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# The Emerging Law of Race and Student Assignment Plans

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John Charles Boger and Elizabeth Jean Bower

TODAY, more than at any time since 1954, North Carolina school boards face a legal challenge to the tools of desegregation, a challenge with the potential to undo much of the educational diversity that has been achieved since *Brown v. Board of Education*.<sup>1</sup> The new challenge has found its first decisive judicial expression in three recent federal decisions, two of them rendered by the U.S. Court of Appeals for the Fourth Circuit and the third by a federal district court sitting in Charlotte: *Tuttle v. Arlington County School Board*,<sup>2</sup> *Eisenberg v. Montgomery County Public Schools*,<sup>3</sup> and *Capacchione v. Charlotte-Mecklenburg Schools*.<sup>4</sup> Together these decisions suggest important new constitutional do's and don'ts for local school boards. The requirements depart sharply from the rules laid down during the *Brown* era, adherence to which now seems to be second nature for administrators, teachers, students, and parents in public schools throughout North Carolina and the nation.

In essence the new decisions forbid all school boards (unless they are operating under federal desegregation decrees) from considering race or ethnicity as they assign children to public schools. The prohibition

holds even if it leads to resegregated schools, even if most parents desire their children to attend racially diverse schools, and even if school boards are acting in good faith to ensure that students receive the educational benefits that may come from a diverse school environment.

The future of the new principles announced in *Tuttle*, *Eisenberg*, and *Capacchione* remains uncertain. To date, the Supreme Court has not agreed to consider them. However, they might eventually require greater real change in school attendance policies (and perhaps also in faculty and staff assignment policies) than any court decisions since *Brown*. Moreover, the Fourth Circuit Court decisions set forth constitutional rules that purport to bind every school district within the circuit, which includes Maryland, North Carolina, South Carolina, Virginia, and West Virginia. So North Carolinians cannot ignore them. Instead, every state and local school board and every interested parent must give them close attention.

Understanding this potential change requires that interested citizens and public school officials review the constitutional landscape of school assignment policies. This article undertakes that review. First, it looks at the legal requirements created by *Brown* and two important cases that followed it—*Green v. County School Board of New Kent County*<sup>5</sup> in 1968 and *Swann v. Charlotte-Mecklenburg Board of Education*<sup>6</sup> in 1971. Together the three cases clarified the specific obligations resting on

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1. *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

2. *Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698 (4th Cir. 1999), *cert. dismissed*, 120 S. Ct. 1552 (2000).

3. *Eisenberg v. Montgomery County Public Schs.*, 197 F.3d 123 (4th Cir. 1999).

4. *Capacchione v. Charlotte-Mecklenburg Schs.*, 57 F. Supp. 2d 228 (W.D.N.C. 1999), *reversed sub nom. Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 233 F.3d 232 (4th Cir. 2000); *opinion vacated and rehearing en banc granted* Jan. 17, 2001.

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5. *Green v. County Sch. Bd. of New Kent County*, 391 U.S. 430 (1968).

6. 402 U.S. 1 (1971).

all school systems found to have engaged in formal racial segregation. Next, the article examines three Supreme Court cases from the early 1990s that offer important new guidance on when and how school districts under court order can gain release from further judicial oversight.

The article then reviews the basics of another body of law on the Equal Protection Clause that has emerged in response to the debate over affirmative action in government contracting, public employment, and college admissions. It explores how the Fourth Circuit Court in *Tuttle* and *Eisenberg* has applied that body of law in a new context—the assignment of children to elementary and secondary public schools. Finally, because *Tuttle* and *Eisenberg* constitute the law that now applies to school districts in the Fourth Circuit, the last two portions of the article assess the legal choices still open to school boards and parents in North Carolina and describe some innovative steps being taken in Wake County.

## Desegregation: 1954 to 1990

In May 1954 the U.S. Supreme Court declared in *Brown* that the South's traditional "dual system" of public education was inconsistent with the Equal Protection Clause of the Fourteenth Amendment.<sup>7</sup> *Brown* directly challenged the fundamental policy reflected in public school segregation—the assignment of black and white children to different schools.

After *Brown*, many Southern school boards initially chose to ignore or defy the Court and the Constitution, invoking principles of state sovereignty and long-standing racial traditions. After years of stubborn resistance in some districts and grudging acquiescence in others,<sup>8</sup> most school districts eventually began to implement school desegregation in earnest. Widespread change did not begin, however, until 1965,

7. The Equal Protection Clause reads, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

8. See C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 154–68 (3d rev. ed., New York: Oxford Univ. Press, 1974) (recounting the post-1954 campaign of state resistance to school desegregation, especially in Virginia and the Deep South); WILLIAM H. CHAFEE, *CIVILITIES AND CIVIL RIGHTS: GREENSBORO, NORTH CAROLINA AND THE BLACK STRUGGLE FOR FREEDOM* 48–70 (paperback ed., New York: Oxford Univ. Press, 1981) (describing North Carolina's development and implementation of the Pearsall Plan, which was designed to obstruct and delay school desegregation).

when Congress first conditioned eligibility for its massive education spending program under the Elementary and Secondary Education Act on compliance with the antidiscrimination provisions of the Civil Rights Act of 1964.<sup>9</sup>

Even after desegregation began in earnest, protracted legal challenges continued in the 1960s and 1970s as federal courts struggled to resolve many legal and educational debates over the meaning of *Brown*'s central insight that "[s]eparate educational facilities are inherently unequal." Not until 1968, in the watershed case of *Green*, did the Supreme Court finally outline the changes that would be necessary in every formerly segregated school system. Every such system, it announced, bore an "affirmative duty" to "take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." The *Green* Court specified at least six areas in which federal courts should measure progress toward a "unitary" (desegregated) school system: (1) student enrollments, (2) faculty assignments, (3) administrative and staff assignments, (4) transportation to schools, (5) extracurricular activities, and (6) physical facilities.<sup>10</sup>

The *Green* Court rejected the school district's argument that it had complied with its desegregation obligations when, in 1965, it adopted a "freedom of choice" approach that permitted all parents—black or white—to choose the public school their children would attend. Offering school choice, the Court held, did not suffice in the New Kent County school district because that plan had not worked in practice to achieve measurable student desegregation.<sup>11</sup> *Green* made unmistakably clear that the Fourteenth Amendment requires

9. The Civil Rights Act of 1964, Title VI, 42 U.S.C. §§ 2000d, 2000d.1. to 2000d.4 (1994). Before congressional enactment of Title VI, which denies federal funds to any state or local authorities that discriminate on the basis of race, only 2.25 percent of all African-American schoolchildren in the South were actually attending desegregated schools. James R. Dunn, *Title VI, the Guidelines and School Desegregation in the South*, 53 VIRGINIA L. REV. 42, 44, n.9 (1967). See also Gary Orfield, *Turning Back to Segregation*, in *DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION* (Gary Orfield & Susan E. Eaton eds., New York: New Press, 1996).

10. *Green*, 391 U.S. at 435.

11. "'Freedom of choice' is not a sacred talisman; it is only a means to a constitutionally required end—the abolition of the system of segregation and its effects. If the means prove effective, [freedom of choice] is acceptable, but if it fails to undo segregation, other means must be used to achieve this end. The school officials have the continuing duty to take whatever action may be necessary to create a 'unitary, non-racial system.'" *Green*, 391 U.S. at 440, quoting *Bowman v. County School Bd.*, 382 F.2d 326, 333 (4th Cir. 1967) (Sobeloff, J., concurring).

tangible results—real racial integration—not merely compliance with formal color-blind procedures.

In 1971 the Supreme Court again turned to the issue of school desegregation in *Swann*, a famous decision involving the Charlotte-Mecklenburg school district. Speaking for all nine justices, Chief Justice Warren Burger held that federal courts were fully authorized to require a variety of tools to achieve school desegregation, including (1) express racial percentages as initial targets in assigning students to desegregating schools; (2) express racial ratios of faculty and staff; (3) administrative “pairing” and “clustering” of two or more geographically distant residential areas to create racially diverse student assignment zones; and (4) use of cross-town busing or other transportation remedies, if necessary. The Court acknowledged that school boards would need to consider students’ races expressly as they assigned students to schools in order to achieve meaningful desegregation.<sup>12</sup>

In a companion case decided the same day as *Swann*, the Court condemned a North Carolina state statute that forbade assignment of children by race, local school board plans relying on racial balances or ratios, and use of involuntary busing.<sup>13</sup> Again writing for a unanimous Court, Chief Justice Burger rebuffed North Carolina’s argument that the Constitution required color-blind student assignments and forbade any use of racial balancing in public education. He described race-conscious student assignments as an essential tool to fulfill “the promise of *Brown*”:

Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy. To forbid, at this stage, all assignments made on the basis of race would deprive school authorities of the one tool absolutely essential to fulfillment of their constitutional obligation to eliminate existing dual school systems.<sup>14</sup>

During the twenty years that followed, *Green* and *Swann* provided the basic guidelines for southern school desegregation.

Some North Carolina school districts did not wait to be sued. Clearly seeing the handwriting on the wall, they submitted official forms devised by the federal Department of Health, Education, and Welfare (HEW),

declaring themselves to be fully desegregated. In 1967 the civil rights functions of HEW were consolidated under the Office for Civil Rights (OCR). Using more specific guidelines and armed with greater personnel, OCR moved beyond reliance on school board assurances and began to perform actual reviews of school compliance. OCR combined this approach with negotiations with the local school districts. HEW gradually began to move away from the pre-1964 focus of “shoot-ing for court cases” and worked more cooperatively with local districts to achieve compliance. Although exact numbers are difficult to obtain, this comprehensive, cooperative approach resulted in stronger ties with local officials and, together with the strong Supreme Court statements in *Green* and *Swann*, turned most districts toward compliance in a spirit of cooperation.<sup>15</sup>

## Desegregation in the 1990s

In the early 1990s, after nearly two decades of silence, the Supreme Court returned to the issue of southern school desegregation. By then, the principal question was no longer, What must school boards lawfully do to desegregate? but How long should judicial supervision of school boards last? and When and by what standards should a federal court determine that a school district has completed its remedial tasks and become, not a dual system, but a unitary system at last? The Court’s first important decision on these questions came in 1991 in *Board of Education of Oklahoma City v. Dowell*. From the outset, sharp differences from earlier decisions were evident in Dowell’s tone and emphasis. No longer unanimous—indeed, sharply divided in a 5-3 opinion written by Chief Justice William Rehnquist—the Court stressed that federal supervision of local school systems had been intended only as “a temporary measure to remedy past discrimination” and that “important values” are served by “local control of public school systems.”<sup>16</sup> Although the Court eventually sent *Dowell* back to the lower courts for further consideration, most court watchers read the case as a signal that the era of

12. *Swann*, 402 U.S. at 25.

13. *North Carolina State Bd. of Educ. v. Swann*, 402 U.S. 43, 45 (1971), referring to former N.C. GEN. STAT. § 115-176.1 (Supp. 1969).

14. *North Carolina State Bd.*, 402 U.S. at 46.

15. See generally BERYL RADIN, IMPLEMENTATION, CHANGE, AND THE FEDERAL BUREAUCRACY (New York: Teachers College Press, 1977); U.S. COMM’N ON CIVIL RIGHTS, HEW AND TITLE VI (Washington, D.C.: U.S. Gov’t Printing Office, 1970).

16. *Board of Educ. of Oklahoma City v. Dowell*, 498 U.S. 237, 247-48 (1991).

court-ordered desegregation decrees might be drawing to a close.

The next year the Court reinforced that impression in *Freeman v. Pitts*, a case arising in the suburban Atlanta district of DeKalb County. The school board in *Freeman* sought a declaration that it had overcome its racial duality between 1979 and 1992 and now was unitary. Such a declaration would permit the district's release from further judicial supervision. Measuring the district against the six *Green* factors, the Supreme Court held, for the first time, that a federal court might properly release a school system from judicial supervision one factor at a time. To merit such an outcome, a school board must demonstrate that it has sufficiently overcome racial problems in that one area—such as student assignments or extracurricular activities—even if racial disparities remain in another area—such as faculty assignments.<sup>17</sup>

The *Freeman* Court also held that, if a school district has diligently followed a court's student assignment orders for a significant period, a court might withdraw further judicial supervision—even if schools' racial populations have subsequently become imbalanced—as long as the emerging racial imbalance can plausibly be traced not to the school board but to other causes, such as residential decisions made by parents themselves.<sup>18</sup>

To aid lower federal courts in determining when they should declare a school district to be unitary and withdraw judicial supervision, the *Freeman* Court directed them to weigh three new factors:

[1] whether there has been full and satisfactory compliance with the [desegregation] decree in those aspects of the system where supervision is to be withdrawn; [2] whether retention of judicial controls is necessary or practicable to achieve compliance with the decree in other facets of the school system [e.g., other *Green* factors still under court supervision]; and [3] whether the school district has demonstrated . . . its good-faith commitment to the whole of the court's decree and to those provisions of the law and the Constitution that were the predicate for judicial intervention in the first instance.<sup>19</sup>

17. *Freeman v. Pitts*, 503 U.S. 467, 489–91 (1992).

18. *Freeman*, 503 U.S. at 494–95. The Court reasoned that “[w]here resegregation is a product not of state action [by the school board or another governmental actor] but of private choices [by parents and other individuals], it does not have constitutional implications. It is beyond the authority and beyond the practical ability of the federal courts to try to counteract these kinds of continuous and massive demographic shifts. . . . Residential housing choices, and their attendant effects on the racial composition of schools, present an ever-changing pattern, one difficult to address through judicial remedies.” *Freeman*, 503 U.S. at 495.

19. *Freeman*, 503 U.S. at 491.

Read broadly, each of these factors subtly shifted primary judicial attention from a practical concern about concrete consequences of school board actions—whether black and white children, teachers, and staff were actually attending school together—toward a technical concern about formal compliance with court decrees. *Freeman* also reinforced the theme of local control and the temporary nature of court supervision that had been voiced in *Dowell*. The “end purpose” of federal desegregation litigation, the Court emphasized, must be “to remedy the violation and, in addition, to restore state and local authorities to the control of a school system,” in order to restore the “vital national tradition” of local school board autonomy.<sup>20</sup>

In 1995 in *Missouri v. Jenkins (III)*, the Court expanded on its new criteria for assessing unitary status when it reviewed the progress of the Kansas City, Missouri, school district toward unitary status.<sup>21</sup> *Jenkins III* stressed that courts did not need to require the elimination of racial disparities—for example, in test scores—unless the plaintiffs could trace those disparities directly to prior segregation, and that school districts had no affirmative duty to implement educational policies merely to encourage white suburban children to return to urban school districts.

Together, *Dowell*, *Freeman*, and *Jenkins III* have invited the round of unitary status litigation that is currently under way throughout the nation, offering school districts the prospect of a more successful trip to the federal courthouse for release from judicial supervision.

## Affirmative Action Principles Applied to Desegregation

### The Strict-Scrutiny Test

In the late 1970s, the Supreme Court began to consider race in a very different context from school desegregation. State legislatures, public employers, and others had started creating voluntary programs of affirmative action to extend some limited preferences to African-Americans (or other traditionally disadvantaged groups) as compensation for prior decades of wholesale discrimination. Eventually, unhappy whites raised legal challenges to these programs, which were

20. *Freeman*, 503 U.S. at 489–90.

21. *Missouri v. Jenkins (III)*, 515 U.S. 70 (1995). The opinion is called *Jenkins III* because the Supreme Court had twice before considered other aspects of the Kansas City desegregation case.

targeted at admission to public colleges and universities,<sup>22</sup> public employment,<sup>23</sup> and public contracting.<sup>24</sup>

The Supreme Court initially was uncertain about how to address the new racial preferences because, unlike traditional discriminatory legislation, they apparently were intended not to punish or subordinate disfavored racial groups but to compensate group members for the legal and economic exclusion that they had endured under slavery and Jim Crow segregation. Nonetheless, in *City of Richmond v. J. A. Croson Co.*, a watershed case decided in 1989, a majority of five justices reasoned that all state or local policies that employed race-conscious classifications should be subjected to “strict judicial scrutiny.” Under strict scrutiny, as Justice Sandra Day O’Connor clarified it, federal courts should examine and invalidate any race-conscious categories or factors, whether motivated by racial hostility or goodwill, unless the state or local agency could demonstrate that the racial categories (1) would promote “compelling government interests” and (2) were “narrowly tailored” (carefully drawn) to achieve their compelling ends without causing undue racial injury to innocent victims.<sup>25</sup> This twofold constitutional test has since been widely employed to scrutinize race-conscious preferences that appear in a variety of state and federal statutes.<sup>26</sup>

### Extension of *Croson’s* Strict Scrutiny to Student Assignment to Schools

In both of the Fourth Circuit Court’s recent opinions, white parents challenged school board decisions that depended in part on considerations of race or

ethnicity. In Arlington County, Virginia, the school board designated one of its public kindergartens as a “magnet” school, a school to which students were permitted to apply for admission. There were more applicants than available spaces, so the school district instituted a lottery system. To ensure educational and racial diversity, however, the district structured the lottery to give special weight to children from lower-income backgrounds, children whose native language was not English, and children with racial or ethnic minority backgrounds.<sup>27</sup> Parents of Grace Tuttle and other white children who applied for, but were not accepted into, the kindergarten class, brought suit, relying on the logic of the affirmative action cases to argue that the school district’s use of racial considerations violated the Equal Protection Clause.

In the second Fourth Circuit case, the parents of Jacob Eisenberg challenged the student transfer policy of Montgomery County, Maryland. In reviewing students’ requests for transfer from one school to another, Montgomery school officials considered the race of the students as well as the racial composition of the potential sending and receiving schools, to ensure that the transfers would not upset the overall racial makeup of schools within the district. The Eisenbergs sued, alleging that their child would have been transferred to a math and science magnet school but for his race.<sup>28</sup>

In both *Tuttle* and *Eisenberg*, the school districts responded that affording children a racially diverse educational experience was itself a sufficiently compelling goal to meet the standards of strict scrutiny. Therefore, educational diversity should justify the use of race in making student assignments.<sup>29</sup> In the absence of definitive guidance by the Supreme Court, the judicial panels in both cases assumed that a school district’s interest in educational diversity might well be compelling.<sup>30</sup> However, when they turned to the second branch of the strict-scrutiny test—whether the means chosen by the school board were narrowly tailored to minimize

22. See *DeFunis v. Odegaard*, 430 U.S. 144 (1977) (dismissing without deciding a challenge brought by an unsuccessful white applicant to the University of Washington Law School); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (invalidating a rigid set-aside of 16 places among 100 exclusively for minority candidates seeking admission to a state medical school).

23. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (invalidating a racial preference that protected minority teachers—who had been hired under a voluntary affirmative action program—from layoffs during a budgetary crunch); *United States v. Paradise*, 480 U.S. 149 (1987) (upholding a court order that required the Alabama Department of Public Safety to promote qualified black candidates for 50 percent of future promotions, because of the long history of racial discrimination in the department).

24. See *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (upholding a congressional statute that required governmental recipients of federal public works funds to spend at least 10 percent of the funds for goods or services provided by qualified minority business enterprises).

25. *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 493–94 (1989).

26. See, e.g., *Adarand Constructors v. Peña*, 515 U.S. 200 (1995) (extending the rationale of *Croson* beyond the state or local context to reach federal programs).

27. *Tuttle v. Arlington County School Bd.*, 195 F.3d 698, 701 (4th Cir. 1999).

28. *Eisenberg v. Montgomery County Public Schs.*, 197 F.3d 123, 125–27 (4th Cir. 1999).

29. For an excellent discussion of the arguments in support of this view, see Note, *The Constitutionality of Race-Conscious Admissions Programs in Public Elementary and Secondary Schools*, 112 HARVARD L. REV. 940, 948–55 (1999).

30. See *Tuttle*, 195 F.3d at 704; *Eisenberg*, 197 F.3d at 130. Although the Supreme Court itself has never decided the question, in the celebrated *Bakke* case in 1977, five justices who passed on medical school admission policies at the University of California at Davis—although disagreeing sharply on many other aspects of that case—did concur that the “attainment

racial harm—they condemned the actions of the Arlington and Montgomery County school boards as not narrowly tailored enough, and they strongly suggested that any school district plan that employs “racial balancing” is per se impermissible.<sup>31</sup>

The Fourth Circuit Court has recently considered another appeal on these issues, brought by civil rights plaintiffs and the Charlotte-Mecklenburg school board itself. They challenged the September 1999 decision rendered by a federal district court in *Capacchione* (1) declaring that the Charlotte-Mecklenburg school district had achieved unitary status, (2) dismissing the district’s thirty-five-year desegregation lawsuit, (3) lifting all court orders requiring desegregation, and (4) imposing a new order forbidding all further use of race or ethnicity as factors in admitting children to the district’s magnet schools.<sup>32</sup>

The Charlotte-Mecklenburg school board and the original *Swann* attorneys argued that the district court was wrong on all counts: (1) significant vestiges of Charlotte-Mecklenburg’s prior segregation remained to be corrected, and therefore a unitary status finding was inappropriate; and (2) even if Charlotte-Mecklenburg had become a unitary system, it might lawfully consider race in making student assignments to achieve educational diversity and avoid resegregation of its schools.

In November 2000 a three-judge panel of the Fourth Circuit Court, by a 2-1 vote, agreed with the *Swann* plaintiffs that the Charlotte-Mecklenburg schools had not yet been proven unitary in several respects, including student assignment, school facilities, transportation policies, and student achievement. The panel therefore remanded to the district court for further consideration.<sup>33</sup> Then, in January 2001, the full Fourth Circuit Court agreed to rehear the case. In that rehearing, it will not be bound by the ruling of the panel.

## ***Tuttle and Eisenberg* in the Year 2001**

Although serious questions exist about the legal soundness of *Tuttle* and *Eisenberg*, the Fourth Circuit Court has spoken in the two cases. Unless and until the

Supreme Court agrees to resolve this issue, the cases supply binding legal precedent for every school district in North Carolina and neighboring states. The practical question, then, is, What latitude do the cases afford North Carolina school districts in making future student assignments?

Every school district must begin by considering its legal status. If it is currently subject to an active desegregation order, then not only *Green* and *Swann* but the specific terms of court orders in its own case still provide the controlling legal authority for the district. Such school boards may continue—indeed, they must continue—whatever race-conscious remedies have been prescribed by earlier federal decrees until their school districts have been declared unitary and released from federal supervision. Nothing in *Tuttle* and *Eisenberg* holds to the contrary. Nor has the Supreme Court ever suggested that the school districts themselves are under any constitutional obligation to seek release from existing court orders.

The Fourth Circuit Court’s new decisions have their greatest immediate significance for school districts that either were never subject to a desegregation decree or now are considered unitary and released from federal judicial supervision. At a minimum, *Tuttle* and *Eisenberg* forbid these districts from using race or ethnicity when they assign students to magnet schools or evaluate student transfer requests. Yet the logic of these cases may prohibit a student assignment plan of any sort that might directly employ racial or ethnic considerations.

Many questions remain unresolved by the Fourth Circuit Court’s recent decisions. Do these cases forbid all majority-to-minority (M-to-M) transfer programs, under which school boards honor voluntary requests if the students seek to transfer to a school in which their race is in the minority? M-to-M programs differ from the Montgomery County program in that they don’t specify any concrete racial or ethnic goals or quotas. They thereby avoid the racial balancing that *Tuttle* and *Eisenberg* treated as almost unconstitutional per se. Yet such policies do discourage increases in the relative size of any racial group once it exceeds 50 percent of the school’s population, and they operate by sorting transfer applicants according to race. M-to-M programs probably will have a difficult time surviving *Tuttle* and *Eisenberg*.

Another unresolved question is whether these cases forbid any consideration of race or ethnicity when school boards draw or redraw their school attendance boundaries. While forbidding school boards to use racial classifications in making individual student assign-

of a diverse student body . . . clearly is a constitutionally permissible goal for an institution of higher education.” *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 311–12, 314 (1978) (Powell, J., concurring in part and dissenting in part).

31. *Tuttle*, 195 F.3d at 707; *Eisenberg*, 197 F.3d at 131–32.

32. *Capacchione v. Charlotte-Mecklenburg Schools*, 57 F. Supp. 2d 228, 232 (W.D.N.C. 1999).

33. *Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 233 F.3d 232 (4th Cir. 2000).

ments, *Tuttle* cited with favor three school zoning measures identified by an Arlington schools study commission that might well produce greater racial diversity: (1) The board would assign a small geographic area to a home school and fill the remaining spaces in that school “by means of an unweighted random lottery from a . . . geographic area [that] would presumably be selected so that its residents would positively effect [sic] the diversity of the school.” (2) The board would put the names of every child in the school district into a lottery, randomly select a certain number, and offer those randomly selected the opportunity to enter a second lottery comprising those who would like to attend a particular magnet school. (3) “Each neighborhood school . . . [would receive] a certain number of slots at each alternative [magnet] school.”<sup>34</sup>

Both the first and the third of these alternatives rest on the unexamined (yet surely accurate) assumption that different racial and ethnic groups typically live in separate neighborhoods. The panel’s approving citation of these alternative measures suggests that a high degree of race-conscious behavior in developing neighborhood feeder patterns for elementary and secondary schools may be acceptable, as long as the formal criteria finally adopted are racially neutral.<sup>35</sup> This distinction between direct and racially explicit plans, on the one hand, and indirect but racially conscious plans, on the other hand, seems consistent with constitutional principles currently emerging in the voting rights/redistricting area. The Supreme Court has recently acknowledged that “a legislature may be conscious of the voters’ races [when it engages in redistricting] without using race as a basis for assigning voters to districts,” as long as race does not become the “dominant and controlling consideration.”<sup>36</sup>

In sum, school boards desiring to retain some degree of racial diversity probably may do so if (1) they

34. *Tuttle*, 195 F.3d at 706, n.11, quoting the Arlington County commission’s report.

35. School boards may risk a constitutional violation, however, if they make it clear that their sole underlying intent or purpose is to achieve, indirectly, the racial balancing that the Fourth Circuit Court has condemned as a direct means of furthering educational diversity. The Supreme Court has long held that even if states’ or localities’ statutes or policies are racially neutral on their face, they violate the Equal Protection Clause if they were adopted or are administered with the intent to discriminate invidiously. See, e.g., *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977); *Washington v. Davis*, 426 U.S. 229 (1976); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). Yet, to a considerable extent, the rationale of *Tuttle* and *Eisenberg* is internally inconsistent. If a school board’s goal to achieve educational diversity is constitutionally permissible, indeed even compelling for purposes of strict scrutiny (as both *Tuttle* and *Eisenberg* assume), then why is selecting race-conscious methods of student assignment to achieve this compelling end unconstitutional?

36. *Shaw v. Hunt*, 517 U.S. 899, 905 (1996).

avoid formal criteria that expressly look to race or ethnicity (such as racial goals or quotas for individual schools) and (2) they avoid actual practices in which race becomes “the dominant and controlling consideration” in making student assignments. Yet it seems implausible that the current Fourth Circuit Court would approve aggressive pairing and clustering approaches such as those upheld in *Swann* in 1971—joining two or more geographically noncontiguous and racially diverse neighborhoods to create a single attendance zone—if the only explanation for the selection of those neighborhoods is their racial composition.<sup>37</sup>

Beyond student assignment policies, *Tuttle* and *Eisenberg* have grave implications for other administrative practices common in many North Carolina school districts. Some districts expressly consider race or ethnicity in assigning teachers or administrative personnel to various schools; they may well see future challenges to those practices. The Fourth Circuit Court’s constitutional rationale appears broad enough to throw into question all assignment policies for faculty, administrators, or other school personnel that expressly rely on racial considerations. Indeed, in the related area of teacher dismissal policies, both the Supreme Court and other circuits have disapproved of layoff procedures employing racial considerations.<sup>38</sup> Further, at least in terms of layoffs, the Supreme Court has rejected the argument that the need of schoolchildren for teacher role models of different racial backgrounds is sufficient to withstand strict scrutiny.<sup>39</sup>

37. The permissibility of considering race in drawing school attendance zones is currently the object of litigation in *Boston’s Children First v. Boston School Comm.*, 62 F. Supp. 2d 2247 (D. Mass. 1999) (denying plaintiffs’ motion for a preliminary injunction against the Boston School Committee’s use of race in creating school attendance zones, reasoning that the record was insufficient to determine whether plaintiffs were likely to prevail on the merits); *Boston’s Children First*, 98 F. Supp. 2d 111 (D. Mass. 2000) (denying defendant school committee’s motion to dismiss).

38. See *Taxman v. Board of Educ. of Piscataway*, 91 F.3d 1547 (3rd Cir. 1996) (en banc) (holding that a school district violated Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination, when it used race as a factor in choosing which of two qualified teachers it would lay off during a budgetary crisis, and suggesting that, had the court decided the question under the Equal Protection Clause, rather than Title VII, it nonetheless would not have sanctioned the school district’s use of racial distinctions). See also *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (holding that a school board policy of protecting minority teachers with less seniority than some white teachers from being laid off during a budgetary crisis, because of their race, violated the Equal Protection Clause).

39. *Wygant*, 476 U.S. at 275 (“the role model theory . . . has no logical stopping point”) (Powell, J.).

## The Wake County Experiment

In light of *Tuttle* and *Eisenberg*, Wake County has chosen to discard all reliance on race as a factor in making its student assignments, while actively seeking student diversity through consideration of both family socioeconomic status and student academic performance. Wake County's previous use of magnet programs and racial guidelines enabled it to achieve extensive desegregation; according to a recent study, only 21 percent of Wake County's black students, far less than the national average of 70 percent, were in schools with a total minority enrollment above 50 percent.<sup>40</sup>

Under the new Wake County plan, the district is committed to having no school in which (1) more than 40 percent of the children are eligible for free or reduced-price school lunches (such eligibility being a widely employed indicator of lower family income) or (2) more than 25 percent of the students score below grade level (averaged over two years).<sup>41</sup> The plan does not assign

40. For a more comprehensive examination of the Wake County plan, see Elizabeth Jean Bower, *Answering the Call: Wake County's Commitment to Diversity in Education*, 78 NORTH CAROLINA LAW REVIEW 2026, 2026 (2000); see also Todd Silberman, *Schools Facing Diversity Dilemma*, RALEIGH NEWS & OBSERVER, Dec. 26, 1999, at 1A; Tim Simmons, *School Plan Signals New Chapter in Integration*, RALEIGH NEWS & OBSERVER, Jan. 16, 2000, at 1A.

41. See WAKE COUNTY PUBLIC SCHOOL SYSTEM, STUDENT ASSIGNMENT § 6200 D, E, available at [http://www.wcpss.net/policy\\_files/policy\\_pdfs/6000\\_series.pdf](http://www.wcpss.net/policy_files/policy_pdfs/6000_series.pdf) (visited February 13, 2001). The pertinent provisions of the student assignment plan read as follows:

All of the following factors, not in priority order, will be used in the development of the annual student assignment plan:

- A. Instructional program; e.g., magnet programs, special education, ESL, etc.
- B. Adherence to K-5, 6-8, 9-12 grade organization.
- C. Facility utilization, including crowding (projected enrollment should be between 85% and 115% of approved campus capacity). New schools may operate with less than 85% of capacity enrolled if some grade levels will not be assigned during the first year or if significant growth is anticipated in the following years.
- D. Diversity in student achievement (percentage of students scoring below grade level should be no higher than 25%, averaged across a two-year period). Schools with more than 25% of students below grade level will receive an instructional review to ascertain the reasons for the low achievement; improvement trends will be considered in deciding whether to address this issue in development of the assignment plan.
- E. Diversity in socioeconomic status (percentage of students eligible for free or reduced price lunch will be no higher than 40%). Schools with more than 40% of students eligible for free or reduced price lunch will receive an instructional review; improvement trends will be considered in deciding whether to address this issue in development of the assignment plan.
- F. Stability (the percentage of students who will remain at the same school).
- G. Proximity (no student will travel more than the maximum time established by board policy).

children on the basis of their individual circumstances. Instead, if a school's population exceeds the socioeconomic or achievement ceiling set by the board, children living in neighborhoods where a disproportionate percentage are either low-performing or of low socioeconomic status will be moved to other schools.

Although some of the same children targeted under a race-conscious plan (many of them African-American) will be transferred under this new, race-neutral plan (because they are from lower-income families and/or have low test scores), the two approaches are not equivalent. Indeed, the new approach will affect different groups of both white and minority students:

About 38 percent of Wake's minority students will no longer be automatically targeted for integration. . . . And about 13 percent of the district's white students . . . will be among those who could be reassigned to help the schools meet their new, colorblind definition of diversity.<sup>42</sup>

The continuing partial overlap is understandable, for African-American families have disproportionately lower incomes than white families do, not only in North Carolina but in the nation as a whole.<sup>43</sup> Moreover, on average, African-American children lag behind white children in performance on standardized tests, again, not only in North Carolina but nationwide.<sup>44</sup>

Is Wake County's new plan lawful? Can it survive constitutional challenge? Reflection on three sub-questions points to the same conclusion: yes.

### 1. Why should Wake County's reliance on socioeconomic status or student achievement have any better success in withstanding Equal Protection Clause review than race did under the plans in *Tuttle* and *Eisenberg*?

The Supreme Court long ago reserved the exacting form of strict scrutiny employed by the Fourth Circuit Court in *Tuttle* and *Eisenberg* for statutes that draw dis-

42. Simmons, *School Plan Signals*, at 1A.

43. CENTER ON BUDGET & POLICY PRIORITIES, POVERTY & INCOME TRENDS: 1998, at 12-15 (Washington, D.C.: the Center, Mar. 2000) (showing that, since at least 1970, African-American and Hispanic families have experienced poverty at far higher rates than white families have).

44. See NORTH CAROLINA JUSTICE & COMMUNITY DEVELOPMENT CENTER, EXPOSING THE GAP: WHY MINORITY STUDENTS ARE BEING LEFT BEHIND IN NORTH CAROLINA'S EDUCATIONAL SYSTEM 26, 4 (Raleigh, N.C.: the Center, Jan. 2000) (revealing an average gap of 30.9 points between African-American and white students in grades 3-8 in 1998-99 on state end-of-grade tests in reading and in mathematics; and a statewide average overall gap in both reading and mathematics of 30.7 points—79.2 for whites and 48.5 for African-Americans). See generally THE BLACK-WHITE TEST SCORE GAP (Christopher Jencks & Meredith Phillips eds., Washington, D.C.: Brookings Inst. Press, 1998) (analyzing the origins of, the historical extent of, alternative explanations for, and the policies that might overcome, the racial achievement-score gap).

inctions based on race, ethnicity, or national origin, and for those that “substantially burden” a small category of so-called fundamental rights. The Court has specifically held that education is not one of those fundamental rights and that statutes making distinctions based on wealth or poverty (such as the socioeconomic factor adopted by Wake County) should not receive strict judicial review.<sup>45</sup> Indeed, most other legislative choices are reviewed under the “rational basis” test, a standard so remarkably lenient that only a handful of plaintiffs have ever succeeded in having statutes invalidated as unconstitutional.<sup>46</sup>

Both of Wake County’s chosen factors are designed to encourage educational diversity—surely a legitimate end, since the Fourth Circuit Court assumed it to be “compelling” in *Tuttle* and *Eisenberg*—and to improve children’s academic performance. Moreover, the two factors chosen by the school board to attain these important ends are closely and substantially related to those ends. A consistent body of empirical research has proven that students in “high poverty” schools (those with very high percentages of children from low-income families) tend to perform at lower academic levels—irrespective of their own family’s economic circumstances—than children in “low poverty” schools do.<sup>47</sup> Wake County’s new attention to the

socioeconomic composition of its schools therefore should not only increase the diversity of its schools’ student bodies but also eliminate all high-poverty schools in Wake County and thereby improve the average educational performance of children in formerly high-poverty schools.

The other educational strategy adopted by the Wake County school board—not permitting a concentration of low-performing students in any schools—will tend to ensure that all schools have a majority of high-achieving students and that neither teachers nor parents nor other students will be inclined to flee from particular schools because of the students’ disappointing performance on state standardized tests. These are manifestly reasonable means to achieve worthy and important educational ends.

## 2. *Isn’t this plan merely a subterfuge? Hasn’t Wake County kept its racial assignment system under another name?*

The question is an important one, for the Supreme Court has long held that even if a statute or an administrative practice appears to be racially neutral on its face, it still may violate the Equal Protection Clause if it was adopted, or is administered, with a racial motivation.<sup>48</sup> Yet even if the impact of a statute falls more heavily on one race than on another, the federal courts will not invalidate the statute on Equal Protection Clause grounds as long as it is not motivated (solely or principally) by racial considerations. The Wake County plan, as noted earlier, has strong nonracial justifications in addition to the legitimate interest in racial diversity. The plan should improve academic performance, avoid the concentration of either poorly performing or economically needy children in a few disfavored schools, and increase the overall diversity of every school. Other school districts that wish to follow the Wake County approach should likewise be sure to establish a clear record—in their school board debates, in their written policies, and in their administration of those policies—substantiating these other, nonracial goals.

45. See *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 29 (1973) (holding that legislative classifications that accept differences in the property wealth or poverty of various school districts do not normally invoke strict judicial scrutiny under the Equal Protection Clause, even if those differences create disparities in education); *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 458 (1988) (noting that the Court has “previously rejected the suggestion that statutes having different effects on the wealthy and the poor should on that account alone be subjected to strict equal protection scrutiny” and that the Court had never “accepted the proposition that education is a ‘fundamental right’ . . . which should trigger strict scrutiny”).

46. Under the rational-basis review, a state need show only that its underlying goal is at least “legitimate” and that its chosen means might “conceivably” further the end. As Justice O’Connor rephrased the standard, “Social and economic legislation . . . ‘carries with it a presumption of rationality that can only be overcome by a clear showing of arbitrariness and irrationality.’” *Kadrmas*, 487 U.S. at 462, quoting *Hodel v. Indiana*, 452 U.S. 314, 331–32 (1981). See generally LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1439–46 (2d ed., Mineola, N.Y.: Foundation Press, 1988) (reviewing the cases and noting the federal judiciary’s “remarkable deference to state objectives” in most instances).

47. See MARY KENNEDY ET AL., U.S. DEP’T OF EDUC., *POVERTY, ACHIEVEMENT AND THE DISTRIBUTION OF COMPENSATORY EDUCATION SERVICES* 22 (1986) (documenting the adverse relationship between high levels of school poverty and lower average school achievement); LAURA LIPPMAN ET AL., *URBAN SCHOOLS: THE CHALLENGE OF LOCATION AND POVERTY* x–xii (1996) (reporting that both urban location and high school-poverty concentration were associated with lower academic performance); U.S. DEP’T OF EDUC., *PROSPECTS: FINAL REPORT ON STUDENT OUTCOMES* at v, 73 (Cambridge, Mass.: Abt Associates, 1997) (reporting extensive research revealing that “school poverty concentration is associated with lower aca-

ademic performance”); U.S. DEP’T OF EDUC., *SCHOOL POVERTY AND ACADEMIC PERFORMANCE: NAEP ACHIEVEMENT IN HIGH-POVERTY SCHOOLS 3–5* (Washington, D.C.: USDOE, 1998) (noting the relationship between high percentages of lower-income children within schools and the lower average academic performance by children in those schools on mathematics and reading achievement tests administered by the National Assessment of Educational Progress). Moreover, there is evidence that racial integration alone may improve the academic performance of minority children.

48. See, e.g., *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977); *Washington v. Davis*, 426 U.S. 229 (1976); *Yick Wo v. Hopkins*, 118 U.S. 351 (1886).

**3. What about the North Carolina Constitution? Didn't the North Carolina Supreme Court recently hold in *Leandro v. State*<sup>49</sup> that every student has the state constitutional right to a "sound basic education"? Isn't that right violated by the Wake County plan?**

North Carolina schoolchildren do indeed have a newly minted "fundamental right" to a sound basic education. Yet in *Leandro* itself, the North Carolina Supreme Court declined to extend the weapon of strict judicial scrutiny to every plaintiff unhappy about some local educational decision. Instead, it instructed state courts to afford "every reasonable deference" to local educational officials and to strike a statute or a policy only if a plaintiff could make "a clear showing" that he or she was being deprived of a sound basic education.<sup>50</sup> Plausible social science evidence suggests that Wake County's student assignment plan will improve the quality of education that many students receive. Moreover, as already explained, students have no general right to insist on attendance at any particular school or to challenge the assignments made by local school authorities.<sup>51</sup>

## The Uncertain Future of Student Assignments

Although the Wake County approach seems legally sound, its political and educational future remains open. In March 2000 the PTA co-presidents at one Wake County elementary school wrote all parents, urging them to oppose the proposed transfer of sixty-eight low-income and low-performing students to their school from another neighborhood. All but one of the transferring students would be African-American. One

co-president, a white, insisted, "I'm not a racist. . . . I'm trying to protect my neighborhood school." The letter informed parents that there never had been a need for a Title I Basic Skills reading program at their school, though the new students would likely need those services. The white co-president added, "[I]f the school's test scores drop [because of the transferring students], neighborhood parents would flee" and neighborhood property values might drop. The controversy prompted by the letters has apparently led many parents of the transferring children to approach the local chapter of the National Association for the Advancement of Colored People, seeking to forestall the move on the ground that the children should not be placed in a school where they are not welcome.<sup>52</sup>

Meanwhile, a countywide Gallup poll revealed that a sizable minority of Wake County residents, 35.5 percent, want to limit the number of low-performing children being moved and 24.5 percent favor limiting the number of low-income students. Yet a majority support the new plan. Indeed, the principal of the elementary school at issue in the letter described earlier has met with the parents of children who will be transferring, stating, "They will be treated fairly. They will be loved like every other child who goes [here]."<sup>53</sup>

Obviously one key to success will be strong, wise educational leadership. Despite the potential for parental fears and protectiveness, the new plan aims to prevent the emergence of "winner" and "loser" schools. As long as each school contains a relatively similar mix of high-, middle-, and low-income children, as well as children performing at all academic levels, no parent anywhere in the system need conclude that his or her child is being singled out for disadvantage.

Although Wake County is a pioneer in North Carolina, it is not the first school district nationally to adopt or consider such an approach. Apparently the first plan was adopted in 1992 in La Crosse, Wisconsin, a city of 50,000. The school board there set out to end the wide disparities in concentrations of poverty, ranging from 4 percent in some schools to 68 percent in others. The district's plan set a 45 percent ceiling and a 15 percent floor on the proportion of low-income children

49. See *Leandro v. State*, 346 N.C. 336, 488 S.E.2d 249 (1997). See also John Charles Boger, *Leandro v. State—A New Era in Educational Reform?*, POPULAR GOVERNMENT, Spring 1998, at 2.

50. *Leandro*, 346 N.C. at 357, 488 S.E.2d at 261.

51. See, e.g., *In re United States ex rel. Missouri State High Sch. Activities Ass'n*, 682 F.2d 147, 152 (8th Cir. 1982) (observing that "[s]tudents have no indefeasible right to associate through choice of school. Mandatory assignment to public schools based on place of residence or other factors is clearly permissible"); *Wharton v. Abbeville School Dist.* No. 60, 608 F. Supp. 70, 76 (D. S. C. 1984) (noting that plaintiffs in that school desegregation case had "presented no independent source, either in the law of South Carolina, or otherwise, which has granted to them a legitimate claim of entitlement to attend a particular school"); *Citizens Against Mandatory Bussing v. Palmason*, 495 P.2d 657, 663 (1972); cf. *Bronson v. Board of Educ. of City School District*, 550 F. Supp. 941, 959 (S. D. Ohio 1982) (noting that "Ohio law . . . does not confer a right upon pupils to attend a specific school, even if they were previously assigned thereto"), *modified and aff'd on other grounds*, 525 F.2d 344 (6th Cir. 1975).

52. See T. Keung Hui, *School Plan Draws Foes*, RALEIGH NEWS & OBSERVER, Apr. 7, 2000, at B1; T. Keung Hui, *Turned Out, Turned Away*, RALEIGH NEWS & OBSERVER, May 6, 2000, at A1 (describing the circumstances of the children to be moved, most of whom live in lower-income apartments with single working mothers, 81 percent of whom receive free or reduced-price school lunches, and 52 percent of whom have scored below grade level on state end-of-grade tests).

53. Hui, *Turned Out*, at A1.

in any school. As in Wake County, the socioeconomic status of families in La Crosse was closely related to racial and ethnic background, although the predominant racial minority was not African-Americans (who accounted for only 1 or 2 percent of La Crosse's population) but Hmong refugees from Southeast Asia (who made up about 12 percent of the district's population).<sup>54</sup> Although the La Crosse plan has become an accepted feature of the school system and remains in place in 2000, four school board members lost their positions when voters in the early years voted against them and even organized a recall election because of anger at their support for the plan.<sup>55</sup>

Similar proposals have occasionally been considered in other cities, but none have yet been adopted. For example, in 1998 a task force of teachers in Louisville, Kentucky, proposed a student assignment plan that would have considered socioeconomic status and other characteristics of individual children that put them at risk for failure. The task force's proposal was not approved by the school board, however.<sup>56</sup> In the late 1990s, San Francisco's school board fashioned a plan that would have weighed students' socioeconomic status, test scores, English-language ability, and racial or

ethnic background in making assignments. However, in December 1999, in a ruling similar to *Tuttle* and *Eisenberg*, a federal judge held that the school board could not consider children's race and ethnicity. The school board abandoned the entire plan rather than proceed in reliance only on students' socioeconomic backgrounds and prior achievement.<sup>57</sup>

## Conclusion

Very few North Carolinians would willingly return to the pre-1954 era of legally segregated schooling. Yet the Fourth Circuit Court has deprived local school boards of the most straightforward and direct means of ensuring that every child learns about children of other racial and ethnic backgrounds as an indispensable part of his or her socialization in public schools. North Carolinians must await the inevitable moment when the Supreme Court decides whether the Fourth Circuit Court's commitment to an abstract form of color-blindness will prevail or whether school boards in the Fourth Circuit again will be allowed to consider race and ethnic background in making student assignments to achieve educational diversity. In the meantime the experiment under way in Wake County may point toward a new and educationally superior means of achieving similar educational goals. ■

54. See Peter Schmidt, *La Crosse to Push Ahead with Income-Based Busing Plan*, EDUCATION WEEK, Aug. 5, 1992, available at <http://www.edweek.com/ew/vol-11/40crosse.h11>; Peter Schmidt, *District Proposes Assigning Pupils Based on Income*, EDUCATION WEEK, Oct. 30, 1991, available at <http://www.edweek.com/ew/1991/09wis.h11>.

55. Robert C. Johnston, *N.C. District to Integrate by Income*, EDUCATION WEEK, Apr. 26, 2000, at 1.

56. See Andrew Trotter, *Teachers Propose Integrating Schools by Socioeconomic Status*, EDUCATION WEEK, Dec. 2, 1998, available at <http://www.edweek.com/ew/1998/14jefco.h18>.

57. See Nanette Asimov, *S.F. District Ok[ay]s Race-Neutral School Plan*, SAN FRANCISCO CHRONICLE, Jan. 7, 2000, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2000/01/07/MN97233.DTL>.

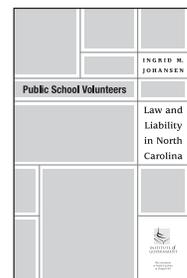
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