COMMON SCHOOLING IN THE 21st CENTURY: WHAT FUTURE FOR AMERICAN EDUCATION?

February 5, 2010

Good morning, and welcome to this distinguished audience whose members have braved icy weather and threats of inch-deep snow to arrive at this 20th Festival of Legal Learning, a wonderful annual event sponsored by the University of North Carolina School of Law. I'm Jack Boger, privileged to be the dean of UNC Law. This is an audience that deserves the title 'distinguished;,' many members this morning have served in public education at all levels – as teachers and principals, as school administrators, as school board members, as lawyers for boards and parents, as legislators, and even North Carolina's nationally prominent "education governor" who helped fashion much of our finest state educational policy. Your collective expertise alone should make me, as your speaker, a little nervous.

The announced topic of this lecture is preposterously broad, moreover:

"*Common Schooling in the 21st Century: What Future for American Education*?"

and the announced description in your program is even more ambitious: "*This session examines the waning public appetite for racial, ethnic, and socioeconomic diversity in the nation's public schools and explores changes in student assignment policies – presently underway in North Carolina's two largest school districts, Charlotte-Mecklenburg and Wake, that reflect those shifting attitudes. It will explore empirical evidence of whether educating children in schools that become racially and socioeconomically isolated makes any appreciable educational difference. The session will discuss what legislative, judicial or policy tools are available to fashion K-12 schools that will assure equal educational opportunities to all American students in the 21st century*."

It is a recklessly overbroad agenda for 55 minutes. Only an administrator who's largely ceased seriously teaching responsibilities could ever have framed it, and if I were to take full stock of both the

challenges of the topic AND the distinguished nature of this morning's audience, I'd be tempted to flee. But instead, I'll be oblivious and just begin.

I. Introduction: A Little History

The phrase "Common schooling," comes, of course, from Horace Mann, the Massachusetts lawyer turned public official who left private practice in 1837 to become the secretary of America's first state board of education, in Massachusetts. A year into his new position, in 1838, Mann founded the *Common School Journal* and began a region-wide and later a nationwide campaign to make state-supported, public schooling universal. It was a radically new idea – not tutors in the home, or private schools for the elite, or church-based schools offering education as a form of charity, but public schools for all children. Horace Mann promoted this new institution tirelessly as "the great equalizer," "a wellspring of freedom," and a "ladder of opportunity" for millions. One of his most distinctive principles was that this "education will be best provided in schools that embrace children from a variety of backgrounds" – although he did not ever take a stand against the racial segregation that emerged in Boston's public schools.

In North Carolina, it was Calvin Wiley, a lawyer and legislator who was appointed this State's first state school superintendent in 1852, who traveled the Old North State tirelessly. "With infinite labor, by travel, speeches, and writings," an historian wrote in the 1964 Peabody Journal of Education, "Wiley overcame opposition to and popularized public schools. The North Carolina system was the best in the South in 1860..."[1] Notably, in his 1860 report to the State, Superintendent Wiley cautioned "that there is as much danger from prejudice between the rich and poor as between master and slave. '*The peace of every social system,*' he wrote*, 'depends upon a just recognition of the mutual dependence of every rank on the other and of the mutual obligations which this imposes . . . . And all attempts . . . . to widen the*

[1] Calvin D. Jarrett, *Calvin H. Wiley: Southern Education Leader,* 41 *Peabody Journal of Education* 276, 279 (1964)

breach between classes of citizens are just as dangerous as efforts to excite slaves to insurrection.'"[2] That in 1860, a year before the Civil War.

One hundred and fifty years later, it seems, we are again testing, in our two largest metropolitan school districts, the wisdom, or the folly, of Superintendent Wiley's warning.

This is not a history lecture, so we must skip over the trauma and destruction to schools and all state infrastructure wrought by the Civil War, the remarkable, multi-racial constitutional revival of public schooling in the Constitution of 1868 in this State (which Ann McCall has made so vivid in her recent work on Constitutional Tales). We will ignore the disintegration of state supported public education after Reconstruction, the early, faltering efforts in local communities to revive it in the 1880s and 1890s, the beginning of 'normal schools' and 'teachers colleges' to train a modern cadre of teachers and administrators, the remarkably progressive effort of Governor Charles Aycock at the turn of the 20th century to offer strong, State support for revived, if racially segregated, public schools, the coming in the Progressive era of the widespread development of a system of graded schools, kindergarten through eighth grade, the emergence of compulsory schooling (not simply the opportunity for education, but the requirement, enforced by truancy laws, that each child attend) , the first public high schools, the consolidation of tiny township or neighborhood school districts into countywide districts, the decision of the State, during the trauma of the Great Depression, to begin offering state aid to local school districts, the post-World War II burst of growth for the baby boomers.

II. The Supreme Court and Race: *Brown* to *Green* to *Swann*

And then, in 1954, there came *Brown v. Board of Education,* in which a unanimous Supreme Court, led by Chief Justice Earl Warren, declared that the racial segregation of white and black children – legally required everywhere throughout the South, and the prevalent norm in every single region of America, North, South, East, and West, was unconstitutional.:

[2] *Id.*, at 279-80, *quoting* Calvin H. Wiley, *Suggestions and Recommendations*, 3 *North Carolina Journal of Education* 132 (1860)

"*We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment*."[3]

There followed, of course, a full generation, 20 years, of struggle, in the courts, in the halls of Congress, in state legislatures, in the schools, on the sidewalks, in the streets, before *Brown*'s words were made real. It took Justice Brennan's opinion for the Court in *Green v. County School Board of New Kent County* before the Court demanded results, visible results, and condemned all delay, declaring:

"The Board must be required to formulate a new plan and, in light of other courses which appear open to the Board, such as zoning, to fashion steps which promise realistically to convert promptly to a system without "white" school[s] [or]. . . "Negro" school[s], but just schools."[4]

It took three more years before Chief Justice Warren Burger -- after reading the briefs and hearing the oral arguments of a young African American lawyer from Mt. Gilead, North Carolina, Julius Chambers – summoned a unanimous Court to declare, in the renowned *Swann v. Charlotte/Mecklenburg* case, that the use of non-contiguous school zoning, numerical assignment of students, faculty, and administrators by race, the use of busing and transportation remedies, and other devices calculated to end a racially divided school system, were all constitutionally permitted, indeed, likely even constitutionally compelled, to end state

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[3] 347 U.S. 483, 495 (1954).
[4] 391 U.S. 440, 442 (1968).

segregation. In passing, the *Swann* Court set forth a core principle about the discretion that was always vested in local school boards, to insist on racial diversity:

> *School authorities are traditionally charged with broad power to formulate and implement educational policy, and might well conclude, for example, that, in order to prepare students to live in a pluralistic society, each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities*.[5]

While that principle, in 1971, commanded assent from all nine Justice then sitting, it has since been cast aside by the Rehnquist Court, and still later, the Roberts Court, as we shall soon hear.

III. Northern De Facto School Segregation: My Hartford Experiences

I was a first-year law student at UNC Chapel Hill in 1971, when *Swann* was decided, and I wanted more than anything in the world to stand with those who were challenging, in court, the systems of separate and unequal education that I had grown up with in my youth, in Concord, North Carolina, in the 1950s and 1960s. Never a single African American classmate – a whole generation of contemporaries in my town who may as well have lived on the moon to me, and me to them. I couldn't initially attract the attention of any civil rights firm and instead went to New York after graduation from UNC Law in 1974, to practice with a large litigation and corporate firm, but as luck would have it, found myself one day invited to work, as a law firm matter, on a *pro bono* case with the NAACP Legal Defense Fund, the very organization that had brought *Brown* and *Green* and *Swann* to the Supreme Court. I threw myself into that case, and when an invitation came to join LDF, I made the leap without once looking back, thrilled to have found my way into by pure serendipity into the public interest career I had earlier dreamed of.

[5] 401 U.S. 1, 16 (1971).

And by the mid 1980s, I found myself dispatched to Harford -- Connecticut's capital city --, under the overall direction of the same young North Carolina lawyer, Julius Chambers, who had argued *Swann* and who had since succeeded Thurgood Marshall and Jack Greenberg as Director/Counsel of the NAACP Legal Defense & Educational Fund. Julius had been instrumental, in his North Carolina practice, in breaking down formal, statutory and constitutional barriers to racial integration in public education, and employment, and voting, and public hospitals statewide, and indeed, through three or four key Supreme Court cases, in changing civil rights law, nationwide.

What he wanted as LDF's director was to open a new legal front to address the many unmet needs of "the minority poor," as we called them. Despite the formal end of state-sanctioned segregation, it had become clear that there remained millions of Americans, locked in high-poverty, low employment neighborhoods throughout the land. We were looking to challenge the intense educational segregation, by race and class, that emerged in these neighborhoods, no longer through the force of positive law, of statutes or constitutional prohibitions, as in the pre-*Brown* era, but by the equally powerful divisions created by racialized economic deprivation which itself was a clear legacy of slavery, Jim Crow, and the pre-*Brown* era. Our thought was not to begin with employment or housing, but instead with public education, the very issue which the NAACP had used in *Brown* to challenge the far broader system of racial segregation forty years earlier.

We looked to Connecticut for a number of reasons: it was among the very richest states in the country; yet with four or five of the nation's poorest cities. Those cities – New Haven, Hartford, Bridgeport, and Waterbury – were once home to some of the nation's leading industries; in or near their centers, they housed some of the nation's finest institutions of higher education. Yet in their public schools, these Connecticut cities miseducated students who were overwhelmingly poor and black or Latino.

Despite these challenges, there were some remarkably positive prospects. Connecticut's apparently enlightened legislature had enacted educational statutes in 1985, under the leadership of a young Chief Education Officer, Gerald Tirozzi, that had created "Connecticut Mastery Tests" – some of

the first statewide achievement tests ever -- to measure student performance in key subjects. Nearly 17 years before No Child Left Behind, these state tests appeared would offer reliable data on student performance – data, we thought, that would allow us to demand educational equity in all of Connecticut public schools.

Beyond its early adoption of statewide testing, the State of Connecticut was doing something very few states had ever done before and that only a few have done since. It was driving dollars to school districts, based not only upon the number of children present, but with dollars expressly weighted to send more to schools where educational performances were low and their family poverty was more prevalent. Thus for every State dollar sent to a suburban school where a middle-class child was doing well, Connecticut sent literally 50% more, toward schools that were educating each low-performing, lower-income children.

In addition, the Connecticut legislature had adopted many special grant programs-- remedial assistance, dropout prevention, health services—that strongly favored either low-wealth districts or districts with poorer and low-achieving students, or both. Under these combined state aid programs, the Hartford school district regularly received nearly three times as much State funding, per pupil, as did suburban districts.

Only one minor problem remained: none of it was working to improve educational performance in Connecticut's largest urban districts.

As in most States throughout the Northeast and North Central area, school districts throughout Connecticut were geographically very tiny. The Hartford metropolitan area alone claimed 22 separate school districts, most of them only a few minutes apart. The Hartford district itself was 92% black and Latino in student population by the late 1980s, and 63% of its students on free and reduced price lunches. By contrast, nearby districts – Avon, Simsbury, and West Hartford – were 96% white, with 5% or fewer students on free and reduced price lunches.

Test score differences between city and suburbs were dramatic. In suburban Avon and Simsbury, 9% of fourth grade students were performing below remedial standards in mathematics; in Hartford, 8 times that many – 70% were below minimal adequacy.

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Our immediate impulse was to pull out LDF's big legal weapons: the Equal Protection Clause, Title VI, and run to federal court. Yet none of the traditional federal constitutional or statutes tools were of any use. For in *Milliken v. Bradley* in 1974, the Supreme Court, had decreed, by a bare 5/4 decision, that federal courts lacked authority to order students bussed across school district lines, unless those lines had been drawn or maintained for racially discriminatory purposes. In the Hartford area, many of the town lines were 200 years old, drawn long before Horace Mann's campaign, indeed long before the State had begun to offer public schooling of any sort to anyone. Legally cognizable, intentional racial discrimination was hard to find.

We thought briefly of school finance litigation – that remarkably fertile, alternative source of so much educational ferment in the 1980s and 1990s. The catch in Connecticut, however, as I noted a moment ago, is that the Connecticut Supreme Court had already granted school finance relief in 1977 -- and the State legislature had subsequently provided very real, substantial financial relief. The only deficiency: none of it had worked, at all, to bring real educational progress.

Moreover, it wasn't a classic 1960s Mississippi question of ruthless white domination: a Puerto Rican superintendent presided over Hartford public schools. He and other dedicated black and Latino teachers and administrators, moreover, had extraordinary sources of assistance. Professor James Comer at Yale, Professors Charles Willie and Gary Orfield at Harvard, some of the finest educational policy talent in the country, stood ready to help.

Yet in the city schools, none of the special educational remedies appeared to be making a measurable difference. The test scores of Hartford children were dismal and hardly moving at all despite all the earnest efforts on their behalf. In sum, Connecticut's educational programs represent the legislative future toward which many other states and school districts are still, in 2010, presently striving. In short,

these financially massive and politically difficult educational reforms, which Connecticut has embraced so completely, had not succeeded to assist its crowded city schools; instead, Hartford and other overwhelming poor and minority urban school systems in Connecticut faced massive educational failure.

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In grappling for some way forward, we stumbled upon some social science by Alison Wolf and by Mary Kennedy at Michigan State, who appeared to have taken up and tested one of the most initially overlooked findings of the famous Coleman Report of 1965. James Coleman's congressionally authorized study of American schooling found, as most of you know, that

> *a pupil's achievement is strongly related to the educational backgrounds and aspirations of the other students in the school. . . Thus . . . if a minority pupil from a home without much educational strength is put with schoolmates with strong educational backgrounds, his achievement is likely to increase.*

The Report concluded, in fact, that the social characteristics of a school student body were the single most important factor in predicting minority student achievement:

> *Attributes of other students account for far more variation in the achievement of minority group children than do any attributes of school facilities and slightly more than do attributes of staff.*

One of the most relentless and critical reanalyzes of the Coleman data came from Christopher Jencks in 1972. Jencks had other major quarrels with Coleman's findings, but he explicitly agreed with Coleman that "*[t]he achievement of lower-class students, both black and white, was fairly strongly related to the socioeconomic level of their classmates*."

Our *Sheff v. O'Neill* litigation, drawing on this research, took the then-novel position that the very constitutional provisions that some states (like Connecticut) had interpreted to assure fair funding to all school districts should also assure fair student assignment policies to all. Other students were a more important state resource than dollars alone, and therefore, state policies that mal-distributed these crucial state

resources could not be constitutionally tolerated. We argued, in effect, that ending high-poverty schooling was a state constitutional imperative.

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Thank goodness, I remember thinking then, that Southern school desegregation had already largely done its work. Thanks to the courageous insistence of non-white parents, the federal courts, and local school officials, who had come to supporting integrated public schooling. Thanks for the large countywide system of school districts throughout most of the South, which meant that rich and poor, black and white, were pooled together in single large residential districts, not diced into tiny, small, racially isolated, socioeconomically homogenous districts as were common in Hartford or many Northeastern and North Central states. "The economic and racial heterogeneity of North Carolina school systems," I remember thinking, "will spare future generations of Southern children, black and white, the educational fate that seems all but inevitable now for the poor and non-white children of Hartford and many other urban, Northern districts."

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IV. The Supreme Court Transformation of Equal Protection Doctrine – Race-Conscious State Action

I was extraordinarily naïve in my hope, as we all now know. The federal courts, from the Supreme Court to local district courts, could, and did, and now certainly have, undergone massive ideological change in the years since 1985. In a triumvirate of cases decided by the Rehnquist Court in the early 1990s, Chief Justice William Rehnquist, joined by Justices Scalia and Kennedy and Thomas, sent unmistakable signals that the era of Southern school desegregation decrees was rapidly drawing to a close. "Out with *Brown* and *Green* and federal judicial supervision," they declared, in effect: "in with local school board prerogative, and local control."

Then, in an initially unrelated series of cases involving preferences in governmental contracting and employment, white plaintiffs began to argue that voluntary efforts by governmental authorities to ensure

racial diversity violated the Equal Protection Clause, whether their purpose was the malign one of preserving benefits for a favored race, or the ostensibly benign one of assuring that government contracts or government employment, long exclusively, or disproportionally, reserved for white citizens, must be distributed more broadly. In 1989, in *City of Richmond v. J.A. Croson Co.*, that skeptical view of all race-conscious government decision making commanded, for the first time, a majority of the Court. Justice Sandra Day O'Connor writing for five, held that the City of Richmond's racial set-aside provision to assure some fraction of non-white subcontractors would be included in on a Richmond, Virginia jail construction project,. was unconstitutional.[6] Yet even as she struck down that City ordinance, Justice O'Connor suggested that race-conscious governmental actions were not always unconstitutional, and she reiterated her point six years later in another affirmative action case involving a federal contract for road construction along Colorado highways. In *Adarand Constructors, Inc. v. Pena,* decided 5-to-4 in 1995, Justice O'Connor wrote:

> *The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it . . . . When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the 'marrow tailoring' test the Court has set out in previous cases . . . .* [decided under the Equal Protection Clause]. [7]

When the Court in 2003 finally shifted it attention from contracting or public employment cases to higher education – specifically, to the widespread admissions practice of affirmatively considering race in making admissions decisions to law schools, Justice O'Connor against wrote the crucial opinion for the majority. This time, however, rather than striking down race-conscious state action, she and four colleagues, upheld the University of Michigan Law School's consideration of race as one factor in its admissions. As she wrote in *Grutter v. Bollinger*:

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[6] 448 U.S. 448 (1980).
[7] 515 U.S. 200, 227 (1995).

We first wish to dispel the notion that the Law School's argument has been foreclosed, either expressly or implicitly, by our affirmative-action cases . . . It is true that some language in those opinions might be read to suggest that remedying past discrimination is the only permissible justification for race-based governmental action. . . . But we have never held that the only governmental use of race . . . is remedying past discrimination. Nor, since Bakke, have we directly addressed the use of race in the context of public higher education. Today, we hold that the Law School has a compelling interest in attaining a diverse student body.

The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer. The Law School's assessment that diversity will, in fact, yield educational benefits is substantiated by respondents and their amici. Our scrutiny of the interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university. . . . .

The Law School's claim of a compelling interest is further bolstered by its amici, who point to the educational benefits that flow from student body diversity. In addition to the expert studies and reports entered into evidence at trial, numerous studies show that student body diversity promotes learning outcomes, and "better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.[8]

All did not go Michigan's way on that day in late spring of 2003. The Court issued a companion decision, you may recall, addressing the undergraduate admissions process at the University of Michigan, and it went against the University, by another 5-to-4 majority in which Justice O'Connor joined, but did not write. Chief Justice Rehnquist condemned the undergraduate process for employing a fixed, numerical weight or

[8] 539 U.S. 306, 328-30 (2003).

preference for all minority applicants that did not vary based upon their other characteristics or circumstances.[9]

Reading the two cases, *Grutter* and *Gratz,* together, the Court had decided that institutions of higher education could, take race into account in their admissions policies, in part to assure racial diversity in their student bodies, so long as they did not use methods that were rigid and inflexible. The obvious question remained: what do *Grutter* and *Gratz* mean for elementary and secondary school districts? Could Southern school boards, for example, continue to assign children to schools based, on race, to assure the very diversity that the *Grutter* Court had upheld at Michigan Law School – even after they had completely satisfied judicially compelled desegregation orders under *Brown*?

One logical response was, of course they can. If it is permissible to hand out seats to a selective law school on the basis, in part, of race – a zero sum game in which many apply but only a select few are chosen, through a competitive process in which Michigan purports to award admission only to the most competitive among its applicants -- then surely it is permissible for a local school board to take race into account as works to create diversity in a fourth grade classroom on Elm Street– a competition in which are no winners and losers, since every single child is guaranteed a teacher, a desk in the classroom, a similar curriculum, and where student assignments are not based on merit, or any competitive process.

Yet two cases arose in Louisville and Seattle, challenging such voluntary diversity plans. Those cases arrived at a newly constituted Supreme Court in 2007. Gone were Justice O'Connor and Chief Justice Rehnquist, replaced by Justice Samuel Alito, and a new Chief Justice, John Roberts. Together Roberts, Scalia, Thomas, and Alito, joined in part by Justice Anthony Kennedy, struck down voluntary integration plans crafted by the Louisville and the Seattle school boards, that were meant to assure the racially diverse student bodies that *Grutter* had declared, only 4 years earlier, a constitutionally compelling state interest. .[10]

[9] Gratz v. Bollinger, 539 U.S. 244 (2003).
[10] Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007).

The Court could not find a majority for any rationale, although five were prepared, for different reasons, to invalidate the school districts' plans. A plurality of four, speaking through Chief Justice Roberts appeared to suggest that ANY race-conscious local policy, not crafted to undo prior, proven discrimination, was unconstitutional.' In my view, Chief Justice Robert's opinion for the four constitutes a stunningly, willfully perverse reading of *Brown* and all that follows. It is directly contrary to the dicta in *Swann*, we cited earlier, which was written by an earlier Chief Justice, Warren Burger, never especially considered as a radical, who wrote for all of his brethren, as we heard earlier, that "*School authorities are traditionally charged with broad power to formulate and implement educational policy, and might well conclude, for example, that, in order to prepare students to live in a pluralistic society, each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities.*"

The 2007 Roberts opinion was also contrary to the Rehnquist' Court justification, put forward in his 1990s decisions,, for curbing most continuing judicial supervision of Southern school districts: that deferring to local school board decisions was of paramount concern, virtually a constitutional necessity. Chief Justice Roberts found not a trace of irony, in declaring, in 2007, that School Boards that act with the undisputed aim of perpetuating the promise of *Brown*, by bring children together across racial lines, to learn from each other, violates the very Equal Protection Clause invoked by Earl Warren in *Brown*.

Justice Kennedy provided the fifth and crucial vote to strike down the Louisville and Seattle assignment policies, yet he took substantial issue with the Roberts plurality. While Justice Kennedy did NOT approve of assigning individual children to a particular school because of their race, even to assure diversity, he did declare that"

In the administration of public schools by the state and local authorities it is permissible to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body, one aspect of which is its racial composition. [S]chool authorities are . . . free to

devise race-conscious measures to address the problem in a general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race.

School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race. These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race. . . .

Executive and legislative branches, which for generations now have considered these types of policies and procedures, should be permitted to employ them with candor and with confidence that a constitutional violation does not occur whenever a decision maker considers the impact a given approach might have on students of different races. Assigning to each student a personal designation according to a crude system of individual racial classifications is quite a different matter; and the legal analysis changes accordingly.[11]

The Supreme Court jurisprudence of *Brown*, therefore, now hangs by a single thread, Justice Anthony Kennedy's enigmatic concurring opinion the only present judicial impediment to a wholesale revocation of race-conscious student assignment

Yet Providence seems to enjoy a good joke, and all of us must now wait upon a skinny former constitutional law professor from the University of Chicago to reset, perhaps, the current Supreme Court balance in future days and years.

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[11] Id., 551 U.S. at (Kennedy, J., concurring).

V. The Contemporary Scene in Charlotte/Mecklenburg and Wake County

Even as all this Supreme Court disputation was in process in the stratosphere, on the ground, in school districts across the South, at first gradually, then with increasing speed, the conservative tide of Rehnquist and Robert and Scalia jurisprudence has come to predominate, and the educational fabric created by *Swann* and *Green* has begun to unravel. Racially identifiable public schooling, so long a feature of the Northeast and North Central states, has returned to much of my native South.

I want to focus now on Charlotte/Mecklenburg and Wake County, the state's two largest school districts and among the largest 20 in the nation (according to, forgive me, Wikipedia).

The last thirty years experience in Charlotte schools has mirrored the constitutional changes I have just described in Supreme Court jurisprudence. Home base of the *Swann* decision, the Charlotte/Mecklenburg system in the mid to late 1970s engaged in perhaps the most far-reaching school desegregation efforts of any system in the nation. It would have been interesting to resurrect Horace Mann and Calvin Wiley and led them to CMS, as the district is often called, to see what their advocacy had wrought, in ways almost certainly unimaginable to them 130 years earlier, as countywide buses rolled through city and countryside to bring children together across racial and socioeconomic lines.

Yet in the 1990s, as many parents black and white began to grumble about the burdens their children bore under the assignment system, CMS moved to greater reliance on 'magnet schools,' schools designed to offer special educational programs and emphases – mathematics and science, arts, other specialties -- that would draw parents and children to them like iron filings, prompting them voluntarily to take longer daily bus trips in the belief that the special features of these magnet schools would be worthwhile. The school administrators kept a keen eye on the racial balance in these schools, so that magnets could use limited "choice" by willing parents to assure continuing racial diversity.

In the late 1990s, however, a white CMS parent, William Capacchione, whose child had been denied entrance to a magnet school because her presence would have unbalanced the racial diversity, sued in federal

court, urging that consideration of the students' race violated her Equal Protection Clause rights. The CMS school district responded that it was still acting under the court-ordered desegregation decree in *Swann*, which made race-conscious student assignment policies compulsory. Capacchione replied that the era of court ordered supervision in *Swann* was, or should be declared over, that CMS had long ago met its constitutional obligation to disestablish its dual system, and that under the developing jurisprudence of *Croson* and *Adarand*, race-conscious state action NOT undertaken for the purpose of remedying prior discrimination was unconstitutional.

I could easily devote an entire CLE program to the Capacchione case. Suffice it to say that a district judge eventually agreed with Mr. Capacchione that: (1) it was time to declare that the Charlotte/Mecklenburg district had become "unitary," and that it would no longer need to act pursuant to federal judicial supervision. Moreover, while it was now free to make its own choice, the district court concluded; (2) the school board count not continue making any race-conscious student assignment choices, since that would violate the Equal Protection Clause. The very efforts that yesterday had been constitutionally compelled would tomorrow be constitutionally forbidden.

A panel of the Fourth Circuit reversed, both on the finding that CMS had completed its remedial obligations under *Swann* and on its Equal Protection analysis, but that panel decision was itself subsequently vacated by the full en banc Fourth Circuit, which in 2001 largely reaffirmed the district court's original decree. The Supreme Court, acting two years before *Grutter* was decided, denied certiorari and allowed the CMS decision stand.

While this tumult of litigation was ensuing, the CMS School Board decided in the year 2000 to abandon its magnet program and its mandatory assignments, and instead to opt for a new "home school guarantee" plan, based on a preference for assigning students to the schools nearest their homes. Since Mecklenburg County, like most counties nationwide, has residential communities that are still largely racially segregated or at least identifiable, and even more so, since those communities are economically segregated (with high income, middle income, and lower income neighborhoods), some objected that this new plan,

implemented in 2002-03, would lead to the rapid resegregation of CMS schools by race and class. The School Board responded that students would continue to have the option to select schools beyond their home school, affording greater racial and socioeconomic diversity if desired.

What transpired, however, defied these protestations by the CMS board. In those suburban Charlotte districts that were largely white and middle or upper middle class, parents and children opted predominantly to remain in their 'home schools,' many of which became quickly overcrowded, operating at 105% or 110% capacity. In central Charlotte and western Charlotte's poorer, and predominantly African American and Latino neighborhoods, by contrast, many schools found themselves under enrolled, as some substantial fraction of parents opted to move their children elsewhere. So central city elementary, middle and high schools were operating at only70% or 75% capacity, while suburban schools were at 110% overcapacity.

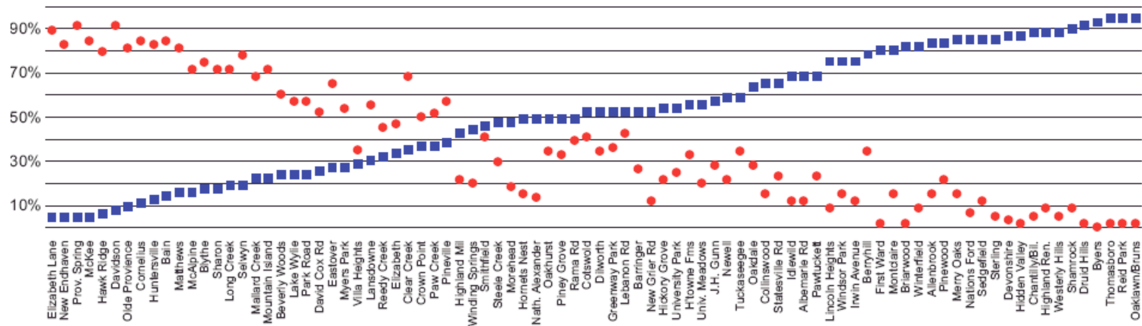
The School Board promised to compensate for the emergence of these high-poverty, racially concentrated schools, by designating the schools as Equity Plus II schools, providing them with additional resources. They would offer teacher and administrator incentives that would induce employees to remain in these schools, as well as special family support services, and reduced class sizes (very easy to promise, of course, since the schools were operating at 70 or 80% of capacity). They also promised special curriculum enhancements "to elevate and meet expectations of excellence," the plan read.

What ensued was a sharp collapse divide in academic performance that can be seen by my visual aid this morning, which looks at the distribution of students at CMS's 84 elementary schools by race in 2003-04, when the changes I have been describing were just underway.

[Show slide]

CMS Elementary Schools by Race and SES Concentration, 2003-4 Choices

Parent choices for fall 2003, by elementary school: ● = percent white; ■ = percent on subsidized lunch.



What appears, as you will see, is that along the axes, two different sets of figures form an irregular cross. Looking at the top left, we see dots indicating the percentage of students at each school who are white. Elizabeth Lane at the extreme left has a white student population of 90%. It is clear, looking left to right across the graph, is that the percentage of white students has already begun to vary widely in CMS elementary schools that two decades ago were racially balanced. While at least 11 elementary schools had white student populations between 80% and 90%, the dots on the far right side reveal that in at least 16 elementary schools where fewer than 10% of the students were white.

The real power of this graph, however, comes when we focus on the blue squares. Each square measures the percentage of students who are eligible for a federally subsidized school lunch, our best available proxy for family poverty. What the squares and circles, read together, reveal is that in not a single school with at least a 50% white student population were a majority of students eligible for subsidized lunches. By vivid contrast, in at least 16 schools where non-white student populations exceed 75%, had student populations where 90% or more were on subsidized lunch.

In other words, *all* of CMS's highest-poverty elementary schools in 2003-2004 were heavily non-white; and in schools in which at least 50% of the students were white, not a single one housed a majority of students who were from poor families.

I said CMS officials voiced the hope that, by attracting and retaining the best teachers in these high-poverty schools, educational declines could be staunched or reversed. Yet teachers, especially good teachers, have lots of options, and in CMS, in the second year of the new assignment plan, 2003-04, 38% of all teachers who taught in these Equity Plus schools left, compared with 16% in all other schools combined.

Professors Helen Ladd and Charles Clotfelter of Duke's Sanford Institute of Public Policy recently released the results of a careful study designed to address this very question. Reviewing statewide data, the researchers determined that in every grade, African American students in North Carolina were far more likely to be taught by novice teachers than were white students. For example, a typical African American seventh grader is 54% more likely to have a novice teacher in mathematics than is a white seventh grader, and 38 percent more likely to have a novice English teacher.

By 2006, when Judge Howard Manning, Jr., looked statewide at the performance of all North Carolina high school students, his attention was gripped the results in CMS. After an exhaustive analysis at performance in CMS high schools from 2002-2005, Judge Manning found that

The three year analysis also shows that there has been NO overall progress made in high school student achievement in CMS in the years 2002, 2003, and 2004. Black students remain constant ***at 60% below grade level in high school EOC tests*** *while White students remain constant at 23% below grade level in high school EOC tests. While there was some individual improvement in some high schools in 2004, much of this can probably be attributed to absence of low scores normally generated by U.S. History and ELPS EOC tests.*

Judge Manning's characteristically blunt conclusion:

The most appropriate way for the Court to describe what is going on academically at CMS's bottom "8" high schools is ***academic genocide*** **for** *the at-risk, low income children.* [12]

In recent years, a new Superintendent, Peter Gorman, has worked very hard and in apparent good faith to changes these outcomes. Yet his success has been limited. Is it possible that he is attempting an all but impossible task?

I told you earlier that we in Connecticut's school case in the 1980s had relied on a 40-year body of research that began with James Coleman's famous study in the mid 1960s, finding a relationship between high-poverty schooling and lower performance. Do those "headwinds" that appear to work strong against the achievement of students in high poverty schools continue to exist, or have educators learned something since the 1960s about how to mitigate the impact of racial and socioeconomic isolation? We are fortunate to have the benefit of a very recent, comprehensive look at North Carolina's high schools and the relationship between resource allocation and educational outcomes. The report was conducted by two of North Carolina's finest educational researcher, Charles Thompson of East Carolina University, and Gary Henry of UNC-Chapel Hill, at the request of the Easley Administration. It was designed to address two interrelated questions: whether low-performing North Carolina high schools could substantially improve their students' academic performance by using district financial resources more efficiently, and whether high schools across the state were getting the most out of the resources they had. Entitled "North Carolina High School Resource Allocation Study: Final Report, February 2008," the Henry/Thompson report it is important reading for anyone concerned about the future of North Carolina's public schools, especially as they drift toward greater racial and socioeconomic isolation.

What the researchers found, from their meticulous examination of factors that can make a difference in academic performance is that, not surprisingly, a student's own skills and prior performance re the best measure of future performance, and that their own mathematics skills are a particularly important factor in their future learning. Resources that are spent on regular classroom instruction, especially by better teachers,

[12] Report from the Court, The High School Problem, Hoke County Bd. Of Educ. v. *State (Leandro II)*, No. 95CVS 1158 (May 24, 2005) at 21, 23.

also made an important difference. So far, just what you might expect. The next finding, however, echoes powerfully, in North Carolina in the first decade of the 21st century, what James Coleman and subsequent researchers begin finding fifty years ago, in the 1960s. Let me quote:

Even after taking into account these effect of individual student characteristics, higher concentrations of poor and minority students within a high school reduce average EOC scores. In other words, low-income students perform worse on EOC exams when they are in schools with high percentages of other low-income students. . . . The combined effects of students' individual characteristics and the overall composition of a high school's student population are extremely powerful influences on the average level of academic performance in that school.[13]

Should North Carolina school districts be spending more money of these high-poverty students? One surprising finding was that at present, North Carolina is already spending, on average, considerably MORE on lower-income students than on others. In 2005-06, the quarter of NC high schools with the highest percentage of low-income students received $7,930 per student, compared with $6400 per student -- $15000 per student less – in the 25% of North Carolina high schools with the lowest percentage of low-income students.[14]

Henry & Thompson naturally urged that North Carolina school authorities drive financial resources toward regular classroom instruction, which they had found to be the most effective school input available. Yet they cautioned that the evidence in their report "*does not mean that increases in spending on regular classroom instruction would definitely improve students' scores. Nor does it mean that increasing spending on regular instruction is the only way or the most efficient way to improve student outcomes.*"[15] In their summary, they conclude that "*local school districts have the best chance for improving academic performance in North Carolina's high schools by undertaking the following actions. [first] reducing [the] concentration of students with low entering skills and from low-income families, [second] increasing*

[13] Henry & Thompson Report, at ii.
[14] *Id*. at iii.
[15] *Id*.

spending on regular instruction, [third] improving teacher quality, and [fourth] improving principal leadership."[16]

At least one school district in North Carolina had, long before the publication of this 2008 report, already moved to reduce the number of high-poverty schools. The district is, as many of you know, Wake County, which managed to avoid the racial "affirmative action" litigation fate of CMS throughout the 1990s and 2000s by shrewdly (or fortuitously) discarding race as an express factor in student assignment in the late 1990s. Instead, as many of you know, Wake also adopted and adapted the insights of Coleman, Jencks and others by assigning Wake County children to schools based on two key criteria beyond residential location: first, – on family poverty, attempting to assure that no more than 40% of the students in any school would come from low-income families; and second, that no more than 25% of the students in any school would be performing below grade level. In other words, Wake County committed itself self-consciously to Horace Mann's ideal of "common schools," designed to bring together children from all socioeconomic backgrounds,, and they likewise assured parents that the percentage of low-performing students in their child's school would be capped, so there would be no low-performing school, no "academic genocide" underway in Wake County.

The system has remained in place for over a decade. For most of that time, it has been widely hailed as one of the nation's most successful large districts, with good schools countywide, higher test score results for both whites and non-whites than most other urban systems – indeed the mirror opposite of CMS. When Judge Manning issued a report in 2004-05 he put 44 high schools on the list of the lowest performing in the State, all with composite scores in which 45% or more of the student were below State basic achievement norms. Nine of the 44 were in CMS district; none were from Wake County. Between 1998 and 2003, under the leadership of Superintendent Bill McNeill, the achievement rate among African American high school students on EOC composite tests improved by 18 percentage points, and the district as a whole achieved 91 percent passage rates.

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[16] *Id*. at vi.

Yet Wake struggled with explosive growth over the decade of the 2000s, and with some real stretching of the original promises, as first a handful, and then still larger numbers of schools moved above the 40% poverty ceiling. By 2006-07, some 35 of the system's 146 schools exceeded the 40% poverty ceiling, with 9 above 60% poverty. Moreover, the intense focus on lower-performing and minority students that had been part of the so-called "Goal 2003" effort was not sustained during the subsequent five years. In 2008-09, for the first time, to widespread surprise,

There have also been, as we all know, serious political challenges, which now appear to be threatening imminent change in this policy. Its critics have charged that Wake's present assignment system requires far too many changes in student assignments year-by-year in order to keep the schools in balance. Many parents are unhappy when their children are shunted from school to school over several years. Critics have also alleged that the Wake School Board's focus on "social engineering," as opposed to quality education in every school, is misplaced (as if their alternative plans were any less "social engineering."). Some parents have insisted that attendance at schools in their residential neighborhoods will be better for their children and better for other parents' children as well – with schools and teachers and afterschool opportunities all near to one's home.

. Two related school board developments – the move to year-round schools and the effort to mandatorily assign some children to year-round schools, drew sharp anger in many quarters, as parents saw schools interfering with their traditional patterns of summer vacations and related expectations.

In sum, for a variety of reasons, this past November saw the emergence of a political revolt that installed a new majority emerge on the Wake County School Board, pledging to end the current use of socioeconomic status and test score performance to balance the student populations of each school... Not especially shy, the majority moved has aggressively to assert its political control, displacing the former the chair, vice chair, reshaping committee assignments, and declaring that the present student assignment policy will soon be replaced by one favoring neighborhood schooling. Impediments have appeared. Many parents are happy with the current student assignment policies and have begun to organize against any changes. Other

parents continue to be are fond of magnet schools that allow their children, at the end of a long bus ride, to receive special or enhanced educational offerings. Moreover, a recent poll suggests that a far higher percentage of parents with children subjected to year round schools – over 90% -- are happy with those assignments. The final and most inescapable reality is that the continued in-migration of newcomers to Wake County and the national, state and metropolitan-wide economic decline give Wake County school board officials more administrative challenges, and fewer available resources, to work their transformation than they might have anticipated.

The new majority alleges that the recent decline in the scores of lower-income and minority Wake students on state standardized tests shows that all the diversity policy did was to hide the performance of these children amid their higher-income and higher-performing school mates. The counter argument is that Wake's poor and minority children did just fine – better than in almost any similar large urban system, until school officials took their eye off the improvement ball after Goal 2003. The counter argument is also that it seems unlikely that these children's performance will IMPROVE by being grouped together with other low-performing children in low-income and non-white neighborhoods.

I think back to my own observations in Hartford, where a rich state, with far smaller urban school districts, with dollars poured into Hartford on nearly a two-for-one basis favoring city schools and children, with the nation's leading educational experts, up from New Haven, down from Cambridge, trying every educational reform known to them – all with a benign superintendent and great state leadership. None of it worked. the While Superintendent Gorman is working earnestly in Charlotte to overcome the headwinds and disadvantages of CMS's high poverty concentrations, while the new Wake County majority assure questioners that targeted resources can suffice for the high-poverty, racially isolated schools that could well emerge in Raleigh soon, others caution, thinking of Professors Gary Henry and Charles Thompson careful study in 2008, Professors James Coleman and Christopher Jencks work from the 1960s and 1970s, and indeed, of Calvin Wiley in 1860:

All attempts . . . . To widen the breach between classes of citizens are as dangerous as efforts to excite slaves to insurrection.

Or as Justice Thurgood Marshall wrote in his dark dissent in the Detroit school case, *Milliken v. Bradley*, in 1974:

> *In the short run, it may seem to be the easier course to allow our great metropolitan areas to be divided up, each into two cities – one white, the other black – but it is a course, I predict, our people will ultimately regret.* [17]

The title of this talk has been "Common Schooling in the 21st Century: What Future for American Education?" For many well-informed educational experts and researchers around the nation, the choices that are will soon made and play out in Charlotte and in Raleigh North Carolina are the bellwethers for the future of common public schooling everywhere in this great nation. I suppose I'm old school enough to hope that the bright vision of *Brown* and *Green* and *Swann* will somehow prevail.

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