing to *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638, n.2 (1975); *Buckley v. Valeo*, 424 U.S. 1, 93 (1976); *United States v. Paradise*, 480 U.S. 149, 166, n.16 (1987)).

143. See *id.* at 217, 227. See also *Croson*, 488 U.S. 469 (1989). It is important to note that the Supreme Court in *Adarand* was reviewing a case in which the law was designed as a voluntary race-based affirmative action program that conferred a benefit or burden on a particular race.

144. See *Adarand*, 515 U.S. at 237.

[W]e wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.' The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it.

Id. (O'Connor, J. quoting, for herself and Justice Kennedy, *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring)).

145. Evidence of this change is also apparent by the Court's holding in *Miller v. Johnson*, 515 U.S. 900 (1995), which stated that constitutional standards are violated by congressional re-districting only when race becomes the "predominant factor." *Id.* at 917.

146. See *Stanley v. Darlington*, 915 F. Supp. 764, 775 (1996). See also *Kromnick v. Sch. Dist. of Philadelphia*, 739 F.2d 894 (1984), *cert. denied*, 469 U.S. 1107 (1985); *Vaughns v. Bd. of Educ. of Prince George's County*, 742 F. Supp. 1275 (1990), *aff'd*, 977 F.2d 574 (1992), *cert. denied*, 506 U.S. 1051 (1993); *Jacobson v. Cincinnati Bd. of Educ.*, 961 F.2d 100 (6th Cir. 1992), *cert. denied*, 506 U.S. 830 (1992).

147. 961 F.2d 100 (6th Cir. 1992), *cert. denied*, 506 U.S. 830 (1992).

148. See *id.* at 103. It is important to note here that this decision was made post-*City of Richmond v. Croson*, 488 U.S. 469 (1989) (holding that the Fourteenth Amendment requires strict scrutiny of all race-based action by state and local governments) (emphasis added). See also *Vaughns v. Bd. of Educ. of Prince George's County*, 742 F. Supp. 1275, 1297 (D. Md. 1990) (applying lower level of scrutiny to faculty assignment policy which was intended to prevent schools from being identified by race, but concluding that such policy also would withstand strict scrutiny if required).

149. See *Jacobson*, 961 F.2d. at 101.

policy restricted the ability of teachers to voluntarily transfer between schools, and it required the reassignment of other teachers.¹⁵⁰ The Sixth Circuit affirmed the district court's finding that the policy was race-conscious, in that it allowed them to utilize race, but in a neutral way.¹⁵¹ In application, the policy acted equally towards black and white teachers, thus, not establishing a preference for either race.¹⁵² The court stated that because the classification was not preferential, the most appropriate standard could possibly be minimum rationality.¹⁵³ However, since race was utilized, the court reasoned that intermediate scrutiny was most appropriate because the program did not "prefer one race over another."¹⁵⁴

Similarly in *Kromnick v. School District*,¹⁵⁵ the Third Circuit used an intermediate standard of review when faced with a policy that was race-conscious, but not race-preferential.¹⁵⁶ The court reviewed a policy instituted by the Philadelphia Board of Education, which sought to maintain a specific faculty ratio of black to white teachers at each school that reflected the overall racial composition of the faculty in the district.¹⁵⁷ The Third Circuit overruled the lower court's decision for they found no preference scheme like the type used in race-based affirmative action.¹⁵⁸ The program was considered by the Third Circuit to be racially neutral, in that there was no burden or benefit placed on a particular race because transfer was required of both white and black teachers.¹⁵⁹ Therefore, the court ruled that intermediate scrutiny was the appropriate standard of review.¹⁶⁰

Even though the court used a "broad brush in painting the *Adarand* framework,"¹⁶¹ it is questionable whether its holding in *Adarand*¹⁶² should apply to the magnet school admissions policy in *Capacchione*.¹⁶³ There is indication, evidenced in the *Adarand* decision itself, that the Supreme Court will concur with the other lower courts' decisions to use intermediate scrutiny for race-conscious policies. First, in support of race-conscious policies, the Court specifically excluded all "race-neutral statutes and regulations" from its decision to use strict

150. *See id.* at 101-02.

151. *See id.* at 102.

152. *See id.*

153. *See id.* at 103.

154. *Id.*

155. 739 F.2d 894 (3d Cir. 1984), *cert. denied*, 469 U.S. 1107 (1985).

156. *See id.* at 903.

157. *See id.* at 896.

158. *See id.* at 902-03.

159. *See id.*

160. *See id.*

161. *See Stanley v. Darlington County Sch. Dist.*, 915 F. Supp. 764, 774 (1996).

162. 515 U.S. 200 (1995).

163. *See Capacchione*, 57 F. Supp. 2d 228, 294 (1999).

scrutiny.¹⁶⁴ Secondly, the Court also differentiated the decisions regarding school desegregation.¹⁶⁵ This is a clear indication from the Court that it considers school desegregation cases to form a separate category. Lastly, the concept of “unequal treatment” permeates the Court’s decision in *Adarand* to use strict scrutiny when reviewing race-based policies.¹⁶⁶ Clearly, the Court’s decision in *Adarand* hinges on the policy in question, using some type of preference scheme that benefits or burdens a person based solely on race.¹⁶⁷ The Court’s reasoning that a classification must subject a person to unequal treatment¹⁶⁸ falls in line with the lower courts’ decisions that strict scrutiny is called for only when the program benefits or burdens a person based on race.¹⁶⁹

E. The CMS Magnet School Admissions Policy

As noted by the district court, the appropriate question regarding the school district’s departure from the desegregation order is whether the magnet school admissions policy harmed an individual’s rights.¹⁷⁰ The district court began its analysis upon the assumption that any use of racial criteria was subject to a strict scrutiny analysis, and that the magnet school admissions process clearly used “racial classifications.”¹⁷¹ However, a deeper analysis of the admissions process shows that the program is a race-conscious program as opposed to a race-based program utilizing racial classifications.

CMS’s magnet school admissions policy required that seats first be filled based on whether the student lived in the neighborhood or had a sibling attending the school.¹⁷² Then, to achieve racial balance, CMS proceeded to select students from a “black” lottery and a “non-black” lottery to fill the remaining seats.¹⁷³ The 1992 student assignment plan stated that “[s]paces in magnet schools will be allocated to a percentage of black students that equals the system-wide percentage of black

164. *Adarand*, 515 U.S. at 212-13. “[T]he Subcontracting Compensation Clause program . . . is subject only to ‘the most relaxed judicial scrutiny . . . [t]o the extent that the statutes and regulations involved in this case are race-neutral, we agree.’” *Id.*

165. “Later cases *in contexts other than school desegregation* did not distinguish between the duties of the States and the Federal Government to avoid racial classifications.” *Id.* at 216 (emphasis added).

166. *Id.* at 224, 228, 229-30.

167. *See id.* at 204 (minority hiring preferences); *see also Paradise*, 480 U.S. 149 (promotional preferences accorded to minorities); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (race-based shield from lay-offs accorded minority teachers).

168. *See Adarand*, 515 U.S. at 224.

169. *See Stanley v. Darlington County Sch. Dist.*, 915 F. Supp. 764, 774-75 (1996).

170. *See Capacchione v. Charlotte-Mecklenberg*, 57 F. Supp. 2d 228, 287 (W.D.N.C. 1999).

171. *See id.*

172. *See id.* *See also Stanley*, 915 F. Supp. 764. “[R]eserving community seats was one of the key program components because it gave the community a sense of ownership in the school . . . educational research demonstrates that programs work much better when there is some feeling of neighborhood ownership.” *Id.* at 770.

173. *Capacchione*, 57 F. Supp. 2d at 273.

students.¹⁷⁴ Grade levels will maintain racial balance.”¹⁷⁵ Furthermore, the policy stated that applicants on the waiting list would be admitted in a manner that would maintain the 40 percent/60 percent racial balance.¹⁷⁶ If there were not enough applicants to fill the program to establish the desired racial balance, then fluctuations would be allowed.¹⁷⁷

The 40/60 plan did not provide a preference to any particular racial group attempting to gain admission because both races were afforded an equal opportunity to apply for available magnet school seats based on the community’s racial composition.¹⁷⁸ The 40/60 plan did not bestow a particular racial group an advantage because it approximated the community’s racial make-up.¹⁷⁹ Nor did the plan inflict a burden on another racial group, unlike the race-preference schemes considered in *Adarand*.¹⁸⁰ Hence, the 40/60 program was not a “racial classification” subjecting any person to detrimental or beneficial treatment. The magnet school program, like the programs in *Jacobson*¹⁸¹ and *Kromnick*,¹⁸² clearly fits the model of a race-conscious program, in that its policies considered race, but equally impacted all racial groups.¹⁸³ Consequently, strict scrutiny should not have been applied.

Intermediate scrutiny is triggered when there is an important, but not fundamental right at stake, such as education.¹⁸⁴ In being subject to intermediate scrutiny, the race-conscious program must have a substantial relationship to the achievement of an important governmental objective.¹⁸⁵ School authorities have broad power in the educational policies of their school districts.¹⁸⁶ It is within their administrative authority to implement assignment programs that promote diversity within the school system.¹⁸⁷ A federal district court should only intervene when there has been a constitutional violation.¹⁸⁸

174. *Id.*

175. *Id.*

176. *See id.*

177. *See id.*

178. *See Stanley*, 915 F. Supp. at 775. One might even argue that non-blacks, as Ms. Capacchione is, have a greater opportunity to gain admission.

179. *See id.*

180. *See id.*

181. 961 F.2d at 100 (6th Cir. 1992), *cert. denied*, 506 U.S. 830 (1992).

182. 739 F.2d 894 (3d Cir. 1984), *cert. denied*, 469 U.S. 1107 (1985).

183. *See Stanley*, 915 F. Supp. at 775. In both *United States v. Montgomery County Bd. of Educ.*, 395 U.S. 225 (1969) and *Swann v. Charlotte-Mecklenberg Bd. of Educ.*, 402 U.S. 1 (1971), the Supreme Court expressly upheld the use of race-conscious assignment programs that utilized mathematical racial balancing ratios. The Supreme Court again restated this conclusion in *North Carolina State Bd. of Educ. v. Swann*, 402 U.S. 43, 45-46 (1971). *See also Vaughns v. Bd. of Educ. of Prince George’s County*, 742 F.Supp. 1275, 1298 (1990).

184. *See TRIBE*, *supra* note 83, § 16-32, at 1602, 1612-13.

185. *See Craig v. Boren*, 429 U.S. 190, 197 (1976).

186. *See Swann*, 402 U.S. at 16.

187. *See id.*; *see also Vaughns*, 742 F. Supp. at 1298.

188. *See Freeman v. Pitts*, 503 U.S. 467, 495 (1992).

The Supreme Court itself has proclaimed that a school board may design assignment programs to ensure diversity,¹⁸⁹ and has established that a school board has a responsibility to prevent the school system from re-establishing segregative conditions.¹⁹⁰ It follows that the magnet school admissions program is substantially related to an important governmental objective.¹⁹¹ Thus, a school district should be entitled to substantial discretion in creating and implementing race-conscious assignment programs when it has been subject to a remedial court-ordered decree to desegregate. Strict scrutiny should be reserved for circumstances in which a school system has instituted a voluntary, race-based program.

V. CONCLUSION

Race-conscious programs take race into account, but do not benefit or burden a person based on race as do preferential race-based policies. In order to remedy historical racial discrimination, race must be utilized in a non-preferential way. Utilization of an intermediate standard of review, for race-conscious policies instituted by school systems court-ordered to desegregate, will allow school systems to eradicate the past vestiges of their dual school systems. Therefore, if racial classifications that confer a benefit or burden are absent, courts should apply intermediate scrutiny to school boards' race-conscious policies.

189. *See Swann*, 402 U.S. at 16.

190. *See id.* at 21; *see also Freeman*, 503 U.S. at 490.

191. *See* TRIBE, *supra* note 83, § 16-32, at 1602, § 16-33, at 1612-13.