10-1981

Washington v. Seattle School District No. 1

Lewis F. Powell Jr.

See Lockhart-Clark case 91-38
(Hold it for this one)

Note

Reply by State adds nothing
BL

The State of Washington, by a "initiative/referendum" forbids compulsory busing — subject to Constitutional requirements.

A case of far-reaching consequences

PRELIMINARY MEMORANDUM

October 9, 1981 Conference
List 1, Sheet 1

No. 81-9

ok WASHINGTON, et al. — Appeal from CA 9 (Ely, Nelson; Wright, dissenting)

v.

ok SEATTLE SCHOOL DIST. NO. 1, et al. — Federal/Civil — Timely

1. SUMMARY: Appellants contest the CA's decision holding unconstitutional a state initiative that prohibits local school boards -- in the absence of a need to remedy constitutional violations -- from assigning students to schools other than the

Note — The CA9 held unconstitutional an anti-bussing initiative. The initiative specifically permits bussing in cases of constitutional violations. The decision by the CA9 will make it difficult for a state to ever rescind affirmative action programs — even when those programs were NOT constitutionally required. This poses a substantial question for the Court

BL yes

one geographically nearest or next nearest the student's residence.[1]

2. FACTS AND PROCEEDINGS BELOW: The Washington Constitution charges the State with a duty "to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex." Art. IX, § 1. Appellants aver that "no Washington school district has ever been judicially declared to have committed a single act of intentional racial segregation in violation of the Fourteenth Amendment in the operation of public schools." Juris. Statement 4. Against this backdrop, the appellee Seattle school board in 1977 adopted a resolution aimed at eliminating perceived racial imbalance in the district's schools.[2] To implement the resolution, the board adopted in March 1978 a plan of race-conscious student assignments. Similar student assignment policies were adopted and implemented by the appellee school districts of Tacoma and Pasco.

Meanwhile, an organization of citizens opposed to the student assignment policies, appellant CiVIC, drafted and campaigned for Initiative 350, which the State's voters adopted at the November 1978 general election. The initiative provides

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[1]Similar issues are raised in Crawford v. Board of Education, No. 81-38, which is also scheduled for consideration at the October 9 conference.

[2]The school board defined racial imbalance to exist when the combined minority enrollment in a school exceeded the district-wide average by 20%. It also provided that "the single minority enrollment ... of no school will exceed 50 percent of the student body."

that "no school board ... shall directly or indirectly require any student to attend a school other than a school which is geographically nearest or next nearest the student's place of residence ...." Wash. Rev. Code § 28A.26.010 (Cum. Supp. 1981). It provides exceptions "[i]f a student requires special education, care or guidance"; "[i]f there are health or safety hazards" between the student's residence and the neighborhood school; or if the neighborhood school "is unfit or inadequate because of overcrowding, unsafe conditions or lack of physical facilities." Ibid. Initiative 350 also expressly provides that it "shall not prevent any court of competent jurisdiction from adjudicating constitutional issues relating to the public schools." Id. § 28A.26.060. Savings Clause

Following the November 1978 election, the appellee school districts, together with certain individual plaintiffs, brought suit in federal court challenging the constitutionality of Initiative 350. The court permitted extensive intervention by parties who claimed that the school districts operated unconstitutional dual school systems. The court later bifurcated the proceedings to delay consideration of the intervenors' claims. The United States was permitted to intervene on behalf of the plaintiffs.

Following an extended trial, the DC (Voorhees - W.D. Wash.) declared Initiative 350 unconstitutional and permanently enjoined its enforcement. The court based its judgment on three grounds:

> (1) "[Initiative 350] forbids mandatory student assignments for racial reasons but permits such

> student assignments for purposes unrelated to race, (2) a racially discriminatory purpose was one of the factors which caused Initiative 350 to be adopted, and (3) the initiative is overly inclusive in that it permits only court-ordered busing of students for racial purposes even though a school board may be under a constitutional duty to do so even in the absence of a court order." App. to Juris. Statement A-27.

The DC refused to award attorney's fees to the appellee school districts since their litigation expenses were already financed through public funds. The court also refused to award attorney's fees to the intervenors because their role in the first phase of the litigation had been de minimis. The court noted that it would entertain a motion for fees following completion of that phase of the litigation devoted to intervenors' claims of unlawful segregation within the school districts.

The CA affirmed by a divided vote. Relying on this Court's decision in Hunter v. Erickson, 393 U.S. 385 (1969), and the decision of the DC in Lee v. Nyquist, 318 F. Supp. 710 (W.D.N.Y. 1970), aff'd, 402 U.S. 935 (1971), the CA held that Initiative 350 is unconstitutinal because it embodies an impermissible legislative classification based on race.[3] The statute "legislatively differentiates student assignment for purposes of achieving racial balance from student assignment for any other significant reason." App. to Juris. Statement B-5. It is of no consequence that the classification is established covertly by

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[3]Accordingly, the court expressly declined to address the second and third grounds on which the DC relied.

omission, rather than expressly on the face of the statute.[4]

The court also concluded, in support of its central holding, that Initiative 350 "radically restructures the political process of Washington by allowing a state-wide majority to usurp traditional local authority over local school board educational policies." Id., at B-7. The CA recognized this Court's holding in Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 413-14 (1977), that a school board may rescind previously adopted desegregation measures that the board was under no constitutional duty to adopt in the first place. In this case, however, "a different governmental body - the state-wide electorate - rescinded a policy voluntarily enacted by locally elected school boards ...." App. to Juris. Statement B-11. The State's interest in restoring traditional neighborhood school assignment practices was insufficiently compelling to override the interest of local school boards in promulgating their own educational policies.

Finally, the CA considered the cross-appeal of appellees challenging the DC's denial of attorney's fees. The court held that the DC had abused its discretion in denying fees to the school districts. Successful plaintiffs ordinarily should recover attorney's fees unless an award would be unjust. That the school districts are publicly funded entities does not render an award to them unjust. The court also abused its discretion in

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[4]The court relied on the DC's finding that Initiative 350 "was conceived, drafted, advocated and adopted for the specific purpose of overriding the decision of the Seattle School Board to balance Seattle schools racially by means of student assignments." App. to Juris. Statement B-4, B-6 n.4.

denying an award to the intervenors. Although their participation in the first phase of the trial was not substantial, the intervenors did devote substantial time and effort preparing for the bifurcated second phase. That the second phase may have been rendered unnecessary by virtue of the DC's holding on the constitutionality of Initiative 350 does not preclude an award of fees. "To retrospectively deny attorney's fees because an issue is not considered or because a party's participation proves unnecessary would have the effect of discouraging the intervention of what in future cases may be essential parties."

In dissent Judge Wright argued that although Initiative 350 does treat student assignments to achieve racial balance differently than student assignments for other purposes, that difference is not a racial classification. It is a means of expressing a preference for neighborhood schools and dissatisfaction with the burdens of mandatory busing. Merely addressing a problem that involves a racial minority does not create ipso facto a racial classification. The majority has chosen to find such a classification in order to avoid the laborious inquiry into intent that would otherwise be required.[5]

3. CONTENTIONS: (1) Dayton Bd. of Educ. v. Brinkman, supra, indicates that a school board may constitutionally rescind desegregation measures that it was under no constitutional duty

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[5]Judge Wright also reached, and rejected, the other grounds on which the DC relied in invalidating the Initiative.

to adopt. Presumably, this is so despite the fact that the decision to rescind is taken with the knowledge that racial matters are involved. Otherwise, no governmental entity would be able to curtail "affirmative action" programs. If a local school board is permitted to take such action, the superior legislative authority of the State should be allowed to do so as well.

(2) The CA's opinion confuses treatment of racial problems with treatment on the basis of race. In so doing, it distorts equal protection analysis in order to avoid the inquiry into intent and motive that plainly is required.[6] This departure is not sanctioned by Lee and Hunter. Those cases establish the principle that a governmental body may not "stack the political deck" against a minority that seeks adoption of laws in its interest. In this case, however, the State -- and not the local school boards -- bears primary responsibility under the state constitution for educational policy. Proponents of mandatory busing must convince either the legislature or the electorate that their cause is worthy. But they do not confront any special burden in the governmental process not shared by proponents of every other proposal affecting educational policy.

(3) The DC's decision is at odds with those of four CA's which have upheld the Equal Educational Opportunities Act of 1974, 20 U.S.C. § 1701 et seq. That statute expresses a

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[6]Appellants request that the Court articulate the criteria for determining illicit discriminatory intent in an initiative or referendum. They object to the DC's decision not to investigate the probable intent of the voters in determining whether Initiative 350 was motivated by racial bias.

congressional declaration of policy in favor of neighborhood schools and forbids federal courts and agencies from ordering transportation of students to schools other than those closest or next closest to their homes.

(4) Nothing in the legislative history of either the Civil Rights Attorneys' Fees Award Act, 42 U.S.C. § 1988, or the Emergency School Aid Act, 20 U.S.C. § 3205, indicates that Congress intended municipal corporations to receive attorney's fees from the State that created them. The "private attorney general" rationale is particularly inapt here, because the appellee school districts have financed their lawsuit from funds already appropriated by the State for such purposes.

4. RESPONSE: The appellee school districts have moved to dismiss or affirm. They track the CA's opinion in arguing that the decisions below were compelled by Lee and Hunter. Initiative 350 treats racial student assignment matters differently from other student assignment matters. By foreclosing the attainment of important minority educational goals at the local level, it "structures the political process in a nonneutral manner." And, since the law establishes a racial classification, it is presumptively invalid, regardless of intent.

Appellees submit that the CA's decision does not preclude a school board from reversing a decision voluntarily to desegregate its schools. The reversal, however, must avoid the creation of a racial classification in the use of student assignments. Initiative 350 is also quite different from the Equal Educational Opportunity Act of 1974. That law expressly preserves the

authority of local school boards voluntarily to desegregate. See 20 U.S.C. § 1716.

Appellees also maintain that the DC was correct in its alternative finding that Initiative 350 was adopted with a discriminatory purpose. The initiative will result in increased school segregation to the detriment of minorities; the history of the initiative indicates it was adopted to reverse the Seattle desegregation plan; proponents departed from normal procedures by seeking approval of the initiative at the state, rather than local, level. The DC was also correct in concluding that the initiative is impermissibly overinclusive. It prohibits all voluntary efforts to desegregate, regardless of whether they are necessary to satisfy perceived constitutional requirements. School boards ought to be free to desegregate their schools without awaiting a court order declaring the boards' policies unconstitutional. (The State contends that Initiative 350 permits school boards to use busing when necessary to remedy constitutional violations.)

Turning to the attorney's fee question, appellees maintain that nothing in the relevant statutes or in their legislative histories indicates a congressional intention to limit fee awards to private parties. The policy of the statutes is to encourage litigation vindicating civil rights. That policy is served no less by awards to publicly funded litigants than by awards to private parties. Moreover, the State is incorrect in implying that an award would duplicate funding already provided by the

State. The appellees' budgets are funded by local property taxes as well as state appropriations.

The appellee intervenors have also filed a motion to dismiss or affirm. The States of Arizona, Kansas, Nebraska, and Utah , as amici curiae, have filed a brief in support of the jurisdictional statement. They argue, inter alia, that a statutory racial classification dictates different results for members of different races, by reason of their race. Initiative 350 creates a classification among reasons for mandatory busing. It does not create a racial classification on its face. Rather, it indicates an intent to adopt a policy against the use of racial classifications in assigning students to schools. It may be that the statute was adopted for discriminatory reasons, but that is impossible to know without further inquiry into intent.

Finally, the SG has filed a memorandum urging the Court to note probable jurisdiction. Although the United States intervened on behalf of the appellees in the DC, the SG notes that the United States now supports the appellants in arguing that Initiative 350 should be upheld. Should the Court reverse the CA, it may either remand the case for consideration of the remaining grounds on which the DC relied, or it may decide those issues itself. The SG does not address the attorney's fee issue.

5. DISCUSSION: This case presents two questions. The first, which concerns the constitutionality of Initiative 350, is within the Court's appellate jurisdiction and is plainly substantial. The second, which concerns the award of attorney's fees to the appellee school districts, is not an appealable

CA9 found an invalid "classification" — then obviating need to consider intent

question. Nevertheless, it too presents an important and unresolved issue which the Court may wish to address should it note probable jurisdiction to consider the first question.

The CA held that Initiative 350 creates an impermissible racial classification. That holding is significant, in part because it obviates the need to investigate purpose and intent. Unlike most laws that create racial classifications, Initiative 350 does not expressly confer benefits or impose disadvantages on the basis of race. Rather, by omission, it prohibits the assignment of all children beyond their neighborhood schools for the purpose of achieving racial balance. To treat this decision as one creating a racial classification is, in effect, to conclusively presume that the voters' opposition to busing is a manifestation of racial discrimination. The presumption may be true, but it ought to be established through the sort of investigation this Court has required in testing allegations of discriminatory intent.

Despite all of this, the CA may have been justified by this Court's decision in Hunter v. Erickson, supra. At issue in Hunter was a city charter amendment that both repealed existing ordinances forbidding housing discrimination and required the approval of the voters as a precondition to enactment of new ordinances. All other ordinances regulating the real estate market could become effective merely upon passage by the City Council. The Court determined that the charter amendment created a racial distinction among that class of persons who would seek the enactment of ordinances regulating the real estate market.

Hunter

393 U.S., at 390. The Court also condemned the amendment because it placed "special burdens on racial minorities within the governmental process." Id. at 391.

Hunter was decided before this Court's recent elaboration of the differences between racial classification, disparate impact, and discriminatory intent in cases such as Washington v. Davis, 426 U.S. 229 (1976), and Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977). In addition, Hunter may best be explained as prohibitting the imposition of special burdens on minorities who seek legal protection through the legislative process. Initiative 350 imposes no similar burdens. As the SG argues in his memorandum, the initiative, at most, reallocates responsibility for student assignment from the school board to the State. It does not alter the methods of legislative change at either level in a way that burdens minorities. Contrary to the CA's reasoning, it is doubtful that the Equal Protection Clause per se forbids such reallocations of authority. SG

This appeal raises one final issue worth discussing, and that is the extent to which governmental entities may rescind measures designed for the benefit of racial minorities without running afoul of the presumption against racial classifications. As appellants note, the Court in Dayton Bd. of Educ. v. Brinkman, supra, intimated that such rescissions are permissible, provided that adoption of the measures was not constitutionally compelled in the first place. The discussion in Brinkman, however, is abbreviated and this appeal presents the opportunity for more thorough consideration.

I would note probable jurisdiction.

Appellees have filed motions to dismiss or affirm; the United States and amici have filed briefs in support of the jurisdictional statement.

9/21/81	Folse	DC and CA Opns in Juris. Statement

Reviewed 3/21 - Excellent & persuasive.

David thinks both Initiative 350 & Proposition 1 are valid, though recognizing that since the later withdraws power only from state courts (& thus does not alter the state "political" system) it is somewhat easier to defend vs. Hunter than the Washington Initiative 350 that alters state political process by withdrawing power from school boards.

dfl 03/20/82

BENCH MEMORANDUM

To: Mr. Justice Powell March 20, 1982

From: David Levi

Nos. 81-9 & 81-38: Washington v. Seattle School District
Crawford v. Board of Education of Los Angeles

Question Presented

Whether the state may limit the power of local "school boards" to order mandatory busing when this busing is not required by the Fourteenth Amendment?

Whether the state may limit the power of "state courts" to order mandatory busing to instances in which a federal court would order mandatory busing?

I do not pretend to have mastered these exceptionally difficult cases, but I hope that the following summary and analysis is useful. I conclude that the two cases are analytically indistinguishable--although the two anti-busing laws differ greatly in their particulars--and that they are both constitutional.

I. Facts and Decisions Below

A. The Washington Initiative

Initiative 350 was passed in November, 1978, at a state-wide election. The initiative forbids any school board from "directly or indirectly" requiring "any student to attend a school other than the school which is geographically nearest or next nearest the student's place of residence." There are three exceptions to this prohibition included in the initiative: if a student requires special education, if there are health or safety hazards, or if the school nearest or next nearest is unsafe or overcrowded, the student may be assigned to a more distant school. The Initiative does not bar any

voluntary programs: magnet schools "or any other voluntary option offered to students" are still permissible. Further, the Initiative does not purport to limit the power of "any court" "from adjudicating constitutional issues relating to the public schools."

No effort to limit judicial action

In short, the Initiative prohibits busing beyond the "next nearest" school, unless the busing is court ordered. Although the Initiative is not specifically directed to busing for racial desegregation, the history of the Initiative indicates that this was one of its prime targets. Specifically, Seattle had just adopted a wide-ranging plan of mandatory busing for integration. Note, however, that the Initiative would permit voluntary programs and would also permit assignment (and busing) to the "next nearest" school to be made on the basis of race.

The effect of Initiative 350

The District Judge held that the Initiative violated the Fourteenth Amendment for three reasons: "(1) it forbids mandatory student assignments for racial reasons but permits such student assignments for purposes unrelated to race, (2) a racially discriminatory purpose was one of the facts which caused Initiative 350 to be adopted, and (3) the intiative is overly inclusive in that it permits only court-ordered busing of students for racial purposes even though a school board may be under a constitutional duty to do so even in the absence of a court order."

DC

The CA9 affirmed on the basis of the District Court's first rationale only: "the statute was correctly struck down as an impermissible legislative classification based on racial criteria." Judge Ely's opinion is not a model of clarity. His argument proceeds in three parts. First, he argues that although the Initiative does not embody an explicit racial classification it does in effect: it permits busing for three reasons but not for the purpose of achieving racial balance. Having established that Initiative 350 employs a racial classification, he then argues that such a classification is impermissible under the decision of this Court in Hunter v. Erickson, 393 U.S. 385 (1969) and Lee v. Nyquist, 318 F. Supp. 710 (W.D.N.Y. 1970) (3-Judge Court), aff'd, 402 U.S. 935 (1971). These decisions establish that the political process may not be re-structured in such a way as to make it more difficult for racial minorities to achieve their legislative goals. Under this principle the Initiative must be condemned: "[I]t is manifest that Initiative 350 both creates a constitutionally-suspect racial classification and radically restructures the political process of Washington by allowing a state-wide majority to usurp traditional local authority over local school baord educational policies." Finally, Judge Ely argues that the classification cannot be supported by any compelling interest. The State's interest in a state-wide neighborhood school policy is not as strong as the interest "of the locally elected school boards and the

CA9 aff'd on different grounds: "a racial classification"

Hunter relied upon by Judge Ely

community they represent in promulgating their own educational policy. Therefore, we hold that Initiative 350, which attempts to wrest from local control the formulation and implementation of educational and desgregation policies, is not supported by any compelling state interest." Judge Wright dissented.

B. The California Proposition

Proposition 1, an initiative measure amending article I, section 7(a) of the California Constitution, was adopted at a state-wide election on November 6, 1979. The proposition instructs that no state court shall order busing "(1) except to remedy a specific violation by such party that would also constitute a violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution, and (2) unless a federal court would be permitted under federal decisional law to impose that obligation or responsibility upon such party to remedy the specific violation of the Equal Protection Clause of the 14th Amendment." Although restricting the power of state courts, the Proposition leaves the powers of local school boards intact: "Nothing herein shall prohibit the governing board of a school district from voluntarily continuing or commencing a school integration plan."

Calif #1 limits power of state courts to exceed Fed law, but leaves S/Bds free to act.

The state court found that the Proposition was constitutional. School boards remain under a "state law duty"

to desegregate the school regardless of the cause of segregation. In fulfilling their duty the Boards may order busing; but no state court may order the Boards to require busing (unless a federal court would order busing). The effect of the proposition is simply "to withdraw one desegregative technique from the state court's arsenal of remedies available to alleviate unintended, non-purposeful segregation, but to leave all other available techniques intact." The court rejected the argument that the proposition was invalid under Reitman v. Mulkey, 1967, 387 U.S. 369 or Hunter v. Erickson, supra. The proposition did not authorize private discrimination as in Mulkey. Nor can the recission of a state law remedy be said to violate the rule in Hunter. Such a conclusion would be illogical: "If a state is not under a federal duty to adopt a particular act in the first place ... recisision of the act cannot be unconstitutional."

Bds may order busing

Effect of Prop. 1

Point

II. Relevant Case Law

There are four relevant decisions, the most important of which is Hunter v. Erickson.

1. Hunter v. Erickson

In 1964 the Akron City Council enacted a fair housing ordinance establishing a Commission on Equal

Opportunity in Housing. Following passage of this ordinance, a proposal for charter amendment was placed on the ballot at a general election upon petition of more than 10% of the electorate. The charter amendment provided that "Any ordinance enacted by the Council of The City of Akron which regulates the use, sale, ... lease... of real property ... on the basis of race, color, religion, national origin or ancestry must first be approved by a majority of the electors voting on the question at a regular or general election before said ordinance shall be effective." As a result of the charter amendment, the 1964 fair housing ordinance was no longer valid.

The Court (per White, J.) held that the charter amendment was unconstitutional. In general, measures passed by the City Council became law in 30 days and were subject to referendum only if 10% of the electors signed an appropriate petition. The effect of the charter amendment was that ordinances to end housing discrimination--unlike any other ordinances--were automatically subject to a referendum. This was "an explicitly racial classification treating racial housing matters differently from other racial and housing matters." The effect of this explicit racial classification was to place "special burdens on racial minorities within the governmental process."

Effect of Charter Amend. - racial classification

It is noteworthy that the Court did "not hold that mere repeal of an existing ordinance violates the Fourteenth

Amendment." Thus, had the fair housing ordinance been repealed in the normal way--by a referendum following upon a petition of 10% of the voters--there would have been no constitutional violation.

In concurrence Justice Harlan emphasized Hunter that minorities could not complain if any particular governmental process--e.g. bicameralism--made it more difficult to pass equal rights legislation. "In the case before us, however, the city of Akron has not attempted to allocate governmental power on the basis of any general principle. Here, we have a provision that has the clear purpose of making it more difficult for certain racial and religious minorities to achieve legislation that is in their interest." Through the existing referendum process Akron voters could always repeal any particular fair housing measure that they disliked. The effect of the charter amendment, however, was to make it difficult to pass a fair housing law even when the electorate was not aroused to passionate opposition.

2. Lee v. Nyquist

This decision by a 3-judge court (Hayes, Henderson, Burke) was summarily affirmed by this Court.

The state statute at issue in Lee provided that "no student shall be assigned or compelled to attend any school on account of race, creed, color, or national origin, or for the

purpose of achieving equality in attendance or increased attendance or reduced attendance, at any school, of persons of one or more particular races, creeds, colors, or national origins" unless "with the express approval of a board of education having jurisdiction, a majority of the members of such board having been elected." In short, the statute prohibited state education officials and appointed school boards from assigning students on the basis of race. Buffalo has an appointed Board of Education, and parents of children attending Buffalo schools brought suit to challenge the statute.

Writing for the court, Judge Hayes held that the statute was invalid under the 14th Amendment. The court rested its decision on Hunter. "The principle of Hunter is that the state creates an 'explicitly racial classification' whenever it differentiates between the treatment of problems involving racial matters and that afforded other problems in the same area." The New York statute "by prohibiting the implementation of plans designed to alleviate racial imbalance in the schools except with the approval of a local elected board ... creates a single exception to the broad supervisory powers the state Commissioner of Educatione exercises over local publich education. ... The statute thus creates a clearly "racial classification", treating educational matters involving racial criteria differently from other educational

matters and making it more difficult to deal with racial imbalance in the public schools."

3. Reitman v. Mulkey (1967)

Calif. Proposition was held to authorize private discrimination in housing by use of

Reitman preceded Hunter. In Reitman the Court (White, J.) invalidated Proposition 14, an amendment to the California constitution. Proposition 14 provided that neither the State nor local governments "shall deny, limit or abridge, ... the right of any person ... to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses." The Court found that Proposition 14 did more than just repeal existing laws regulating private discrimination in housing, it authorized private discrimination in the housing market.

Justice Harlan dissented. "[A]ll that has happended is that California has effected a pro tanto repeal of its prior statutes forbidding private discrimination. This runs no more afoul of the Fourteenth Amendment than would have California's failure to pass any such antidiscrimination statutes in the first instance." He argued that the Court should "permit the political process" a degree of leeway and flexibility in dealing with racial matters: "When legislation in this field is unsuccessful there should be wide opportunities for legislative amendment, as well as for change through such processes as the popular initiative and

I agree generally

referendum. ... Here the electorate itself overwhelmingly wished to overrule and check its own legislature on a matter left open by the Federal Constitution."

4. Dayton Bd. of Ed. v. Brinkman, 433 U.S. 406 (1977)

In Dayton I a subsequent School Board rescinded the resolutions adopted by an earlier Board. Justice Rehnquist found no constitutional violation in such a recission:

> "The Board had not acted to undo operative regulations affecting the assignment of pupils or other aspects of the management of school affairs, cf Reitman, but simply repudiated a resolution of a predecessor Board stating that it recognized its own fault in not taking affirmative action at an earlier date. We agree with the Court of Appeals' treatment of this aciton, wherein that court said:
> 'The question of whether a rescission of previous Board action is in and of itself a violation of appellants' constitutional rights is inextricably bound up with the question of whether the Board was under a constitutional duty to take the action which it initially took. ....If the Board was not under such a duty, then the rescission of the initial action in and of itself cannot be a constitutional violation.'"

III. Analysis

The question in both cases is whether the particular limitation on school assignments so changes the "rules of the game" that the holding in Hunter is applicable. Both cases

are susceptible to such an analysis. The California limitation on the state court's power to order busing is an unusual limit on the courts' authority and one which makes it more difficult to proponents of busing to get the relief they seek. Moreover, the rules have been changed in a general way--a particular exericise of authority was not repealed. Arguably, proponents of desegregation have been particularly burdened by a unique alteration in judicial process.

Similarly, with respect to the Washington case one may argue that the limit on the local school board's authority marks a change in the rules that particularly burdens those who favor busing for desegregation and those who favor desegregation generally. Lee, supra, is closely analogous. The 3-judge court there held that a limit on power of appointed boards of education to order busing for desegregation placed a unique limitation of the powers of state boards. Likewise, one could argue that the limit on the ability of local school boards to bus imposes a unique limit on the traditional powers of the local school board. Alternatively, one may argue that whereas the school board may order busing for some reasons, it may not order busing for desegregation. Thus, the Initiative imposes a non-neutral limit on the school board's power to order busing. Moreover, as in Hunter, the rules of the game have been changed. Under Dayton it is clear that the Seattle Board of Education itself could have repealed its desegregation plan. Further, it is

Lee in v Nyquist in closest case (Appeal by this Court)

likely that even the State through initiative could repeal the Seattle plan. But here no particular plan has been repealed. Rather, as a general matter busing by local school boards has been removed from the array of local school board powers.

On the other hand, strong arguments can be advanced for distinguishing Hunter. To begin with I start with the notion in Harlan's dissent in Reitman that the Court ought not make it impossible for legislatures and voters to experiment with race related programs. Putting Hunter to the side, one would think that a state ought to be able to try affirmative action program of various sorts--busing, hiring, etc--but yet retain the freedom to terminate such programs if they prove unsuccessful.

Moreover, taking on Hunter directly, I think that both of these cases can be distinguished. To begin with the regulation in Hunter and Lee embodied an explicit racial classification. Here we have at least facial neutrality. In the California case all busing ordered by a state court is prohibited. No mention is made of busing for one purpose as opposed to another. Again, in Washington the Initiative permits busing for reasons of safety or school overcrowding but prohibits busing for any other purpose without particular regard to busing for integration.

Further, it is not clear to me that the burden on busing proponents is comparable to the burden placed on proponents of fair housing in Hunter. In California, busing

proponents may seek integration by busing or by other techniques from local school boards. Indeed, they may continue to seek court ordered integration from the state courts; these courts may order integration through means other than busing--e.g. magnet schools. In Washington the burden seems somewhat greater. Even so, the proponents of integration may still seek their goal through voluntary busing plans and through any other voluntary programs. Further, I believe that mandatory busing for integration may be ordered in Washington after the Initiative so long as the student is not bussed beyond the next nearest school. From this perspective, it is as if the Initiative placed a 30 minute limit on non-court ordered busing. In the Pasco school district, for example, there are many schools near the black neighborhoods but very few in the white neighborhoods. Ironically, after the initiative, white students can be bussed to the "next nearest school"--which would be in black neighborhoods-- although blacks may not be bussed out of their neighborhoods since the next nearest school is still in the black quarter.

Ask

Perhaps most convincingly, Hunter may be distinguished in line with the suggestion in Dayton that a school board may rescind its own previous action. In Hunter the city council was restructured by the city electorate so as to disfavor one classification of legislation. Here by contrast there is simply recission of powers previously

granted by the state to some other body--school boards or courts. Thus, in the California case the state has withdrawn a power granted to the "state courts". Similarly, in Washington the state regathers to itself some of the sovereign power delegated to local school boards. Had Ohio state passed legislation removing fair housing legislation or racial legislation generally from the power of local municipalities Hunter would be more closely analogous.

Persuasive way to analize

I can see no reason why the state should not be able to withdraw powers it has previously granted. Suppose that in partially funding local school boards the state stipulated that funds were not to be used for mandatory busing--unless required by the federal constitution--or for any affirmative action without state authorization. That would seem perfectly appropriate to me if the state's reason was to maintain some consistent state policy on the treatment of race. Similarly, suppose that in passing some state anti-discrimination law the State chooses not to provide for punitive damages for plaintiffs. Would that fall afoul of the Hunter principle because other plaintiffs under state law may seek such damages? If as an initial matter the state may order such restrictions, why may it not alter its grant of authority subsequently?

David Hunter a State may withdraw powers it previously granted

In addition, the Hunter characterization is quite slippery. The Initiative process is well established in the West. It is not clear to me that there has been any change in

the political process in Washington. Busing opponents--stymied at the local level--took their grievance to the State level. That is the typical pattern. Had busing proponents lost at the local level they too may have sought relief at the next level. Similarly, it is not clear to me that the California proposition works any change in the political process. It changes the variety of relief one may attain from a state court, but I am not sure that state court remedies ought to be viewed as a part of the political process--although the argument is credible.

In short, I think that Hunter is distinguishable in both cases. I acknowledge that the California proposition is somewhat easier to uphold. Because it involves judicial remedies rather than some change in the political process, Hunter seems less clearly applicable. Moreover, since it permits so many other avenues for relief--from local school boards, as well as from state courts--the burden on busing proponents appears slight. Obviously, the Court will feel some pressure to reaffirm its faith in integration, and so to invalidate one of these measures. Perhaps the Washington Initiative would be less vulnerable to attack had it been aimed solely at the Seattle plan--although I doubt respondents would agree to this. Yet it would seem odd to permit the state wide electorate to abolish a local plan but not permit the electorate to set state wide policy as a general matter.

Yes

Court ..... Voted on ....., 19...

Argued ....., 19... Assigned ....., 19... No. 81-9

Submitted ....., 19... Announced ....., 19...

WASHINGTON

vs.

SEATTLE SCH. DIST., #1

WQB thinks there was local school dist. plan - CA9 in right. + XT There is a similar case. 9'd take both.

Note

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.													
Brennan, J.							✓						
~~Stewart, J.~~													
White, J.				✓									
Marshall, J.							✓						
Blackmun, J.				✓									
Powell, J.				✓									
Rehnquist, J.				✓									
Stevens, J.							✓						
O'Connor, J.				✓									

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 1, 1982

Re: 81-9 - Washington v.
Seattle School District No. 1

Dear Harry,

Please join me.

Sincerely yours,

Byron

Justice Blackmun

Copies to the Conference

cpm

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 1, 1982

RE: No. 81-9 Washington v. Seattle School District

Dear Harry:

I agree.

Sincerely,

Bill

Justice Blackmun

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 2, 1982

Re: 81-9 - Washington v. Seattle School District

Dear Harry:

Please join me.

Respectfully,

JPS

Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 2, 1982

Re: No. 81 - 9 - Washington v. Seattle School District

Dear Harry:

Please join me.

Sincerely,

T.M.

T.M.

Justice Blackmun

cc: The Conference

STYLISTIC CHANGES
+ P. 9

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Blackmun**

Circulated: _____

Recirculated: JUN 3 1982

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-9

WASHINGTON, ET AL., APPELLANTS *v.* SEATTLE SCHOOL DISTRICT NO. 1 ET AL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June ——, 1982]

JUSTICE BLACKMUN delivered the opinion of the Court.

We are presented here with an extraordinary question: whether an elected local school board may use the Fourteenth Amendment to *defend* its program of busing for integration from attack by the State.

I

A

Seattle School District No. 1 (District), which is largely coterminous with the city of Seattle, Wash., is charged by state law with administering 112 schools and educating approximately 54,000 public school students. About 37% of these children are of Negro, Asian, American Indian, or Hispanic ancestry. Because segregated housing patterns in Seattle have created racially imbalanced schools, the District historically has taken steps to alleviate the isolation of minority students; since 1963, it has permitted students to transfer from their neighborhood schools to help cure the District's racial imbalance.[1]

[1] In 1971, the District implemented a program of mandatory reassignments to integrate certain of its middle schools. This prompted an attempt to recall four school board members who had voted for the program. That attempt narrowly failed. See 473 F. Supp. 996, 1006 (WD Wash.

Despite these efforts, the District in 1977 came under increasing pressure to accelerate its program of desegregation.[2] In response, the District's Board of Directors (School Board) enacted a resolution defining "racial imbalance" as "the situation that exists when the combined minority student enrollment in a school exceeds the districtwide combined average by 20 percentage points, provided that the single minority enrollment . . . of no school will exceed 50 percent of the student body." 473 F. Supp. 996, 1006 (WD Wash. 1979). The District resolved to eliminate all such imbalance from the Seattle public schools by the beginning of the 1979–1980 academic year.[3]

In September 1977, the District implemented a "magnet" program, designed to alleviate racial isolation by enhancing educational offerings at certain schools, thereby encouraging voluntary student transfers. A "disproportionate amount of the overall movement" inspired by the program was undertaken by Negro students, however, *id.*, at 1006, and racial imbalance in the Seattle schools was found to have actually increased between the 1970–1971 and 1977–1978 academic years. The District therefore concluded that mandatory re-

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1979).

[2] Several community organizations threatened legal action if the District did not initiate a more effective integration effort, while the Mayor of Seattle and a number of community leaders, by letter dated May 20, 1977, urged the District to adopt "a definition of racial isolation and measurable goals leading to the elimination of racial isolation in the Seattle Public Schools prior to a Court ordered and mandated desegregation remedy." App. 139.

[3] The District Court found that the actions of the School Board were prompted by its members' "desire to ward off threatened litigation, their desire to prevent the threatened loss of federal funds, their desire to relieve the black students of the disproportionate burden which they had borne in the voluntary efforts to balance the schools racially and their perception that racial balance in the schools promotes the attainment of equal educational opportunity and is beneficial in the preparation of all students for democratic citizenship regardless of their race." 473 F. Supp., at 1007.

assignment of students was necessary if racial isolation in its schools was to be eliminated. Accordingly, in March 1978, the School Board enacted the so-called "Seattle Plan" for desegregation. The plan, which makes extensive use of busing and mandatory reassignments, desegregates elementary schools by "pairing" and "triading" predominantly minority with predominantly white attendance areas, and by basing student assignments on attendance zones rather than on race. The racial makeup of secondary schools is moderated by "feeding" them from the desegregated elementary schools. App. 142–143. The District represents that the plan results in the reassignment of roughly equal numbers of white and minority students, and allows most students to spend roughly half of their academic careers attending a school near their homes. Brief for Appellee Seattle School District 5.

The desegregation program, implemented in the 1978–1979 academic year, apparently was effective: the District Court found that the Seattle Plan "has substantially reduced the number of racially imbalanced schools in the district and has substantially reduced the percentage of minority students in those schools which remain racially imbalanced." 473 F. Supp., at 1007.

B

In late 1977, shortly before the Seattle Plan was formally adopted by the District, a number of Seattle residents who opposed the desegregation strategies being discussed by the School Board formed an organization called the Citizens for Voluntary Integration Committee (CiVIC). This organization, which the District Court found "was formed because of its founders' opposition to The Seattle Plan," 473 F. Supp., at 1007, attempted to enjoin implementation of the Board's mandatory desegregation program though litigation in state court; when these efforts failed, CiVIC drafted a statewide initiative designed to terminate the use of mandatory busing

for purposes of racial integration.[4] This proposal, known as Initiative 350, provided that "no school board . . . shall directly or indirectly require any student to attend a school other than the school which is geographically nearest or next nearest the student's place of residence . . . and which offers the course of study pursued by such student. . . ." See Wash. Rev. Code § 28A.26.010 (1981).[5] The initiative then set out, however, a number of broad exceptions to this requirement: a student may be assigned beyond his neighborhood school if he "requires special education, care or guidance," or if "there are health or safety hazards, either natural or man made, or physical barriers or obstacles . . . between the student's place of residence and the nearest or next nearest school," or if "the school nearest or next nearest to his place of residence is unfit or inadequate because of overcrowding, unsafe conditions or lack of physical facilities." See *ibid.* Initiative 350 also specifically proscribed use of seven enumerated methods of "indirec[t]" student assignment—among them the redefinition of attendance zones, the pairing of schools, and the use of "feeder" schools—that are a part of the Seattle Plan. See § 28A.26.030. The initiative envisioned busing for racial purposes in only one circumstance: it did not purport to "prevent any court of competent jurisdiction from adjudicating constitutional issues relating to the public schools." See § 28A.26.060.

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[4] Washington's Constitution reserves to the people of the State "the power to propose bills, laws, and to enact or reject the same at the polls, independent of the legislature." Wash. Const. Art. II, § 1. Such initiatives are placed on the ballot upon the petition of 8% of the State's voters registered and voting for governor at the last preceding regular gubernatorial election. § 1(a). If passed by the electorate, an initiative may not be repealed by the state legislature for two years, although it may be amended within two years by a vote of two-thirds of each house of the legislature. § 41. See generally Comment, Judicial Review of Laws Enacted by Popular Vote, 55 Wash. L. Rev. 175 (1979).

[5] The text of Initiative 350 is now codified as Wash. Rev. Code §§ 28A.26.010–28A.26.900 (1981).

Its proponents placed Initiative 350 on the Washington ballot for the November 1978 general election. During the ensuing campaign, the District Court concluded, the leadership of CiVIC "acted legally and responsibly," and did not address "its appeals to the racial biases of the voters." 473 F. Supp., at 1009. At the same time, however, the court's findings demonstrate that the initiative was directed solely at desegregative busing in general, and at the Seattle Plan in particular. Thus, "[e]xcept for the assignment of students to effect racial balancing, the drafters of Initiative 350 attempted to preserve to school districts the maximum flexibility in the assignment of students," *id.*, at 1008, and "[e]xcept for racially-balancing purposes" the initiative "permits local school districts to assign students other than to their nearest or next nearest schools for most, if not all, of the major reasons for which students are at present assigned to schools other than their nearest or next nearest schools." *Id.*, at 1010.[6] In campaigning for the measure, CiVIC officials accurately represented that its passage would result in "no loss of school district flexibility other than in busing for desegregation purposes," *id.*, at 1008, and it is evident that the campaign focused almost exclusively on the wisdom of "forced busing" for integration. See *id.*, at 1009.

On November 8, 1978, two months after the Seattle Plan went into effect, Initiative 350 passed by a substantial margin, drawing almost 66% of the vote statewide. The initative failed to attract majority support in two state legislative districts, both in Seattle. In the city as a whole, however, the initiative passed with some 61% of the vote. Within the month, the District, together with the Tacoma and Pasco school districts,[7] initiated this suit against the

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[6] At the beginning of the 1978–1979 academic year, approximately 300,000 of the 769,040 students enrolled in Washington's public schools were bused to school. Ninety-five percent of these students were transported for reasons unrelated to race. 473 F. Supp., at 1002.

[7] Along with Seattle, Tacoma School District No. 10 and Pasco School District No. 1 are the only districts in the State of Washington with com-

State in United States District Court for the Western District of Washington, challenging the constitutionality of Initiative 350 under the Equal Protection Clause of the Fourteenth Amendment. The United States and several community organizations intervened in support of the District[8]; CiVIC intervened on behalf of the defendants.

After a nine-day trial, the District Court made extensive and detailed findings of fact. The court determined that "[t]hose Seattle schools which are most crowded are located in those areas of the city where the preponderance of minority families live." 473 F. Supp., at 1001. Yet the court found that Initiative 350, if implemented, "will prevent the racial balancing of a significant number of Seattle schools and will cause the school system to become more racially imbalanced than it presently is," "will make it impossible for Tacoma schools to maintain their present racial balance," and will make "doubtful" the prospects for integration of the Pasco schools. *Id.*, at 1010; see *id.*, at 1001, 1011. Except for desegregative busing, however, the court found that "almost all of the busing of students currently taking place in

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prehensive integration programs, and therefore the three are the only districts affected by Initiative 350. See 473 F. Supp., at 1009. Since 1965, Pasco has made use of school closures and a mandatory busing program to overcome the racial isolation caused by segregated housing patterns; if students attended the schools nearest their homes, three of Pasco's seven elementary schools would have a primarily white and three a primarily minority student body. *Id.*, at 1002–1003. The Tacoma school district has made use of school closures, racially controlled enrollment at magnet schools, and voluntary transfers—though not mandatory busing—to enhance racial balance in its schools. *Id.*, at 1003–1004.

[8] Several of the intervenor plaintiffs also alleged that the District had engaged in *de jure* segregation, and therefore was operating an unconstitutional dual school system. The District Court therefore bifurcated the litigation, first addressing the constitutionality of Initiative 350. Because of the court's conclusions on that question, the allegations of *de jure* segregation did not go to trial and have not been addressed by the District Court or by the Court of Appeals.

[Washington] is permitted by Initiative 350." *Id.*, at 1010. And while the court found that "racial bias . . . is a factor in the opposition to the 'busing' of students to obtain racial balance," *id.*, at 1001, it also found that voters were moved to support Initiative 350 for "a number of reasons," so that "[i]t is impossible to ascertain all of those reasons [o]r to determine the relative impact of those reasons upon the electorate." *Id.*, at 1010.

The District Court then held Initiative 350 unconstitutional, for three independent reasons. The court first concluded that the initiative established an impermissible racial classification, in violation of *Hunter* v. *Erickson*, 393 U. S. 385 (1969), and *Lee* v. *Nyquist*, 318 F. Supp. 710 (WDNY 1970) (three-judge court), summarily aff'd, 402 U. S. 935 (1971), "because it permits busing for non-racial reasons but forbids it for racial reasons." 473 F. Supp., at 1012. The court next held Initiative 350 invalid because "a racially discriminatory purpose was one of the factors which motivated the conception and adoption of the initiative." *Id.*, at 1013.[9] Finally, the District Court reasoned that Initiative 350 was unconstitutionally overbroad, because in the absence of a court order it barred even school boards that had engaged in *de jure* segregation from taking steps to foster integration.[10]

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[9] The District Court acknowledged that it was impossible to determine whether the supporters of Initiative 350 "subjectively [had] a racially discriminatory intent or purpose," because "[a]s to that subjective intent the secret ballot raises an impenetrable barrier." 473 F. Supp., at 1014. The court looked instead to objective factors, noting that it "marked [a] departure from the norm . . . for the autonomy of school boards to be restricted relative to the assignment of students," and that it marked a similar "departure from the procedural norm" for "an administrative decision of a subordinate local unit of government . . . [to be] overridden in a statewide initiative." *Id.*, at 1016. These factors, when coupled with the "racially disproportionate impact of the initiative," its "historical background," and "the sequence of events leading to its adoption," were found to demonstrate that a "racially discriminatory intent or purpose was at least one motivating factor in the adoption of the initiative." *Ibid.*

[10] The District Court noted that school boards that had practiced *de jure*

Id., at 1016. The court permanently enjoined implementation of the initiative's restrictions.

On the merits, a divided panel of the United States Court of Appeals for the Ninth Circuit affirmed, relying entirely on the District Court's first rationale. 633 F. 2d 1338 (1980).[11] By subjecting desegregative student assignments to unique treatment, the Court of Appeals concluded, Initiative 350 "both creates a constitutionally-suspect racial classification and radically restructures the political process of Washington by allowing a state-wide majority to usurp traditional local authority over local school board educational policies." 633 F. 2d, at 1344. In doing so, the court continued, the initiative "*remove[s]* from local school boards their existing authority, and in large part their capability, to enact programs designed to desegregate the schools." *Id.*, at 1346 (emphasis in original; citation omitted). The court found such a result contrary to the principles of *Hunter* v. *Erickson*, *supra*, and *Lee* v. *Nyquist*, *supra*. The court acknowledged that the issue would be a different one had a successor school board attempted to rescind the Seattle Plan. Here, however, "a different governmental body—the state-wide electorate—rescinded a policy voluntarily enacted by locally elected school boards already subject to local political control." 633 F. 2d, at 1346.[12]

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segregation are under an affirmative obligation to eliminate the effects of that practice. 473 F. Supp., at 1016. See *Columbus Board of Education* v. *Penick*, 443 U. S. 449, 458–459 (1979).

[11] The Court of Appeals therefore did not address the District Court's alternative finding that Initiative 350 had been adopted for discriminatory reasons, or its conclusion that the initiative was overbroad. 633 F. 2d, at 1342.

[12] After the decision on the merits, the District Court had declined to award attorney's fees to the plaintiff school districts because the districts are state-funded entities. App. to Juris. Statement C-1. The Court of Appeals reversed on this issue, concluding that the District Court had abused its discretion in denying fees. The Court of Appeals determined

The State appealed to this Court. We noted probable jurisdiction to address an issue of significance to our Nation's system of education. —— U. S. —— (1981).

II

A

The Equal Protection Clause of the Fourteenth Amendment guarantees racial minorities the right to full participation in the political life of the community. It is beyond dispute, of course, that given racial or ethnic groups may not be denied the franchise, or precluded from entering into the political process in a reliable and meaningful manner. See *White* v. *Regester*, 412 U. S. 755 (1973); *Nixon* v. *Herndon*, 273 U. S. 536 (1927). But the Fourteenth Amendment also reaches "a political structure that treats all individuals as equals," *Mobile* v. *Bolden*, 446 U. S. 55, 84 (1980) (STEVENS, J., concurring in the judgment), yet more subtly distorts governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation.

This principle received its clearest expresion in *Hunter* v. *Erickson*, *supra*, a case that involved attempts to overturn antidiscrimination legislation in Akron, Ohio. The Akron city council, pursuant to its ordinary legislative processes, had enacted a fair housing ordinance. In response, the local citizenry, using an established referendum procedure, see 393 U. S., at 390, and n. 6; 393–394, and n. * (Harlan, J., concurring), amended the city charter to provide that ordinances regulating real estate transactions "on the basis of race, color, religion, national origin or ancestry must first be ap-

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that the school districts fell within the language of the attorney's fees statutes, 42 U. S. C. § 1988 and 20 U. S. C. § 3205, see n. 28, *infra*, and it reasoned that "[a]s long as a publicly-funded organization advances important constitutional values, it is eligible for fees under the statutes." 633 F. 2d, at 1348.

proved by a majority of the electors voting on the question at a regular or general election before said ordinance shall be effective." *Id.*, at 387. This action "not only suspended the operation of the existing ordinance forbidding housing discrimination, but also required the approval of the electors before any future [fair housing] ordinance could take effect." *Id.*, at 389–390. In essence, the amendment changed the requirements for the adoption of one type of local legislation: to enact an ordinance barring housing discrimination on the basis of race or religion, proponents had to obtain the approval of the city council *and* of a majority of the voters citywide. To enact an ordinance preventing housing discrimination on other grounds, or to enact any other type of housing ordinance, proponents needed the support of only the city council.

In striking down the charter amendment, the *Hunter* Court recognized that, on its face, the provision "draws no distinctions among racial and religious groups." 393 U. S., at 390. But it did differentiate "between those groups who sought the law's protection against racial . . . discriminations in the sale and rental of real estate and those who sought to regulate real property transactions in the pursuit of other ends," *ibid.*, thus "disadvantag[ing] those who would benefit from laws barring racial . . . discriminations as against those who would bar other discriminations or who would otherwise regulate the real estate market in their favor." *Id.*, at 391. In "reality," the burden imposed by such an arrangement necessarily "falls on the minority. The majority needs no protection against discrimination and if it did, a referendum might be bothersome but no more than that." *Ibid.* In effect, then, the charter amendment served as an "explicitly racial classification treating racial housing matters differently from other racial and housing matters." *Id.*, at 389. This made the amendment constitutionally suspect: "the State may no more disadvantage any *particular* group by making it more difficult to enact legislation in its behalf than

it may dilute any person's vote or give any group a smaller representation than another of comparable size." *Id.*, at 393 (emphasis added).

Lee v. *Nyquist*, 318 F. Supp. 710 (WDNY 1970) (three-judge court), offers an application of the *Hunter* doctrine in a setting strikingly similar to the one now before us. That case involved the New York education system, which made use of both elected and appointed school boards and which conferred extensive authority on state education officials. In an effort to eliminate *de facto* segregation in New York's schools, those officials had directed the city of Buffalo—a municipality with an appointed school board—to implement an integration plan. While these developments were proceeding, however, the New York Legislature enacted a statute barring state education officials and appointed—though not elected—school boards from "assign[ing] or compell[ing] [students] to attend any school on account of race . . . or for the purpose of achieving [racial] equality in attendance . . . at any school." 318 F. Supp., at 712.[16]

Applying *Hunter*, the three-judge District Court invalidated the statute, noting that under the provision "[t]he Commissioner [of Education] and local appointed officials are prohibited from acting in [student assignment] matters only where racial criteria are involved." *Id.*, at 719. In th court's view, the statute therefore "place[d] *burdens* on the implementation of educational policies designed to deal with race on the local level" by "treating educational matters involving racial criteria differently from other educational matters and making it more difficult to deal with racial imbalance in the public schools." *Id.*, at 719 (emphasis in original). This drew an impermissible distinction "between the treatment of problems involving racial matters and that afforded other problems in the same area." *Id.*, at 718. This Court

[16] As does Initiative 350, the New York statute apparently permitted voluntary student transfers to achieve integration. See n. 16, *infra*.

affirmed the District Court's judgment without opinion. 402 U. S. 935 (1971).

These cases yield a simple but central principle. As Justice Harlan noted while concurring in the Court's opinion in *Hunter*, laws structuring political institutions or allocating political power according to "neutral principles"—such as the executive veto, or the typically burdensome requirements for amending state constitutions—are not subject to equal protection attack, though they may "make it more difficult for minorities to achieve favorable legislation." 393 U. S., at 394. Because such laws make it more difficult for *every* group in the community to enact comparable laws, they "provid[e] a just framework within which the diverse political groups in our society may fairly compete." *Id.*, at 393. Thus, the political majority may generally restructure the political process to place obstacles in the path of everyone seeking to secure the benefits of governmental action. But a different analysis is required when the State allocates governmental power non-neutrally, by explicitly using the *racial* nature of a decision to determine the decisionmaking process. State action of this kind, the Court said, "places *special* burdens on racial minorities within the governmental process," *id.*, at 391 (emphasis added), thereby "making it *more* difficult for certain racial and religious minorities [than for other members of the community] to achieve legislation that is in their interest." *Id.*, at 395 (emphasis added) (Harlan, J., concurring). Such a structuring of the political process, the Court said, was "no more permissible than [is] denying [members of a racial minority] the vote, on an equal basis with others." *Id.*, at 391.

III

We believe that the Court of Appeals properly focused on *Hunter* and *Lee*, for we find the principle of those cases dispositive of the issue here. In our view, Initiative 350 must fall because it does "not attemp[t] to allocate governmental

power on the basis of any general principle." *Hunter* v. *Erickson*, 393 U. S., at 395 (Harlan, J., concurring). Instead, it uses the racial nature of an issue to define the governmental decisionmaking structure, and thus imposes substantial and unique burdens on racial minorities.

A

Noting that Initiative 350 nowhere mentions "race" or "integration," appellants suggest that the legislation has no racial overtones; they maintain that *Hunter* is inapposite because the initiative simply permits busing for certain enumerated purposes while neutrally forbidding it for all other reasons. We find it difficult to believe that appellants' analysis is seriously advanced, however, for despite its facial neutrality there is little doubt that the initiative was effectively drawn for racial purposes. Neither the initiative's sponsors, nor the District Court, nor the Court of Appeals had any difficulty perceiving the racial nature of the issue settled by Initiative 350. Thus, the District Court found that the text of the referendum was carefully tailored to interfere only with desegregative busing.[14] Proponents of the initiative candidly "represented that there would be no loss of school district flexibility other than in busing for desegregation purposes." 473 F. Supp., at 1008. And, as we have noted, Initiative 350 in fact allows school districts to bus their students "for most, if not all," of the non-integrative purposes required by their educational policies. *Id.*, at 1010. The Washington electorate surely was aware of this, for it was "assured" by CiVIC officials that "'99% of the school districts in the state'"—those that lacked mandatory integration programs—"would not be affected by the passage of 350." *Id.*, at 1008–1009. It is beyond reasonable dispute, then, that the initiative was

[14] The Court of Appeals accepted the District Court's characterization of the initiative, and even the dissenting judge in the Court of Appeals agreed that Initiative 350 addresses a "racial" problem. 633 F. 2d, at 1353.

enacted "'because of,' not merely 'in spite of,' its adverse effects upon" busing for integration. *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U. S. 256, 279 (1979).

Even accepting the view that Initiative 350 was enacted for such a purpose, the United States—which has changed its position during the course of this litigation, and now supports the State—maintains that busing for integration, unlike the fair housing ordinance involved in *Hunter*, is not a peculiarly "racial" issue at all. Brief for United States 17, n. 18. Again, we are not persuaded. It undoubtedly is true, as the United States suggests, that the proponents of mandatory integration cannot be classified by race: Negroes and whites may be counted among both the supporters and the opponents of Initiative 350. And it should be equally clear that white as well as Negro children benefit from exposure to "ethnic and racial diversity in the classroom." *Columbus Board of Education* v. *Penick*, 443 U. S. 449, 486 (1979) (POWELL, J., dissenting). See *Milliken* v. *Bradley*, 418 U. S. 717, 783 (1974) (MARSHALL, J., dissenting).[15] But neither of these factors serves to distinguish *Hunter*, for we may fairly assume that members of the racial majority both favored and benefited from Akron's fair housing ordinance. Cf. *Havens Realty Corp.* v. *Coleman*, —— U. S. ——, —— (1982) (slip op. 11–12, and n. 17); *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S. 91, 111, 115 (1979).

In any event, our cases suggest that desegregation of the public schools, like the Akron open housing ordinance, at bottom inures primarily to the benefit of the minority, and is de-

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[15] Appellants and the United States do not challenge the propriety of race-conscious student assignments for the purpose of achieving integration, even absent a finding of prior *de jure* segregation. We therefore do not specifically pass on that issue. See generally *Swann* v. *Charlotte-Mecklenberg Board of Education*, 402 U. S. 1, 16 (1971); *North Carolina State Board of Education* v. *Swann*, 402 U. S. 43, 45 (1971). Cf. *University of California Regents* v. *Bakke*, 438 U. S. 265, 300, n. 39, 312–314 (1978) (opinion of POWELL, J.).

signed for that purpose. Education has come to be "a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." *Brown* v. *Board of Education*, 347 U. S. 483, 493 (1954). When that environment is largely shaped by members of different racial and cultural groups, minority children can achieve their full measure of success only if they learn to function in—and are fully accepted by—the larger community. Attending an ethnically diverse school may help accomplish this goal by preparing minority children "for citizenship in our pluralistic society," *Estes* v. *Metropolitan Branches of the Dallas NAACP*, 444 U. S. 437, 451 (1980) (POWELL, J., dissenting), while, we may hope, teaching members of the racial majority "to live in harmony and mutual respect" with children of minority heritage. *Columbus Board of Education* v. *Penick*, 443 U. S., at 485, n. 5 (POWELL, J., dissenting). *Lee* v. *Nyquist* settles this point, for the Court there accepted the proposition that mandatory desegregation strategies present the type of racial issue implicated by the *Hunter* doctrine.[16]

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[16] The United States seeks to distinguish *Lee* by suggesting that the statute there at issue "clearly prohibited" all attempts to ameliorate racial imbalance in the schools, while Initiative 350 permits voluntary desegregation efforts. Brief for United States 25. Even assuming that this distinction would otherwise be of constitutional significance, its premise is not accurate. The legislation challenged in *Lee did* permit voluntary integration efforts, for it expressly exempted from its restrictions "the assignment of a pupil in the manner requested or authorized by his parents or guardian." 318 F. Supp., at 712. Thus, as the District Court in *Lee* noted, the statute "denie[d] appointed officials the power to implement *non-voluntary* programs for the improvement of racial balance." *Id.*, at 715 (emphasis added). The difficulty in *Lee*—as in this case—stemmed from the *Lee* District Court's conclusion that a voluntary program would not serve to integrate the community's schools: "Voluntary plans for achieving racial balance . . . have not had a significant impact on the problems of racial segregation in the Buffalo public schools; indeed it would appear that racial isolation is actually increasing." *Ibid.* Thus the statute

It is undeniable that busing for integration—particularly when ordered by a federal court—now engenders considerably more controversy than does the sort of fair housing ordinance debated in *Hunter*. See *Estes* v. *Metropolitan Branches of the Dallas NAACP*, 444 U. S., at 448–451 (POWELL, J., dissenting). But in the absence of a constitutional violation, the desirability and efficacy of school desegregation are matters to be resolved through the political process. For present purposes, it is enough that minorities may consider busing for integration to be "legislation that is in their interest." *Hunter* v. *Erickson*, 393 U. S., at 395 (Harlan, J., concurring). Given the racial focus of Initiative 350, this suffices to trigger application of the *Hunter* doctrine.

B

We are also satisfied that the practical effect of Initiative 350 is to work a reallocation of power of the kind condemned in *Hunter*. The initiative removes the authority to address a racial problem—and only a racial problem—from the existing decisionmaking body, in such a way as to burden minority interests. Those favoring the elimination of *de facto* school segregation now must seek relief from the state legislature, or from the statewide electorate. Yet authority over all other student assignment decisions, as well as over most other areas of educational policy, remains vested in the local school board. Indeed, by specifically exempting from Initiative 350's proscriptions most non-racial reasons for assigning students away from their neighborhood schools, the initiative expressly requires those championing school integration to surmount a considerably higher hurdle than persons seeking comparable legislative action. As in *Hunter*, then, the community's political mechanisms are modified to place affirmative

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challenged in Lee and Initiative 350 operated in probably the same way to "deny . . . student(s) the right to attend a fully integrated school." Brief for United States 25.

decisionmaking authority over a racial issue at a different level of government.[17] In a very obvious sense, the initiative thus "disadvantages those who would benefit from laws barring" *de facto* desegregation "as against those who . . . would otherwise regulate" student assignment decisions; "the reality is that the law's impact falls on the minority." *Hunter* v. *Erickson*, 393 U. S., at 391.

The state appellants and the United States, in response to this line of analysis, argue that Initiative 350 has not worked *any* reallocation of power. They note that the State necessarily retains plenary authority over Washington's system of education, and therefore they suggest that the initiative amounts to nothing more than an unexceptional example of a

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[17] In *Hunter*, the procedures for enacting racial legislation were modified in such a way as to place effective control in the hands of the citywide electorate; here, the power to enact racial legislation has been reallocated. In each case, the effect of the challenged action was to redraw decisionmaking authority over racial matters—and only over racial matters—in such a way as to place comparative burdens on minorities. While the United States observes that the proponents of integrated schools remain free to use Washington's initiative system to further their ends, that was true in *Hunter* as well: proponents of open housing were not barred from invoking Akron's initiative procedures to repeal the charter amendment, or to enact fair housing legislation of their own. It surely is an excessively formal exercise, then, to argue that the procedural revisions at issue in *Hunter* imposed special burdens on minorities, but that the selective allocation of decisionmaking authority worked by Initiative 350 does not erect comparable political obstacles. Indeed, in a sense the situation here is less favorable to minority interests than was the arrangement in *Hunter*, for the Akron charter amendment at least made provision for the passage of fair housing legislation, while Initiative 350 on its face forbids virtually all mandatory desegregation strategies. The United States would note that Initiative 350's "modification of state policy [was] not the result of any unusual political procedure," Brief for United States 30, for initiatives and referenda are often used by the Washington electorate. But that observation hardly serves to distinguish this case from *Hunter*, since the fair housing charter amendment was added through the unexceptional use of Akron's initiative procedure. See 393 U. S., at 387.

State's intervention in its own school system. In effect, they maintain that the State functions as a "super school board," Tr. of Oral Arg. 5, 17, which typically involves itself in all areas of educational policy. And, the argument continues, if the State is the body that usually makes decisions in this area, Initiative 350 worked a simple change in policy rather than a forbidden reallocation of power. Cf. *Crawford* v. *Los Angeles Board of Education*, *post*.

This at first glance would seem to be a potent argument, for States traditionally have been accorded the widest latitude in ordering their internal governmental processes, see *Holt Civic Club* v. *Tuscaloosa*, 439 U. S. 60, 71 (1978), and school boards, as creatures of the State, obviously must give effect to policies announced by the state legislature. But "insisting that a State may distribute legislative power as it desires . . . furnish[es] no justification for a legislative structure which otherwise would violate the Fourteenth Amendment. Nor does the implementation of this change through popular referendum immunize it." *Hunter* v. *Erickson*, 393 U. S., at 392. The issue here, after all, is not whether Washington has the authority to intervene in the affairs of local school boards; it is, rather, whether the State has exercised that authority in a manner consistent with the Equal Protection Clause. As the Court noted in *Hunter*, "though Akron might have proceeded by majority vote . . . on all its municipal legislation, it has instead chosen a more complex system. Having done so, the State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote." *Id.*, at 392–393. Washington also has chosen to make use of a more complex governmental structure, and a close examination both of the Washington statutes and of the Court's decisions in related areas convinces us that *Hunter* is fully applicable here.

At the outset, it is irrelevant that the State might have vested all decisonmaking authority in itself, so long as the po-

litical structure it in fact erected imposes comparative burdens on minority interests; that much is settled by *Hunter* and by *Lee*.[18] And until the passage of Initiative 350, Washington law in fact had established the local school board, rather than the State, as the entity charged with making decisions of the type at issue here. Like all 50 States, see Brief for National School Boards Assn. as *Amicus Curiae* 11, 14–16, Washington of course is ultimately responsible for providing education within its borders, see Wash. Const., Art. IX; Wash. Rev. Code § 28A.02.010 (1981); ch. 28A.41 (establishing a uniform school financing system); *Seattle School Dist.* v. *State*, 90 Wash. 2d 476, 585 P. 2d 71 (1978), and it therefore has set certain procedural requirements and minimum educational standards to be met by each school. See, *e. g.*, §§ 28A.01.010, 28A.01.020 (length of school day and year); ch. 28A.27 (mandatory attendance); ch. 28A.67 (teacher qualifications); ch. 28A.05 and §§ 28A.58.750–28A.58.754 (curriculum). But Washington has chosen to meet its educational responsibilities primarily through "state and local officials, boards, and committees," § 28A.02.020, and the responsibility to devise and tailor educational programs to suit local needs has emphatically been vested in the local school boards.

Thus "each common school district board of directors" is made "accountable for the proper operation of [its] district to the local community and its electorate." § 28A.58.758(1). To this end, each school board is "vested with the *final* responsibility for the setting of policies ensuring quality in the content and extent of its educational program" (emphasis

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[18] The Court noted in *Hunter* that Akron "might have proceeded by majority vote . . . on all its municipal legislation," 393 U. S., at 392; the charter amendment was invalidated because the citizens of Akron did not reserve all power to themselves, but rather distributed it in a non-neutral manner. In *Lee*, of course, the State had unquestioned authority to vest all power over education in state officials.

added). *Ibid.* School boards are given responsibility for, among many other things, "establish[ing] performance criteria" for personnel and programs, for assigning staff "according to board enumerated classroom and program needs," for setting requirements concerning hours of instruction, for establishing curriculum standards "relevant to the particular needs of district students or the unusual characteristics of the district," and for evaluating teaching materials. § 28A.58.758(2). School boards are generally directed to "develop a program identifying student learning objectives for their district[s]," §§ 28A.58.090; see also § 28A.58.092, to select instructional materials, § 28A.58.103, to stock libraries as they deem necessary, § 28A.58.104, and to initiate a variety of optional programs. See, *e. g.*, §§ 28A.34.010, 28A.35.010, 28A.58.105. School boards, of course, are given broad corporate powers. §§ 28A.58.010, 28A.58.075, 28A.59.180. Significantly for present purposes, school boards are directed to determine which students should be bused to school and to provide those students with transportation. § 28A.24.055.

Indeed, the notion of school board responsibility for local educational programs is so firmly rooted that local boards are subject to disclosure and reporting provisions specifically designed to ensure the board's "accountability" to the people of the community for "the educational programs in the school distric[t]." § 28A.58.758(3). And, perhaps most relevantly here, before the adoption of Initiative 350 the Washington Supreme Court had found it within the general discretion of local school authorities to settle problems related to the denial of "equal educational opportunity."[19] *Citizens Against*

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[19] Indeed, even the State's efforts to help ensure equal opportunity in education and to encourage desegregation are cast in cooperative terms, and are designed to assist school districts in implementing programs of their choosing. See, *e. g.*, Wash. Rev. Code §§ 28A.21.010(3), 28A.21.136(1) and (3) (1981); cf. § 28A.58.245(3).

Mandatory Bussing v. *Palmason*, 80 Wash. 2d 445, 453, 495 P. 2d 657, 663 (1972). It therefore had squarely held that a program of desegregative busing was a proper means of furthering the school board's responsibility to "administe[r] the schools in such a way as to provide a sound education for all children." *Id.*, at 456, 495 P. 2d, at 664.[20] See *State ex rel. Citizens Against Mandatory Bussing* v. *Brooks*, 80 Wash. 2d 121, 492 P. 2d 536 (1972); *State ex rel. Lukens* v. *Spokane School District*, 147 Wash. 467, 474, 266 P. 189, 191 (1928).[21]

Given this statutory structure, we have little difficulty concluding that Initiative 350 worked a major reordering of the State's educational decisionmaking process. Before adoption of the initiative, the power to determine what programs would most appropriately fill a school district's educational needs—including programs involving student assignment and desegregation—was firmly committed to the local board's discretion. The question whether to provide an integrated learning environment rather than a system of neighborhood schools surely involved a decision of that sort. See *Citizens Against Mandatory Bussing* v. *Palmason*, 80 Wash. 2d, at 459–460, 495 P. 2d, at 666–667. After passage of Initiative 350, authority over all but one of those areas remained in the

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[20] The Washington Supreme Court noted that "as long as the school board authorized or required students to attend schools geographically situated close to their homes, they had such a right. But the right existed only because it was given to them by the school authorities." 80 Wash. 2d, at 452, 495 P. 2d, at 662.

[21] We also note that the State has not attempted to reserve to itself exclusive power to deal with racial issues generally. Municipalities in Washington have been given broad powers of self-government, see generally Wash. Const., Amdt. 40; Wash. Rev. Code §§ 35.22.020, 35.23.440, 35.27.370, 35.30.010 (1981); Wash. Rev. Code Tit. 35A (Optional Municipal Code), and Washington courts specifically have held that municipalities have the power to enact antidiscrimination ordinances. See, *e. g.*, *Seattle Newspaper-Web Pressmen's Union Local No. 26* v. *City of Seattle*, 24 Wash. App. 462, 604 P. 2d 170 (1979). Cf. 5 E. McQuillin, Municipal Corporations § 19.23, p. 425 (3d ed. rev. 1981).

hands of the local board. By placing power over desegregative busing at the state level, then, Initiative 350 plainly "differentiates between the treatment of problems involving racial matters and that afforded other problems in the same area." *Lee* v. *Nyquist*, 318 F.Supp., at 718. The District Court and the Court of Appeals similarly concluded that the initiative restructured the Washington political process, and we see no reason to challenge the determinations of courts familiar with local law. Cf. *Milliken* v. *Bradley*, 418 U. S., at 769 (WHITE, J., dissenting).

That we reach this conclusion should come as no surprise, for when faced with a similar educational scheme in *Milliken* v. *Bradley*, *supra*,[22] the Court concluded that the actions of a local school board could not be attributed to the State that had created it. We there addressed the Michigan education system, which vests in the State constitutional responsibility for providing education: "'The policy of [Michigan] has been to retain control of its school system, to be administered throughout the State under State laws by local State agencies . . . to carry out the delegated functions given [them] by the legislature.'" *Milliken* v. *Bradley*, 418 U. S., at 794 (MARSHALL, J., dissenting), quoting *School District of the City of Lansing* v. *State Board of Education*, 367 Mich. 591, 595, 116 N.W. 2d 866, 868 (1962). See *Milliken* v. *Bradley*, *supra*, at 726, n. 5. To fulfill this responsibility, the State of Michigan provided a substantial measure of school district funding, established standards for teacher certification, determined part of the curriculum, set a minimum school term, approved bus routes and textbooks, established disciplinary procedures, and under certain circumstances had the power even to remove local school board members. See *id.*, at 795–796 (MARSHALL, J., dissenting). See *id.*, at 726, n. 5,

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[22] One *amicus* observes that many States employ a similar educational structure. See Brief for National School Boards Assn. as *Amicus Curiae* 11, 14–16, App. 1a–10a.

727 (describing State controls over education); *id.*, at 768 and n. 4 (WHITE, J., dissenting) (same); *id.*, at 794 (MARSHALL, J., dissenting) (same).

Yet the Court, noting that "[n]o single tradition in public education is more deeply rooted than local control over the operation of schools," concluded that the "Michigan educational structure . . . in common with most States, provides for a large measure of local control." *Id.*, at 741–742. Relying on this analysis, the Court determined that a Michigan school board's assignment policies could not be attributed to the State, and therefore declined to permit interdistrict busing as a remedy for one school district's acts of unconstitutional segregation. If local school boards operating under a similar statutory structure are considered separate entities for purposes of constitutional adjudication when they make segregative assignment decisions, it is difficult to see why a different analysis should apply when a local board's *desegregative* policy is at issue.

In any event, we believe that the question here is again settled by *Lee*. There, state control of the educational system was fully as complete as it now is in Washington. See generally N.Y. Educ. Law §§ 305, 306, 308–310 (McKinney) (1969 and Supp. 1981). The state statute under attack reallocated power over mandatory desegregation in two ways: it transferred authority from the State Commissioner of Education to local elected school boards, and it shifted authority from local appointed school boards to the state legislature.[23] When presented with this restructuring of the political process, the District Court declared that it could "conceive of no more compelling case for the application of the *Hunter* principle." 318 F. Supp., at 719. This Court of course affirmed the District Court's judgment. We see no

[23] When authority to initiate desegregation programs was removed from appointed school boards and from state education officials, the only body capable of exercising power over such programs was the state legislature.

relevant distinction between this case and *Lee*; indeed, it is difficult to imagine a more precise parallel.[24]

C

To be sure, "the simple repeal or modification of desegregation or anti-discrimination laws, without more, never has been viewed as embodying a presumptively invalid racial classification." *Crawford* v. *Los Angeles Board of Education*, *post*, at ——, (slip op. 10). See *Dayton Board of Education* v. *Brinkman*, 443 U. S. 526, 531, n. 5 (1979); *Hunter* v. *Erickson*, 393 U. S., at 390, n. 5. As Justice Harlan noted in *Hunter*, the voters of the polity may express their displeasure through an established legislative or referendum procedure when particular legislation "arouses passionate opposition." *Id.*, at 395 (concurring opinion). Had Akron's fair housing ordinance been defeated at a referendum, for example, "Negroes would undoubtedly [have lost] an important

[24] The United States makes only one attempt to distinguish *Lee* in this regard: *Lee* is inapposite, the United States maintains, because the statute at issue there "blocked desegregation efforts even by 'a school district subject to a pre-existing order to eliminate segregation in its schools,'" and therefore—purportedly in contrast to Initiative 350—"interfere[d] with the efforts of individual school districts to eliminate de jure segregation." Brief for the United States 25, quoting *Lee* v. *Nyquist*, 318 F. Supp., at 715. If by this statement the United States seeks to place the District Court's holding and this Court's affirmance in *Lee* on the ground that the New York statute interfered with Buffalo's attempts to eliminate *de jure* segregation, its submission is simply inaccurate. At the time of the *Lee* litigation, Buffalo had *not* been found guilty of practicing intentional segregation. See *Arthur* v. *Nyquist*, 573 F. 2d 134, 137 (CA2 1978). As the United States notes, Buffalo was under a "pre-existing order to eliminate segregation in its schools"—but that order was issued by the New York Commissioner of Education, because he had found Buffalo's schools *de facto* segregated. *Appeal of Dixon*, 4 N.Y. Educ. Dept. Reports 115 (1965). See *Lee* v. *Nyquist*, 318 F. Supp., at 714–715. *Lee* did not concern *de jure* segregation; it is to be explained only as a straightforward application of the *Hunter* doctrine.

political battle, but they would not thereby [have been] denied equal protection." *Id.*, at 394.

Initiative 350, however, works something more than the "mere repeal" of a desegregation law by the political entity that created it. It burdens all future attempts to integrate Washington schools in districts throughout the State, by lodging decisionmaking authority over the question at a new and remote level of government. Indeed, the initiative, like the charter amendment at issue in *Hunter*, has its most pernicious effect on integration programs that do "*not* arouse extraordinary controversy." *Id.*, at 396 (emphasis in original). In such situations the initiative makes the enactment of racially beneficial legislation difficult, though the particular program involved might not have inspired opposition had it been promulgated through the usual legislative processes used for comparable legislation.[25] This imposes direct and undeniable burdens on minority interests. "If a governmental institution is to be fair, one group cannot always be expected to win," *id.*, at 394; by the same token, one group cannot be subjected to a debilitating and often insurmountable disadvantage.

IV

In the end, appellants are reduced to suggesting that *Hunter* has been effectively overruled by more recent decisions of this Court. As they read it, *Hunter* applied a simple

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[25] That phenomenon is graphically demonstrated by the circumstances of this litigation. The long-standing desegregation programs in Pasco and Tacoma, as well as the Seattle middle school integration plan, have functioned for years without creating undue controversy. Yet they have been swept away, along with the Seattle Plan, by Initiative 350. As a practical matter, it seems most unlikely that proponents of desegregative busing in smaller communities such as Tacoma or Pasco will be able to obtain the statewide support now needed to permit them to desegregate the schools in their communities.

"disparate impact" analysis: it invalidated a facially neutral ordinance because of the law's adverse effects upon racial minorities. Appellants therefore contend that *Hunter* was swept away, along with the disparate impact approach to equal protection, in *Washington* v. *Davis*, 426 U. S. 229 (1976), and *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252 (1977). Cf. *James* v. *Valtierra*, 402 U. S. 137 (1971).

Appellants unquestionably are correct when they suggest that "purposeful discrimination is 'the condition that offends the Constitution,'" *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U. S., at 274, quoting *Swann* v. *Charlotte-Mecklenberg Board of Education*, 402 U. S. 1, 16 (1971), for the "central purpose of the Equal Protection Clause . . . is the prevention of official conduct discriminating on the basis of race." *Washington* v. *Davis*, 426 U. S., at 239. Thus, when facially neutral legislation is subjected to equal protection attack, an inquiry into intent is necessary, to determine whether the legislation in some sense was designed to accord disparate treatment on the basis of racial considerations. Appellants' suggestion that this analysis somehow conflicts with *Hunter*, however, misapprehends the basis of the *Hunter* doctrine. We have not insisted on a particularized inquiry into motivation in all equal protection cases: "A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification." *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U. S., at 272. And legislation of the kind challenged in *Hunter* falls into this inherently suspect category.[26]

There is one immediate and crucial difference between *Hunter* and the cases cited by appellants. While decisions such as *Washington* v. *Davis* and *Arlington Heights* consid-

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[26] The State does not suggest that Initiative 350 furthers the kind of compelling interest necessary to overcome the strict scrutiny applied to explicit racial classifications.

ered classifications facially unrelated to race, the charter amendment at issue in *Hunter* dealt in explicitly racial terms with legislation designed to benefit minorities "as minorities," not legislation intended to benefit some larger group of underprivileged citizens among whom minorities were disproportionately represented. This does not mean, of course, that every attempt to address a racial issue gives rise to an impermissible racial classification. See *Crawford* v. *Los Angeles Board of Education, post.* But when the political process or the decisionmaking mechanism used to *address* racially conscious legislation—and only such legislation—is singled out for peculiar and disadvantageous treatment, the governmental action plainly "rests on 'distinctions based on race.'" *James* v. *Valtierra*, 402 U. S., at 141, quoting *Hunter* v. *Erickson*, 393 U. S., at 391. And when the State's allocation of power places unusual burdens on the ability of racial groups to enact legislation specifically designed to overcome the "special condition" of prejudice, the governmental action seriously "curtail[s] the operation of those political processes ordinarily to be relied upon to protect minorities." *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152–153, n. 4 (1938). In a most direct sense, this implicates the judiciary's special role in safeguarding the interests of those groups that are "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio School Dist.* v. *Rodriguez*, 411 U. S. 1, 28 (1973).[27]

Hunter recognized the considerations addressed above, and it therefore rested on a principle that has been vital for over a century—that "the core of the Fourteenth Amend-

[27] We also note that singling out the political processes affecting racial issues for uniquely disadvantageous treatment inevitably raises dangers of impermissible motivation. When political institutions are more generally restructured, as JUSTICE BRENNAN has noted in another context: "The very breadth of [the] scheme . . . negates any suggestion" of improper purpose. *Walz* v. *Tax Commission*, 397 U. S. 664, 689 (1970) (concurring opinion).

ment is the prevention of meaningful and unjustified official distinctions based on race." 393 U. S., at 391. Just such distinctions infected the reallocation of decisionmaking authority considered in *Hunter*, for minorities are no less powerless with the vote than without it when a racial criterion is used to assign governmental power in such a way as to exclude particular racial groups "from effective participation in the political proces[s]." *Mobile* v. *Bolden*, 446 U. S., at 94 (WHITE, J., dissenting). Certainly, a state requirement that "desegregation or anti-discrimination laws," *Crawford* v. *Los Angeles Board of Education*, *post*, at —— (slip op. 10), and only such laws, be passed by unanimous vote of the legislature would be constitutionally suspect. It would be equally questionable for a community to require that laws or ordinances "designed to ameliorate race relations or to protect racial minorities," *id.*, at —— (slip op. 11), be confirmed by popular vote of the electorate as a whole, while comparable legislation is exempted from a similar procedure. The amendment addressed in *Hunter*—and, as we have explained, the legislation at issue here—was less obviously pernicious than are these examples, but was no different in principle.

V

In reaching this conclusion, we do not undervalue the magnitude of the State's interest in its system of education. Washington could have reserved to state officials the right to make all decisions in the areas of education and student assignment. It has chosen, however, to use a more elaborate system; having done so, the State is obligated to operate that system within the confines of the Fourteenth Amendment. That, we believe, it has failed to do.[29]

Accordingly, the judgment of the Court of Appeals is

Affirmed.

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[29] Appellants also challenge the Court of Appeals' award of attorney's fees to the school district plaintiffs, see n. 12, *supra*, arguing that state-

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funded entities are not eligible to receive such awards from the State. In our view, this contention is without merit. The districts are plainly parties covered by the language of the fees statutes. See 42 U. S. C. § 1988 (1976 ed., Supp. IV) ("In any action . . . to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title . . . the court, in its discretion, may allow *the prevailing party, other than the United States*, a reasonable attorney's fee as part of its costs.") (emphasis added); 20 U. S. C. § 3205 (1976 ed., Supp. IV) ("Upon the entry of a final order by a court of the United States against a . . . State . . . for failure to comply with . . . the fourteenth amendment to the Constitution of the United States as [it] pertain[s] to elementary and secondary education, the court, in its discretion . . . may allow *the prevailing party, other than the United States*, a reasonable attorney's fee as part of its costs.") (emphasis added). Nothing in the history of the statutes suggests that this language was meant to exclude state-funded entities. To the contrary, the Courts of Appeals have held with substantial unanimity that publicly-funded legal services organizations may be awarded fees. See, *e. g.*, *Dennis* v. *Chang*, 611 F. 2d 1302 (CA9 1980); *Holley* v. *Lavine*, 605 F. 2d 638 (CA2 1979), cert. denied *sub nom. Blum* v. *Holley*, 446 U. S. 913 (1980); *Lund* v. *Affleck*, 587 F. 2d 75 (CA1 1978). And when it enacted § 1988, Congress cited with approval a decision awarding fees to a state-funded organization. See H.R. Rep. No. 94–1558, p. 8, n. 16 (1976) (citing *Incarcerated Men of Allen County Jail* v. *Fair*, 507 F. 2d 281 (CA6 1974). In any event, the underlying congressional policies are served by awarding fees in cases such as the one before us: no matter what the source of their funds, school boards have limited budgets, and allowing them fees "encourage[s] compliance with and enforcement of the civil rights laws." *Dennis* v. *Chang*, 611 F. 2d, at 1306. See *id.*, at 1306–1307. While appellants suggest that it is incongruous for a State to pay attorney's fees to one of its school boards, it seems no less incongruous that a local board would feel the need to sue the State for a violation of the Fourteenth Amendment. We see no reason to disturb the judgment of the Court of Appeals on this point.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

June 3, 1982

No. 81-9 Washington v. Seattle School District No. 1

Dear Harry,

I will await further writing.

Sincerely,

Sandra

Justice Blackmun

Copies to the Conference

L. F. P.
Renewed
6/15

dfl 06/15/82

Draft: Washington v. Seattle School District: No. 81-9

two-to-one

Justice Powell, dissenting.

~~Through~~ the enactment of Initiative 350, the people of the State of Washington, by, have adopted a neighborhood school policy. The policy is binding on local school boards but in no way affects the authority of state or federal courts to order school transportation to remedy violations of the Fourteenth Amendment. Nor does

the Initiative affect the power of local school districts to establish voluntary transfer programs for racial integration or for any other purpose.

The Court does not hold that the adoption of an identical policy by local school districts would be unconstitutional. Rather, ~~the Court~~ it holds that the ~~creation~~ adoption of such a policy at the State level--~~instead of~~ rather than at the local level--violates the Equal Protection Clause of the Fourteenth Amendment. I dissent from the Court's ~~extraordinary~~ unprecedented intrusion into the structure of a state government. "[T]he Fourteenth Amendment leaves the States free to distribute the powers of government as they will between their legislative and judicial branches." Hughes v. Superior Court, 339 U.S. 460, 467 (1950). In my view, ~~it~~ that Amendment leaves the States equally free to distribute the powers of government between State and local governmental bodies.

I

~~I state the factual background in some detail and I believe it is necessary to explain underlying~~ of what the Court does today

David- This history can be omitted

Since 1963 the Seattle School District No. 1 has sought to promote the racial integration of its schools through voluntary transfer programs. In 1977 the district implemented a school "magnet" program that "succeeded in

Can be shortened

promoting [voluntary] student movement to a greater degree than ... ever before." 473 F. Supp., 1006. In December, 1977, however, the District approved a new policy of mandatory student reassignment in an effort to speed the process of desegregation. The District was not then--nor is it now--under a court order to desegregate. It has never been found to have engaged in or encouraged segregation.

The adoption of mandatory busing was opposed by a group of citizens who formed an organization called the Citizens for Voluntary Integration Committee (CiVIC). As its name implies, CiVIC favored the achievement of racial integration through voluntary programs. ~~It sought to~~ ~~overturn~~ opposed the District's mandatory plan through legal action, through preparation of an alternative voluntary racial balancing plan, and through means of a statewide initiative limiting the use of mandatory school reassignment. After its legal efforts failed, and after the District formally adopted a mandatory busing plan, CiVIC concentrated its efforts on enacting a statewide initiative, known as Initiative 350.[1] At the November,

neither favored / ~~did not favor~~ / It / Rather, it opposed voluntary programs to achieve a greater degree of integration

Elements ~~most~~ most of this. We are concerned only with 350

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[1]Art. II, §1, of the Washington Constitution reserves legislative authority in the people: "[T]he

Footnote continued on next page.

350 would require transportation to remote areas. Reassignment of pupils is commonplace as ~~pop~~ population shift

1978, general election, the voters of the State adopted the Initiative by a ~~substantial~~ two to one majority.[2]

Initiative 350 sets forth a neighborhood school policy binding on local school districts.[3] It establishes a general rule prohibiting school districts from "directly or indirectly requir[ing] any student to attend a school other than the school which is geographically nearest or next nearest the student's place of residence." Wash. Rev.

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people reserve to themselves the power to propose bills, laws, and to enact or reject the same at the polls, independent of the legislature, and also reserve power, at their own option, to approve or reject at the polls any act, item, section or part of any bill, act or law passed by the legislature." Legislation adopted by initiative or approved by referendum may not be amended or repealed by the legislature for two years thereafter except upon a two-thirds vote of each house of the legislature. Art. II, §41.

[2]The District Court found that in campaigning for Initiative 350, the leadership of CiVIC acted "legally and responsibly" and had not "directed its appeals to the racial biases of the voters. Indeed, "CiVIC, its agents and consultants deliberately took steps to avoid race becoming an issue in the campaign, since, they felt, its interjection into the campaign would have lost support for the initiative." 473 F. Supp., at 1009. Proponents of Initiative 350 argued that mandatory busing ultimately would lead to greater segregation of the schools due to "white flight," as had been experienced in other cities.

The Initiative was adopted ~~passed~~ by almost 66% of the statewide vote. In Seattle the Initiative passed by over 61% of the vote. It failed in only two of Seattle's legislative districts--one predominantly black and one predominantly white.

[3]The drafters of Initiative 350 used three federal enactments as their models: The Esch Amendment, 20 U.S.C. §1714(a), the Byrd Amendment, P.L. 94-206, §209, 90 Stat. 22, and the Eagleton-Biden Amendment. P.L. 95-205, 91 Stat. 1460. The Initiative is strikingly similar in its provisions and exceptions to these federal enactments.

Citations for this?

Code §28A.26.010 (1981). The rule may be avoided in individual instances only if the student requires special education; if there are health or safety hazards between the student's residence and the nearest or next nearest school; or if the nearby schools are overcrowded, unsafe, or lacking in physical facilities. Ibid.

OK

The Initiative includes two broad and significant limitations upon the scope of its neighborhood school policy. In keeping with CiVIC's preference for voluntary integration, the Initiative expressly provides that nothing in the Initiative shall "preclude the establishment of schools offering specialized or enriched educational programs which students may voluntarily choose to attend, or of any other voluntary option offered to students."[4] Moreover, and critical to this case, the authority of state and federal courts to order mandatory school assignments to remedy constitutional violations is left untouched by the Initiative: "This chapter shall not prevent any court of

We should emphasize this in conclusion

[4]In addition to this reservation of authority to school districts, the Initiative also reserves "the authority of any school district to close school facilities." 28A.26.030.

competent jurisdiction from adjudicating constitutional issues relating to the public schools."[5]

This suit was filed in United States District Court shortly after the Initiative was enacted. The Seattle School District, joined by the Tacoma and Pasco School Districts[6] and certain individual plaintiffs, argued that the Initiative violated the Equal Protection Clause of the Fourteenth Amendment. The District Court agreed and advanced three reasons for its conclusion, only one of which is at issue in this case: the Initiative creates a racial classification by forbidding student assignments for racial reasons while permitting it for other reasons; the Initiative was adopted because of an intent to discriminate; the Initiative is overbroad in

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[5]Unlike the constitutional amendment at issue in Crawford v. Los Angeles Bd. of Ed., ___ U.S. ___ (1982), Initiative 350 places no limits on the State courts in their interpretation of the State Constitution. Thus, if mandatory school assignments were required by the State Constitution-- although not by the Fourteenth Amendment of the Federal Constitution--Initiative 350 would not hinder a State from enforcing the State constitution.

[6]Tacoma School District No. 10 and Pasco School District No. 1 are the only other school districts in Washington with extensive integration programs. Pasco has relied upon school closings and mandatory busing to achieve racial balance in its schools. Only minority children are bused under the Pasco plan. 473 F. Supp., at 1002. In addition to school closings, the Tacoma integration plan relies upon voluntary techniques--magnet schools and voluntary transfers.

that it forbids a school board from busing students even though the school board might be under a constitutional duty to do so in the absence of a court order. 473 F. Supp, at 1012.[7]

The Court of Appeals affirmed ~~but only on the basis of the District Court's first reason. The court~~ found that although the Initiative does not refer to race expressly, it effectively "embodies a constitutionally-suspect classification based on racial criteria because it legislatively differentiates student assignment for purposes of achieving racial balance from student assignment for any other significant reason."[8] Relying ~~upon the decision of this Court in~~ on Hunter v. Erickson, 393 U.S. 385 (1969), the court concluded that Initiative 350 "both creates a constitutionally-suspect racial

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[7]Certain of the intervenor plaintiffs argued that the school districts had operated unconstitutional dual school systems. Because of its invalidation of Initiative 350, however, the District Court did not reach this claim.

[8]The Court of Appeals relied upon the District Court's finding of fact that "[e]xcept for racially balancing purposes, Initiative 350 permits local school districts to assign students other than to their nearest or next nearest schools for most, if not all, of the major reasons for which students are at present assigned to schools other than their nearest or next nearest schools."

classification and radically restructures the political process of Washington by allowing a state-wide majority to usurp traditional local authority over local school board educational policies." 633 F. 2d, at 1344.[9] Finding the Initiative invalid on this basis, the Court found it unnecessary to address the District Court's alternative holdings.[10]

note

Good

[9]Although the Court of Appeals stated that Initiative 350 "radically restructures the political process" and "wrest[s] from local control the formulation and implementation of educational and desegregation policies," the court nowhere sought to support these conclusory statements. Nor were any findings made by the District Court with respect to the Washington political system. Indeed, it is apparent that both the District Court and the Court of Appeals considered that the Initiative embodied a "constitutionally-suspect classification based on racial criteria" simply because it deals with a matter connected to race relations.

Good

[10]Judge Wright dissented. In his view Initiative 350 could not be said to embody a racial classification. The Initiative does not classify individuals on the basis of their race. It simply deals with a matter bearing on race relations. Moreover, no racial classification is created because the citizens of a State favor mandatory school reassignments for some purposes but not for reasons of race. The benefits and problems associated with busing for one reason are not the same as for another. Finally, Judge Wright could not understand how the exercise of authority by the State could create a racial

their

David - see my memo just dictated. Put the law of desegregation first in Part II, & then the substance of what you have - tightening it where you can

II

The principles that should guide us in reviewing the constitutionality of Initiative 350 are well established. To begin with, it is no concern of ours how the States choose to distribute their sovereign authority as among their various institutions. See National League of Cities v. Usery, 426 U.S. 833 (1976); Hughes v. Superior Court, 339 U.S. 460, 467 (1950). "[A]ccording to the institutions of this country, the sovereignty in every State resides in the people of the State, and ... they may alter and change their form of government at their own pleasure." Luther v. Borden, 7 How. 1, 47 (1849); Hunter v. Erickson, 393 U.S. 385, 394 (1969) (Harlan, J. concurring). The Constitution does not dictate to the States a particular division of authority between legislature and judiciary or between state and local governing bodies. It does not protect or define institutions of local government. As we have noted, the States have "extraordinarily wide latitude ... in creating various types of political subdivisions and conferring authority upon them." Holt Civic Club v. Tuscaloosa, 439

U.S. 60, 71 (1978).[11]

Thus, a State may choose to run its schools from the state legislature or through local school boards just as it may choose to address the matter of race relations at the State or local level. The only relevant constitutional limitation on a State's freedom to order its political institutions is that it may not do so in a fashion designed to "[place] special burdens on racial minorities within the governmental process." Hunter v. Erickson, supra, at 391 (emphasis added).

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[11] In Community Communications Co. v. Boulder, ___ U.S. ___, ___ (1982), the Court explained that all sovereing authority in the United States resides either with the Federal government or with the States:

> "The States possess a significant measure of sovereignty under our Constitution. But this principle contains its own limitation: Ours is a 'dual system of government," [Parker v. Brown, 317 U.S. 341, 351 (1943)] (emhpasis added), which has no place for sovereign cities. As this Court stated long ago, all sovereign authority 'within the goegraphical limits of the United States' resides either with 'the Government of the United States, or [with] the States of the Union. There exist within the broad domain of sovereignty but these two. There may be cities, counties, and other organized bodies with limited legislative functions, but they are all derived from, or exist in, subordination to one or the other of these.' United States v. Kagama, 118 U.S. 375, 379 (1886) (emphasis added)."

good find!

See Sailors v. Board of Education, 387 U.S. 105, 109 (1967) ("Save and unless the state, county, or municipal government runs afoul of a federally protected right, it has vast leeway in the management of its internal affairs."); Fortson v. Morris, 385 U.S. 231, 234 (1966).

¶ We have recognized as a general principle, however, that

Unlike the internal ordering of state government, the Constitution has quite a bit more to say about the way in which States deal with racial matters. States may not act on the basis of a racial classification unless necessary to further a compelling state interest. See McLaughlin v. Florida, 379 U.S. 184, 196 (1964). Nor may they act in an ostensibly neutral fashion if in fact their purpose is discriminatory. See Washington v. Davis, 426 U.S. 229 (1976). Even so, the States retain an area of freedom and discretion when dealing with racial matters or with questions affecting racial minorities. A neutral State law will not be held unconstitutional simply because it has a disproportionately adverse effect on a racial minority. See id. And a law specifically addressed to a racial question will not be invalidated necessarily: The Court has recognized a distinction between treatment of race relations and treatment of individuals on the basis of race. See Crawford v. Los Angeles Bd. of Ed., ___ U.S. ___, ___ (1982); ante, at ___.

?

Any other cite for this?

Moreover, in certain limited circumstances, the Court has held that a State may treat persons differently

on the basis of race. See University of California Regents v. Bakke, 438 U.S. 265 (1978). The Court has suggested that even in the absence of a finding of a constitutional violation, States or school authorities voluntarily may 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." Swann v. Charlotte-Mecklenberg Board of Education, 402 U.S. 1, 16 (1971). See University of California Regents v. Bakke, supra, at 300, n. 39 (opinion of Powell, J.). But this is a matter of policy within the State's discretion. We have never held, or even intimated, that absent a federal constitutional violation, a State must choose to treat persons differently on the basis of race. There is no obligation on a State to do "more" than the Fourteenth Amendment requires. In the absence of a federal constitutional violation requiring race-specific remedies, a policy of strict racial neutrality by a State would violate no federal constitutional principle. In particular, a neighborhood school policy and a decision not to assign students on the basis of their race, does

not offend the Fourteenth Amendment in itself.[12]

III

A

Application of these ~~well established~~ settled principles ~~to the circumstances of this case~~, demonstrates the leads me to a different ~~misunderstanding~~ of the Court's conclusion than that reached by the Court. Through the Initiative process the State has adopted a ~~facially neutral~~ neighborhood school policy, to be applied without regard to race. ~~under which school assignments must be made without respect to race~~. ~~The State's decision to~~ Use of the Initiative ~~as a~~ is a valid and uniquely deliberative legislative technique, ~~does not violate~~ any ~~federal constitutional provision~~. See James v. Valtierra, 402 U.S. 1137, 142 (1971). Nor does the State's ~~insistence upon~~ adoption of racial neutrality in student assignments violate the Equal Protection Clause of the Fourteenth Amendment. None of the school districts involved in this litigation was required to adopt race specific school assignments in order to remedy a federal constitutional

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[12]See Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 28 (1971) ("Absent a constitutional violation there would be no basis for judicially ordering assignment of students on racial basis. All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes.").

There is no history of discrimination in the operation of the public schools of Washington.

(We should make this clear at beginning of opinion)

Can we say the D.C. Council is aware of that?

violation. Any one of them might have cancelled its integration program without violating the Federal Constitution.[13]

Moreover, ~~I do not understand~~ Initiative 350 may not properly be viewed as ~~to~~ creating ~~create~~ a racial classification. The Initiative in no way requires or suggests that persons are to be treated differently on account of their race. Indeed, it has precisely the opposite effect: ~~After~~ Under Initiative 350, school districts may no longer assign students on the basis of race absent a court order. Whether this is wise policy is not for us to say. Children of all races benefit from neighborhood schooling just as children of all races benefit from exposure to "ethnic and racial diversity in the classroom." Columbus Board of Education v. Penick, 443 U.S. 449, 486 (1979) (Powell, J., dissenting). But as the Court explains, whether the benefits of mandatory school assignments for the purpose of racial integration outweigh the costs, is a question

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[13]The Court consistently has held "that the Equal Protectoin Clause is not violated by the mere repeal of race related legislation or policies that were not required by the Federal Constitution in the first place." Crawford v. Los Angeles Bd. of Ed., supra, at ___.

Any other cite? We had one or more in

Marginal argument

that the political process constitutionally may decide: "[I]n the absence of a constitutional violation, the desirablility and efficacy of school desegregation are matters to be resolved through the political process." See ante, at ___.

Certainly, the Initiative treats mandatory student reassignments for reasons of race differently from reassignments for other reasons. But this difference in treatment does not create a racial classification. "The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." Tigner v. Texas, 310 U.S. 141, 147 (1940). The benefits and burdens associated with the assignment of students on the basis of race are unique. The State may conclude that mandatory reassignments to avoid a safety hazard or overcrowding are justified whereas reassignments on the basis of race are not. Similarly, the State may decide that an employment preference in State hiring for veterans is wise policy but conclude that a preference on the basis of race detracts from the ideal of racial neutrality. The State does not

Cite the Mass case

Application of these settled principles demonstrates the serious error of today's decision - an error that cuts deeply into the heretofore unquestioned right of a state to structure decision-making authority ~~of~~ within its government. In Washington, as in many other states, use of an initiative - a popular referendum - to determine state policy is a valid and uniquely democratic legislative technique. See James v. Valtierra, at 137, 142 (1971). In this case, by Initiatve 350, the state adopted a policy of racial neutrality in student assignments. As there had been no state segregated schools, Washington was perfectly free to adopt this policy.

The issue here arises only because the Seattle School Board - in the absence of a then established state policy and exercising its broad discretion - had chosen to adopt race specific school assignments with extensive busing. It is not questioned that the school board itself, at any time thereafter, could have changed its mind and cancelled its integration program without violating the federal Constitution.[13] Yet this Court, by

a process of reasoning that defies rational understanding, holds that neither the legislature, or the people of the State of Washington could alter what the school board had decided.

The Court holds that the people of Washington by Initiative 350 created a racial classification, and yet concedes that identical action by the Seattle school board itself would have created no such classification. This is not an easy argument to answer because it seems to make no sense. School boards are the creation of supreme state authority, whether in a state constitution or by legislative enactment. Until today's decision no one would have questioned the authority of a state to abolish school boards altogether, or to require that they conform to any lawful state policy. And in the State of Washington, a neighborhood school policy would have been lawful. Under today's decision this heretofore undoubted supreme authority of a state's electorate is to be curtailed whenever a school board - or indeed any other state board or local instrumentality - adopts a race specific program that arguably benefits racial minorities.

Once such a program is adopted, only the local or subordinate entity that approved it will have authority to change it. The Court offers no authority or relevant explanation for this extraordinary subordination of the ultimate sovereign power of a state ~~to~~ over action with respect to racial matters by subordinate bodies. The Constitution of the United States does not require such a bizarre result.

This dissent well could conclude at this point. Yet, even if one assumes that somehow the federal Constitution now imposes special ~~conditions~~ limitations on the exercise of state sovereignty once a local school board has acted, this is certainly not a case where a state - in moving to change a locally adopted policy - has established some racially discriminatory requirement. It is essential to bear in mind that no finding has been made in this, or in any other case, that schools in Washington have been segregated by state action. Thus, there had been no constitutional violation to be remedied by the Seattle board or the state. Nor does Initiative 350 authorize or approve segregation in any form or degree.

It is neutral on its face, and neutral as public policy. It merely limits the discretionary authority of school boards to seek racial balance by mandatory busing beyond certain limits. The rationale of the initiative is that children of all races benefit from neighborhood schooling, just as children of all races benefit from exposure to "ethnic and racial diversity in the classroom". Columbus Board of Education v. Penick, 443 U.S. 449, 486 (1979)(Powell, J., dissenting). (David: other authority for this?)

Note to David: The above is a rough shot at rewriting III-A. There may be flaws in some of my rather simplistic reasoning, and also some repetition. I count on you to get this straight. But, if I am right, this sort of argument has considerable force. The difficulty is that having made it, there is not much left to be said.

In any event, it seems to me that most, if not all, of III-B commencing with the last sentence at the

bottom of page 14, can be eliminated as a secondary type of argument.

violate the Equal Protection Clause simply because it must deal with a particular, race related issue. See Crawford v. Los Angeles Board of Education, supra. Nor does the State violate the Equal Protection Clause because it fails to treat all mandatory school reassignments--whether for racial balance or for safety--as if they were the same, when, in fact, they are not.

?

92 Swann precedent for this

B

Finally, I cannot agree with the Court that Initiative 350 places "special burdens on racial minorities within the governmental process," Hunter v. Erickson, supra, at 391, thereby justifying federal court ~~such that~~ interference with the State's distribution of of its sovereign authority, ~~is justified~~. In my view, Initiative 350 is simply a reflection of the State's political process at work. It does not alter that process in any respect. It does not require, for example, that all matters dealing with race--or with integration in the schools--must henceforth be submitted to a referendum of the people. Cf. Hunter v. Erickson, supra. The State has done no more than precisely what the Court has said that it should do: It has "resolved through the political

process" the "desirability and efficacy of [mandatory] school desegregation." Ante, at ___.

The political process in Washington, as in all States, permits persons who are dissatisfied at a local level to appeal to the State legislature or the people of the State for redress. Such a process is inherent in the continued sovereignty of the State. There is nothing unusual about it. Nor is there anything singular about the State's decision to deal with a matter on the State level rather than by delegation to local officials. Undoubtedly any time a State chooses to deal with a matter at the State level, rather than at the local level, some group may be disadvantaged. But there is no unfairness in this and certainly no Constitutional violation.[14]

In this case, by means of an Initiative, the State of Washington has asserted its authority over one

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[14] Cf. James v. Valtierra, 402 U.S. 137, 142 (1971) ("[O]f course a lawmaking procedure that 'disadvantages' a particular group does not always deny equal protection. Under any such holding, presumably a State would not be able to require referendums on any subject unless referendums were required on all, because they would always disadvantage some group. And this Court would be required to analyze governmental structures to determine whether a gubernatorial veto provision or a filibuster rule is likely to 'disadvantage' any of the diverse an shifting groups that make up the American people.").

aspect of public schooling and race relations just as it has over many other aspects of public schooling and race relations, and over many other areas of life. By regulating in this manner, the State has not singled out matters of interest to racial minorities for some particular and unusual treatment. The State deals with almost an infinite range of questions at the State level, often by the initiative process.

If the assertion of the State's authority over its local school boards violates the Fourteenth Amendment in this case--because removal of decision-making to a "remote" political body, see ante, at ___, dilutes the political strength of local minority groups--then it is difficult to see why any decision-making at the State rather than local level, dealing with racial matters would not violate the Equal Protection Clause as well. A policy of racial neutrality in public hiring or in admission to State University's--if imposed by the people of the State, the State legislature, or the State Supreme Court in its interpretation of the State Constitution--would then be unconstitutional. ~~Such~~ a ~~principle, if established,~~ Then would dramatically limit the reasoning,

David— is it a single word?

Under the Court's "remote" political body, if once authority were delegated to the local level - whether to a city council, board of supervisors or school board, the State would be impotent to effect any change that affect a minority group adversely

David — my language needs refining. Also may be repetitious

Subsequent and different action affecting race relations at the State level

ability of the States to deal with one of the most pressing social issues confronting our society.

I find nothing in the Constitution, or in the prior decisions of this Court, that would ~~require~~ prescribe -- once a delegation to the local level was made -- ~~decisions affecting race to be made at the local,~~ rather than ~~State, level~~. Such a rule contradicts the principle of State sovereignty that the Constitution does embody.

IV

In view of the Court's heavy reliance on Hunter, ~~and the~~ ~~only discussion of this~~ I will consider that case in some detail. When understood, it does not support today's decision.

Nonetheless, and in reliance upon the decision of this Court in Hunter v. Erickson, supra, the Court holds that Initiative 350 "imposes substantial and unique burdens on racial minorities" in the governmental process, and therefore must be found unconstitutional. See ante, at 13.[15] Its authority for this holding is Hunter v. Erickson, supra. In Hunter the people of Akron passed a charter amendment that "not only suspended the operation of the existing ordinance forbidding housing discrimination, but

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[15] The Court also relies at certain critical points in its discussion on the summary affirmance in Lee v. Nyquist, 318 F. Supp. 710 (WDNY 1970, summarily aff'd, 402 U.S. 935 (1971). As we have often noted, however, summary affirmances by this Court are of little precedential force. See Metromedia, Inc. v. San Diego, 453 U.S. 490, 500 (1981). A summary affirmance "is not to be read as an adoption of the reasoning supporting the judgment under review." Zobel v. Williams, ___ U.S. ___, ___ n. 13 (1982).

also required the approval of the electors before any future [anti-discrimination] ordinance could take effect." 393 U.S., at 389-390. Although the charter amendment was facially neutral, the Court found that it could be said to embody a racial classification: "[T]he reality is that the law's impact falls on the minority. The majority needs no protection against discrimination." Id., at 391. By making it more difficult to pass legislation in favor of racial minorities, the amendment placed "special burdens on racial minorities within the governmental process." Ibid.

The holding in Hunter rests upon three elements, as the Court recognizes. First, the Akron amendment explicitly addressed a racial matter. Second, the effect of the amendment was to deprive minorities of something clearly to their benefit--e. g., fair housing laws. Finally, the political process was radically altered: "racially conscious legislation--and only such legislation--[was] singled out for peculiar and disadvantageous treatment." Ante, at 27. In the presence of these three factors, legislation may be held

unconstitutional even though facially neutral and even though there has been no finding of a purpose to discriminate.

Each of the elements underlying the holding in Hunter is indispensable. The absence of any one of them will not provide a basis for condemning state action. Thus, if the particular legislation is not expressly directed to a racial matter, it will not be unconstitutional even though it may harm racial minorities and even though it alters the political process. See James v. Valtierra, 402 U.S. 137 (1971). Similarly, if state action deals expressly with a racial matter and alters the governmental process, but fails to burden a racial minority, it will not be found unconstitutional. See United Jewish Organizations of Williamsburgh, Inc. v. Carey, 430 U.S. 144 (1977). Finally, if a State addresses a racial matter by removing a benefit racial minorities consider to be in their interest, but in no way alters the political process so as to disadvantage minority groups, a constitutional violation will not necessarily be found absent a showing of discriminatory intent. Otherwise, a

State could never "merely repeal" an affirmative action program. See Crawford v. Los Angeles Board of Education, ___ U.S. ___ (1982); Hunter v. Erickson, supra, at 390, n. 5.

The Court argues that each one of the three Hunter elements is present in this case. ~~First, the Court~~ It finds that Initiative 350 deals explicitly with a racial matter; ~~Second,~~ it argues that mandatory busing per se for racial integration is in the interest of racial minorities even in the absence of a constitutional violation; ~~Finally,~~ and it concludes that the decision by the State to regulate mandatory school reassignments for racial integration at the "remote" State level, rather than by delegation to school officials, subjects racial minorities "to a debilitating and often insurmountable disadvantage" as compared to other groups. Ante, at ___.

I will not quarrel with the Court's conclusion that Initiative 350 addresses a racial issue problem despite its facial neutrality and despite the fact that a neighborhood school policy reasonably may be viewed as having a socially beneficial effect. ~~its likely affect on school reassignments for other reasons than racial integration~~. But I find little to support the Court's conclusion that

David - Is this your thought here? ?

David - ~~court~~ it is not simply "mandatory reassignment" that is at issue? Pupils are reassigned every year in a city with shifting population. The real issue is "busing ~~to achieve~~ beyond certain limits to achieve racial balance or greater integration. We should be careful about terminology in this area particularly

Initiative 350 places a ~~clear~~ burden on racial minorities or that it "redraw[s] decisionmaking authority over racial matters--and only over racial matters--in such a way as to place comparative burdens on minorities." Ante, at ___, n. 17.

The Court states that "our cases suggest that desegregation of the public schools ... at bottom inures primarily to the benefit of the minority, and is designed for that purpose." Ante, at ___. But the question addressed by Initiative 350 is not the value of racially integrated education. Rather, Initiative 350 addresses the costs of achieving racial integration through mandatory reassignments beyond special area. Just as integration tends to benefit all students, so, too, ~~so~~ mandatory reassignment on the basis of race potentially may harm all students whatever their race. Thus, it is far from clear, ~~to me that~~, in the absence of a constitutional violation, that the mandatory reassignment of students on the basis of race necessarily benefits racial minorities or that it is even viewed with favor by racial minorities. See Crawford v. Board of Education of the City of Los Angeles, ___ U.S. ___, ___ n.

Does it? Cite it

32 (1982). As the Court indicates, the busing question is complex and is best resolved by the political process.

Moreover, it is significant that Initiative 350 places no limits on voluntary programs or on court ordered reassignments. It permits school districts to order school closings for purposes of racial balance. And it permits school districts to order -- and bus if necessary -- a student to attend the "next nearest"--rather than nearest--school to promote racial integration. Thus, the Tacoma School District's voluntary integration program is ~~not much~~ very little affected by Initiative 350, while the Pasco District--through mandatory assignments to the next nearest school--can maintain racial balance although now it will be white children who must ride the busses. The record does not disclose the ~~effect~~ actual effect, ~~of~~ if any, on other school districts. (Is this true, David?)

In view of the extensive ~~Through the~~ techniques of racial integration ~~which~~ that ~~the~~ Initiative 350 leaves open, and ~~in light of the~~ the uncertain benefits ~~reaped by~~ that may result from mandatory pupil ~~assignments~~ busing to remote areas -- in the absence of a constitutional violation, ~~I cannot say~~ it is sheer speculation to assume that ~~with any degree of certainty that Initiative 350 places~~ a ~~peculiar burden on~~ racial minorities thereby are "insurmountable disadvantaged." Unlike the fair housing laws at issue in Hunter, ~~we cannot say that~~ this

The State simply exercised its sovereign authority of a local body.

~~legislation~~ enactment does not have the ~~"has the"~~ clear purpose of making it more difficult for certain racial ... minorities to achieve legislation that is in their interest." 393 U.S., at 395 (Harlan, J., concurring).

In the absence of a clear burden on racial minorities, Hunter has no application. But Hunter is irrelevant to this case for another reason as well. The rule in Hunter applies only where the political or decisionmaking process has been redrawn "in such a way as to place comparative burdens on minorities" Ante, at ___, n. 17. 50. In this case, as already indicated, the political system has not been redrawn or altered. It has been employed as ~~[illegible]~~ provided by the State Constitution. Nor have racial minorities been asked to bear a unique or comparative burden. The State simply has placed ~~[illegible]~~ certain mandatory reassignments for racial balance among the much larger group of questions regulated at the State level. Racial minorities, if indeed they are burdened by Initiative 350, are not singled out for unique treatment. They are precisely like any other group that would sometimes prefer a matter to be delegated to local authorities.

David - W/out any dictatorial machine I make a dreadful mess

¶ The Court commits unique error in holding that an appeal to the ultimate state of Washington -- the people -- does not ~~I fail to understand how an appeal to a higher~~ authority constitute~~s~~ an alteration of ~~the~~ their political system. Nor does the record show ~~let alone an alteration that uniquely disadvantages singled out racial minorities.~~ We have in this case ~~for discrimination. It would seem to be~~ simply the normal operation of a system with multiple layers of authority. Thus, if the admissions committee of a State law school developed an affirmative action plan not required by law, ~~that came under fire~~, ~~I~~ it would hardly be ~~not find it~~ unconstitutional for the Dean ~~of the Law School~~ to intervene by establishing different but lawful criteria for ~~all~~ admission ~~such plans~~ or by prohibiting any such plan--even though admissions decisions were traditionally left to the Committee. Nor would it be ~~I would not find it~~ unconstitutional--or in any way extraordinary--if the matter were then ~~was~~ taken to the faculty of the law school or to the faculty of the university as a whole. And if the issue ~~matter~~ ultimately were decided by the University President, the Chancellor of the University System, or the Board of Regents, I still would find nothing in the Federal Constitution or the decision in Hunter that ~~which~~ would authorize this Court to intervene.

¶ In short, it seems totally irrelevant whether the State has traditionally intervened in school affairs. The fact

is that the State may, and often does, intervene in local affairs in a variety of areas. An appeal to the State is not an alteration of the system, it is the system. But even assuming that the State must demonstrate some historical interest in public schooling or race relations, the Court's attempt to demonstrate that Initiative 350 represents a unique thrust by the State into these areas is ~~utterly unpersuasive~~ supported neither by precedent nor reason. The Court's own discussion indicates the breadth of the State's activity. The Common School Provisions of the State's Code of Laws is nearly 200 pages long governing a broad variety of school matters. Any one who takes a moment to leaf through these pages of the State code will have little doubt that the State has taken seriously its constitutional obligation to provide public education. See Art. IX, §2 ("The legislature shall provide for a general and uniform system of public schools"); Seattle School District v. State, 90 Wash. 2d 476, 518, 585 P. 2d 71, 95 (1978).

In light of the wealth of regulation of the public schools by the State, ~~it is unclear to me~~ the Court fails to explain just what degree of prior State interference by the State would

satisfy ~~the Court~~ its peculiar view of what a State may do. Apparently the State may specify the design and marking of school buses, §28A.03.079, and it may specify the rules and regulations concerning the training of school bus drivers, §28A.04.131, but it may not specify when these buses are to be used for racial integration. ~~Moreover,~~ It is undoubtedly true that in many areas of school life, the State has chosen to delegate authority to local authorities. Yet these decisions to delegate are no less State decisions affecting public education. They are decisions as to what is properly left to local officials and what is properly left to the State. But Initiative 350 is just such a decision as well.

In addition to public school affairs generally, the State has taken a direct interest in ending racial discrimination in the schools and elsewhere. See §49.60.010 et seq. Article IX, §1 of the State Constitution specifically prohibits discrimination in the provision of public schooling: "It is the paramount duty of the state to make ample provision for the education of all children residing within its borders without distinction or preference on account of race, color,

caste, or sex." The State Supreme Court has not interpreted this section of the State Constitution to prohibit race conscious school assignments in the absence of a violation of the Fourteenth Amendment. Cf. Citizens Against Mandatory Bussing v. Palmason, 80 Wash. 2d 445, 495 P. 2d 657 (1972).[16] But until today's decision one would have thought that the State Court could have rendered such a decision without violating the Federal Constitution.

V

We are not asked to decide the wisdom of a policy that limits the ability of local school districts to adopt mandatory reassignments for racial balance. We must decide only whether the Federal Constitution permits the State to adopt such a policy. ~~The Court does~~ no one suggests not in

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[16] In Palmason, the Washinton Supreme Court turned back a challenge to a desegregation plan adopted by the Seattle School District and approved by the State Superintendent of Public Instruction. The court held that opponents of the plan were not entitled to attack it by means of a local referendum: "initiative and referendum procedures can be invoked at the local level only if their exercise cannot in conflict with state law. ... Clearly they cannot be used to interfere in the management of the state's school system." 80 Wash. 2d at 450, 495 P. 2d, at 661. Judge Wright noted in his dissent the irony "that a federal court now hold that the state itself may not interfere in its own school system."

~~any way intimate~~ that the School Districts in this case were under a federal constitutional obligation to adopt mandatory busing. Nor is it suggested that having tried a system of mandatory race conscious school assignments, the School Districts might not decide to return to a voluntary program. ~~Rather~~, the Court simply ~~objects to the State setting policy in this area. I would not~~ dictate to ~~the~~ a States ~~at what~~ the level of ~~government~~ state decisions that affecting the public schools must be taken. I ~~do not understand~~ the Federal Constitution authorizes no such intrusion ~~to intrude so deeply~~ into the State's internal structure.

lfp/ss 06/16/82

MEMORANDUM

TO: David DATE: June 16, 1982

FROM: Lewis F. Powell, Jr.

81-9 Seattle

This will be a suggestion with respect to Part III-B (pp. 16-19).

I think III-B could be eliminated as a separate part. In III-B we are addressing primarily our basic position that the Court strikes a blow at the very heart of state sovereignty. Some of what is now said in III-B can be used to advantage in the III-A argument - particularly the first paragraph in III-B and the first full paragraph on page 18. The remainder of III-B is expendable, except perhaps a sentence or two that you may wish to save for Part IV dealing with Hunter.

If this suggestion is adopted, the structure of our opinion would be as follows:

Part I - introduction and summarized facts to frame the issue.

Part II - the governing principles, with particular emphasis on the constitutional law of desegregation.

Part III - our basic attack on the Court opinion as an unprecedented interference with the exercise of state political authority.

Part IV - distinguishing Hunter, but more briefly - much more briefly than at present. Your first draft gives Hunter more attention than it deserves. I am now persuaded this case is fundamentally different. Let us focus on the principal distinction between this case and Hunter, rather than go through a long and detailed point-by-point exposition of the differences. Hunter did create at the city level a new governmental structure that imposed a new obstacle forminorities to overcome. Initiative 350 did neither. Here we are dealing with the exercise of supreme authority by vote of the people establishing a statewide policy on a question always within its power, but not exercised until initiative 350. No new obstacle was created, as you have emphasized.

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In line with some of the thoughts we have discussed this morning, I have roughed out - and attach hereto - some language that may be considered in a revision of Part III-A. The purpose would be to emphasize, early in our opinion, what you and I both think is our strongest point.

As I have indicated in a separate little memo, I believe Part III-B can be eliminated, and Part III can include what is the heart of our opinion. Feel free to state this as you think best, using only the enclosure to the extent it fits in with your revision.

I am fully aware, David, that with both of us "scribbling" at the same time, I am making revisions by you especially difficult, ~~for you~~. I am prompted to proceed in this fashion only because we have a Conference tomorrow, and I also have a good deal of work to do on Mississippi State.

I feel under no pressure to circulate Seattle even tomorrow. Let us do the best we can to destroy the Court opinion in about 15 to 18 typewritten pages. It is worth doing it carefully.

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MEMORANDUM

TO: David DATE: June 16, 1982

FROM: Lewis F. Powell, Jr.

81-9 Seattle

This is a "piecemeal" comment, addressed only to Part II.

This is viewed as a busing case. Although the central issue is whether the 14th Amendment limits the power of a state to structure its own government, this issue is best understood - certainly from our viewpoint - in the context of what the Constitution requires with respect to desegregation. I therefore would commence Part II with a summary - and perhaps quotations in footnotes - of the basic principles of desegregation.

The Court has never held that there is an affirmative duty to integrate in the absence of a finding of invalid segregation. No such finding has ever been made in Washington. The state - whether acting through a school board or legislature or by referendum - was perfectly free to follow a neighborhood policy, and to take no affirmative steps to integrate pupils. Even where desegregation is ordered because of a constitutional violation, the Court has never held that racial balance itself is a constittuional requirement. This is said in Swann, possibly in Milliken I and either Dayton or Columbus I. And Pasadena held that even where there had been segregated schools, once

desegregation was accomplished no further duty existed to maintain integration.

All of this can be said as briefly as possible, but driving home the fact that there has never been a constitutional violation in Washington, and that the Seattle school board acted on its own initiative in ordering mandatory busing to achieve racial balance. At that time, there had been no determination of state policy on the question of achieving racial balance in the schools by mandatory busing away from the neighborhood schools. Thus, the Seattle board acted within its general authority without specific direction from the legisture or people of the state. It was then free to act, and the question that we address primarily is whether its action created vested constitutional rights that limited indefinitely (perhaps forever!) the sovereign authority of the people of Washington to enact otherwise perfectly valid laws.

As I indicated illegibly in the margin a couple of times, we are not talking simply about "mandatory pupil assignment" by the school board. This occurs every year as population shifts require changes in attendance areas. The issue here concerns mandatory busing to achieve racial balance beyond a defined limit. Rather than undertake to spell all of this out whenever we mention it, I suggest that we define - in a note - the term "mandatory busing" to be used interchangeably with "mandatory busing to achieve racial balance".

The second part of Part II, stating general principles should summarize the principles you already have stated. These two are important and necessary to our decision.

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L.F.P., Jr.

ss

L.F.P.

Great!
And revised with astonishing celerity!
Only the last couple of page seem to need a second careful look by you.

dfl 06/16/82

Revised
Draft: Washington v. Seattle School District: No. 81-9

After a co-clerk casts a critical eye over this, go ahead with the circulation of an A~~tes~~ draft.
When in print we can - & should - give it a fresh & careful review.

Justice Powell, dissenting.

The people of the State of Washington, by a two to one vote, have adopted a neighborhood school policy. The policy is binding on local school boards but in no way affects the authority of state or federal courts to order school transportation to remedy violations of the Fourteenth Amendment. Nor does the policy affect the power of local school districts to establish voluntary transfer programs for racial integration or for any other purpose.

In the absence of a constitutional violation, no decision of this Court compels a school district to adopt

or maintain a mandatory busing program for racial integration.[1] Accordingly, the Court does not hold that the adoption of an identical policy by local school districts would be unconstitutional. Rather, ~~Instead~~, it holds that the adoption of a neighborhood school policy at the State level--rather than at the local level--violates the Equal Protection Clause of the Fourteenth Amendment.

I dissent from the Court's unprecedented intrusion into the structure of a state government. The School Districts in this case were under no Federal Constitutional obligation to adopt mandatory busing programs. The State of Washington, the governmental body ultimately responsible for the provision of public education, has determined that certain mandatory busing programs are detrimental to the education of its children. "[T]he Fourteenth Amendment leaves the States free to distribute the powers of government as they will between their legislative and judicial branches." Hughes v.

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[1] Throughout this dissent, I use the term "mandatory busing" to refer to busing--or mandatory student reassignments--for the purpose of achieving racial balance.

Superior Court, 339 U.S. 460, 467 (1950). In my view, that Amendment leaves the States equally free to distribute the powers of government between State and local governmental bodies.

I

At the November, 1978, general election, the voters of the State adopted Initiative 350 by a two to one majority.[2] The Initiative sets forth a neighborhood school policy binding on local school districts. It establishes a general rule prohibiting school districts from "directly or indirectly requir[ing] any student to attend a school other than the school which is geographically nearest or next nearest the student's place of residence." Wash. Rev. Code §28A.26.010 (1981). The rule may be avoided in individual instances only if the student requires special education; if there are health or safety hazards between the student's residence and the nearest or next nearest school; or if the nearby schools are overcrowded, unsafe,

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[2] The initiative passed by almost 55% of the statewide vote. In Seattle the initiative passed by over 61% of the vote. It failed in only two of Seattle's legislative districts—one predominantly black and one predominantly white.

or lacking in physical facilities. Ibid.

The Initiative includes two significant limitations upon the scope of its neighborhood school policy. It expressly provides that nothing in the Initiative shall "preclude the establishment of schools offering specialized or enriched educational programs which students may voluntarily choose to attend, or of any other voluntary option offered to students."[3] Moreover, and critical to this case, the authority of state and federal courts to order mandatory school assignments to remedy constitutional violations is left untouched by the Initiative: "This chapter shall not prevent any court of competent jurisdiction from adjudicating constitutional issues relating to the public schools."[4]

This suit was filed in United States District

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[3]In addition to this reservation of authority to school districts, the Initiative also reserves "the authority of any school district to close school facilities." 28A.25.030.

[4]Unlike the constitutional amendment at issue in Crawford v. Los Angeles Bd. of Ed., ___ U.S. ___ (1982), Initiative 350 places no limits on the State courts in their interpretation of the State Constitution. Thus, if mandatory school assignments were required by the State Constitution-- although not by the Fourteenth Amendment of the Federal Constitution--Initiative 350 would not hinder a State from enforcing the State constitution.

Court shortly after the Initiative was enacted. The Seattle School District, joined by the Tacoma and Pasco School Districts[5] and certain individual plaintiffs, argued that the Initiative violated the Equal Protection Clause of the Fourteenth Amendment. The District Court agreed, and, in a split decision, the Court of Appeals affirmed. Relying on Hunter v. Erickson, 393 U.S. 385 (1969), the Court of Appeals concluded that Initiative 350 "both creates a constitutionally-suspect racial classification and radically restructures the political process of Washington by allowing a state-wide majority to usurp traditional local authority over local school board educational policies." 633 F. 2d, at 1344.[6]

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[5]Tacoma School District No. 10 and Pasco School District No. 1 are the only other school districts in Washington with extensive integration programs. Pasco has relied upon school closings and mandatory busing to achieve racial balance in its schools. Only minority children are bused under the Pasco plan. 473 F. Supp., at 1002. In addition to school closings, the Tacoma integration plan relies upon voluntary techniques--magnet schools and voluntary transfers.

[6]Judge Wright dissented. In his view Initiative 350 could not be said to embody a racial classification. The Initiative does not classify individuals on the basis of their race. It simply deals with a matter bearing on race relations. Moreover, no racial classification is created because the citizens of a State favor mandatory school reassignments for some purposes but not for reasons of race. The benefits and problems associated with busing for one reason are not the same as for another. Finally, Judge Wright could not understand how the exercise of

Footnote continued on next page.

II

The principles that should guide us in reviewing the constitutionality of Initiative 350 are well established. To begin with, we have never held, or even intimated, that absent a federal constitutional violation, a State must choose to treat persons differently on the basis of race. In the absence of a federal constitutional violation requiring race-specific remedies, a policy of strict racial neutrality by a State would violate no federal constitutional principle. Cf. University of California Regents v. Bakke, 438 U.S. 265 (1978).

In particular, a neighborhood school policy and a decision not to assign students on the basis of their race, does not offend the Fourteenth Amendment.[7] The

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authority by the State could create a racial classification. The State had not intervened by altering the legislative process in a way that burdened racial minorities. Charged by the State Constitution with the responsibility for the provision of public education, the State had simply exercised its authority to run its own school system.

Judge Wright also addressed the District Court's alternative holdings that Initiative 350 is overbroad or that it was motivated by discriminatory intent. He found no basis for either conclusion.

[7] See Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 28 (1971) ("Absent a constitutional violation there would be no basis for judicially ordering assignment of students on racial basis. All things being equal, with no history of discrimination, it might well be

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Court has never held that there is an affirmative duty to integrate the schools in the absence of a finding of unconstitutional segregation. See Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 24 (1971); Dayton Board of Education v. Brinkman, 433 U.S. 406, 417 (1977). Certainly there is no constitutional duty to adopt mandatory busing in the absence of such a constitutional violation. Indeed, even where desegregation is ordered because of a constitutional violation, the Court has never held that racial balance itself is a constitutional requirement. Id. And even where there have been segregated schools, once desegregation has been accomplished no further

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desirable to assign pupils to schools nearest their homes.").

Indeed, in the absence of a finding of segregation by the School District, mandatory busing on the basis of race raises constitutional difficulties of its own. Extensive pupil transportation may threaten liberty or privacy interests. See University of California Board of Regents v. Bakke, 438 U.S. 265, 300 n. 39 (opinion of Powell, J.); Keyes v. School District No. 1, 413 U.S. 189, 240-250 (1973) (Powell, J., concurring in part and dissenting in part). Moreover, when a State or school board assigns students on the basis of their race, it acts on the basis of a racial classification, and we have consistently held that "[a] racial classification, regardless of purported motivtion is presumptively invalid and can be upheld only upon an extraordinary justification." Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 272 (1979).

On target!

constitutional duty exists upon school boards or States to maintain integration. See Pasadena City Board of Education v. Spangler, 427 U.S. 424 (1976).

Moreover, it is a well established principle that the States have "extraordinarily wide latitude ... in creating various types of political subdivisions and conferring authority upon them." Holt Civic Club v. Tuscaloosa, 439 U.S. 60, 71 (1978).[8] The Constitution does not dictate to the States a particular division of authority between legislature and judiciary or between state and local governing bodies. It does not protect or define institutions of local government.

Thus, a State may choose to run its schools from the state legislature or through local school boards just as it may choose to address the matter of race relations

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[8] "[A]ccording to the institutions of this country, the sovereignty in every State resides in the people of the State, and ... they may alter and change their form of government at their own pleasure." Luther v. Borden, 7 How. 1, 47 (1849). See Community Communications Co. v. Boulder, ___ U.S. ___, ___ (1982); Sailors v. Board of Education, 387 U.S. 105, 109 (1967) ("Save and unless the state, county, or municipal government runs afoul of a federally protected right, it has vast leeway in the management of its internal affairs"); United States v. Kagama, 118 U.S. 375, 379 (1886) (under the Constitution, sovereign authority resides either with the States or the Federal government, and "[t]here exist ... but these two").

at the State or local level. There is no constitutional requirement that the State establish or maintain local institutions of government or that it delegate particular powers to these bodies. The only relevant constitutional limitation on a State's freedom to order its political institutions is that it may not do so in a fashion designed to "[place] special burdens on racial minorities within the governmental process." Hunter v. Erickson, supra, at 391 (emphasis added).

In sum, in the absence of a prior constitutional violation, the States are under no constitutional duty to adopt integration programs in their schools, and certainly they are under no duty to establish a regime of mandatory busing. Nor does the Federal Constitution require that particular decisions concerning the schools or any other matter be made on the local as opposed to the State level. It does not require the States to establish local governmental bodies or to delegate unreviewable authority to them.

III

next page →

III

Application of these settled principles demonstrates the serious error of today's decision--an error that cuts deeply into the heretofore unquestioned right of a state to structure the decisionmaking authority of its government. In this case, by Initiatve 350, the State has adopted a policy of racial neutrality in student assignments. The policy in no way interferes with the power of State or Federal Courts to remedy constitutional violations. And if such a policy had been adopted by any of the school districts in this litigation there could have been no question that the policy was constitutional.[9]

The issue here arises only because the Seattle School Board--in the absence of a then established state policy--chose to adopt race specific school assignments with extensive busing. It is not questioned that the School Board itself, at any time thereafter, could have changed its mind and cancelled its integration program without violating the Federal Constitution. Yet this

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[9]The Court consistently has held "that the Equal Protection Clause is not violated by the mere repeal of race related legislation or policies that were not required by the Federal Constitution in the first place." Crawford v. Los Angeles Bd. of Ed., supra, at ___.

Court holds that neither the legislature or the people of the State of Washington could alter what the School Board had decided.

The Court holds that the people of Washington by Initiative 350 created a racial classification, and yet must concede that identical action by the Seattle school board itself would have created no such classification. This is not an easy argument to answer because it seems to make no sense. School boards are the creation of supreme State authority, whether in a State constitution or by legislative enactment. Until today's decision no one would have questioned the authority of a State to abolish school boards altogether, or to require that they conform to any lawful State policy. And in the State of Washington, a neighborhood school policy would have been lawful.

Under today's decision this heretofore undoubted supreme authority of a State's electorate is to be curtailed whenever a school board--or indeed any other state board or local instrumentality--adopts a race specific program that arguably benefits racial minorities.

Once such a program is adopted, only the local or subordinate entity that approved it will have authority to change it. The Court offers no authority or relevant explanation for this extraordinary subordination of the ultimate sovereign power of a state to action with respect to racial matters by subordinate bodies. It is a strange notion that local governmental bodies can forever preempt the ability of a State--the sovereign power--to address a matter of compelling concern to the State. The Constitution of the United States does not require such a bizarre result.

Even if one assumes that somehow the federal Constitution now imposes special conditions on the exercise of state sovereignty once a local school board has acted, this is certainly not a case where a State--in moving to change a locally adopted policy--has established a racially discriminatory requirement. Initiative 350 does not impede enforcement of the Fourteenth Amendment. If a Washington school district should be found to have established a segregated school system, Initiative 350 will place no barrier in the way of a remedial busing

order. Nor does Initiative 350 authorize or approve segregation in any form or degree. It is neutral on its face, and racially neutral as public policy. Children of all races benefit from neighborhood schooling, just as children of all races benefit from exposure to "ethnic and racial diversity in the classroom." Ante, at ___, quoting Columbus Board of Education v. Penick, 443 U.S. 449, 486 (1979) (Powell, J., dissenting).[10]

Finally, Initiative 350 places no "special burdens on racial minorities within the governmental process," Hunter v. Erickson, supra, at 391, such that interference with the State's distribution of authority is justified. Initiative 350 is simply a reflection of the State's political process at work. It does not alter that process in any respect. It does not require, for example,

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[10]The policies in support of neighborhood schooling are various but all of them are racially neutral. The people of the State legitimately could decide that enforced mandatory busing places too great a burden on the liberty and privacy interests of families and students of all races. It might decide that the reassignment of students to distant schools, on the basis of race, was too great a departure from the ideal of racial neutrality in State action. And, in light of the experience with mandatory busing in other cities, the State might conclude that such a program ultimately would lead to greater imbalance in the schools. See Keyes v. Metropolitan Branches of the Dallas NAACP, 446 U.S. 437, 451 (1980) (Powell, J., dissenting).

that all matters dealing with race--or with integration in the schools--must henceforth be submitted to a referendum of the people. Cf. Hunter v. Erickson, supra. The State has done no more than precisely what the Court has said that it should do: It has "resolved through the political process" the "desirability and efficacy of [mandatory] school desegregation." where there has been no unlawful segregation. Ante, at ___.

The political process in Washington, as in all States, permits persons who are dissatisfied at a local level to appeal to the State legislature or the people of the State for redress. It permits the people of a State to preempt local policies, and to formulate new programs and regulations. Such a process is inherent in the continued sovereignty of the States. This is our system. Any time a State chooses to address a major issue some persons or groups may be disadvantaged. In a democratic system there are winners and losers. But there is no inherent unfairness in this and certainly no Constitutional violation.[11]

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[11] Cf. James v. Valtierra, 402 U.S. 137, 142 (1971) ("[O]f course a lawmaking procedure that 'disadvantages' a

Footnote continued on next page.

IV

Nonetheless, the Court holds that Initiative 350 "imposes substantial and unique burdens on racial minorities" in the governmental process. See ante, at ___. Its authority for this holding is Hunter v. Erickson, supra.[12] In Hunter the people of Akron passed a charter amendment that "not only suspended the operation of the existing ordinance forbidding housing discrimination, but also required the approval of the electors before any future [anti-discrimination] ordinance could take effect." 393 U.S., at 389-390. Although the charter amendment was facially neutral, the Court found that it could be said to embody a racial classification:

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particular group does not always deny equal protection. Under any such holding, presumably a State would not be able to require referendums on any subject unless referendums were required on all, because they would always disadvantage some group. And this Court would be required to analyze governmental structures to determine whether a gubernatorial veto provision or a filibuster rule is likely to 'disadvantage' any of the diverse an shifting groups that make up the American people.").

[12] The Court also relies at certain critical points in its discussion on the summary affirmance in Lee v. Kyquist, 318 F. Supp. 710 (WDWI 1970), summarily aff'd, 402 U.S. 935 (1971). As we have often noted, however, summary affirmances by this Court are of little precedential force. See Mercado v. Ian. v. San Diego, 455 U.S. 490, 500 (1981). A summary affirmance "is not to be read as an adoption of the reasoning supporting the judgment under review." Zobel v. Williams, ___ U.S. ___, ___ n. 13 (1982).

"[T]he reality is that the law's impact falls on the minority. The majority needs no protection against discrimination." Id., at 391. By making it more difficult to pass legislation in favor of racial minorities, the amendment placed "special burdens on racial minorities within the governmental process." Ibid.

Nothing in Hunter supports the Court's extraordinary invasion into the State's distribution of authority. Even could it be assumed that Initiative 350 imposed a ~~clear~~ burden on racial minorities,[13] it simply does not place unique political obstacles in the way of racial minorities. In this case, unlike in Hunter, ~~as already indicated~~, the political system has not been redrawn or altered. Nor have racial minorities been asked to bear a "special ~~unique or comparative~~ burden [3]." The political system is not altered

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[13] It is far from clear that in the absence of a constitutional violation, mandatory busing necessarily benefits racial minorities or that it is even viewed with favor by racial minorities. See Crawford v. Board of Education of the City of Los Angeles, U.S. , 50 [illegible] (1982). As the Court indicates, the busing question is complex and is best resolved by the political process.

Moreover, it is significant that Initiative 350 places no limits on voluntary programs or on court ordered reassignments. It permits school districts to order school closings for purposes of racial balance. And it permits school districts to order a student to attend the "next nearest"--rather than nearest--school to promote racial integration.

because the State decides to regulate within an area subject to its control. And racial minorities are not uniquely or comparatively burdened by the adoption by the State of a policy that lawfully could be adopted by any School District in the State.

Hunter is simply irrelevant. If anything, it is the Court that by its decision today disrupts the normal course of State government.[14] Under its holding, the people of the State of Washington apparently are forever barred even from developing a differently structured policy on mandatory busing ~~because~~ where a School District ~~got there~~ had previously adopted one of its own first. Under the ~~Court's peculiar~~ its unprecedented theory of a "vested constitutional right to local decisionmaking," the State

Put in a note. This is a bit far out even for Levi + Powell

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[14]The Court's decision intrudes deeply into normal State decisionmaking. Thus, if the admissions committee of a State law school developed an affirmative action plan that came under fire, the Court apparently would find it unconstitutional for any higher authority to intervene unless that authority traditionally dictates admissions policies. Thus, as a constitutional matter, the Dean of the Law School, the faculty of the University as a whole, the University President, the Chancellor of the University System, and the Board of Regents might be powerless to intervene despite their greater authority under state law.

After today's decision it is unclear ~~to me~~ whether the State may set policy in any area of race relations where a local governmental body arguably has done "more" than the Fourteenth Amendment requires. If local employment or benefits are distributed on a racial basis to the benefit of racial minorities, the State apparently may not intervene. Indeed, under the Court's theory one must wonder whether the Federal Government ~~may no longer~~ could assert its superior authority to regulate in these areas.

thereafter ever

under the due E/P component of the 5th -- e even

the ~~prior~~ pressing problem of how best to accommodate family - and in the best interest of educating all children - in a ~~society of a~~ multi-racial society

is now forever barred from addressing ~~a question of~~ an educational ~~interest to its people~~.[15] apparently upset when the local school board had ~~prev~~ previously taken a position

V

We are not asked to decide the wisdom of a state policy that limits the ability of local school districts -- on their own volition -- to adopt mandatory reassignments for racial balance. We must decide only whether the Federal Constitution permits the State to adopt such a policy. The School Districts in

David - this strains even my credulity. Take a look at my change

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[15] Even accepting the dubious notion that a State must demonstrate some past interest in public schooling or race relations before intervening in these matters, the Court's attempt to demonstrate that Initiative 350 represents a unique thrust by the State into these areas is ~~utterly~~ unpersuasive. The Court's own discussion indicates the ~~breadth~~ of the State's activity. The Common School Provisions of the State's Code of Laws is nearly 200 pages long, governing a broad variety of school matters. The State has taken seriously its constitutional obligation to provide public education. See Art. IX, §2 ; Seattle School District v. State, 90 Wash. 2d 476, 518, 585 P. 2d 71, 95 (1978). In light of the ~~wealth~~ wide range of regulation of the public schools by the State, it is unclear ~~to me~~ wholly ~~just~~ what degree of prior ~~State interference~~ concern by the State would satisfy the Court's new doctrine.

David - cite to where HAB expressed or implied this "notion"

comprehensive character

In addition to public school affairs generally, the State has taken a direct interest in ending racial discrimination in the schools and elsewhere. See §49.60.010 et seq. Article IX, §1 of the State Constitution specifically prohibits discrimination in ~~the provision of~~ public schooling: "It is the paramount duty of the state to make ample provision for the education of all children residing within its borders without distinction or preference on account of race, color, caste, or sex." The State Supreme Court has not interpreted this section of the State Constitution to prohibit race conscious school assignments in the absence of a violation of the Fourteenth Amendment. Cf. Citizens Against Mandatory Bussing v. Palmason, 80 Wash. 2d 445, 495 P. 2d 657 (1972). But until today's decision one would have thought that the State Court could have rendered such a decision without violating the Federal Constitution.

Plyler!

the perplexing ~~and~~ problems of how best to educate fairly all children in a multi-racial society where, as in this case, the ~~problem~~ local school board has acted first.[15]

apparently

is now forever b

~~interest to its pe~~

V

David - this stands over my credulity. Take a look at my change

We are not asked to decide the wisdom of a state policy that limits the ability of local school districts -- on their own volition -- to adopt mandatory reassignments for racial balance. We must decide only whether the Federal Constitution permits the State to adopt such a policy. The School Districts in

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David - cite to where HAB expressed or implied this "notion"

In addition to public school affairs generally, the State has taken a direct interest in ending racial discrimination in the schools and elsewhere. See §49.60.010 et seq. Article IX, §1 of the State Constitution specifically prohibits discrimination in ~~the provision of~~ public schooling: "It is the paramount duty of the state to make ample provision for the education of all children residing within its borders without distinction or preference on account of race, color, caste, or sex." The State Supreme Court has not interpreted this section of the State Constitution to prohibit race conscious school assignments in the absence of a violation of the Fourteenth Amendment. Cf. Citizens Against Mandatory Bussing v. Palmason, 80 Wash. 2d 445, 495 P. 2d 657 (1972). But until today's decision one would have thought that the State Court could have rendered such a decision without violating the Federal Constitution.

Playlet!

Absent such an obligation, the State - exercising its sovereign authority - should be free to reject this debatable restriction of liberty.

this case were under no federal constitutional obligation to adopt mandatory busing. ~~Having tried a system~~ of mandatory busing, ~~they were free to return to a voluntary program.~~ ~~The Court objects to the State setting policy~~ in ~~this area.~~ ~~Indeed, it~~ deprives the State of all opportunity to address the questions ~~presented by the adoption of~~ mandatory busing. The Constitution does not dictate to the States at what level of government decisions affecting the public schools must be taken. It does not strip the States of their sovereignty. It does not authorize today's intrusion into the State's internal structure.

But today's decision denies this right to a State. In this case, it deprives the State of Washington of all opportunity to address the questions resulting from extensive mandatory busing.

Application of these settled principles demonstrates the serious error of today's decision - an error that cuts deeply into heretofore unquestioned authority of a state to structure decision-making authority of its government. In Washington, as in many other states, use of an initiative - a popular referendum - to determine state policy is a valid and uniquely democratic legislative technique. See James v. Valtierra, at 137, 142 (1971).(?) In this case, by initiatve 350, the state adopted a statewide policy of racial neutrality in student assignments. As there had been no state segregated schools, the state was perfectly free to adopt this policy. The issue here arises only because the Seattle School Board - in the absence of a then established state policy and exercising its broad discretion - had chosen to adopt race specific school assignments with extensive busing. It is not questioned in this case that the school board itself, at any time thereafter, could have changed its mind and cancelled its

integration program without violating the federal Constitution.[13] Yet this Court, by a process of reasoning that defies rational understanding, holds that neither the legislature or the people of the State of Washington could alter what the school board had decided.

The Court's reasoning is that the people of Washington by initiative 350 created a racial classification, although identical action by the Seattle school board would have created no such classification. This is not an easy argument to answer because it is wholly illogical. School boards are the creation of supreme state authority, whether in a state constitution or by legislative enactment. Until today's decision no one would have questioned that school boards could have been abolished altogether or the operation of public schools could be restructured in any neutral way approved by the legislature or the people. Under today's decision this heretofore undoubted supreme authority of a state's electorate is to be curtailed whenever a school board - or indeed any other state board or local instrumentality - adopts a race specific program that arguably benefits

racial minorities. Once such a program is adopted, only the local or subordinate entity that approved it will have authority to change it. The Court offers no explanation for this extraordinary subordination of the ultimate sovereign authority of a state to action with respect to racial matters by subordinate bodies. The Constitution of the United States does not require such a bizarre result.

B

This dissent well could conclude at this point. Yet, even if one assumes that somehow the federal Constitution imposes special conditions on the exercise of state sovereign authority once a local school board has acted, this is not a case where a state - in moving to change a locally adopted policy - has established some racially discriminatory requirement. It is fundamental to bear in mind that no finding has been made in this or in any other case of schools in Washington segregated by state action. Nor does initiative 350 authorize or approve segregation in any form or degree. It is neutral on its face, and neutral as public policy. It merely limits - to a specified extent - the discretionary

authority of school boards to seek racial balance by mandatory busing beyond certain limits. The rationale of the initiative is that children of all races benefit from neighborhood schooling, just as children of all races benefit from exposure to "ethnic and racial diversity in the classroom". Columbus Board of Education v. Penick, 443 U.S. 449, 486 (1979)(Powell, J., dissenting).

Note to David: The above is a rough shot at rewriting III-A. There may be flaws in my rather simplistic reasoning, and I count on you to consider it critically. If I am right, this sort of argument has considerable force. The difficulty is that having made it, there is not much to be said.

If we accept the substance of what I have dictated above, it would be a substitute for all of present III-B. In any event, it seems to me that most, if not all, of III-B commencing with the last sentence at the bottom of page 14, can be eliminated as a secondary type of argument.

Application of these settled principles demonstrates the serious error of today's decision - an error that cuts deeply into heretofore unquestioned right of a state to structure decision-making authority of its government. In Washington, as in many other states, use of an initiative - a popular referendum - to determine state policy is a valid and uniquely democratic legislative technique. See James v. Valtierra, at 137, 142 (1971). In this case, by Initiatve 350, the state adopted a policy of racial neutrality in student assignments. As there had been no state segregated schools, Washington was perfectly free to adopt this policy.

The issue here arises only because the Seattle School Board - in the absence of a then established state policy and exercising its broad discretion - had chosen to adopt race specific school assignments with extensive busing. It is not questioned that the school board itself, at any time thereafter, could have changed its mind and cancelled its integration program without violating the federal Constitution.[13] Yet this Court, by

a process of reasoning that defies rational understanding, holds that neither the legislature or the people of the State of Washington could alter what the school board had decided.

The Court holds that the people of Washington by Initiative 350 created a racial classification, and yet concedes that identical action by the Seattle school board itself would have created no such classification. This is not an easy argument to answer because it seems to make no sense. School boards are the creation of supreme state authority, whether in a state constitution or by legislative enactment. Until today's decision no one would have questioned the authority of a state to abolish school boards altogether, or to require that they conform to any lawful state policy. And in the State of Washington, a neighborhood school policy would have been lawful. Under today's decision this heretofore undoubted supreme authority of a state's electorate is to be curtailed whenever a school board - or indeed any other state board or local instrumentality - adopts a race specific program that arguably benefits racial minorities.

Once such a program is adopted, only the local or subordinate entity that approved it will have authority to change it. The Court offers no authority or relevant explanation for this extraordinary subordination of the ultimate sovereign power of a state to action with respect to racial matters by subordinate bodies. The Constitution of the United States does not require such a bizarre result.

This dissent well could conclude at this point. Yet, even if one assumes that somehow the federal Constitution now imposes special conditions on the exercise of state sovereignty once a local school board has acted, this is certainly not a case where a state - in moving to change a locally adopted policy - has established some racially discriminatory requirement. It is essential to bear in mind that no finding has been made in this or in any other case, that schools in Washington have been segregated by state action. Thus, there had been no constitutional violation to be remedied by the Seattle board or the state. Nor does Initiative 350 authorize or approve segregation in any form or degree.

It is neutral on its face, and neutral as public policy. It merely limits the discretionary authority of school boards to seek racial balance by mandatory busing beyond certain limits. The rationale of the initiative is that children of all races benefit from neighborhood schooling, just as children of all races benefit from exposure to "ethnic and racial diversity in the classroom". Columbus Board of Education v. Penick, 443 U.S. 449, 486 (1979)(Powell, J., dissenting). (David: other authority for this?)

Note to David: The above is a rough shot at rewriting III-A. There may be flaws in some of my rather simplistic reasoning, and also some repetition. I count on you to get this straight. But, if I am right, this sort of argument has considerable force. The difficulty is that having made it, there is not much left to be said.

In any event, it seems to me that most, if not all, of III-B commencing with the last sentence at the

bottom of page 14, can be eliminated as a secondary type of argument.

David - Should not we use consistently ~~either~~ "School Board" (if this is the legal term in Washington) to mean the elected body, and "School District" to mean the area of its jurisdiction? Both terms now are used loosely. Nor does state law (statutes) use these terms?

Rather than change every page, ~~[illegible]~~ a definitional note could set it straight.

LFP

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor
Justice Powell

Circulated: JUN 17 1982

Recirculated: _____

Washington v. Seattle School District: No. 81-9

Justice Powell, dissenting.

The people of the State of Washington, by a two to one vote, have adopted a neighborhood school policy. The policy is binding on local school ~~boards~~ districts but in no way affects the authority of state or federal courts to order school transportation to remedy violations of the Fourteenth Amendment. Nor does the policy affect the power of local school districts to establish voluntary transfer programs for racial integration or for any other purpose. ? See comment above

In the absence of a constitutional violation, no decision of this Court compels a school district to adopt

or maintain a mandatory busing program for racial integration.[1] Accordingly, the Court does not hold that the adoption of a neighborhood school ~~an identical~~ policy by local school districts would be unconstitutional. Rather, it holds that the adoption of such a ~~a neighborhood school~~ policy at the State level--rather than ~~instead of~~ at the local level--violates the Equal Protection Clause of the Fourteenth Amendment.

I dissent from the Court's unprecedented intrusion into the structure of a state government. The School Districts in this case were under no Federal Constitutional obligation to adopt mandatory busing programs. The State of Washington, the governmental body ultimately responsible for the provision of public education, has determined that certain mandatory busing programs are detrimental to the education of its children. "[T]he Fourteenth Amendment leaves the States free to distribute the powers of government as they will between their legislative and judicial branches." Hughes v.

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[1]Throughout this dissent, I use the term "mandatory busing" to refer to busing--or mandatory student reassignments--for the purpose of achieving racial ~~balance~~. integration.

David: This Court has not held that the E/P clause requires that desegregation to the extent of a "racial balance". See Swann. I have used the term too loosely in what I have said & written in this case. Please correct.

We say this on p 8

Superior Court, 339 U.S. 460, 467 (1950). In my view, that Amendment leaves the States equally free to decide matters of concern to the State at the State, rather than local, level of government.

I

At the November, 1978, general election, the voters of the State adopted Initiative 350 by a two to one majority.[2] The Initiative sets forth a neighborhood school policy binding on local school districts. It establishes a general rule prohibiting school districts from "directly or indirectly requir[ing] any student to attend a school other than the school which is geographically nearest or next nearest the student's place of residence." Wash. Rev. Code §28A.26.010 (1981). The rule may be avoided in individual instances only if the student requires special education; if there are health or safety hazards between the student's residence and the nearest or next nearest school; or if the nearby schools are overcrowded, unsafe,

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[2]The Initiative passed by almost 66% of the statewide vote. In Seattle the Initiative passed by over 61% of the vote. It failed in only two of Seattle's legislative districts--one predominantly black and one predominantly white.

or lacking in physical facilities. Ibid.

The Initiative includes two significant limitations upon the scope of its neighborhood school policy. It expressly provides that nothing in the Initiative shall "preclude the establishment of schools offering specialized or enriched educational programs which students may voluntarily choose to attend, or of any other voluntary option offered to students." §28A.26.050. Moreover, and critical to this case, the authority of state and federal courts to order mandatory school assignments to remedy constitutional violations is left untouched by the Initiative: "This chapter shall not prevent any court of competent jurisdiction from adjudicating constitutional issues relating to the public schools." §28A.26.060.[3]

This suit was filed in United States District

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[3]Unlike the constitutional amendment at issue in Crawford v. Los Angeles Bd. of Ed., ___ U.S. ___ (1982), Initiative 350 places no limits on the State courts in their interpretation of the State Constitution. Thus, if mandatory school assignments were required by the State Constitution--although not by the Fourteenth Amendment of the Federal Constitution--Initiative 350 would not hinder a State from enforcing ~~the State~~ its Constitution.

Court shortly after the Initiative was enacted. The Seattle School District, joined by the Tacoma and Pasco School Districts[4] and certain individual plaintiffs, argued that the Initiative violated the Equal Protection Clause of the Fourteenth Amendment. The District Court agreed, and, in a split decision, the Court of Appeals affirmed. Relying on Hunter v. Erickson, 393 U.S. 385 (1969), the Court of Appeals concluded that Initiative 350 "both creates a constitutionally-suspect racial classification and radically restructures the political process of Washington by allowing a state-wide majority to usurp traditional local authority over local school board educational policies." 633 F. 2d, at 1344.[5]

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[4]Tacoma School District No. 10 and Pasco School District No. 1 are the only other school districts in Washington with extensive integration programs. Pasco has relied upon school closings and mandatory busing to achieve racial balance in its schools. Only minority children are bused under the Pasco plan. 473 F. Supp., at 1002. In addition to school closings, the Tacoma integration plan relies upon voluntary techniques--magnet schools and voluntary transfers.

[5]Judge Wright dissented. In his view Initiative 350 could not be said to embody a racial classification. The Initiative does not classify individuals on the basis of their race. It simply deals with a matter bearing on race relations. Moreover, no racial classification is

Footnote continued on next page.

II

The principles that should guide us in reviewing the constitutionality of Initiative 350 are well established. To begin with, we have never held, or even intimated, that absent a federal constitutional violation, a State must choose to treat persons differently on the basis of race. In the absence of a federal constitutional violation requiring race-specific remedies, a policy of strict racial neutrality by a State would violate no federal constitutional principle. Cf. University of California Regents v. Bakke, 438 U.S. 265 (1978).

In particular, a neighborhood school policy and

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created because the citizens of a State favor mandatory school reassignments for some purposes but not for reasons of race. The benefits and problems associated with busing for one reason are not the same as for another. Finally, Judge Wright could not understand how the exercise of authority by the State could create a racial classification. The State had not intervened by altering the legislative process in a way that burdened racial minorities. Charged by the State Constitution with the responsibility for the provision of public education, the State had simply exercised its authority to run its own school system.

Judge Wright also addressed the District Court's alternative holdings that Initiative 350 is overbroad or that it was motivated by discriminatory intent. He found no basis for either conclusion.

← David, Is this sentence right?

?

e.g. racial integration

e.g., to avoid safety hazards.

a decision not to assign students on the basis of their race, does not offend the Fourteenth Amendment.[6] The Court has never held that there is an affirmative duty to integrate the schools in the absence of a finding of unconstitutional segregation. See Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 24 (1971); Dayton Board of Education v. Brinkman, 433 U.S. 406, 417 (1977). Certainly there is no constitutional duty to adopt mandatory busing in the absence of such a violation.

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[6]See Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 28 (1971) ("Absent a constitutional violation there would be no basis for judicially ordering assignment of students on racial basis. All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes.").

Indeed, in the absence of a finding of segregation by the School District, mandatory busing on the basis of race raises constitutional difficulties of its own. Extensive pupil transportation may threaten liberty or privacy interests. See University of California Board of Regents v. Bakke, 438 U.S. 265, 300 n. 39 (opinion of Powell, J.); Keyes v. School District No. 1, 413 U.S. 189, 240-250 (1973) (Powell, J., concurring in part and dissenting in part). Moreover, when a State or school board assigns students on the basis of their race, it acts on the basis of a racial classification, and we have consistently held that "[a] racial classification, regardless of purported motivation is presumptively invalid and can be upheld only upon an extraordinary justification." Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 272 (1979).

Indeed, even where desegregation is ordered because of a constitutional violation, the Court has never held that racial balance itself is a constitutional requirement. Id. And even where there have been segregated schools, once desegregation has been accomplished no further constitutional duty exists upon school boards or States to maintain integration. See Pasadena City Board of Education v. Spangler, 427 U.S. 424 (1976).

Moreover, it is a well established principle that the States have "extraordinarily wide latitude ... in creating various types of political subdivisions and conferring authority upon them." Holt Civic Club v. Tuscaloosa, 439 U.S. 60, 71 (1978).[7] The Constitution

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[7] "[A]ccording to the institutions of this country, the sovereignty in every State resides in the people of the State, and ... they may alter and change their form of government at their own pleasure." Luther v. Borden, 7 How. 1, 47 (1849). See Community Communications Co. v. Boulder, ___ U.S. ___, ___ (1982); Sailors v. Board of Education, 387 U.S. 105, 109 (1967) ("Save and unless the state, county, or municipal government runs afoul of a federally protected right, it has vast leeway in the management of its internal affairs"); United States v. Kagama, 118 U.S. 375, 379 (1886) (under the Constitution, sovereign authority resides either with the States or the Federal government, and "[t]here exist ... but these two").

does not dictate to the States a particular division of authority between legislature and judiciary or between state and local governing bodies. It does not ~~protect or~~ define institutions of local government.

Thus, a State may choose to run its schools from the state legislature or through local school boards just as it may choose to address the matter of race relations at the State or local level. There is no constitutional requirement that the State establish or maintain local institutions of government or that it delegate particular powers to these bodies. The only relevant constitutional limitation on a State's freedom to order its political institutions is that it may not do so in a fashion designed to "[place] special burdens on racial minorities within the governmental process." Hunter v. Erickson, supra, at 391 (emphasis added).

In sum, in the absence of a prior constitutional violation, the States are under no constitutional duty to adopt integration programs in their schools, and certainly they are under no duty to establish a regime of mandatory busing. Nor does the Federal Constitution require that particular decisions concerning the schools or any other matter be made on the local as opposed to the State level.

It does not require the States to establish local governmental bodies or to delegate unreviewable authority to them.

III

Application of these settled principles demonstrates the serious error of today's decision--an error that cuts deeply into the heretofore unquestioned right of a state to structure the decisionmaking authority of its government. In this case, by Initiatve 350, the State has adopted a policy of racial neutrality in student assignments. The policy in no way interferes with the power of State or Federal Courts to remedy constitutional violations. And if such a policy had been adopted by any of the school districts in this litigation there could have been no question that the policy was constitutional.[8]

The issue here arises only because the Seattle School Board--in the absence of a then established State policy--chose to adopt race specific school assignments

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[8]The Court consistently has held "that the Equal Protection Clause is not violated by the mere repeal of race related legislation or policies that were not required by the Federal Constitution in the first place." Crawford v. Los Angeles Bd. of Ed., supra, at ___.

with extensive busing. It is not questioned that the School ~~Board~~ District itself, at any time thereafter, could have changed its mind and cancelled its integration program without violating the Federal Constitution. Yet this Court holds that neither the legislature or the people of the State of Washington could alter what the School ~~Board~~ District had decided.

The Court ~~holds~~ argues that the people of Washington by Initiative 350 created a racial classification, and yet must agree that identical action by the Seattle School ~~Board~~ District itself would have created no such classification. This is not an easy argument to answer because it seems to make no sense. School boards are the creation of supreme State authority, whether in a State Constitution or by legislative enactment. Until today's decision no one would have questioned the authority of a State to abolish school boards altogether, or to require that they conform to any lawful State policy. And in the State of Washington, a neighborhood school policy would have been lawful.

David - as we use "argument" in the second sentence, the change seems desirable

Under today's decision this heretofore undoubted supreme authority of a State's electorate is to be curtailed whenever a school board--or indeed any other

state board or local instrumentality--adopts a race specific program that arguably benefits racial minorities. Once such a program is adopted, only the local or subordinate entity that approved it will have authority to change it. The Court offers no authority or relevant explanation for this extraordinary subordination of the ultimate sovereign power of a State to act~~ion~~ with respect to racial matters by subordinate bodies. It is a strange notion --alien to our system-- that local governmental bodies can forever preempt the ability of a State--the sovereign power--to address a matter of compelling concern to the State. ~~Certainly~~, The Constitution of the United States does not require such a bizarre result.

Even if one assumes that somehow the Federal Constitution now imposes special conditions on the exercise of State sovereignty once a local school board has acted, this is certainly not ~~a~~ the case where a State--in moving to change a locally adopted policy--has established a racially discriminatory requirement. Initiative 350 does not impede enforcement of the Fourteenth Amendment. If a Washington school district should be found to have established a segregated school system, Initiative 350 will place no barrier in the way of a remedial busing

order. Nor does Initiative 350 authorize or approve segregation in any form or degree. It is neutral on its face, and racially neutral as public policy. Children of all races benefit from neighborhood schooling, just as children of all races benefit from exposure to "ethnic and racial diversity in the classroom." Ante, at ___, quoting Columbus Board of Education v. Penick, 443 U.S. 449, 486 (1979)(Powell, J., dissenting).[9]

Finally, Initiative 350 places no "special burdens on racial minorities within the governmental process," Hunter v. Erickson, supra, at 391, such that interference with the State's distribution of authority is justified. Initiative 350 is simply a reflection of the

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[9]The policies in support of neighborhood schooling are various but all of them are racially neutral. The people of the State legitimately could decide that unlimited mandatory busing places too great a burden on the liberty and privacy interests of families and students of all races. It might decide that the reassignment of students to distant schools, on the basis of race, was too great a departure from the ideal of racial neutrality in State action. And, in light of the experience with mandatory busing in other cities, the State might conclude that such a program ultimately would lead to greater racial imbalance in the schools. See Estes v. Metropolitan Branches of the Dallas NAACP, 444 U.S. 437, 451 (1980) (Powell, J., dissenting).

State's political process at work. It does not alter that process in any respect. It does not require, for example, that all matters dealing with race--or with integration in the schools--must henceforth be submitted to a referendum of the people. Cf. Hunter v. Erickson, supra. The State has done no more than precisely what the Court has said that it should do: It has "resolved through the political process" the "desirability and efficacy of [mandatory] school desegregation" where there has been no unlawful segregation. Ante, at ___,.

The political process in Washington, as in ~~all~~ other States, permits persons who are dissatisfied at a local level to appeal to the State legislature or the people of the State for redress. It permits the people of a State to preempt local policies, and to formulate new programs and regulations. Such a process is inherent in the continued sovereignty of the States. This is our system. Any time a State chooses to address a major issue some persons or groups may be disadvantaged. In a democratic system there are winners and losers. But there is no inherent unfairness in this and certainly no Constitutional violation.[10]

Footnote(s) 10 will appear on following pages.

IV

Nonetheless, the Court holds that Initiative 350 "imposes substantial and unique burdens on racial minorities" in the governmental process. See ante, at ___. Its authority for this holding is said to be Hunter v. Erickson, supra.[11] In Hunter the people of Akron passed a charter amendment that "not only suspended the operation of the existing ordinance forbidding housing discrimination, but also required the approval of the electors before any future [anti-discrimination] ordinance

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[10] Cf. James v. Valtierra, 402 U.S. 137, 142 (1971) ("[O]f course a lawmaking procedure that 'disadvantages' a particular group does not always deny equal protection. Under any such holding, presumably a State would not be able to require referendums on any subject unless referendums were required on all, because they would always disadvantage some group. And this Court would be required to analyze governmental structures to determine whether a gubernatorial veto provision or a filibuster rule is likely to 'disadvantage' any of the diverse an shifting groups that make up the American people.").

[11] The Court also relies at certain critical points in its discussion on the summary affirmance in Lee v. Nyquist, 318 F. Supp. 710 (WDNY 1970), summarily aff'd, 402 U.S. 935 (1971). As we have often noted, however, summary affirmances by this Court are of little precedential force. See Metromedia, Inc. v. San Diego, 453 U.S. 490, 500 (1981). A summary affirmance "is not to be read as an adoption of the reasoning supporting the judgment under review." Zobel v. Williams, ___ U.S. ___, ___ n. 13 (1982).

could take effect." 393 U.S., at 389-390. Although the charter amendment was facially neutral, the Court found that it could be said to embody a racial classification: "[T]he reality is that the law's impact falls on the minority. The majority needs no protection against discrimination." Id., at 391. By making it more difficult to pass legislation in favor of racial minorities, the amendment placed "special burdens on racial minorities within the governmental process." Ibid.

Nothing in Hunter supports the Court's extraordinary invasion into the State's distribution of authority. Even could it be assumed that Initiative 350 imposed a burden on racial minorities,[12] it simply does

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[12]It is far from clear that in the absence of a constitutional violation, mandatory busing necessarily benefits racial minorities or that it is even viewed with favor by racial minorities. See Crawford v. Board of Education of the City of Los Angeles, ___ U.S. ___, ___ n. 32 (1982). As the Court indicates, the busing question is complex and is best resolved by the political process. cite?

Moreover, it is significant that Initiative 350 places no limits on voluntary programs or on court ordered reassignments. It permits school districts to order school closings for purposes of racial balance. §28A.26.030. And it permits school districts to order a student to attend the "next nearest"--rather than nearest--school to promote racial integration.

not place unique political obstacles in the way of racial minorities. In this case, unlike in Hunter, the political system has not been redrawn or altered. Nor have racial minorities been asked to bear "special burdens." The political system is not altered because the State decides to regulate within an area subject to its control. And racial minorities are not uniquely or comparatively burdened by the adoption by the State of a policy that lawfully could be adopted by any School District in the State.

Hunter is simply irrelevant. ~~If anything~~, It is the Court that by its decision today disrupts the normal course of State government.[13] Under its unprecedented

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[13]The Court's decision intrudes deeply into normal State decisionmaking. Under its holding the people of the State of Washington apparently are forever barred from developing a different policy on mandatory busing where a School District previously has adopted one of its own. This principle would not seem limited to the question of mandatory busing. Thus, if the admissions committee of a State law school developed an affirmative action plan that came under fire, the Court apparently would find it unconstitutional for any higher authority to intervene unless that authority traditionally dictated admissions policies. As a constitutional matter, the Dean of the Law School, the faculty of the University as a whole, the University President, the Chancellor of the University System, and the Board of Regents might be powerless to

Footnote continued on next page.

theory of a "vested constitutional right to local decisionmaking," the State apparently is now forever barred from addressing the perplexing problems of how best to educate fairly all children in a multi-racial society where, as in this case, the local school board has acted first.[14]

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intervene despite their greater authority under State law.

After today's decision it is unclear whether the State may set policy in any area of race relations where a local governmental body arguably has done "more" than the Fourteenth Amendment requires. If local employment or benefits are distributed on a racial basis to the benefit of racial minorities, the State apparently may not thereafter ever intervene. Indeed, under the Court's theory one must wonder whether--under the Equal Protection component of the Fifth Amendment--even the Federal Government could assert its superior authority to regulate in these areas.

[14]Even accepting the dubious notion that a State must demonstrate some past control over public schooling or race relations before now intervening in these matters, ante, at 19, the Court's attempt to demonstrate that Initiative 350 represents a unique thrust by the State into these areas is unpersuasive. The Court's own discussion indicates the comprehensive character of the State's activity. The Common School Provisions of the State's Code of Laws ~~is~~ are nearly 200 pages long, governing a broad variety of school matters. The State has taken seriously its constitutional obligation to provide public education. See Art. IX, §2 ; Seattle School District v. State, 90 Wash. 2d 476, 518, 585 P. 2d 71, 95 (1978). In light of the wide range of regulation of the public schools by the State, it is wholly unclear what degree of prior concern or control by the State would satisfy the

Footnote continued on next page.

V

We are not asked to decide the wisdom of a State policy that limits the ability of local school districts to adopt--on their own volition--mandatory reassignments for racial balance. We must decide only whether the Federal Constitution permits the State to adopt such a policy. The School Districts in this case were under no federal constitutional obligation to adopt mandatory busing. Absent such an obligation, the State--exercising its sovereign authority over all subordinate agencies--should be free to reject this debatable restriction on

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Court's new doctrine.

In addition to public school affairs generally, the State has taken a direct interest in ending racial discrimination in the schools and elsewhere. See §49.60.010 et seq. Article IX, §1 of the State Constitution specifically prohibits discrimination in public schools: "It is the paramount duty of the state to make ample provision for the education of all children residing within its borders without distinction or preference on account of race, color, caste, or sex." The State Supreme Court has not interpreted this section of the State Constitution to prohibit race conscious school assignments in the absence of a violation of the Fourteenth Amendment. Cf. Citizens Against Mandatory Bussing v. Palmason, 80 Wash. 2d 445, 495 P. 2d 657 (1972). But until today's decision one would have thought that the State Court could have rendered such a decision without violating the Federal Constitution.

liberty. But today's decision denies this right to a State. In this case, it deprives the State of Washington of all opportunity to address the as yet unresolved questions resulting from extensive mandatory busing. The Constitution does not dictate to the States at what level of government decisions affecting the public schools must be taken. It certainly does not strip the States of their sovereignty. It therefore does not authorize today's intrusion into the State's internal structure.[15]

---

[15] As a former school board member for many years, I accept the privilege of a dissenting Justice to add a personal note. In my view, the local school board--responsible to the people of the district it serves--is the best qualified agency of a State government to make decisions affecting education within its district. As a policy matter, I would not favor reversal of the Seattle Board's decision to experiment with a mandatory busing program, despite my own doubts as to the educational or social merit of such a program. See Estes v. Metropolitan Branches of the Dallas NAACP, 444 U.S. 437, 438-458 (Powell, J., dissenting). But this case presents a question, not of educational policy or even the merits of busing for racial balance. The question is one of a State's sovereign authority to structure and regulate its own subordinate bodies.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 18, 1982

Re: 81-9 - Washington v. Seattle School Dist. #1

Dear Lewis:

I join your dissent.

Regards,

WEB

Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

June 18, 1982

No. 81-9 Washington v. Seattle School Dist. #1

Dear Lewis,

Please join me in your dissent.

Sincerely,

Sandra

Justice Powell

Copies to the Conference

1, 3-4, 6-13

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

L.F.P.

I'm replied to HAB, ask when & under what circumstances the legislature of people would do what the Board advised would do

From: Justice Powell

Circulated:

Recirculated: JUN 21 1982

Printed

1st DRAFT

For speech see 11

SUPREME COURT OF THE UNITED STATES

No. 81-9

WASHINGTON, ET AL., APPELLANTS *v.* SEATTLE SCHOOL DISTRICT NO. 1 ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June —, 1982]

JUSTICE POWELL, dissenting.

The people of the State of Washington, by a two to one vote, have adopted a neighborhood school policy. The policy is binding on local school districts but in no way affects the authority of state or federal courts to order school transportation to remedy violations of the Fourteenth Amendment. Nor does the policy affect the power of local school districts to establish voluntary transfer programs for racial integration or for any other purpose.

In the absence of a constitutional violation, no decision of this Court compels a school district to adopt or maintain a mandatory busing program for racial integration.[1] Accordingly, the Court does not hold that the adoption of a neighborhood school policy by *local* school districts would be unconstitutional. Rather, it holds that the adoption of such a policy at the *State* level—rather than at the local level—violates the Equal Protection Clause of the Fourteenth Amendment.

I dissent from the Court's unprecedented intrusion into the structure of a state government. The School Districts in

[1] Throughout this dissent, I use the term "mandatory busing" to refer to busing—or mandatory student reassignments—for the purpose of achieving racial integration.

this case were under no Federal Constitutional obligation to adopt mandatory busing programs. The State of Washington, the governmental body ultimately responsible for the provision of public education, has determined that certain mandatory busing programs are detrimental to the education of its children. "[T]he Fourteenth Amendment leaves the States free to distribute the powers of government as they will between their legislative and judicial branches." *Hughes* v. *Superior Court*, 339 U. S. 460, 467 (1950). In my view, that Amendment leaves the States equally free to decide matters of concern to the State at the State, rather than local, level of government.

I

At the November, 1978, general election, the voters of the State adopted Initiative 350 by a two to one majority.[2] The Initiative sets forth a neighborhood school policy binding on local school districts. It establishes a general rule prohibiting school districts from "directly or indirectly requir[ing] any student to attend a school other than the school which is geographically nearest or next nearest the student's place of residence." Wash. Rev. Code § 28A.26.010 (1981). The rule may be avoided in individual instances only if the student requires special education; if there are health or safety hazards between the student's residence and the nearest or next nearest school; or if the nearby schools are overcrowded, unsafe, or lacking in physical facilities. *Ibid.*

The Initiative includes two significant limitations upon the scope of its neighborhood school policy. It expressly provides that nothing in the Initiative shall "preclude the establishment of schools offering specialized or enriched educa-

[2] The Initiative passed by almost 66% of the statewide vote. In Seattle the Initiative passed by over 61% of the vote. It failed in only two of Seattle's legislative districts—one predominantly black and one predominantly white.

How many Districts?

tional programs which students may voluntarily choose to attend, or of any other voluntary option offered to students." § 28A.26.050. Moreover, and critical to this case, the authority of state and federal courts to order mandatory school assignments to remedy constitutional violations is left untouched by the Initiative: "This chapter shall not prevent any court of competent jurisdiction from adjudicating constitutional issues relating to the public schools." § 28A.26.060.[3]

This suit was filed in United States District Court shortly after the Initiative was enacted. The Seattle School District, joined by the Tacoma and Pasco School Districts[4] and certain individual plaintiffs, argued that the Initiative violated the Equal Protection Clause of the Fourteenth Amendment. The District Court agreed, and, in a split decision, the Court of Appeals affirmed. Relying on *Hunter* v. *Erickson*, 393 U. S. 385 (1969), the Court of Appeals concluded that Initiative 350 "both creates a constitutionally-suspect racial classification and radically restructures the political process of Washington by allowing a state-wide majority to usurp traditional local authority over local school board educational policies." 633 F. 2d, at 1344.[5]

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[3] Unlike the constitutional amendment at issue in *Crawford* v. *Los Angeles Bd. of Ed.*, —— U. S. —— (1982), Initiative 350 places no limits on the State courts in their interpretation of the State Constitution. Thus, if mandatory school assignments were required by the State Constitution—although not by the Fourteenth Amendment of the Federal Constitution—Initiative 350 would not hinder a State from enforcing its Constitution.

[4] Tacoma School District No. 10 and Pasco School District No. 1 are the only other school districts in Washington with extensive integration programs. Pasco has relied upon school closings and mandatory busing to achieve racial integration in its schools. Only minority children are bused under the Pasco plan. 473 F. Supp., at 1002. In addition to school closings, the Tacoma integration plan relies upon voluntary techniques—magnet schools and voluntary transfers.

[5] Judge Wright dissented. In his view Initiative 350 could not be said to embody a racial classification. The Initiative does not classify individuals on the basis of their race. It simply deals with a matter bearing on

II

The principles that should guide us in reviewing the constitutionality of Initiative 350 are well established. To begin with, we have never held, or even intimated, that absent a federal constitutional violation, a State *must* choose to treat persons differently on the basis of race. In the absence of a federal constitutional violation requiring race-specific remedies, a policy of strict racial neutrality by a State would violate no federal constitutional principle. Cf. *University of California Regents* v. *Bakke*, 438 U. S. 265 (1978).

In particular, a neighborhood school policy and a decision *not* to assign students on the basis of their race, does not offend the Fourteenth Amendment.[6] The Court has never

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race relations. Moreover, no racial classification is created because the citizens of a State favor mandatory school reassignments for some purposes but not for reasons of race. The benefits and problems associated with busing for one reason—*e. g.* for racial integration—are not the same as for another—*e. g.* to avoid safety hazards. Finally, Judge Wright could not understand how the exercise of authority by the State could create a racial classification. The State had not intervened by altering the legislative process in a way that burdened racial minorities. Charged by the State Constitution with the responsibility for the provision of public education, the State had simply exercised its authority to run its own school system.

Judge Wright also addressed the District Court's alternative holdings that Initiative 350 is overbroad or that it was motivated by discriminatory intent. He found no basis for either conclusion. These alternative holdings were not addressed by the Court of Appeals majority. Nor are they relied upon by the Court today. Accordingly, they are not discussed in this dissent.

[6] See *Swann* v. *Charlotte-Mecklenburg Bd. of Ed.*, 402 U. S. 1, 28 (1971) ("Absent a constitutional violation there would be no basis for judicially ordering assignment of students on racial basis. All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes.").

Indeed, in the absence of a finding of segregation by the School District, mandatory busing on the basis of race raises constitutional difficulties of its own. Extensive pupil transportation may threaten liberty or privacy in-

held that there is an affirmative duty to integrate the schools in the absence of a finding of unconstitutional segregation. See *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 24 (1971); *Dayton Board of Education* v. *Brinkman*, 433 U. S. 406, 417 (1977). Certainly there is no constitutional duty to adopt mandatory busing in the absence of such a violation. Indeed, even where desegregation is ordered because of a constitutional violation, the Court has never held that racial balance itself is a constitutional requirement. *Id.* And even where there have been segregated schools, once desegregation has been accomplished no further constitutional duty exists upon school boards or States to maintain integration. See *Pasadena City Board of Education* v. *Spangler*, 427 U. S. 424 (1976).

Moreover, it is a well established principle that the States have "extraordinarily wide latitude . . . in creating various types of political subdivisions and conferring authority upon them." *Holt Civic Club* v. *Tuscaloosa*, 439 U. S. 60, 71 (1978).[7] The Constitution does not dictate to the States a

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terests. See *University of California Board of Regents* v. *Bakke*, 438 U. S. 265, 300 n. 39 (opinion of POWELL, J.); *Keyes* v. *School District No. 1*, 413 U. S. 189, 240–250 (1973) (POWELL, J., concurring in part and dissenting in part). Moreover, when a State or school board assigns students on the basis of their race, it acts on the basis of a racial classification, and we have consistently held that "[a] racial classification, regardless of purported motivation is presumptively invalid and can be upheld only upon an extraordinary justification." *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U. S. 256, 272 (1979).

[7] "[A]ccording to the institutions of this country, the sovereignty in every State resides in the people of the State, and . . . they may alter and change their form of government at their own pleasure." *Luther* v. *Borden*, 7 How. 1, 47 (1849). See *Community Communications Co.* v. *Boulder*, —— U. S. ——, —— (1982); *Sailors* v. *Board of Education*, 387 U. S. 105, 109 (1967) ("Save and unless the state, county, or municipal government runs afoul of a federally protected right, it has vast leeway in the management of its internal affairs"); *United States* v. *Kagama*, 118 U. S. 375, 379 (1886) (under the Constitution, sovereign authority resides either

particular division of authority between legislature and judiciary or between state and local governing bodies. It does not define institutions of local government.

Thus, a State may choose to run its schools from the state legislature or through local school boards just as it may choose to address the matter of race relations at the State or local level. There is no constitutional requirement that the State establish or maintain local institutions of government or that it delegate particular powers to these bodies. The only relevant constitutional limitation on a State's freedom to order its political institutions is that it may not do so in a fashion designed to "[place] *special* burdens on racial minorities within the governmental process." *Hunter* v. *Erickson*, *supra*, at 391 (emphasis added).

In sum, in the absence of a prior constitutional violation, the States are under no constitutional duty to adopt integration programs in their schools, and certainly they are under no duty to establish a regime of mandatory busing. Nor does the Federal Constitution require that particular decisions concerning the schools or any other matter be made on the local as opposed to the State level. It does not require the States to establish local governmental bodies or to delegate unreviewable authority to them.

III

Application of these settled principles demonstrates the serious error of today's decision—an error that cuts deeply into the heretofore unquestioned right of a state to structure the decisionmaking authority of its government. In this case, by Initiatve 350, the State has adopted a policy of racial neutrality in student assignments. The policy in no way interferes with the power of State or Federal Courts to remedy constitutional violations. And if such a policy had been adopted

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with the States or the Federal government, and "[t]here exist . . . but these two").

by any of the school districts in this litigation there could have been no question that the policy was constitutional.[8]

The issue here arises only because the Seattle School District—in the absence of a then established State policy—chose to adopt race specific school assignments with extensive busing. It is not questioned that the District itself, at any time thereafter, could have changed its mind and cancelled its integration program without violating the Federal Constitution. Yet this Court holds that neither the legislature or the people of the State of Washington could alter what the District had decided.

The Court argues that the people of Washington by Initiative 350 created a racial classification, and yet must agree that identical action by the Seattle School District itself would have created no such classification. This is not an easy argument to answer because it seems to make no sense. School boards are the creation of supreme State authority, whether in a State Constitution or by legislative enactment. Until today's decision no one would have questioned the authority of a State to abolish school boards altogether, or to require that they conform to any lawful State policy. And in the State of Washington, a neighborhood school policy would have been lawful.

Under today's decision this heretofore undoubted supreme authority of a State's electorate is to be curtailed whenever a school board—or indeed any other state board or local instrumentality—adopts a race specific program that arguably benefits racial minorities. Once such a program is adopted, *only* the local or subordinate entity that approved it will have authority to change it. The Court offers no authority or relevant explanation for this extraordinary subordination of the

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[8] The Court consistently has held "that the Equal Protection Clause is not violated by the mere repeal of race related legislation or policies that were not required by the Federal Constitution in the first place." *Crawford* v. *Los Angeles Bd. of Ed.*, *supra*, at ——.

ultimate sovereign power of a State to act with respect to racial matters by subordinate bodies. It is a strange notion—alien to our system—that local governmental bodies can forever preempt the ability of a State—the sovereign power—to address a matter of compelling concern to the State. The Constitution of the United States does not require such a bizarre result.

OMISSION

This is certainly not a case where a State—in moving to change a locally adopted policy—has established a racially discriminatory requirement. Initiative 350 does not impede enforcement of the Fourteenth Amendment. If a Washington school district should be found to have established a segregated school system, Initiative 350 will place no barrier in the way of a remedial busing order. Nor does Initiative 350 authorize or approve segregation in any form or degree. It is neutral on its face, and racially neutral as public policy. Children of all races benefit from neighborhood schooling, just as children of all races benefit from exposure to "ethnic and racial diversity in the classroom." *Ante*, at ——, quoting *Columbus Board of Education* v. *Penick*, 443 U. S. 449, 486 (1979) (POWELL, J., dissenting).[9]

Finally, Initiative 350 places no "special burdens on racial minorities within the governmental process," *Hunter* v. *Erickson*, *supra*, at 391, such that interference with the State's distribution of authority is justified. Initiative 350 is

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[9] The policies in support of neighborhood schooling are various but all of them are racially neutral. The people of the State legitimately could decide that unlimited mandatory busing places too great a burden on the liberty and privacy interests of families and students of all races. It might decide that the reassignment of students to distant schools, on the basis of race, was too great a departure from the ideal of racial neutrality in State action. And, in light of the experience with mandatory busing in other cities, the State might conclude that such a program ultimately would lead to greater racial imbalance in the schools. See *Estes* v. *Metropolitan Branches of the Dallas NAACP*, 444 U. S. 437, 451 (1980) (POWELL, J., dissenting).

simply a reflection of the State's political process at work. It does not alter that process in any respect. It does not require, for example, that all matters dealing with race—or with integration in the schools—must henceforth be submitted to a referendum of the people. Cf. *Hunter* v. *Erickson*, *supra*. The State has done no more than precisely what the Court has said that it should do: It has "resolved through the political process" the "desirability and efficacy of [mandatory] school desegregation" where there has been no unlawful segregation. *Ante*, at ——.

The political process in Washington, as in other States, permits persons who are dissatisfied at a local level to appeal to the State legislature or the people of the State for redress. It permits the people of a State to preempt local policies, and to formulate new programs and regulations. Such a process is inherent in the continued sovereignty of the States. This is our system. Any time a State chooses to address a major issue some persons or groups may be disadvantaged. In a democratic system there are winners and losers. But there is no inherent unfairness in this and certainly no Constitutional violation.[10]

IV

Nonetheless, the Court holds that Initiative 350 "imposes substantial and unique burdens on racial minorities" in the governmental process. See *ante*, at ——. Its authority for this holding is said to be *Hunter* v. *Erickson*, *supra*.[11] In

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[10] Cf. *James* v. *Valtierra*, 402 U. S. 137, 142 (1971) ("[O]f course a law-making procedure that 'disadvantages' a particular group does not always deny equal protection. Under any such holding, presumably a State would not be able to require referendums on any subject unless referendums were required on all, because they would always disadvantage some group. And this Court would be required to analyze governmental structures to determine whether a gubernatorial veto provision or a filibuster rule is likely to 'disadvantage' any of the diverse an shifting groups that make up the American people.").

[11] The Court also relies at certain critical points in its discussion on the

Hunter the people of Akron passed a charter amendment that "not only suspended the operation of the existing ordinance forbidding housing discrimination, but also required the approval of the electors before any future [anti-discrimination] ordinance could take effect." 393 U. S., at 389–390. Although the charter amendment was facially neutral, the Court found that it could be said to embody a racial classification: "[T]he reality is that the law's impact falls on the minority. The majority needs no protection against discrimination." *Id.*, at 391. By making it more difficult to pass legislation in favor of racial minorities, the amendment placed "special burdens on racial minorities within the governmental process." *Ibid.*

Nothing in *Hunter* supports the Court's extraordinary invasion into the State's distribution of authority. Even could it be assumed that Initiative 350 imposed a burden on racial minorities,[12] it simply does not place unique political obstacles in the way of racial minorities. In this case, unlike in *Hunter*, the political system has *not* been redrawn or altered. The authority of the State over the public school system, act-

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summary affirmance in *Lee* v. *Nyquist*, 318 F. Supp. 710 (WDNY 1970), summarily aff'd, 402 U. S. 935 (1971). As we have often noted, however, summary affirmances by this Court are of little precedential force. See *Metromedia, Inc.* v. *San Diego*, 453 U. S. 490, 500 (1981). A summary affirmance "is not to be read as an adoption of the reasoning supporting the judgment under review." *Zobel* v. *Williams*, —— U. S. ——, —— n. 13 (1982).

[12] It is far from clear that in the absence of a constitutional violation, mandatory busing necessarily benefits racial minorities or that it is even viewed with favor by racial minorities. See *Crawford* v. *Board of Education of the City of Los Angeles*, —— U. S. ——, —— n. 32 (1982). As the Court indicates, the busing question is complex and is best resolved by the political process. *Ante*, at ——.

Moreover, it is significant that Initiative 350 places no limits on voluntary programs or on court ordered reassignments. It permits school districts to order school closings for purposes of racial balance. § 28A.26.030. And it permits school districts to order a student to attend the "next nearest"—rather than nearest—school to promote racial integration.

ing through Initiative or the legislature, is plenary. Thus, the State's political system is not altered when it adopts for the first time a policy, concededly within the area of its authority, for the regulation of local school districts. And certainly racial minorities are not uniquely or comparatively burdened by the State's adoption of a policy that would be lawful if adopted by any School District in the State.

Hunter, therefore, is simply irrelevant. It is the *Court* that by its decision today disrupts the normal course of State government.[13] Under its unprecedented theory of a vested constitutional right to local decisionmaking, the State apparently is now forever barred from addressing the perplexing problems of how best to educate fairly *all* children in a multiracial society where, as in this case, the local school board has acted first.[14]

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[13] The Court's decision intrudes deeply into normal State decisionmaking. Under its holding the people of the State of Washington apparently are forever barred from developing a different policy on mandatory busing where a School District previously has adopted one of its own. This principle would not seem limited to the question of mandatory busing. Thus, if the admissions committee of a State law school developed an affirmative action plan that came under fire, the Court apparently would find it unconstitutional for any higher authority to intervene unless that authority traditionally dictated admissions policies. As a constitutional matter, the Dean of the Law School, the faculty of the University as a whole, the University President, the Chancellor of the University System, and the Board of Regents might be powerless to intervene despite their greater authority under State law.

After today's decision it is unclear whether the State may set policy in any area of race relations where a local governmental body arguably has done "more" than the Fourteenth Amendment requires. If local employment or benefits are distributed on a racial basis to the benefit of racial minorities, the State apparently may not thereafter ever intervene. Indeed, under the Court's theory one must wonder whether—under the Equal Protection component of the Fifth Amendment—even the Federal Government could assert its superior authority to regulate in these areas.

[14] Even accepting the dubious notion that a State must demonstrate some past control over public schooling or race relations before now intervening in these matters, *ante*, at 19, the Court's attempt to demonstrate

V

We are not asked to decide the wisdom of a State policy that limits the ability of local school districts to adopt—on their own volition—mandatory reassignments for racial balance. We must decide only whether the Federal Constitution permits the State to adopt such a policy. The School Districts in this case were under no federal constitutional obligation to adopt mandatory busing. Absent such an obligation, the State—exercising its sovereign authority over all subordinate agencies—should be free to reject this debatable restriction on liberty. But today's decision denies this right to a State. In this case, it deprives the State of Washington of all opportunity to address the unresolved questions resulting from extensive mandatory busing. The Constitution does not dictate to the States at what level of government de-

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that Initiative 350 represents a unique thrust by the State into these areas is unpersuasive. The Court's own discussion indicates the comprehensive character of the State's activity. The Common School Provisions of the State's Code of Laws are nearly 200 pages long, governing a broad variety of school matters. The State has taken seriously its constitutional obligation to provide public education. See Art. IX, § 2; *Seattle School District v. State*, 90 Wash. 2d 476, 518, 585 P. 2d 71, 95 (1978). In light of the wide range of regulation of the public schools by the State, it is wholly unclear what degree of prior concern or control by the State would satisfy the Court's new doctrine.

In addition to public school affairs generally, the State has taken a direct interest in ending racial discrimination in the schools and elsewhere. See § 49.60.010 *et seq.* Article IX, § 1 of the State Constitution specifically prohibits discrimination in public schools: "It is the paramount duty of the state to make ample provision for the education of all children residing within its borders without distinction or preference on account of race, color, caste, or sex." The State Supreme Court has not interpreted this section of the State Constitution to prohibit race conscious school assignments in the absence of a violation of the Fourteenth Amendment. Cf. *Citizens Against Mandatory Bussing v. Palmason*, 80 Wash. 2d 445, 495 P. 2d 657 (1972). But until today's decision one would have thought that the State Court *could* have rendered such a decision without violating the Federal Constitution.

cisions affecting the public schools must be taken. It certainly does not strip the States of their sovereignty. It therefore does not authorize today's intrusion into the State's internal structure.[15]

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[15] As a former school board member for many years, I accept the privilege of a dissenting Justice to add a personal note. In my view, the local school board—responsible to the people of the district it serves—is the best qualified agency of a State government to make decisions affecting education within its district. As a policy matter, I would not favor reversal of the Seattle Board's decision to experiment with a reasonable mandatory busing program, despite my own doubts as to the educational or social merit of such a program. See *Estes* v. *Metropolitan Branches of the Dallas NAACP*, 444 U. S. 437, 438-458 (POWELL, J., dissenting). But this case presents a question, not of educational policy or even the merits of busing for racial integration. The question is one of a State's sovereign authority to structure and regulate its own subordinate bodies.

Supreme Court of the United States
Washington, D. C. 20543

File

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 21, 1982

MEMORANDUM TO THE CONFERENCE

Re: No. 81-9 - Washington v. Seattle School Dist. No. 1

In response to Lewis' dissent, now in print, I shall make the following changes in the Court's opinion:

1. Footnote 17 on page 17 will be revised to read:

"[17] JUSTICE POWELL finds Hunter completely irrelevant, dismissing it with the conclusory statement that 'the political system [of Washington] has not been redrawn or altered.' Post, at 10 (emphasis in original). But the dissent entirely fails to address the relevance of Hunter to the reallocation of decisionmaking authority worked by Initiative 350. The evil condemned by the Hunter Court was not the particular political obstacle of mandatory referenda imposed by the Akron charter amendment; it was, rather, the comparative structural burden placed on the political achievement of minority interests. Thus, in Hunter, the procedures for enacting racial legislation were modified in such a way as to place effective control in the hands of the city-wide electorate. Similarly here, the power to enact racial legislation has been reallocated. In each case, the effect of the challenged action was to redraw decisionmaking authority over racial matters -- and only over racial matters -- in such a way as to place comparative burdens on minorities. While JUSTICE POWELL and the United States find it crucial that the proponents of integrated schools remain free to use Washington's initiative system to further their ends, that was true in Hunter as well: proponents of open housing were not barred from invoking Akron's initiative procedures to repeal the charter amendment, or to enact fair housing legislation of their own. It surely is an excessively formal exercise, then, to argue that the procedural revisions at issue in Hunter imposed special burdens on minorities, but that the selective allocation of decisionmaking authority worked by Initiative 350 does not erect comparable political obstacles. Indeed, Hunter would have been virtually identical to this case had the Akron charter amendment simply barred the city council from passing any fair housing ordinance, as Initiative 350 forbids the use of virtually all mandatory desegregation strategies. Surely, however, Hunter would not have come out the other way had the charter amendment

made no provision for the passage of fair housing legislation, instead of subjecting such legislation to ratification by referendum.

"The United States also would note that Initiative 350's 'modification of state policy [was] not the result of any unusual political procedure,' Brief for the United States 30, for initiatives and referenda are often used by the Washington electorate. But that observation hardly serves to distinguish this case from Hunter, since the fair housing charter amendment was added through the unexceptional use of Akron's initiative procedure. See 393 U.S., at 387."

2. At the end of the penultimate sentence of the full paragraph on page 18, following "393," I shall drop a footnote (new 18) reading as follows:

"[18]Despite the force with which it is written, then, JUSTICE POWELL's essay on 'the heretofore unquestioned right of a State to structure the decisionmaking authority of its government,' post, at 6 -- as well as his observations on a State's right to repeal programs designed to eliminate de facto segregation -- is largely beside the point. The State's "power" has not been questioned at any point during this litigation. The single narrow question before us is whether the State has "exercised its power" in such a way as to place special, and therefore impermissible, burdens on minority interests."

How else could it exercise its power?

3. On page 22, following the citation of Lee v. Nyquist, in the fifth line, I shall add the following footnote (to be numbered 23):

"[23]Throughout his dissent, JUSTICE POWELL insists that the Court has created a 'vested constitutional right to local decisionmaking,' post, at 11, that under our holding 'the people of the State of Washington apparently are forever barred from developing a different policy on mandatory busing where a School District previously has adopted one of its own,' id., at 11, n.13, and that today's decision somehow raises doubts about 'the authority of a State to abolish school boards altogether.' Id., at 11. See also id., at 8, and at 11, n.14. These statements evidence a basic misunderstanding of our decision. Our analysis vests no rights, and has nothing to do with whether school board action predates that taken by the State. Instead, what we find objectionable about Initiative 350 is the comparative burden it imposes on minority participation in the

political process -- that is, the racial nature of the way in which it structures the process of decisionmaking. It is evident, then, that the horribles paraded by the dissent, post, at 11, n.13 -- which have nothing to do with the ability of minorities to participate in the process of self-government -- are entirely unrelated to this case. It is equally clear, as we have noted at several points in our opinion, that the State remains free to vest all decisionmaking power in state officials, or to remove authority from local school boards in a race-neutral manner." ?

How

4. On page 26, I shall modify the final sentence of the full paragraph to read:

"And legislation of the kind challenged in Hunter similarly falls into an inherently suspect category."

5. On page 27, following the second full sentence after the words "based on race," I shall add a footnote (to be numbered 29) reading as follows:

"[29]Thus we do not hold, as the dissent implies, post, at 7, that the State's attempt to repeal a desegregation program creates a racial classification, while 'identical action' by the Seattle School Board does not. It is the State's race-conscious restructuring of its decisionmaking process that is impermissible, not the simple repeal of the Seattle Plan."

Other footnotes would be renumbered accordingly.

Harry

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 21, 1982

Re: No. 81-9 Washington v. Seattle School Dist. #1

Dear Lewis:

Please join me in your dissent.

Sincerely,

WHR/pb

Justice Powell

cc: The Conference

June 23, 1982

81-9 Washington v. Seattle School District

Dear Harry:

In view of the additions made in your opinion for the Court, I will add - in response - the two notes I now circulate.

Sincerely,

Justice Blackmun

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 23, 1982

81-9 Washington v. Seattle School District

Dear Harry:

In view of the additions made in your opinion for the Court, I will add - in response - the two notes I now circulate.

Sincerely,

Lewis

Justice Blackmun

lfp/ss

cc: The Conference

The following two footnotes will be added to my dissenting opinion in Washington v. Seattle School District No. 1--81-9.

Add as new footnote 13 at page 11:

The Court repeatedly states that the effect of Initiative 350 is "to redraw decisionmaking authority over racial mmaters--and only over racial matters--in such a way as to place comparative burdens on minorities." Ante, at ___, n. 17 (emphasis added). But the decision by the State to exercise its authority over the schools and over racial matters in the schools does not place a comparative burden on racial minorities. In Hunter, as we have understood it, "fair housing legislation alone was subject to an automatic referendum requirement." Gordon v. Lance, 403 U.S. 1, 5 (1971) (emphasis added). By contrast, Initiative 350 merely places mandatory busing among the much larger group of matters--covering race relations, administration of the schools, and a variety of other matters--addressed at the State level. See note ___, infra. Racial minorities, if indeed they are burdened by Initiative 350, are not comparatively burdened. In this respect, they are in the same position as any other group of persons who are disadvantaged by regulations drawn at the State level.

Add at page 12, as a new footnote 15:

15. Responding to this dissent, the Court denies that its opinion limits the authority of the people of the State of Washington and the Legislature to control or regulate school boards. It further states that "the State remains free to vest all decisionmaking power in state officials, or to remove authority from local school boards in a race-neutral manner." Ante, at ___, n. 23. These are puzzling statements that seem entirely at odds with much of the text of the Court's opinion. It will be surprising if officials of the State of Washington--with the one exception mentioned below--will have any clear idea as to what the State now lawfully may do.

The Court does say that "[i]t is the State's race-conscious restructuring of its decisionmaking process that is impermissible, not the simple repeal of the Seattle plan". Ante, at ___, n. 29. Apparently the Court is saying that, despite what else may be said in its opinion, the people of the State--or the State legislature--may repeal the Seattle plan, even though neither the people nor the legislature validly may prescribe statewide standards. I perceive no logic in--and certainly no constitutional basis for--a distinction between repealing the Seattle plan of mandatory busing and establishing a statewide policy to the same effect. The people of a State have far greater interest in the general problems associated with compelled busing for purpose of integration than in the plan of a single school board.

David: What do my "Board of Editors" (your fonts) think of this as a final note??

As a former school board member for many years, I accept the privilege of a dissenting justice to add a personal note. In my view, ~~and the~~ the local school board -- responsible to the people of the district it serves -- is the best qualified agency of a state government to make decisions affecting ~~the~~ education within its district. As a policy matter, I would not favor reversal of the Seattle Board's decision to experiment with a mandatory busing program, ~~although~~ my personal ~~vacillation~~ despite my own doubts as to the educational or social merit of such a program. See Ester (citation). But this case presents ~~of~~ a question, not of educational policy ~~of~~ or ever the merits of busing for racial balance. The question ~~is~~ is one of a State sovereign authority to structure and regulate its own subordinate bodies. ~~as the absence of a~~

maybe there is a worthwhile quote in Ester as to role of S/B

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 24, 1982

Re: No. 81-9 Washington v. Seattle School District No. 1

Dear Lewis:

I shall have no further response to your footnote addition in this case. Therefore, it is ready to come down with Crawford.

Sincerely,

Harry

Justice Powell

cc: The Chief Justice

THE C. J.	W. J. B.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.	J. P. S.	S. D. O'C.
				4/2/82				
~~Join~~ Join L7P 6/18/82	agree 6/1/82	Join HAB 6/1/82	Join HAB 6/2/82	1st draft 5/21/82 2nd draft 6/3/82	dissent Typed draft 6/17/82	Join L7P 6/21/82	Join HAB 6/2/82	await further writing 6/3/82
				3rd draft 6/23/82	1st printed draft 6/21/82 2nd draft 6/25/82			Join L7P 6/18/82

81-9 Washington v. Seattle School District

81-9 WASHINGTON v. SEATTLE SCHOOL DIST. Argued 3/22/82

350

Does Institute purport to limit power of any court - state or fed - to order busing.

People of Wash could abolish S/Bds & have a Secretary of Ed appoint school

State could withdraw assignment auth of S/Bds & vest it in a State Officer or Body

Absent de jure seg. is there a legal duty to bus?

Limitation on an action not required by law.

Absent de jure seg., is there any legal duty to order busing

Eckenberry (AG of Washington)
No court has ever found any de jure segregation.

Guideline 350 adopts policy of neighborhood schools. It does not reflect opportunity to desegregation.

D.C. found discriminatory purpose but CAG did not review this.* The AG argues there is no ev. to support it as there has never been any segregation of State schools.

No limitation on courts state or fed.

Hoge
Absent de jure seg., no duty to order busing.

Relies heavily on Hunter.

The 3 school Districts in this case are only ones of the 300 Districts in State that have desegregation plans.

9/89 write read Hoge's answer to JPS's Q as to who are in classification also see SG's Brief p16

---

* CAG formed an inverted classification. JPS ask who are the classes? Who is favored person. Hoge said white people.

Eckenhart (Reply)
Majority of blacks approved 350 {Is this true?

Different + Don't like limitation on S/B

3/23/82

81-9 Seattle School Dist Case (Initiative 350)

Critical fact: Does not involve any de jure discrimination.

It concerns voluntary actions by S/Bds.

Courts - state & fed - remain free to include busing in desegregation decrees.

Hunter is distinguishable; 350 applies to all children

1. No special burden on minorities

Where there is de jure segregation, there is a stigma that should be removed.

But long distance busing per se is not necessarily beneficial to minority students: Fair housing - as in Hunter - is specifically designed to assure housing if - & only if - minorities want the housing.

Minority students - like white students - are given no choice in mandatory busing.

Denial of S/Bds right to order mandatory busing deprives both minority & white students of benefits of integration

2. Hunter is also distinguishable from Hunter because no major restructuring of political process.

a. Initiative process remained unchanged. It merely was used.

b. State's basic control over schools remains same in all other respects. Many things S/Bds can do:

(i) Some busing still may be ordered by S/Bd.

x x x x

Fundamentally — no violation of 14th Amend & no limitation of right to exercise 14th A rights

x x x

No racial classification

Can't tell motivation of voters

Intent impossible to ascertain.

Fine memo

dfl 03/23/82

To: Justice Powell
From: David
Re: The Busing Cases: Nos. 81-9; 81-38

I have thought a bit more about these cases after our discussion of yesterday. The Washington case is the more difficult of the two--because of Hunter v. Erikson. Even so, I think Hunter can be readily distinguished for two reasons:

I. By contrast to Hunter, the busing limitation imposes no special burden on a minority.

The essential point here is that busing, unlike fair-housing legislation, is not necessarily beneficial to minority students. In the case of de jure segregation busing may be needed to remove the stigma of official discrimination. Even here your opinions have noted the risks posed by busing to desegregation itself as well as to other goals. Outside the context of de jure segregation, the dangers posed by busing would seem even more pressing because not balanced by the desire to remove the taint of official action. As you have noted it is not always clear what interest the busing/integration cases seek to protect. When there has not been a fourteenth amendment violation, mandatory busing

presumably seeks to expose students to the benefits of integration. But these benefits are open to black and white alike. A decision to cease busing in this circumstance "hurts" blacks and whites both--both are deprived of the benefits of integrated education. Similarly, both are helped by being assigned to closer schools.

II. By contrast to Hunter, there has been no radical restructuring of the political process.

In at least three ways the Washingto Initiative does not appear to have placed any unusual obstacle in the way of minority groups. First, the Initiative process is itself a well established mode of legislation in Washington. The process was not altered in this case; it was merely used. Second, the state retains a certain amount of control over the operation of the schools. It appears from the state's brief that most school decisions are made at the state level. Third, I would assume that many decisions pertaining to racial matters are made at the state level. Finally, there has been no change in procedure akin to the Hunter situation.

I think that James v. Valtierra, 402 U.S. 137 (1971), has some bearing on this argument. That case involved Article XXXIV of the state constitution which provided that no low-rent housing project could be developed by a state public

body until the project was approved by a majority of those voting at a community election. A 3-judge court found that the Article violated the 14th Amendment on the Hunter principle. This Court reversed. The Court found first that the Article was racially neutral: "The Article requires referendum approval for any low-rent public housing project, not only for projects which will be occupied by a racial minority." Second, "California's entire history demonstrates the repeated use of referendums to give citizens a voice on questions of public policy.... A lawmaking procedure that 'disadvantages' a particular group does not always deny equal protection." Finally, "an examination of California law reveals that persons advocating low-income housing have not been singled out for mandatory referendums while no other group must face that obstacle. Mandatory referendums are reequired for approval of state constitutional amendments" etc.

I suppose it can be argued that the Washington plan does not fall under Valtierra because it is not "racially neutral." But I think it can be said that although the Initiative may--in effect--prohibit busing for racial integration, this does not mean that it is not "racially neutral." The benefits and burdens of busing in the setting of de facto segregation presumably fall equally upon blacks and whites alike.

There seems to be a continuum of governmental action from Hunter to Valtierra. I think that this Initiative is on the Valtierra side of the line.

Teachers Who Lost Jobs Because of Race

By Walter Berns

Last year, I introduced an article on this page with the statement: "Seventeen years ago Congress set out to eliminate discrimination in the workplace. To accomplish this, it enacted the Civil Rights Act of 1964, Title VII of which declares it to be unlawful for an employer 'to fail or refuse to hire or to discharge any individual . . . because of such individual's race, color, religion, sex, or national origin.'" ("The Carter Agreement That Creates Racial Quotas," Feb. 5, 1981.) Presumably, hiring and firing were now to be done on a nondiscriminatory basis.

The occasion for the article was a consent decree, approved a month earlier by a federal judge, according to which the government agreed to scrap an aptitude test used to screen applicants for civil service jobs. The test was said to be discriminatory because too few blacks and Hispanics managed to pass it, and very few with scores high enough to insure their being employed. In place of the test, the government agreed to inaugurate what in effect is a racial quota system. So much for hiring on a nondiscriminatory basis. What about firings?

This past February, even as the press was excoriating the Reagan administration for failing to move swiftly on the affirmative-action front, the U.S. Court of Appeals in Boston affirmed an order discharging over 600 of Boston's public school teachers solely because of their race.

They were white; or more precisely, they were not black. They were also tenured professionals with an average of 10 years seniority and working under a contract—part of a valid collective bargaining agreement—specifying that, in the event reductions in force became necessary, they would be discharged in reverse order of seniority. Except insofar as it honored this seniority principle in the selection of the whites to be laid off, the Boston school committee violated this contract. No black teachers, however junior, were laid off; indeed, during this same period, 15 blacks were newly hired. So much for discharging on a nondiscriminatory basis.

Hiring on a One-for-One Basis

This mass layoff of teachers is the latest episode in the Boston public school crisis that began, or, at least, that came to the attention of a wider-than-Boston public, in 1974 when Judge W. Arthur Garrity of the U.S. District Court ruled that Boston was maintaining a dual school system, one for whites and one for blacks. The following year, having determined there was racial discrimination not only in pupil assignment but in faculty and staff hiring and assignment, Judge Garrity ordered the city to hire teachers on a one-for-one basis until the proportion of black teachers reached 20% (thus approximating the proportion of blacks in the city) and to pursue a policy of affirmative recruitment of black teachers until that figure reached 25%. By early 1981, the proportion of black teachers had reached 19.09%.

Meanwhile, and thanks in large part to Judge Garrity's desegregation orders, the proportion of white students in Boston's public schools, 61% in 1971-72, had fallen to approximately 30%. And public school enrollment itself had experienced a steady and severe decline.

These court orders pit black worker against white worker in a matter that is vital to their lives. By abrogating the principle of seniority, they strike at the heart of trade unionism.

The schools also faced a fiscal crisis, brought on in part by the taxpayers' revolt that culminated in the passage of Proposition 2½. The five-person school committee (now three whites and two blacks) faced the prospect of having to reduce the number of teachers. It also had to decide whether to respect the contract with the Boston Teachers Union or obey the court's order to reach—and, presumably, maintain—that 20% quota of black teachers. It decided to obey the court order, and, to the surprise of no one, Judge Garrity approved this decision. (Untypically, but graciously, he permitted the school committee temporarily to suspend its efforts to recruit black teachers until their proportion reached 25%.) It was Judge Garrity's approval of this layoff plan that the Court of Appeals affirmed last Feb. 17. So it came about that, the contract notwithstanding, teachers were discharged on a racial basis.

To say the least, that contract did not figure prominently in Judge Campbell's opinion for the Court of Appeals; he disposed of it in a brief footnote. The contract, he said, cannot "bar a federal court from granting effective relief for constitutional violations." And that was that. Of course, neither the discharged teachers nor the union had been responsible for any constitutional violations; the Constitution had been violated by the Boston school committee when it maintained the dual school system. Then, too, the black teachers who benefited from the layoff plan had never been victims of hiring discrimination; if anything, having been hired under the quota system, many of them were the beneficiaries of reverse discrimination. By what right should they, in the face of a nondiscriminatory contract, be preferred at the expense of teachers who had done no wrong to them or to anyone else?

The union asked this question in the appeals court and was told that it did not understand the nature of the case. The Court of Appeals said this was not a case pitting white teacher against black teacher; it was a case brought by black school children against the school board. Judge Garrity's original order requiring the school board to hire black teachers—now interpreted to forbid their being fired—was issued not to protect them, but, rather, to protect the black children. The hiring and firing orders were "designed to make the children whole, to vindicate their rights, and that is indeed their effect." It was not a question of preferring black teachers over white teachers who, admittedly, had done no wrong; it was a question of observing a contract or of benefiting the children—vindicating their rights and making them "whole"—and a labor contract could not stand in the way of action that benefits children who had been deprived of constitutional rights.

It seems important to know whether the children have been benefited by Judge Garrity's orders. The children were to be made "whole" through their attendance at nonsegregated schools—an idea one can readily accept—and by being taught by an integrated faculty, a faculty at least 20% black. Such a faculty, said the Court of Appeals, "provides black students with role models." This idea may have some validity, but when the Boston school committee used it back in 1974 to defend its assignment of black teachers to mostly black schools, Judge Garrity rejected it. "The record," he said, "is barren of evidence supporting the argument." There be such evidence, but if so, the Appeals didn't bother to point t conscious remedies have appa come so much a part of our la dence of their efficacy is no quired.

Teachers' Union Is Appealin

By upholding this remedy, the cuit federal courts have create more racially based entitlemen the consent decree created a rac entitlement to federal jobs, amended Voting Rights Act, soo acted by Congress, will create based entitlement to representat portion to population, so we now cially based entitlement to job one that supersedes a job-secur ment negotiated by a union on b members of all races.

No longer could Martin Luthe that "Negroes are almost entire ing people [whose] needs are ide labor's needs." These court black worker against white wo matter that is vital to their live abrogating the principle of senio strike at the heart of trade which is why the teachers' union ing the case to the Supreme Cou

It bears repeating, however, case being appealed is, formally school segregation case and not a ment discrimination case, which explains why Title VII of the Rights Act does not figure in it. ton Teachers Union were also to VII action against the Boston sc mittee and on behalf of the white who are the aggrieved parties discrimination issue could be faced. If the case were to reac preme Court, the union might ev There is, after all, a section of that permits employers to apply "conditions of employment purs bona fide seniority or merit syste

A few weeks ago, in a case this provision, the Supreme Cour seniority system against the ch while racially neutral in its term discriminatory impact. That Court ruled 5-4, is not alone suffic validate the system. So, as I union might yet win on this issue. language ought to carry some w our judges.

Mr. Berns is a resident scho American Enterprise Institute.

Aff'm 5 Rev 3

81-9 Washington v. Seattle School CJ Pass Conf. 3/24/82

No. _____, _____

The Chief Justice Pass on first vote. After discussion, still Pass
No unconst. segregation has been found
& courts remain free if there is found
to remedy it.
On record before us, no facial showing of a
14th Amend. One may occur later.
All classification on basis of race
are not invalid - e.g. Fullilove.

Justice Brennan Aff'm (WJB had his statement written out)
Initiative 350 was racially motivated.
Historically, student assignment left to S/Bds.
350 changes "rules of game"
Hunter controls.
350 is facially violative of 14th Amend.

Justice White Aff'm
May be dif. from Calif case.
Finding of discriminatory purpose.
Racial classification under 350
Hunter probably controls.
Though this is a "hard case".

Justice Marshall Aff'm

Local people should make these decisions (what! Fed. judges have been making them)

Seattle not first ~~and~~ City to desegregate voluntarily.

"Don't want anything to prevent local people from deciding these questions"

Invoked on gen. problem that City should be free to decide these issues.

Justice Blackmun Aff'm

Hunter is applicable - places special burdens on blacks.

Lee also applies.

J. Wright's dissent itself recognized racial purpose.

Justice Powell Rev.

See my notes

Justice Rehnquist Rev.

Hunter is relevant but is distinguishable. See fn. in Hunter - mere repeal of ordinance.

Justice Stevens Aff'm

Tricky case.

Intent issue requires more careful analysis.

?, In this case, there was racial motivation but don't equate this with ~~hostility~~ hostility to blacks.

Hunter controls. 350 in a state wide new rule.

Justice O'Connor Rev.

Mandatory busing is racial conscious action.

It is not unconst. for the ~~electorate~~ the people of a state to limit school board authority.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 2, 1982

Re: No. 81-9 - Washington v. Seattle School District No. 1

Dear Lewis:

Would you be disposed to take on a dissent in this case?

Regards,

WEB

Justice Powell

cc: Justice Rehnquist
Justice O'Connor

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 2, 1982

RE: No. 81-9 Washington v. Seattle School District

Dear Chief:

Harry has agreed to take the opinion for the Court in the above.

Sincerely,

Bill

The Chief Justice

cc: The Conference

April 5, 1982

81-9 Washington v. Seattle School District

Dear Chief:

I will be glad to undertake a dissent in this case.

Sincerely,

The Chief Justice

lfp/ss

cc: Justice Rehnquist
Justice O'Connor

The "Seattle Plan" - 3
CIVIC dropped Initiative 350 - 3, 4
Exception - 4
Court ordered busing OK - 4

DC's findings: - 5, 6
No appeal to racial bias - 5
Left flexibility to S/Bs except busing - 5
Negative effects on achieving racial bias - 6
Most Seattle busing still permitted - 6
Voters motivated by "number of reasons - 7
DC invalidated for three reasons - 7
CA9 applied Soley on "racial classification" - 8
Bd's action recruited by "dif. govt. body" - 8
HAB's expansive reliance on "national interest - 9 (what about democracy?)

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

L.F.P

From: Justice Blackmun

Circulated: MAY 31 1982

Recirculated:

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-9

WASHINGTON, ET AL., APPELLANTS v. SEATTLE SCHOOL DISTRICT NO. 1 ET AL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June —, 1982]

Hunter controls - 9, 12, 13
Lee v Nyquist "strikingly similar" - 11, 23, 24
Principle of these cases - 12 (See Harlan quote - 12, 2
Here, classification was racial - 12, 13

JUSTICE BLACKMUN delivered the opinion of the Court.

We are presented here with an extraordinary question: whether an elected local school board may use the Fourteenth Amendment to *defend* its program of busing for integration from attack by the State.

Position of S.G. - 14, 17

I

350 works a "reallocation" of power - 16 (But in a democracy, "power" lies in majority)
SG argues no reallocation - 17, 21

A

Seattle School District No. 1 (District), which is largely coterminous with the city of Seattle, Wash., is charged by state law with administering 112 schools and educating approximately 54,000 public school students. About 37% of these children are of Negro, Asian, American Indian, or Hispanic ancestry. Because segregated housing patterns in Seattle have created racially imbalanced schools, the District historically has taken steps to alleviate the isolation of minority students; since 1963, it has permitted students to transfer from their neighborhood schools to help cure the District's racial imbalance.[1]

Concedes State has the "power" by HAB says it was exercised in invalid manner - 18
Power of S/Bs - 19
Exaggerates effect of 350 - 22
"Restructured" state's "political process" - 22, 23. Initiative 350 burdens all integrative efforts - 25!
Los Angeles case - 24, 26

no segregation by state authorities; thus no 14th Amend violation

[1] In 1971, the District implemented a program of mandatory reassignments to integrate certain of its middle schools. This prompted an attempt to recall four school board members who had voted for the program. That attempt narrowly failed. See 473 F. Supp. 996, 1006 (WD Wash.

David - See p20 for Pico. Also 19, 23

Despite these efforts, the District in 1977 came under increasing pressure to accelerate its program of desegregation.[2] In response, the District's Board of Directors (School Board) enacted a resolution defining "racial imbalance" as "the situation that exists when the combined minority student enrollment in a school exceeds the districtwide combined average by 20 percentage points, provided that the single minority enrollment . . . of no school will exceed 50 percent of the student body." 473 F. Supp. 996, 1006 (WD Wash. 1979). The District resolved to eliminate all such imbalance from the Seattle public schools by the beginning of the 1979–1980 academic year.[3]

In September 1977, the District implemented a "magnet" program, designed to alleviate racial isolation by enhancing educational offerings at certain schools, thereby encouraging voluntary student transfers. A "disproportionate amount of the overall movement" inspired by the program was undertaken by Negro students, however, *id.*, at 1006, and racial imbalance in the Seattle schools was found to have actually increased between the 1970–1971 and 1977–1978 academic years. The District therefore concluded that mandatory re-

---

1979).

[2] Several community organizations threatened legal action if the District did not initiate a more effective integration effort, while the Mayor of Seattle and a number of community leaders, by letter dated May 20, 1977, urged the District to adopt "a definition of racial isolation and measurable goals leading to the elimination of racial isolation in the Seattle Public Schools prior to a Court ordered and mandated desegregation remedy." App. 139.

[3] The District Court found that the actions of the School Board were prompted by its members' "desire to ward off threatened litigation, their desire to prevent the threatened loss of federal funds, their desire to relieve the black students of the disproportionate burden which they had borne in the voluntary efforts to balance the schools racially and their perception that racial balance in the schools promotes the attainment of equal educational opportunity and is beneficial in the preparation of all students for democratic citizenship regardless of their race." 473 F. Supp., at 1007.

Mandatory reassignment adopted

assignment of students was necessary if racial isolation in its schools was to be eliminated. Accordingly, in March 1978, the School Board enacted the so-called "Seattle Plan" for desegregation. The plan, which makes extensive use of busing and mandatory reassignments, desegregates elementary schools by "pairing" and "triading" predominantly minority with predominantly white attendance areas, and by basing student assignments on attendance zones rather than on race. The racial makeup of secondary schools is moderated by "feeding" them from the desegregated elementary schools. App. 142–143. The District represents that the plan results in the reassignment of roughly equal numbers of white and minority students, and allows most students to spend roughly half of their academic careers attending a school near their homes. Brief for Appellee Seattle School District 5.

The desegregation program, implemented in the 1978–1979 academic year, apparently was effective: the District Court found that the Seattle Plan "has substantially reduced the number of racially imbalanced schools in the district and has substantially reduced the percentage of minority students in those schools which remain racially imbalanced." 473 F. Supp., at 1007.

B

In late 1977, shortly before the Seattle Plan was formally adopted by the District, a number of Seattle residents who opposed the desegregation strategies being discussed by the School Board formed an organization called the Citizens for Voluntary Integration Committee (CiVIC). This organization, which the District Court found "was formed because of its founders' opposition to The Seattle Plan," 473 F. Supp., at 1007, attempted to enjoin implementation of the Board's mandatory desegregation program though litigation in state court; when these efforts failed, CiVIC drafted a statewide initiative designed to terminate the use of mandatory busing

Organization – CIVIC

formed, DC found, because of opposition to Seattle Plan.

Drafted the Initiative

for purposes of racial integration.[4] This proposal, known as Initiative 350, provided that "no school board . . . shall directly or indirectly require any student to attend a school other than the school which is geographically nearest or next nearest the student's place of residence . . . and which offers the course of study pursued by such student. . . ." See Wash. Rev. Code §28A.26.010 (1981).[5] The initiative then set out, however, a number of broad exceptions to this requirement: a student may be assigned beyond his neighborhood school if he "requires special education, care or guidance," or if "there are health or safety hazards, either natural or man made, or physical barriers or obstacles . . . between the student's place of residence and the nearest or next nearest school," or if "the school nearest or next nearest to his place of residence is unfit or inadequate because of overcrowding, unsafe conditions or lack of physical facilities." See *ibid.* Initiative 350 also specifically proscribed use of "seven" enumerated methods of "indirec[t]" student assignment—among them the redefinition of attendance zones, the pairing of schools, and the use of "feeder" schools—that are a part of the Seattle Plan. See §28A.26.030. The initiative envisioned busing for racial purposes in only one circumstance: it did not purport to "prevent any court of competent jurisdiction from adjudicating constitutional issues relating to the public schools." See §28A.26.060.

Initiative 350

Exceptions

Invalidated several integrative techniques -

any court - state or fed.

[4] Washington's Constitution reserves to the people of the State "the power to propose bills, laws, and to enact or reject the same at the polls, independent of the legislature." Wash. Const. Art. II, §1. Such initiatives are placed on the ballot upon the petition of 8% of the State's voters registered and voting for governor at the last preceding regular gubernatorial election. §1(a). If passed by the electorate, an initiative may not be repealed by the state legislature for two years, although it may be amended within two years by a vote of two-thirds of each house of the legislature. §41. See generally Comment, Judicial Review of Laws Enacted by Popular Vote, 55 Wash. L. Rev. 175 (1979).

[5] The text of Initiative 350 is now codified as Wash. Rev. Code §§28A.26.010–28A.26.900 (1981).

CiVIC - no appeal to racial bias

DC's findings

DC

Its proponents placed Initiative 350 on the Washington ballot for the November 1978 general election. During the ensuing campaign, the District Court concluded, the leadership of CiVIC "acted legally and responsibly," and did not address "its appeals to the racial biases of the voters." 473 F. Supp., at 1009. At the same time, however, the court's findings demonstrate that the initiative was directed solely at desegregative busing in general, and at the Seattle Plan in particular. Thus, "[e]xcept for the assignment of students to effect racial balancing, the drafters of Initiative 350 attempted to preserve to school districts the maximum flexibility in the assignment of students," *id.*, at 1008, and "[e]xcept for racially-balancing purposes" the initiative "permits local school districts to assign students other than to their nearest or next nearest schools for most, if not all, of the major reasons for which students are at present assigned to schools other than their nearest or next nearest schools." *Id.*, at 1010.[6] In campaigning for the measure, CiVIC officials accurately represented that its passage would result in "no loss of school district flexibility other than in busing for desegregation purposes," *id.*, at 1008, and it is evident that the campaign focused almost exclusively on the wisdom of "forced busing" for integration. See *id.*, at 1009.

HAB construes DC's findings negatively.

For most part they are positive

On November 8, 1978, two months after the Seattle Plan went into effect, Initiative 350 passed by a substantial margin, drawing almost 66% of the vote statewide. The initative failed to attract majority support in two state legislative districts, both in Seattle. In the city as a whole, however, the initiative passed with some 61% of the vote. Within the month, the District, together with the Tacoma and Pasco school districts,[7] initiated this suit against the

66% of vote

City - 61%

[6] At the beginning of the 1978–1979 academic year, approximately 300,000 of the 769,040 students enrolled in Washington's public schools were bused to school. Ninety-five percent of these students were transported for reasons unrelated to race. 473 F. Supp., at 1002.

95% of busing unrelated to race

[7] Along with Seattle, Tacoma School District No. 10 and Pasco School District No. 1 are the only districts in the State of Washington with com-

State in United States District Court for the Western District of Washington, challenging the constitutionality of Initiative 350 under the Equal Protection Clause of the Fourteenth Amendment. The United States and several community organizations intervened in support of the District[7]; CiVIC intervened on behalf of the defendants.

After a nine-day trial, the District Court made extensive and detailed findings of fact. The court determined that "[t]hose Seattle schools which are most crowded are located in those areas of the city where the preponderance of minority families live." 473 F. Supp., at 1001. Yet the court found that Initiative 350, if implemented, "will prevent the racial balancing of a significant number of Seattle schools and will cause the school system to become more racially imbalanced than it presently is," "will make it impossible for Tacoma schools to maintain their present racial balance," and will make "doubtful" the prospects for integration of the Pasco schools. *Id.*, at 1010; see *id.*, at 1001, 1011. Except for desegregative busing, however, the court found that "almost all of the busing of students currently taking place in

Other DC findings

adverse effect on "racial balance"

But

Only three Districts affected by 350

prehensive integration programs, and therefore the three are the only districts affected by Initiative 350. See 473 F. Supp., at 1009. Since 1965, Pasco has made use of school closures and a mandatory busing program to overcome the racial isolation caused by segregated housing patterns; if students attended the schools nearest their homes, three of Pasco's seven elementary schools would have a primarily white and three a primarily minority student body. *Id.*, at 1002–1003. The Tacoma school district has made use of school closures, racially controlled enrollment at magnet schools, and voluntary transfers—though not mandatory busing—to enhance racial balance in its schools. *Id.*, at 1003–1004.

[7] Several of the intervenor plaintiffs also alleged that the District had engaged in *de jure* segregation, and therefore was operating an unconstitutional dual school system. The District Court therefore bifurcated the litigation, first addressing the constitutionality of Initiative 350. Because of the court's conclusions on that question, the allegations of *de jure* segregation did not go to trial and have not been addressed by the District Court or by the Court of Appeals.

[Washington] is permitted by Initiative 350." *Id.*, at 1010. And while the court found that "racial bias . . . is a factor in the opposition to the 'busing' of students to obtain racial balance," *id.*, at 1001, it also found that voters were moved to support Initiative 350 for "a number of reasons," so that "[i]t is impossible to ascertain all of those reasons [o]r to determine the relative impact of those reasons upon the electorate." *Id.*, at 1010.

DC voters moved by various reasons

The District Court then held Initiative 350 unconstitutional, for three independent reasons. The court first concluded that the initiative established an impermissible racial classification, in violation of *Hunter* v. *Erickson*, 393 U. S. 385 (1969), and *Lee* v. *Nyquist*, 318 F. Supp. 710 (WDNY 1970) (three-judge court), summarily aff'd, 402 U. S. 935 (1971), "because it permits busing for non-racial reasons but forbids it for racial reasons." 473 F. Supp., at 1012. The court next held Initiative 350 invalid because "a racially discriminatory purpose was one of the factors which motivated the conception and adoption of the initiative." *Id.*, at 1013.[8] Finally, the District Court reasoned that Initiative 350 was unconstitutionally overbroad, because in the absence of a court order it barred even school boards that had engaged in *de jure* segregation from taking steps to foster integration.[9]

DC invalidated for three reason: 1. racial classification 2. discriminatory purpose 3. overbroad

[8] The District Court acknowledged that it was impossible to determine whether the supporters of Initiative 350 "subjectively [had] a racially discriminatory intent or purpose," because "[a]s to that subjective intent the secret ballot raises an impenetrable barrier." 473 F. Supp., at 1014. The court looked instead to objective factors, noting that it "marked [a] departure from the norm . . . for the autonomy of school boards to be restricted relative to the assignment of students," and that it marked a similar "departure from the procedural norm" for "an administrative decision of a subordinate local unit of government . . . [to be] overridden in a statewide initiative." *Id.*, at 1016. These factors, when coupled with the "racially disproportionate impact of the initiative," its "historical background," and "the sequence of events leading to its adoption," were found to demonstrate that a "racially discriminatory intent or purpose was at least one motivating factor in the adoption of the initiative." *Ibid.*

[9] The District Court noted that school boards that had practiced *de jure*

Id., at 1016. The court permanently enjoined implementation of the initiative's restrictions.

On the merits, a divided panel of the United States Court of Appeals for the Ninth Circuit affirmed, relying entirely on the District Court's first rationale. 633 F. 2d 1338 (1980).[11] By subjecting desegregative student assignments to unique treatment, the Court of Appeals concluded, Initiative 350 "both creates a constitutionally-suspect racial classification and radically restructures the political process of Washington by allowing a state-wide majority to usurp traditional local authority over local school board educational policies." 633 F. 2d, at 1344. In doing so, the court continued, the initiative "*remove[s]* from local school boards their existing authority, and in large part their capability, to enact programs designed to desegregate the schools." *Id.*, at 1346 (emphasis in original; citation omitted). The court found such a result contrary to the principles of *Hunter* v. *Erickson*, *supra*, and *Lee* v. *Nyquist*, *supra*. The court acknowledged that the issue would be a different one had a successor school board attempted to rescind the Seattle Plan. Here, however, "a different governmental body—the state-wide electorate—rescinded a policy voluntarily enacted by locally elected school boards already subject to local political control." 633 F. 2d, at 1346.[12]

CA9 aff'd entirely on the "racial classification"

Different governmental body?

Different Q if a successor Bd rescinded (why?)

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segregation are under an affirmative obligation to eliminate the effects of that practice. 473 F. Supp., at 1016. See *Columbus Board of Education* v. *Penick*, 443 U. S. 449, 458–459 (1979).

[11] The Court of Appeals therefore did not address the District Court's alternative finding that Initiative 350 had been adopted for discriminatory reasons, or its conclusion that the initiative was overbroad. 633 F. 2d, at 1342.

[12] After the decision on the merits, the District Court had declined to award attorney's fees to the plaintiff school districts because the districts are state-funded entities. App. to Juris. Statement C-1. The Court of Appeals reversed on this issue, concluding that the District Court had abused its discretion in denying fees. The Court of Appeals determined

The State appealed to this Court. We noted probable jurisdiction to address an issue of significance to our Nation's system of education. —— U. S. —— (1981).

Expansive / what about significance to "democracy"

II

A

The Equal Protection Clause of the Fourteenth Amendment guarantees racial minorities the right to full participation in the political life of the community. It is beyond dispute, of course, that given racial or ethnic groups may not be denied the franchise, or have the value of their vote intentionally diluted. See *White* v. *Regester*, 412 U. S. 755 (1973); *Nixon* v. *Herndon*, 273 U. S. 536 (1927). But the Fourteenth Amendment also reaches "a political structure that treats all individuals as equals," *Mobile* v. *Bolden*, 446 U. S. 55, 84 (1980) (STEVENS, J., concurring in the judgment), yet more subtly distorts governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation.

Hunter

This principle received its clearest expresion in *Hunter* v. *Erickson*, *supra*, a case that involved attempts to overturn antidiscrimination legislation in Akron, Ohio. The Akron city council, pursuant to its ordinary legislative processes, had enacted a fair housing ordinance. In response, the local citizenry, using an established referendum procedure, see 393 U. S., at 390, and n. 6; 393–394, and n. —— (Harlan, J., concurring), amended the city charter to provide that ordinances regulating real estate transactions "on the basis of race, color, religion, national origin or ancestry must first be approved by a majority of the electors voting on the question

that the school districts fell within the language of the attorney's fees statutes, 42 U. S. C. § 1988 and 20 U. S. C. § 3205, see n. 28, *infra*, and it reasoned that "[a]s long as a publicly-funded organization advances important constitutional values, it is eligible for fees under the statutes." 633 F. 2d, at 1348.

at a regular or general election before said ordinance shall be effective." *Id.*, at 387. This action "not only suspended the operation of the existing ordinance forbidding housing discrimination, but also required the approval of the electors before any future [fair housing] ordinance could take effect." *Id.*, at 389–390. In essence, the amendment changed the requirements for the adoption of one type of local legislation: to enact an ordinance barring housing discrimination on the basis or race or religion, proponents had to obtain the approval of the city council *and* of a majority of the voters citywide. To enact an ordinance preventing housing discrimination on other grounds, or to enact any other type of housing ordinance, proponents needed the support of only the city council.

In striking down the charter amendment, the *Hunter* Court recognized that, on its face, the provision "draws no distinctions among racial and religious groups." 393 U. S., at 390. But it did differentiate "between those groups who sought the law's protection against racial . . . discriminations in the sale and rental of real estate and those who sought to regulate real property transactions in the pursuit of other ends," *ibid.*, thus "disadvantag[ing] those who would benefit from laws barring racial . . . discriminations as against those who would bar other discriminations or who would otherwise regulate the real estate market in their favor." *Id.*, at 391. In "reality," the burden imposed by such an arrangement necessarily "falls on the minority. The majority needs no protection against discrimination and if it did, a referendum might be bothersome but no more than that." *Ibid.* In effect, then, the charter amendment served as an "explicitly racial classification treating racial housing matters differently from other racial and housing matters." *Id.*, at 389. This made the amendment constitutionally suspect: "the State may no more disadvantage any *particular* group by making it more difficult to enact legislation in its behalf than

it may dilute any person's vote or give any group a smaller representation than another of comparable size." *Id.*, at 393 (emphasis added).

Lee v. *Nyquist*, 318 F. Supp. 710 (WDNY 1970) (three-judge court), offers an application of the *Hunter* doctrine in a setting strikingly similar to the one now before us. That case involved the New York education system, which made use of both elected and appointed school boards and which conferred extensive authority on state education officials. In an effort to eliminate *de facto* segregation in New York's schools, those officials had directed the city of Buffalo—a municipality with an appointed school board—to implement an integration plan. While these developments were proceeding, however, the New York Legislature enacted a statute barring state education officials and appointed—though not elected—school boards from "assign[ing] or compell[ing] [students] to attend any school on account of race . . . or for the purpose of achieving [racial] equality in attendance . . . at any school." 318 F. Supp., at 712.[11]

Applying *Hunter*, the three-judge District Court invalidated the statute, noting that under the provision "[t]he Commissioner [of Education] and local appointed officials are prohibited from acting in [student assignment] matters only where racial criteria are involved." *Id.*, at 719. In the court's view, the statute therefore "place[d] *burdens* on the implementation of educational policies designed to deal with race on the local level" by "treating educational matters involving racial criteria differently from other educational matters and making it more difficult to deal with racial imbalance in the public schools." *Id.*, at 719 (emphasis in original). This drew an impermissible distinction "between the treatment of problems involving racial matters and that afforded

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[11] As does Initiative 350, the New York statute apparently permitted voluntary student transfers to achieve integration. See n. 16, *infra*.

other problems in the same area." *Id.*, at 718. This Court affirmed the District Court's judgment without opinion. 402 U. S. 935 (1971).

These cases yield a simple but central principle. As Justice Harlan noted while concurring in the Court's opinion in *Hunter*, laws structuring political institutions or allocating political power according to "neutral principles"—such as the executive veto, or the typically burdensome requirements for amending state constitutions—are not subject to equal protection attack, though they may "make it more difficult for minorities to achieve favorable legislation." 393 U. S., at 394. Because such laws make it more difficult for *every* group in the community to enact comparable laws, they "provid[e] a just framework within which the diverse political groups in our society may fairly compete." *Id.*, at 393. Thus, the political majority may generally restructure the political process to place obstacles in the path of everyone seeking to secure the benefits of governmental action. But a different analysis is required when the State allocates governmental power non-neutrally, by explicitly using the racial nature of a decision to determine the decisionmaking process. State action of this kind, the Court said, "places *special* burdens on racial minorities within the governmental process," *id.*, at 391 (emphasis added), thereby "making it *more* difficult for certain racial and religious minorities [than for other members of the community] to achieve legislation that is in their interest." *Id.*, at 395 (emphasis added) (Harlan, J., concurring). Such a structuring of the political process, the Court said, was "no more permissible than [is] denying [members of a racial minority] the vote, on an equal basis with others." *Id.*, at 391.

Principle of Hunter & Seattle

Is a state referendum ~~more~~ less burdensome significantly than a state const. amend?

But dif. analysis required where there is "racial" nature ~~of a~~

III

We believe that the Court of Appeals properly focused on *Hunter* and *Lee*, for we find the principle of those cases dispositive of the issue here. In our view, Initiative 350 must

fall because it does "not attemp[t] to allocate governmental power on the basis of any general principle." *Hunter* v. *Erickson*, 393 U. S., at 395 (Harlan, J., concurring). Instead, it uses the racial nature of an issue to define the governmental decisionmaking structure, thus imposes substantial and unique burdens on racial minorities.

A

Noting that Initiative 350 nowhere mentions "race" or "integration," appellants suggest that the legislation has no racial overtones; they maintain that *Hunter* is inapposite because the initiative simply permits busing for certain enumerated purposes while neutrally forbidding it for all other reasons. We find it difficult to believe that appellants' analysis is seriously advanced, however, for despite its facial neutrality there is little doubt that the initiative was effectively drawn for racial purposes. Neither the initiative's sponsors, nor the District Court, nor the Court of Appeals had any difficulty perceiving the racial nature of the issue settled by Initiative 350. Thus, the District Court found that the text of the referendum was carefully tailored to interfere only with desegregative busing.[14] Proponents of the initiative candidly "represented that there would be no loss of school district flexibility other than in busing for desegregation purposes." 473 F. Supp., at 1008. And, as we have noted, Initiative 350 in fact allows school districts to bus their students "for most, if not all," of the non-integrative purposes required by their educational policies. *Id.*, at 1010. The Washington electorate surely was aware of this, for it was "assured" by CiVIC officials that "'99% of the school districts in the state'"—those that lacked mandatory integration programs—"would not be affected by the passage of 350." *Id.*, at 1008–1009. It is be-

Racial purposes

[14] The Court of Appeals accepted the District Court's characterization of the initiative, and even the dissenting judge in the Court of Appeals agreed that Initiative 350 addresses a "racial" problem. 633 F. 2d, at 1353.

yond reasonable dispute, then, that the initiative was enacted "'because of,' not merely 'in spite of,' its adverse effects upon" busing for integration. *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U. S. 256, 279 (1979).

Position of U.S.

Even accepting the view that Initiative 350 was enacted for such a purpose, the United States—which has changed its position during the course of this litigation, and now supports the State—maintains that busing for integration, unlike the fair housing ordinance involved in *Hunter*, is not a peculiarly "racial" issue at all. Brief for United States 17, n. 18. Again, we are not persuaded. It undoubtedly is true, as the United States suggests, that the proponents of mandatory integration cannot be classified by race: Negroes and whites may be counted among both the supporters and the opponents of Initiative 350. And it should be equally clear that white as well as Negro children benefit from exposure to "ethnic and racial diversity in the classroom." *Columbus Board of Education* v. *Penick*, 443 U. S. 449, 486 (1979) (POWELL, J., dissenting). See *Milliken* v. *Bradley*, 418 U. S. 717, 783 (1974) (MARSHALL, J., dissenting).[15] But neither of these factors serves to distinguish *Hunter*, for we may fairly assume that members of the racial majority both favored and benefited from Akron's fair housing ordinance. Cf. *Havens Realty Corp.* v. *Coleman*, —— U. S. ——, —— (1982) (slip op. 11–12, and n. 17); *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S. 91, 111, 115 (1979).

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In any event, our cases suggest that desegregation of the public schools, like the Akron open housing ordinance, at bot-

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[15] Appellants and the United States do not challenge the propriety of race-conscious student assignments for the purpose of achieving integration, even absent a finding of prior *de jure* segregation. We therefore do not specifically pass on that issue. See generally *Swann* v. *Charlotte-Mecklenberg Board of Education*, 402 U. S. 1, 16 (1971); *North Carolina State Board of Education* v. *Swann*, 402 U. S. 43, 45 (1971). Cf. *University of California Regents* v. *Bakke*, 438 U. S. 265, 300, n. 39, 312–314 (1978) (opinion of POWELL, J.).

tom inures primarily to the benefit of the minority, and is designed for that purpose. Education has come to be "a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." *Brown* v. *Board of Education*, 347 U. S. 483, 493 (1954). When that environment is largely shaped by members of different racial and cultural groups, minority children can achieve their full measure of success only if they learn to function in—and are fully accepted by—the larger community. Attending an ethnically diverse school may help accomplish this goal by preparing minority children "for citizenship in our pluralistic society," *Estes* v. *Metropolitan Branches of the Dallas NAACP*, 444 U. S. 437, 451 (1980) (POWELL, J., dissenting), while, we may hope, teaching members of the racial majority "to live in harmony and mutual respect" with children of minority heritage. *Columbus Board of Education* v. *Penick*, 443 U. S., at 485, n. 5 (POWELL, J., dissenting). *Lee* v. *Nyquist* settles this point, for the Court there accepted the proposition that mandatory desegregation strategies present the type of racial issue implicated by the *Hunter* doctrine.[16]

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[16] The United States seeks to distinguish *Lee* by suggesting that the statute there at issue "clearly prohibited" all attempts to ameliorate racial imbalance in the schools, while Initiative 350 permits voluntary desegregation efforts. Brief for United States 25. Even assuming that this distinction would otherwise be of constitutional significance, its premise is not accurate. The legislation challenged in *Lee did* permit voluntary integration efforts, for it expressly exempted from its restrictions "the assignment of a pupil in the manner requested or authorized by his parents or guardian." 318 F. Supp., at 712. Thus, as the District Court in *Lee* noted, the statute "denie[d] appointed officials the power to implement *non-voluntary* programs for the improvement of racial balance." *Id.*, at 715 (emphasis added). The difficulty in *Lee*—as in this case—stemmed from the *Lee* District Court's conclusion that a voluntary program would not serve to integrate the community's schools: "Voluntary plans for achieving racial balance . . . have not had a significant impact on the problems of racial segregation in the Buffalo public schools; indeed it would ap-

It is undeniable that busing for integration—particularly when ordered by a federal court—now engenders considerably more controversy than does the sort of fair housing ordinance debated in *Hunter*. See *Estes* v. *Metropolitan Branches of the Dallas NAACP*, 444 U. S., at 448–451 (POWELL, J., dissenting). But in the absence of a constitutional violation, the desirability and efficacy of school desegregation are matters to be resolved through the political process. For present purposes, it is enough that minorities may consider busing for integration to be "legislation that is in their interest." *Hunter* v. *Erickson*, 393 U. S., at 395 (Harlan, J., concurring). Given the racial focus of Initiative 350, this suffices to trigger application of the *Hunter* doctrine.

B

"a reallocation of power"

But voters of state are ~~could~~ ultimate "decision making body"

We are also satisfied that the practical effect of Initiative 350 is to work a reallocation of power of the kind condemned in *Hunter*. The initiative removes the authority to address a racial problem—and only a racial problem—from the existing decisionmaking body, in such a way as to burden minority interests. Those favoring the elimination of *de facto* school segregation now must seek relief from the state legislature, or from the statewide electorate. Yet authority over all other student assignment decisions, as well as over most other areas of educational policy, remains vested in the local school board. Indeed, by specifically exempting from Initiative 350's proscriptions most non-racial reasons for assigning students away from their neighborhood schools, the initiative expressly requires those championing school integration to surmount a considerably higher hurdle than persons seeking comparable legislative action. As in *Hunter*, then, the com-

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pear that racial isolation is actually increasing." *Ibid.* Thus the statute challenged in *Lee* and Initiative 350 operated in precisely the same way to "deny . . . student[s] the right to attend a fully integrated school." Brief for United States 25.

munity's political mechanisms are modified to place effective decisionmaking authority over a racial issue at a different level of government.[17] In a very obvious sense, the initiative thus "disadvantages those who would benefit from laws barring" *de facto* desegregation "as against those who . . . would otherwise regulate" student assignment decisions; "the reality is that the law's impact falls on the minority." *Hunter* v. *Erickson*, 393 U. S., at 391.

The State appellants and the United States, in response to this line of analysis, argue that Initiative 350 has not worked *any* reallocation of power. They note that the State necessarily retains plenary authority over Washington's system of education, and therefore they suggest that the initiative

Answers argument that state retains plenary auth

[17] In *Hunter*, the procedures for enacting racial legislation were modified in such a way as to place effective control in the hands of the citywide electorate; here, the power to enact racial legislation has been reallocated. In each case, the effect of the challenged action was to redraw decisionmaking authority over racial matters—and only over racial matters—in such a way as to place comparative burdens on minorities. While the United States observes that the proponents of integrated schools remain free to use Washington's initiative system to further their ends, that was true in *Hunter* as well: proponents of open housing were not barred from invoking Akron's initiative procedures to repeal the charter amendment, or to enact fair housing legislation of their own. It surely is an excessively formal exercise, then, to argue that the procedural revisions at issue in *Hunter* imposed special burdens on minorities, but that the selective allocation of decisionmaking authority worked by Initiative 350 does not erect comparable political obstacles. Indeed, in a sense the situation here is less favorable to minority interests than was the arrangement in *Hunter*, for the Akron charter amendment at least made provision for the passage of fair housing legislation, while Initiative 350 on its face forbids virtually all mandatory desegregation strategies. The United States would note that Initiative 350's "modification of state policy [was] not the result of any unusual political procedure," Brief for United States 30, for initiatives and referenda are often used by the Washington electorate. But that observation hardly serves to distinguish this case from *Hunter*, since the fair housing charter amendment was added through the unexceptional use of Akron's initiative procedure. See 393 U. S., at 387.

amounts to nothing more than an unexceptional example of a State's intervention in its own school system. In effect, they maintain that the State functions as a "super school board," Tr. of Oral Arg. 5, 17, which typically involves itself in all areas of educational policy. And, the argument continues, if the State is the body that usually makes decisions in this area, Initiative 350 worked a simple change in policy rather than a forbidden reallocation of power. Cf. *Crawford* v. *Los Angeles Board of Education*, *post*.

This at first glance would seem to be a potent argument, for States traditionally have been accorded the widest latitude in ordering their internal governmental processes, see *Holt Civic Club* v. *Tuscaloosa*, 439 U. S. 60, 71 (1978), and school boards, as creatures of the State, obviously must give effect to policies announced by the state legislature. But "insisting that a State may distribute legislative power as it desires . . . furnish[es] no justification for a legislative structure which otherwise would violate the Fourteenth Amendment. Nor does the implementation of this change through popular referendum immunize it." *Hunter* v. *Erickson*, 393 U. S., at 392. The issue here, after all, is not whether Washington has the authority to intervene in the affairs of local school boards; it is, rather, whether the State has exercised that authority in a manner consistent with the Equal Protection Clause. As the Court noted in *Hunter*, "though Akron might have proceeded by majority vote . . . on all its municipal legislation, it has instead chosen a more complex system. Having done so, the State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote." *Id.*, at 392–393. Washington also has chosen to make use of a more complex governmental structure, and a close examination both of the Washington statutes and of the Court's decisions in related areas convinces us that *Hunter* is fully applicable here.

Issue not one of power - but whether it was exercised in valid manner

At the outset, it is irrelevant that the State might have vested all decisonmaking authority in itself, so long as the political structure it in fact erected imposes comparative burdens on minority interests; that much is settled by *Hunter* and by *Lee*.[18] And until the passage of Initiative 350, Washington law in fact had established the local school board, rather than the State, as the entity charged with making decisions of the type at issue here. Like all 50 States, see Brief for National School Boards Assn. as *Amicus Curiae* 11, 14–16, Washington of course is ultimately responsible for providing education within its borders, see Wash. Const., Art. IX; Wash. Rev. Code § 28A.02.010 (1981); ch. 28A.41 (establishing a uniform school financing system); *Seattle School Dist.* v. *State*, 90 Wash. 2d 476, 585 P. 2d 71 (1978), and it therefore has set certain procedural requirements and minimum educational standards to be met by each school. See, *e. g.*, §§ 28A.01.010, 28A.01.020 (length of school day and year); ch. 28A.27 (mandatory attendance); ch. 28A.67 (teacher qualifications); ch. 28A.05 and §§ 28A.58.750–28A.58.754 (curriculum). But Washington has chosen to meet its educational responsibilities primarily through "state and local officials, boards, and committees," § 28A.02.020, and the responsibility to devise and tailor educational programs to suit local needs has emphatically been vested in the local school boards.

Broad authority in school ~~boards~~ boards — true, of course

Thus "each common school district board of directors" is made "accountable for the proper operation of [its] district to the local community and its electorate." § 28A.58.758(1).

62% of District voted for 350

[18] The Court noted in *Hunter* that Akron "might have proceeded by majority vote . . . on all its municipal legislation," 393 U. S., at 392; the charter amendment was invalidated because the citizens of Akron did not reserve all power to themselves, but rather distributed it in a non-neutral manner. In *Lee*, of course, the State had unquestioned authority to vest all power over education in state officials.

+ of course

Note this for Prec (also p 19)

To this end, each school board is "vested with the *final* responsibility for the setting of policies ensuring quality in the content and extent of its educational program" (emphasis added). *Ibid.* School boards are given responsibility for, among many other things, "establish[ing] performance criteria" for personnel and programs, for assigning staff "according to board enumerated classroom and program needs," for setting requirements concerning hours of instruction, for establishing curriculum standards "relevant to the particular needs of district students or the unusual characteristics of the district," and for evaluating teaching materials. § 28A.58.758(2). School boards are generally directed to "develop a program identifying student learning objectives for their district[s]," §§ 28A.58.090; see also § 28A.58.092, to select instructional materials, § 28A.58.103, to stock libraries as they deem necessary, § 28A.58.104, and to initiate a variety of optional programs. See, *e. g.*, §§ 28A.34.010, 28A.35.010, 28A.58.105. School boards, of course, are given broad corporate powers. § § 28A.58.010, 28A.58.075, 28A.59.180. Significantly for present purposes, school boards are directed to determine which students should be bused to school and to provide those students with transportation. § 28A.24.055.

Indeed, the notion of school board responsibility for local educational programs is so firmly rooted that local boards are subject to disclosure and reporting provisions specifically designed to ensure the board's "accountability" to the people of the community for "the educational programs in the school distric[t]." § 28A.58.758(3). And, perhaps most relevantly here, before the adoption of Initiative 350 the Washington Supreme Court had found it within the general discretion of local school authorities to settle problems related to the denial of "equal educational opportunity."[19] *Citizens Against*

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[19] Indeed, even the State's efforts to help ensure equal opportunity in education and to encourage desegregation are cast in cooperative terms.

Mandatory Bussing v. *Palmason*, 80 Wash. 2d 445, 453, 495 P. 2d 657, 663 (1972). It therefore had squarely held that a program of desegregative busing was a proper means of furthering the school board's responsibility to "administe[r] the schools in such a way as to provide a sound education for all children." *Id.*, at 456, 495 P. 2d, at 664.[20] See *State ex rel. Citizens Against Mandatory Bussing* v. *Brooks*, 80 Wash. 2d 121, 492 P. 2d 536 (1972); *State ex rel. Lukens* v. *Spokane School District*, 147 Wash. 467, 474, 266 P. 189, 191 (1928).[21]

Given this statutory structure, we have little difficulty concluding that Initiative 350 worked a major reordering of the State's educational decisionmaking process. Before adoption of the initiative, the power to determine what programs would most appropriately fill a school district's educational needs—including programs involving student assignment and desegregation—was firmly committed to the local board's discretion. The question whether to provide an integrated learning environment rather than a system of neighborhood schools surely involved a decision of that sort. See *Citizens*

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and are designed to assist school districts in implementing programs of their choosing. See, *e. g.*, Wash. Rev. Code §§ 28A.21.010(3), 28A.21.136(1) and (3) (1981); cf. § 28A.58.245(3).

[20] The Washington Supreme Court noted that "as long as the school board authorized or required students to attend schools geographically situated close to their homes, they had such a right. But the right existed only because it was given to them by the school authorities." 80 Wash. 2d, at 452, 495 P. 2d, at 662.

[21] We also note that the State has not attempted to reserve to itself exclusive power to deal with racial issues generally. Municipalities in Washington have been given broad powers of self-government, see generally Wash. Const., Amdt. 40; Wash. Rev. Code §§ 35.22.020, 35.23.440, 35.27.370, 35.30.010 (1981); Wash. Rev. Code Tit. 35A (Optional Municipal Code), and Washington courts specifically have held that municipalities have the power to enact antidiscrimination ordinances. See, *e. g.*, *Seattle Newspaper-Web Pressmen's Union Local No. 26* v. *City of Seattle*, 24 Wash. App. 462, 604 P. 2d 170 (1979). Cf. 5 E. McQuillin, Municipal Corporations § 19.23, p. 425 (3d ed. rev. 1981).

Against Mandatory Bussing v. *Palmason*, 80 Wash. 2d, at 459–460, 495 P. 2d, at 666–667. After passage of Initiative 350, authority over all but one of those areas remained in the hands of the local board. By placing power over desegregative busing at the state level, then, Initiative 350 plainly "differentiates between the treatment of problems involving racial matters and that afforded other problems in the same area." *Lee* v. *Nyquist*, 318 F. Supp., at 718. The District Court and the Court of Appeals similarly concluded that the initiative restructured the Washington political process, and we see no reason to challenge the determinations of courts familiar with local law. Cf. *Milliken* v. *Bradley*, 418 U. S., at 769 (WHITE, J., dissenting).

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That we reach this conclusion should come as no surprise, for when faced with a similar educational scheme in *Milliken* v. *Bradley*, *supra*,[2] the Court concluded that the actions of a local school board could not be attributed to the State that had created it. We there addressed the Michigan education system, which vests in the State constitutional responsibility for providing education: "'The policy of [Michigan] has been to retain control of its school system, to be administered throughout the State under State laws by local State agencies . . . to carry out the delegated functions given [them] by the legislature.'" *Milliken* v. *Bradley*, 418 U. S., at 794 (MARSHALL, J., dissenting), quoting *School District of the City of Lansing* v. *State Board of Education*, 367 Mich. 591, 595, 116 N.W. 2d 866, 868 (1962). See *Milliken* v. *Bradley*, *supra*, at 726, n. 5. To fulfill this responsibility, the State of Michigan provided a substantial measure of school district funding, established standards for teacher certification, determined part of the curriculum, set a minimum school term, approved bus routes and textbooks, established disciplinary

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[2] One *amicus* observes that many States employ a similar educational structure. See Brief for National School Boards Assn. as *Amicus Curiae* 11, 14–16, App. 1a–10a.

procedures, and under certain circumstances had the power even to remove local school board members. See *id.*, at 795–796 (MARSHALL, J., dissenting). See *id.*, at 726, n. 5, 727 (describing State controls over education); *id.*, at 768 and n. 4 (WHITE, J., dissenting) (same); *id.*, at 794 (MARSHALL, J., dissenting) (same).

Yet the Court, noting that "[n]o single tradition in public education is more deeply rooted than local control over the operation of schools," concluded that the "Michigan educational structure . . . in common with most States, provides for a large measure of local control." *Id.*, at 741–742. Relying on this analysis, the Court determined that a Michigan school board's assignment policies could not be attributed to the State, and therefore declined to permit interdistrict busing as a remedy for one school district's acts of unconstitutional segregation. If local school boards operating under a similar statutory structure are considered separate entities for purposes of constitutional adjudication when they make segregative assignment decisions, it is difficult to see why a different analysis should apply when a local board's *desegregative* policy is at issue.

Use in Pico

In any event, we believe that the question here is again settled by *Lee*. There, state control of the educational system was fully as complete as it now is in Washington. See generally N.Y. Educ. Law §§ 305, 306, 308–310 (McKinney) (1969 and Supp. 1981). The state statute under attack reallocated power over mandatory desegregation in two ways: it transferred authority from the State Commissioner of Education to local elected school boards, and it shifted authority from local appointed school boards to the state legislature.[23] When presented with this restructuring of the political process, the District Court declared that it could

Lee

[23] When authority to initiate desegregation programs was removed from appointed school boards and from state education officials, the only body capable of exercising power over such programs was the state legislature.

"conceive of no more compelling case for the application of the *Hunter* principle." 318 F. Supp., at 719. This Court of course affirmed the District Court's judgment. We see no relevant distinction between this case and *Lee*; indeed, it is difficult to imagine a more precise parallel.[24]

precise parallel

C

To be sure, "the simple repeal or modification of desegregation or anti-discrimination laws, without more, never has been viewed as embodying a presumptively invalid racial classification." *Crawford* v. *Los Angeles Board of Education*, *post*, at ——, (slip op. 10). See *Dayton Board of Education* v. *Brinkman*, 443 U. S. 526, 531, n. 5 (1979); *Hunter* v. *Erickson*, 393 U. S., at 390, n. 5. As Justice Harlan noted in *Hunter*, the voters of the polity may express their displeasure through an established legislative or referendum procedure when particular legislation "arouses passionate opposition." *Id.*, at 395 (concurring opinion). Had Akron's

Crawford

[24] The United States makes only one attempt to distinguish *Lee* in this regard: *Lee* is inapposite, the United States maintains, because the statute at issue there "blocked desegregation efforts even by 'a school district subject to a pre-existing order to eliminate segregation in its schools,'" and therefore—purportedly in contrast to Initiative 350—"interfere[d] with the efforts of individual school districts to eliminate de jure segregation." Brief for the United States 25, quoting *Lee* v. *Nyquist*, 318 F. Supp., at 715. If by this statement the United States seeks to place the District Court's holding and this Court's affirmance in *Lee* on the ground that the New York statute interfered with Buffalo's attempts to eliminate *de jure* segregation, its submission is simply inaccurate. At the time of the *Lee* litigation, Buffalo had *not* been found guilty of practicing intentional segregation. See *Arthur* v. *Nyquist*, 573 F. 2d 134, 137 (CA2 1978). As the United States notes, Buffalo was under a "pre-existing order to eliminate segregation in its schools"—but that order was issued by the New York Commissioner of Education, because he had found Buffalo's schools *de facto* segregated. *Appeal of Dixon*, 4 N.Y. Educ. Dept. Reports 115 (1965). See *Lee* v. *Nyquist*, 318 F. Supp., at 714–715. *Lee* did not concern *de jure* segregation; it is to be explained only as a straightforward application of the *Hunter* doctrine.

fair housing ordinance been defeated at a referendum, for example, "Negroes would undoubtedly [have lost] an important political battle, but they would not thereby [have been] denied equal protection." *Id.*, at 394.

Initiative 350, however, works something more than the "mere repeal" of a desegregation law by the political entity that created it. It burdens all future attempts to integrate Washington schools in districts throughout the State, by lodging decisionmaking authority over the question at a new and remote level of government. Indeed, the initiative, like the charter amendment at issue in *Hunter*, has its most pernicious effect on integration programs that do "*not* arouse extraordinary controversy." *Id.*, at 396 (emphasis in original). In such situations the initiative makes the enactment of racially beneficial legislation difficult, though the particular program involved might not have inspired opposition had it been promulgated through the usual legislative processes used for comparable legislation.[25] This imposes direct and undeniable burdens on minority interests. "If a governmental institution is to be fair, one group cannot always be expected to win," *id.*, at 394; by the same token, one group cannot be subjected to a debilitating and often insurmountable disadvantage.

absurd!

IV

In the end, appellants are reduced to suggesting that *Hunter* has been effectively overruled by more recent deci-

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[25] That phenomenon is graphically demonstrated by the circumstances of this litigation. The long-standing desegregation programs in Pasco and Tacoma, as well as the Seattle middle school integration plan, have functioned for years without creating undue controversy. Yet they have been swept away, along with the Seattle Plan, by Initiative 350. As a practical matter, it seems most unlikely that proponents of desegregative busing in smaller communities such as Tacoma or Pasco will be able to obtain the statewide support now needed to permit them to desegregate the schools in their communities.

sions of this Court. As they read it, *Hunter* applied a simple "disparate impact" analysis: it invalidated a facially neutral ordinance because of the law's adverse effects upon racial minorities. Appellants therefore contend that *Hunter* was swept away, along with the disparate impact approach to equal protection, in *Washington* v. *Davis*, 426 U. S. 229 (1976), and *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252 (1977). Cf. *James* v. *Valtierra*, 402 U. S. 137 (1971).

Appellants unquestionably are correct when they suggest that "purposeful discrimination is 'the condition that offends the Constitution,'" *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U. S., at 274, quoting *Swann* v. *Charlotte-Mecklenberg Board of Education*, 402 U. S. 1, 16 (1971), for the "central purpose of the Equal Protection Clause . . . is the prevention of official conduct discriminating on the basis of race." *Washington* v. *Davis*, 426 U. S., at 239. Thus, when facially neutral legislation is subjected to equal protection attack, an inquiry into intent is necessary, to determine whether the legislation in some sense was designed to accord disparate treatment on the basis of racial considerations. Appellants' suggestion that this analysis somehow conflicts with *Hunter*, however, misapprehends the basis of the *Hunter* doctrine. We have not insisted on a particularized inquiry into motivation in all equal protection cases: "A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification." *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U. S., at 272. And legislation of the kind challenged in *Hunter* falls into this inherently suspect category.[26]

There is one immediate and crucial difference between *Hunter* and the cases cited by appellants. While decisions

Difference bet. this case like Davis & Arlington Heights

[26] The State does not suggest that Initiative 350 furthers the kind of compelling interest necessary to overcome the strict scrutiny applied to explicit racial classifications.

such as *Washington* v. *Davis* and *Arlington Heights* considered classifications facially unrelated to race, the charter amendment at issue in *Hunter* dealt in explicitly racial terms with legislation designed to benefit minorities "as minorities," not legislation intended to benefit some larger group of underprivileged citizens among whom minorities were disproportionately represented. This does not mean, of course, that every attempt to address a racial issue gives rise to an impermissible racial classification. See *Crawford* v. *Los Angeles Board of Education*, *post*. But when the political process or the decisionmaking mechanism used to *address* racially conscious legislation—and only such legislation—is singled out for peculiar and disadvantageous treatment, the governmental action plainly "rests on 'distinctions based on race.'" *James* v. *Valtierra*, 402 U. S., at 141, quoting *Hunter* v. *Erickson*, 393 U. S., at 391. And when the State's allocation of power places unusual burdens on the ability of racial groups to enact legislation specifically designed to overcome the "special condition" of prejudice, the governmental action seriously "curtail[s] the operation of those political processes ordinarily to be relied upon to protect minorities." *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152–153, n. 4 (1938). In a most direct sense, this implicates the judiciary's special role in safeguarding the interests of those groups that are "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio School Dist.* v. *Rodriguez*, 411 U. S. 1, 28 (1973).[27]

Carolene

Hunter recognized the considerations addressed above, and it therefore rested on a principle that has been vital for

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[27] We also note that singling out the political processes affecting racial issues for uniquely disadvantageous treatment inevitably raises dangers of impermissible motivation. When political institutions are more generally restructured, as JUSTICE BRENNAN has noted in another context: "The very breadth of [the] scheme . . . negates any suggestion" of improper purpose. *Walz* v. *Tax Commission*, 397 U. S. 664, 689 (1970) (concurring opinion).

over a century—that "the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on race." 393 U. S., at 391. Just such distinctions infected the reallocation of decisionmaking authority considered in *Hunter*, for minorities are no less powerless with the vote than without it when a racial criterion is used to assign governmental power in such a way as to exclude particular racial groups "from effective participation in the political proces[s]." *Mobile* v. *Bolden*, 446 U. S., at 94 (WHITE, J., dissenting). Certainly, a State requirement that "desegregation or anti-discrimination laws," *Crawford* v. *Los Angeles Board of Education*, *post*, at —— (slip op. 10), and only such laws, be passed by unanimous vote of the legislature would be constitutionally suspect. It would be equally questionable for a community to require that laws or ordinances "designed to ameliorate race relations or to protect racial minorities," *id.*, at —— (slip op. 11), be confirmed by popular vote of the electorate as a whole, while comparable legislation is exempted from a similar procedure. The amendment addressed in *Hunter*—and, as we have explained, the legislation at issue here—was less obviously pernicious than are these examples, but was no different in principle.

V

In reaching this conclusion, we do not undervalue the magnitude of the State's interest in its system of education. Washington could have reserved to state officials the right to make all decisions in the areas of education and student assignment. It has chosen, however, to use a more elaborate system; having done so, the State is obligated to operate that system within the confines of the Fourteenth Amendment. That, we believe, it has failed to do.[25]

Accordingly, the judgment of the Court of Appeals is

Affirmed.

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[25] Appellants also challenge the Court of Appeals' award of attorney's

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fees to the school district plaintiffs, see n. 12, *supra*. Arguing that state-funded entities are not eligible to receive such awards from the State, in our view, this contention is without merit. The districts are plainly parties covered by the language of the fees statutes. See 42 U. S. C. § 1988 (1976 ed., Supp. IV) ("In any action . . . to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs") (emphasis added); 20 U. S. C. § 1415 (1976 ed., Supp. IV) ("Upon the entry of a final order by a court of the United States against a . . . State . . . for failure to comply with . . . the fourteenth amendment to the Constitution of the United States as [it] pertain[s] to elementary and secondary education, the court, in its discretion . . . may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of its costs") (emphasis added). Nothing in the history of the statutes supports that this language was meant to exclude state-funded entities. To the contrary, the Courts of Appeals have held with substantial regularity that publicly-funded legal services organizations may be awarded fees. See, e.g., Bryant v. Chicago, 812 F. 2d 1202 (CA9 1987); Wolfe v. Carter, 606 F. 2d 336 (CA2 1979), cert. denied sub nom. Wolfe v. Hickey, 446 U. S. 912 (1980); Lewis v. Kimball, 587 F. 2d 75 (CA2 1978). And when it enacted § 1988, Congress cited with approval a decision awarding fees to a state-funded organization. See H. R. Rep. No. 94-1558, p. 6, n. 18 (1976) (citing Documented Wrongs v. Action Chicago Coll. v. Fain, 507 F. 2d 381 (CA5 1974)). In any event, the underlying congressional policies are served by awarding fees in cases such as the one before us, no matter what the source of their funds, school boards have limited budgets. And a bonus them fees "encourages compliance with and enforcement of the civil rights laws." Bryant v. Chicago, 812 F. 2d, at 1208. See id., at 1206–1207. While appellants suggest that it is inappropriate for a State to pay attorney's fees to one of its school boards, it seems no less inappropriate that a local board would feel the need to sue the State for a violation of the Fourteenth Amendment. We see no reason to disturb the judgment of the Court of Appeals on this point.