

# South Carolina Law Review

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Volume 51  
Issue 4 *ANNUAL SURVEY OF SOUTH CAROLINA  
LAW*

Article 9

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Summer 2000

## Beaufort County Board of Education v. Lighthouse Charter School Committee: Racial Balancing Provisions in South Carolina Charter Schools Act Flunks the Strict Scrutiny Test

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### Recommended Citation

Moore, John G. (2000) "Beaufort County Board of Education v. Lighthouse Charter School Committee: Racial Balancing Provisions in South Carolina Charter Schools Act Flunks the Strict Scrutiny Test," *South Carolina Law Review*: Vol. 51 : Iss. 4 , Article 9.

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Moore: Beaufort County Board of Education v. Lighthouse Charter School C  
**BEAUFORT COUNTY BOARD OF EDUCATION V.  
LIGHTHOUSE CHARTER SCHOOL COMMITTEE:  
RACIAL BALANCING PROVISION IN SOUTH  
CAROLINA CHARTER SCHOOLS ACT FLUNKS  
THE STRICT SCRUTINY TEST**

## I. INTRODUCTION

Since its enactment, South Carolina's Charter Schools Act of 1996<sup>1</sup> has frequently been criticized for its racial balancing requirement.<sup>2</sup> The balancing requirement dictates that "under no circumstances may a charter school enrollment differ from the racial composition of the school district by more than ten percent."<sup>3</sup> In *Beaufort County Board of Education v. Lighthouse Charter School Committee*<sup>4</sup> the South Carolina Supreme Court affirmed the Beaufort Board's denial of Lighthouse's charter school application for failure to conform to several requirements of the Act, but remanded the case for a ruling on the constitutionality of the racial balancing requirement.<sup>5</sup> In light of case law, including two recent decisions from the United States Court of Appeals for the Fourth Circuit,<sup>6</sup> the constitutionality of the racial balancing requirement, which must be examined under strict scrutiny, is called into doubt under the Equal Protection Clause.

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1. S.C. CODE ANN. §§ 59-40-10 to -190 (West Supp. 1999).

2. See, e.g., *Charter School Law Draws Fire: State Attorney General Says Racial Quota Set*, THE STATE (Columbia, S.C.), Apr. 8, 1997, at B3; *Charter Schools Stalled Until State Law Revised*, THE STATE (Columbia, S.C.), Sep. 16, 1997, at A8; Jason Davis, *S.C.'s Charter School Movement Dragged Down by Racial Issues*, THE STATE (Columbia, S.C.), July 17, 1997, at A13; Edward T. McMullen, *Quota Laws Keep Charter Schools from Offering Children Opportunity*, THE STATE (Columbia, S.C.), July 24, 1998, at A15; Lori D. Roberts, *Changes in Charter School Law Suggested*, THE STATE (Columbia, S.C.), Dec. 1, 1999, at B6; *What to Do if We Really Want Charter Schools*, THE STATE (Columbia, S.C.), June 2, 1999, at A10; *Why Close a Charter School Before it Opens?*, THE STATE (Columbia, S.C.), Apr. 29, 1997, at A8.

3. S.C. CODE ANN. § 59-40-50(B)(6) (West Supp. 1999).

4. 335 S.C. 230, 516 S.E.2d 655 (1999).

5. *Id.* at 241, 516 S.E.2d at 661. As this Note was going to press, the Beaufort County Circuit Court ruled that the racial proportionality requirement in the Charter School Act was unconstitutional. See *Beaufort County Bd. of Educ. v. Lighthouse Charter School Committee*, No. 97-CP-7-794 (S.C. Cir. Ct. May 8, 2000) (Order declaring Charter School Act unconstitutional). The court found the provision was not severable from the Act, and thus the entire act was unconstitutional. *Id.* at 7.

6. See *Eisenberg ex rel Eisenberg v. Montgomery County Pub. Sch.*, 197 F.3d 123 (4th Cir. 1999); *Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698 (4th Cir. 1999).

Part II of this Note reviews the history and criticism of the Act and examines a bill that would modify the racial balancing requirement.<sup>7</sup> Part II also describes the facts and procedural posture of *Lighthouse*, as well as tracks the development of the strict scrutiny standard of review for benign or remedial racial classifications. Part III analyzes the constitutionality of the Act, and Part IV concludes that racial diversity can and should be achieved without resorting to the unconstitutional use of racial quotas.

## II. BACKGROUND

### A. *The South Carolina Charter Schools Act*

In 1996, the General Assembly of South Carolina enacted legislation making South Carolina the twenty-fourth state to legislatively permit the institution of charter schools.<sup>8</sup> The statute defines a charter school as “a public, nonsectarian, nonreligious, nonhome-based, nonprofit corporation forming a school which operates within a public school district, but is accountable to the local school board of trustees of that district, which grants its charter.”<sup>9</sup> The goal is to “provide an opportunity for the organization and operation of flexible, innovative, and substantially deregulated public schools as part of its effort to reform and improve the state’s educational system.”<sup>10</sup> Apparently concerned about possible negative effects, the General Assembly admonished that it “will not allow greater flexibility and deregulation to result in segregation of students by race, gender, ethnic background, income, disability, or religious belief, whether in public charter schools or in public noncharter schools.”<sup>11</sup> A result of this concern was manifested in the racial balancing requirement.<sup>12</sup> As suggested by the statute and construed in *Lighthouse*, evidence of compliance with this and other requirements is required at the application stage.<sup>13</sup>

One commentator has criticized the “numerous restrictions”<sup>14</sup> in South Carolina’s Act and has predicted that the hurdles would “sabotage the possibility of market-like competition by creating high entrance costs for

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7. H.R. 4336, 113th Leg., 1st Sess. (S.C. 2000) (amended May 4, 2000).

8. Recent Legislation, *School Reform—Charter Schools—Connecticut and South Carolina Pass Charter School Statutes—CONN. GEN. STAT. §§ 10-66AA–FF (1997); S.C. CODE ANN. §§ 59-40-10 to -190 (Law Co-op. Supp. 1996)*, 110 HARV. L. REV. 1651, 1651 (1997) (identifying South Carolina as the twenty-fourth state to pass such an act).

9. S.C. CODE ANN. §§ 59-40-40 (West Supp. 1999).

10. 1996 S.C. Acts 447.

11. *Id.*

12. S.C. CODE ANN. § 59-40-50(B)(6) (West Supp. 1999).

13. *Id.* at § 59-40-70(C); *Beaufort County Bd. of Educ. v. Lighthouse Charter Sch. Comm.*, 335 S.C. 230, 236, 516 S.E.2d. 655, 658 (1999).

14. Recent Legislation, *supra* note 8, at 1651, 1652.

charter schools.”<sup>15</sup> Indeed, by late April 1998, only three charter schools had opened in South Carolina, and the Lighthouse application had been rejected.<sup>16</sup> South Carolina’s Superintendent of Education, Barbara Nielson, blamed local school boards’ resistance to change, while school boards blamed the Act for the small number of charter schools created.<sup>17</sup> Newspaper editorials praised the charter school movement but criticized South Carolina’s restricted Act for the small number of charter schools created.<sup>18</sup> Also, the constitutionality of the racial balancing requirement was called into question in opinions issued by the South Carolina Attorney General’s Office.<sup>19</sup> The Attorney General later intervened in *Lighthouse* to test the constitutionality of the racial balancing provision.<sup>20</sup>

An effort to reform South Carolina’s Charter School Act is currently underway. The House recently passed a bill<sup>21</sup> that sought to eliminate the racial balancing requirement of the Act,<sup>22</sup> add a requirement that a charter school application “provide assurance that the school does not conflict with any school district desegregation plan or order in effect,”<sup>23</sup> and retain the existing requirement that a charter school “adhere to the same . . . civil rights . . . requirements as are applied to public schools.”<sup>24</sup> The bill also sought to change other aspects of the Charter Schools Act and allow students to transfer to charter schools outside their home districts.<sup>25</sup> The primary sponsor of the bill, Representative Bobby Harrell, has commented that “[w]e’ve got to provide parents with more opportunities for their children. Charter schools are an excellent opportunity, but we only have nine of them because our law is too burdensome.”<sup>26</sup>

The House version of the bill was substantially amended by the Senate. The Senate’s version of the bill sought to modify the Act’s existing racial balancing enrollment requirements from ten percent to fifteen percent, allow districts to approve charter schools that had made their best efforts to meet the racial balancing guidelines, and insert a legislative finding “that diversity is an

15. *Id.* at 1654.

16. *Few Charter Schools Open 2 Years After Law Passed*, THE HERALD (Rock Hill, S.C.), Apr. 21, 1998, at 9B.

17. Alan Richard, *Charter Schools a Choice not Taken: S.C. Passed Law in ‘96, but Found Few Takers*, THE STATE (Columbia, SC), Apr. 26, 1998, at A1.

18. See *supra* note 2.

19. 1997 Op. S.C. Att’y Gen. 1997 WL 323797; 1997 Op. S.C. Att’y Gen. 1997 WL 255953; 1996 Op. S.C. Att’y Gen. 1996 WL 549569.

20. *Lighthouse*, 335 S.C. at 240, 516 S.E.2d. at 660.

21. H.R. 4336, 113th Leg., 1st Sess. (S.C. 2000) (amended May 4, 2000).

22. S.C. CODE ANN. § 59-40-50(B)(7) (West Supp. 1999).

23. § 59-40-60(F)(8).

24. § 59-40-50(B)(1).

25. § 59-40-145.

26. Bill Robinson, *House OKs New Charter School Bill*, THE STATE (Columbia, S.C.), Feb. 17, 2000, at A1.

educational benefit . . . that promotes racial tolerance, improves academic performance, and breaks down barriers among individuals of different races.”<sup>27</sup> The House recently rejected these amendments, however, and reamended the bill to comport with the earlier House version abolishing the racial balancing requirement all together.<sup>28</sup> At the end of the 2000 session, the bill was in a joint conference committee.<sup>29</sup>

B. Beaufort County Board of Education v. Lighthouse Charter School Committee

Lighthouse Charter School Committee proposed a charter school on Hilton Head Island that would operate year-round for eight hours per day and serve about 400 students from Kindergarten to eighth grade.<sup>30</sup> The Committee’s application to the Beaufort County Board of Education was denied for failure to comply with the racial balancing requirement of South Carolina’s Charter School Act.<sup>31</sup> Lighthouse also failed to obtain approval from the United States Department of Education Office of Civil Rights, which the Beaufort Board found was required by the school district’s 1970 desegregation agreement.<sup>32</sup> Furthermore, the Beaufort Board concluded that Lighthouse would be a “racially identifiable” school, thereby violating the terms of Beaufort’s desegregation agreement.<sup>33</sup> Lighthouse appealed to the South Carolina Board of Education which reversed the local board, finding that the health, safety, and civil rights requirements of the Act need not be met before approval of an application.<sup>34</sup>

The circuit court reversed the state board and held that the requirements must be met in advance.<sup>35</sup> The court declined to consider Attorney General Condon’s challenge to the constitutionality of the racial requirement under the Equal Protection Clause of the Fourteenth Amendment.<sup>36</sup> The South Carolina Supreme Court affirmed the circuit court, finding that the “plain language” of the statute “provides that denial of an application may be predicated on failure

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27. H.R. 4336, 113th Leg., 1st Sess. (S.C. 2000) (amended April 26, 2000).

28. See H.R. 4336, 113th Leg., 1st Sess. (S.C. 2000) (amended May 4, 2000).

29. See *id.* For a discussion of recent developments surrounding the proposed Bill, see Jim Davenport, *Progress Slow on Charter School Changes*, THE STATE (Columbia, S.C.), May 19, 2000, at B3; Jennifer Holland, *Judge Rules Charter Act for S.C. Unconstitutional*, THE STATE (Columbia, S.C.), May 12, 2000, at B3; Ken Knelly, *Charter Ruling Sheds Light on School Reform*, THE STATE (Columbia, S.C.), May 13 2000, at B3.

30. *Lighthouse*, 335 S.C. at 236, 516 S.E.2d at 658.

31. *Id.*

32. *Id.* at 237, 516 S.E.2d at 659.

33. *Id.*

34. *Id.* at 236, 516 S.E.2d at 658.

35. *Id.*

36. *Id.* at 236, 241, 516 S.E.2d at 658, 661.

to comply with § 59-40-50.”<sup>37</sup> The court found that there was no evidence offered to support the Beaufort board’s contention that Lighthouse would be a “racially identifiable” school.<sup>38</sup> It did find, however, that Lighthouse’s noncompliance with the desegregation agreement supported the finding of an “adverse effect” on other students in the district.<sup>39</sup> This finding was based on the observation that “at a minimum, the school district would be required to expend funds defending Lighthouse’s non-compliance.”<sup>40</sup> The “adverse effect” constituted grounds for denial under another section of the Act.<sup>41</sup> Citing judicial economy, the court remanded the case for a ruling on the Equal Protection challenge to the racial balancing requirements in section 59-40-50 so that Lighthouse would know whether it must comply with this requirement should it reapply.<sup>42</sup>

### C. *United States Supreme Court Decisions and the Applicability of Strict Scrutiny*

The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution mandates that no state may deny any person “the equal protection of the laws.”<sup>43</sup> When a state classifies its citizens on the basis of race, such classification is subject to judicial review under the “strict scrutiny” standard.<sup>44</sup> Under the strict scrutiny standard, a racial classification must (1) serve a compelling government interest and (2) be narrowly tailored to achieve that interest.<sup>45</sup> In the advent of affirmative action programs, recent United States Supreme Court decisions have held that strict scrutiny also applies to classifications designed to be “benign” or “remedial” in nature by helping disadvantaged groups.<sup>46</sup> In *Regents of the University of California v. Bakke*<sup>47</sup> the Supreme Court, in a plurality decision, found a minority admissions program at the Medical School of the University of California at Davis unconstitutional.<sup>48</sup> The admissions program reserved sixteen out of one-

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37. *Id.* at 236, 516 S.E.2d at 658 (“Section 59-40-70(C) specifically states that an application may be denied if ‘the application does not meet the requirements specified in § 59-40-50 or 59-40-60.’”).

38. *Id.* at 240, 516 S.E.2d at 660.

39. *Id.*

40. *Id.*

41. *Id.*; see S.C. CODE ANN. § 59-40-70(C) (Law. Co-op Supp. 1996).

42. *Lighthouse*, 335 S.C. at 241, 516 S.E.2d at 661.

43. U.S. CONST. amend. XIV, § 1.

44. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

45. *Id.*

46. See *infra* notes 51-76 and accompanying text.

47. 438 U.S. 265 (1978).

48. *Id.* at 320.

hundred positions in the class for racial minorities.<sup>49</sup> Furthermore, minority applications were reviewed by a separate committee and were not subject to the grade point average minimum required of other applicants.<sup>50</sup> Justice Powell approved of the lower court's application of strict scrutiny and found that "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination."<sup>51</sup> Justice Powell distinguished this case from other desegregation or affirmative action cases in which past discrimination was found.<sup>52</sup> Four justices, however, would have applied a more relaxed standard because they believed the admissions policy implicated no "fundamental right"<sup>53</sup> and served a remedial purpose.<sup>54</sup>

In *Wygant v. Jackson Board of Education*<sup>55</sup> the Supreme Court examined a teacher layoff policy.<sup>56</sup> The policy dictated that in the event of layoffs, "at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff."<sup>57</sup> The policy was designed to help ease racial tension in the community and to ensure the availability of role models for minority children.<sup>58</sup> Justice Powell, writing the plurality opinion, applied the strict scrutiny test and found that while a remedial race-conscious policy by a public employer would be valid to correct factually demonstrated prior de jure discrimination, it was not valid when used to correct societal discrimination.<sup>59</sup> Justice Powell reasoned that there was "no logical stopping point" for applying this policy.<sup>60</sup> On the other hand, Justices Marshall, Brennan, and Blackmun believed:

In this case, it should not matter which test the Court applies. What is most important, under any approach to the constitutional analysis, is that a reviewing court genuinely consider the circumstances of the provision at issue. The history . . . demonstrate[s] that this provision would pass constitutional muster, no matter which standard the Court should adopt.<sup>61</sup>

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49. *Id.* at 275.

50. *Id.*

51. *Id.* at 291.

52. *Id.* at 300-01.

53. *Id.* at 357 (Brennan, Marshall, White, & Blackmun, JJ., concurring in part and dissenting in part).

54. *Id.* at 359

55. 476 U.S. 267 (1986).

56. *Id.* at 270.

57. *Id.*

58. *Id.* at 270, 272.

59. *Id.* at 276

60. *Id.* at 275.

61. *Id.* at 303 (Marshall, J., dissenting).

In a lone dissenting opinion, Justice Stevens also advocated a case-by-case approach and did not suggest a clear standard of review.<sup>62</sup> He would have upheld the policy because it served the public interest:

In the context of public education, it is quite obvious that a school board may reasonably conclude that an integrated faculty will be able to provide benefits to the student body that could not be provided by an all- white, or nearly all-white, faculty. For one of the most important lessons that the American public schools teach is that the diverse ethnic, cultural, and national backgrounds that have been brought together in our famous "melting pot" do not identify essential differences among the human beings that inhabit our land. It is one thing for a white child to be taught by a white teacher that color, like beauty, is only "skin deep"; it is far more convincing to experience that truth on a day-to-day basis during the routine, ongoing learning process.<sup>63</sup>

In *Richmond v. J.A. Croson Co.*<sup>64</sup> the Supreme Court invalidated a city ordinance that provided a thirty percent set-aside of contract work to minority owned subcontractors working on city construction contracts.<sup>65</sup> In that case, as the dissent noted, "for the first time, a majority of this Court has adopted strict scrutiny as its standard of Equal Protection Clause review of race-conscious remedial measures."<sup>66</sup> Justice Stevens again declined to endorse a particular standard of review.<sup>67</sup>

However, in *Metro Broadcasting, Inc. v. FCC*<sup>68</sup> the Court ruled that strict scrutiny did not apply to FCC policies giving preference to applications for new broadcasting stations and licenses which were submitted by minorities.<sup>69</sup> The majority held that

benign race-conscious measures mandated by Congress—even if those measures are not "remedial" in the sense of being designed to compensate victims of past governmental or societal discrimination—are constitutionally permissible to the extent that they serve important

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62. *Id.* at 313 (Stevens, J., dissenting).

63. *Id.*

64. 488 U.S. 469 (1989).

65. *Id.* at 477.

66. *Id.* at 551 (Marshall, J., dissenting).

67. *Id.* at 514 (Stevens, J., concurring in part and concurring in the judgment).

68. 497 U.S. 547 (1990).

69. *Id.* at 552.



governmental objectives within the power of Congress and are substantially related to achievement of those objectives.<sup>70</sup>

In the dissent, Justices Kennedy and Scalia criticized the majority for adopting a less clear standard “which until now only Justice Stevens had advanced.”<sup>71</sup>

However, the Court changed its stance by overruling *Metro Broadcasting in Adarand Constructors, Inc. v. Pena*.<sup>72</sup> The Court held “that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.”<sup>73</sup> Although the case was decided in the context of federal government contracting, its broad language seems to allow for no exceptions. Indeed, lower courts, including the Fourth Circuit Court of Appeals, have cited *Adarand* with approval in applying the strict scrutiny standard to cases involving racial classifications in the educational context.<sup>74</sup>

Thus, in light of *Adarand*, the racial balancing clause of South Carolina’s Charter School Act must serve a compelling state interest and be narrowly tailored in order to pass constitutional muster.

## I. ANALYSIS

### D. *Compelling State Interest?*

The racial balancing provision of the South Carolina Charter Schools Act was apparently included to avoid “segregation of students by race.”<sup>75</sup> Eliminating past de jure segregation but not de facto segregation<sup>76</sup> may clearly be a compelling state interest that can justify the use of race-conscious student assignment policies by school districts.<sup>77</sup> Nevertheless, the remedy must not include neighboring districts in which there is not a finding of past de jure segregation.<sup>78</sup> Furthermore, such a remedy may not be reemployed to reverse

70. *Id.* at 564-65 (footnote omitted).

71. *Id.* at 632 (Kennedy, J., dissenting).

72. 515 U.S. 200 (1995).

73. *Id.* at 227.

74. See, e.g., *Eisenberg ex rel Eisenberg v. Montgomery County Pub. Sch.*, 197 F.3d 123 (4th Cir. 1999); *Tuttle v. Arlington City Sch. Bd.*, 195 F.3d 698 (4th Cir. 1999).

75. 1996 S.C. Acts 447.

76. De facto segregation is “[s]egregation which is inadvertent and without assistance of school authorities and not caused by any state action, but rather by social, economic and other determinates.” BLACK’S LAW DICTIONARY 1362 (7th ed. 1999).

77. *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189 (1973).

78. *Milliken v. Bradley*, 418 U.S. 717, 745 (1974) (indicating that de jure segregation in a Detroit school district did not justify remedy that involved suburbs without a showing of “interdistrict segregation directly caused by the constitutional violation.”).

resegregation by private residential choices, such as “white flight,” once a district has achieved unitary status.<sup>79</sup> The remedy is also no longer appropriate when “the vestiges of past discrimination ha[ve] been eliminated to the extent practicable.”<sup>80</sup> In fact, a district court may end the remedy in stages once certain aspects of past de jure segregation are cured.<sup>81</sup> Indeed, the current trend is toward the dismantling of desegregation plans.<sup>82</sup>

Like many districts in South Carolina,<sup>83</sup> Beaufort is already under a desegregation agreement.<sup>84</sup> Under the agreement, prior approval of the Department of Education Office of Civil Rights is necessary for new school facilities.<sup>85</sup> In *Lighthouse*, the South Carolina Supreme Court extended this requirement to approval of charter schools.<sup>86</sup> Thus, a procedure to police the possible segregation, if any, of the proposed charter school in *Lighthouse* is already in place. Nevertheless, the Act does not provide exceptions to the racial balancing requirement for districts already under desegregation remedies. Thus, the Act’s racial balancing provision seems redundant as to these districts. It is unlikely that this sort of duplicative legislative remedial measure can serve a compelling state interest.

Another compelling state interest that has been asserted in other jurisdictions is diversity of the student body.<sup>87</sup> Social scientists, laymen, and even Congress recognize the various social benefits of culturally and racially diverse settings in schools.<sup>88</sup> The Court’s decision in *Regents of the University*

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De jure segregation is “[s]egregation that is permitted [or mandated] by law.” BLACK’S LAW DICTIONARY 1362 (7th ed. 1999).

79. *Missouri v. Jenkins*, 515 U.S. 70, 92 (1995) (stating that Kansas City Schools, in trying to remedy past de jure segregation, tried to reverse “white flight” in its school system by improving schools and opening enrollment to students in suburban districts, and the Court found that “in effect, the District Court has devised a remedy to accomplish indirectly what it lacks the authority to mandate directly; the interdistrict transfer of students.”).

80. *Board of Educ. v. Dowell*, 498 U.S. 237, 250 (1991). On remand, the *Lighthouse* trial court dismissed the argument that the racial balancing provision was needed due to past de jure discrimination. *Beaufort County Bd. of Educ. v. Lighthouse Charter School Committee*, No. 97-CP-7-794, 7 (S.C. Cir. Ct. May 8, 2000) (Order declaring Charter School Act unconstitutional). The court stated that “while past discrimination may be a compelling reason to discriminate on the basis of race, this provision applies regardless of the current status of a school district.” *Id.*

81. *Freeman v. Pitts*, 503 U.S. 467, 471 (1992).

82. *See, eg.*, *Capacchione v. Charlotte-Mecklenburg Schools*, 57 F. Supp.2d 288 (W.D.N.C. 1999) (ending court-ordered desegregation of Charlotte schools and finding voluntary racial quotas for a magnet school unconstitutional after district had achieved unitary status).

83. *Robinson*, *supra* note 26 (citing attorney for S.C. School Boards Association stating “82 of South Carolina’s 86 districts are under some kind of desegregation order”).

84. *Lighthouse*, 335 S.C. at 237, 516 S.E.2d. at 659 (1999).

85. *Id.*

86. *Id.*

87. *See infra* notes 93-107.

88. *Joanna R. Zahler, Lessons in Humanity: Diversity as a Compelling State Interest in Public Education*, 40 B.C. L. REV. 995 nn.195-258 & 285-342 (1999).

of *California v. Bakke*<sup>89</sup> is at the center of controversy regarding whether diversity may be a compelling interest.<sup>90</sup> In that case, only Justice Powell opined that diversity “furthers a compelling state interest.”<sup>91</sup> However, the majority in *Metro Broadcasting* referred to Justice Powell’s opinion on the diversity interest, thus strengthening its precedential value.<sup>92</sup> Furthermore, in *Wygant* the Court did not rule out the possibility that diversity might be a compelling interest.<sup>93</sup> The now controlling *Adarand* holding, as noted in the dissent, also did not rule out the possibility of diversity as a compelling interest, but merely called for the application of strict scrutiny.<sup>94</sup>

Not surprisingly, lower courts have interpreted the Supreme Court’s mixed signals on diversity in various ways. Recently, the Fourth Circuit decided two cases in which public school student assignment policies used race as a factor in order to achieve diversity.<sup>95</sup> In *Tuttle v. Arlington County School Board* the district had been under desegregation orders.<sup>96</sup> The *Tuttle* court noted that the issue of whether diversity may be a compelling interest is “unresolved.”<sup>97</sup> However, both *Tuttle* and a later case, *Eisenberg v. Montgomery County Public School*, the court left open the compelling interest issue and assumed that diversity is a compelling interest.<sup>98</sup> The court then, in each case, proceeded to invalidate the race-based policies on the second prong of strict scrutiny, finding the provisions not narrowly tailored.<sup>99</sup>

Thus, in the Fourth Circuit, one may plausibly argue that diversity can constitute a compelling interest. If a case were to be presented in which the narrowly tailored prong is satisfied,<sup>100</sup> the court would need to firmly decide the diversity issue and could conceivably rule either way.<sup>101</sup> Indeed, in *Hopwood*

89. 438 U.S. 265 (1978).

90. See, e.g., *id.* at 1013 (questioning whether the diversity rationale of *Bakke* remains good law); Philip T.K. Daniel & Kyle Edward Timken, *The Rumors of My Death Have Been Exaggerated: Hopwood’s Error in “Discarding” Bakke*, 28 J.L. & EDUC. 391 (1999).

91. 438 U.S. at 315.

92. *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 567-68 (1990).

93. 476 U.S. 267, 286 (1986) (O’Connor, J., concurring) (diversity as a compelling state interest was not argued in this case).

94. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 257-58 (1995) (Stevens & Ginsburg, JJ., dissenting).

95. *Eisenberg ex rel Eisenberg v. Montgomery County Pub. Sch.*, 197 F.3d 123 (4th Cir. 1999); *Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698 (4th Cir. 1999).

96. *Tuttle*, 195 F.3d at 700.

97. *Id.* at 704-05.

98. See *id.* at 705; *Eisenberg*, 197 F.3d at 131.

99. *Tuttle*, 195 F.3d at 705; *Eisenberg*, 197 F.3d at 131.

100. Perhaps, for example, something equivalent to the “race plus” admissions system at Harvard that Justice Powell has endorsed. *Bakke*, 438 U.S. at 316-18.

101. On remand, the *Lighthouse* trial court found that the primary purpose of the Act’s racial balancing provision was to promote racial diversity and this goal was not a compelling government interest which would allow “qualified students [to be] turned away due to their race” depriving them of a state funded education. *Beaufort County Bd. of Educ. v. Lighthouse Charter Sch. Comm.*, No. 97-CP-7-794, at 4 (S.C. Cir. Ct. May 8, 2000) (Order declaring Charter School

v. *Texas*,<sup>102</sup> invalidating a minority preference admissions policy at the University of Texas School of Law, the Fifth Circuit concluded that Justice Powell's diversity rationale in *Bakke* was no longer good law.<sup>103</sup> Although that opinion has been criticized by scholars and some Fifth Circuit judges, the case continues to be good law in the Fifth Circuit.<sup>104</sup>

The First Circuit, in *Wessman v. Gittins*,<sup>105</sup> considered a diversity interest in the context of the race-based admissions policy of Boston's prestigious exam schools.<sup>106</sup> The School Board attempted to distinguish the setting of public education from other areas by arguing that "diversity is essential in the modern learning experience."<sup>107</sup> The court did not dispute the good intentions behind the policy or the societal benefits of diversity.<sup>108</sup> The court, however, was not persuaded by mere theoretical and anecdotal evidence, instead indicating that "we must look beyond the School Committee's recital of the theoretical benefits of diversity and inquire whether the concrete workings of the Policy merit constitutional sanction . . . . In short, the devil is in the details."<sup>109</sup> The *Wessman* court refrained from deciding whether diversity might ever be a compelling interest, but decided that the School Committee's policy failed to satisfy the *Bakke* standard.<sup>110</sup>

The stated purpose of the racial balancing provision in South Carolina's Charter School Act, preventing "segregation of students by race,"<sup>111</sup> is consistent with a goal of diversity. Indeed, diversity has been equated with "the opposite of racial isolation."<sup>112</sup> Because segregation results in racial isolation, to avoid segregation is to preserve the diversity already present. In light of views such as those expressed in *Wessman*, however, one should be prepared to present hard evidence regarding the educational value of diversity in order to assert it as a compelling interest.<sup>113</sup> This aspect of diversity, moreover, is not even articulated in the Act, nor is it discussed in *Lighthouse*. Rather, the type

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Act unconstitutional).

102. 78 F.3d 932 (5th Cir. 1996).

103. *Id.* at 944 ("Justice Powell's argument in *Bakke* garnered only his own vote and has never represented the view of a majority of the court in *Bakke* or any other case. Moreover, subsequent Supreme Court decisions regarding education state that non-remedial state interests will never justify racial classifications.").

104. *Daniel & Timken*, *supra* note 90, at 399 n. 47.

105. 160 F.3d 790 (1st Cir. 1998).

106. *Id.* at 792.

107. *Id.* at 797.

108. *Id.*

109. *Id.* at 798.

110. *Id.* at 800.

111. 1996 S.C. Acts 447.

112. *Eisenberg*, 197 F.3d at 130.

113. 160 F.3d at 797.

of diversity contemplated by the South Carolina legislature was mere avoidance of segregation.<sup>114</sup>

### E. *Narrowly Tailored?*

Assuming diversity is a compelling interest, the Act clearly fails the narrowly tailored prong of strict scrutiny under controlling case law. The Fourth Circuit case of *Tuttle v. Arlington County School Board*<sup>115</sup> clearly supports such a conclusion. In *Tuttle*, the Arlington County School Board used a weighted lottery to make the racial composition of the alternative school reflect the racial composition of the community.<sup>116</sup> The racial balancing measure was triggered when the racial composition of the applicant pool deviated more than fifteen percent from that of the county's student population.<sup>117</sup> The court held: "Examining the race/ethnicity factor, we conclude that even under *Bakke* it was not narrowly tailored because it relies upon racial balancing. Such nonremedial racial balancing is unconstitutional."<sup>118</sup>

Arguably, if racial diversity itself is shown to be a compelling goal, then even a narrowly tailored means must necessarily involve an attempt at racial balancing. In that sense, perhaps the *Tuttle* rule should be taken to mean that strict racial balancing, set-asides, or quotas are facially race-based and thus unconstitutional. Nevertheless, South Carolina's racial balancing provision for charter schools is clearly the type of policy invalidated in *Tuttle* and *Bakke*.<sup>119</sup>

114. 1996 S.C. Acts 447.

115. 195 F.3d 698 (4th Cir. 1999).

116. *Id.* at 702.

117. *Id.*

118. 195 F.3d at 705. The court considered five factors in finding that the policy in *Arlington County* was not narrowly tailored:

- (1) the efficacy of alternative race-neutral policies;
- (2) the planned duration of the policy;
- (3) the relationship between the numerical goal and the percentage of minority members in the relevant population or work force;
- (4) the flexibility of the policy, including the provision of waivers if the goal cannot be met, and
- (5) the burden of the policy on innocent third parties.

*Id.* at 706 (quoting *Hayes v. North State Law Enforcement Officers Ass'n*, 10 F.3d 207, 216 (4th Cir. 1993)).

119. In its May 8 Order declaring the Act unconstitutional, the *Lighthouse* trial court stated that "[e]ven if the court were to concede that diversity is a compelling government interest which would support racial discrimination, it does not find that the policy is narrowly tailored." *Beaufort County Bd. of Educ. v. Lighthouse Charter Sch. Comm.*, No. 97-CP-7-794, at 5 (S.C. Cir. Ct. May 8, 2000) (Order declaring Charter School Act unconstitutional). The trial court focused on the last four factors discussed in *Tuttle* as dispositive. As to the second factor regarding the duration of the policy, the court found that the Act requires the school to meet the mandated racial percentages perpetually, and thus forces the schools to continually view their students "strictly on the basis of race." *Id.* Considering the third factor, the trial court noted that the area of the school district from which *Lighthouse* would draw its students was seventy five

Furthermore, unlike the situations in those cases, a desegregation remedy is currently in place in most South Carolina school districts,<sup>120</sup> including Beaufort.<sup>121</sup>

An argument exists that the Supreme Court should carve out a special exception to allow school districts to engage in racial balancing.<sup>122</sup> By recognizing and admitting racial balance as a necessary component of the type of diversity that is sought, passing the narrowly tailored test should become easier. Even so, the Act, in its current form, is not sufficiently narrowly tailored. The Act's requirement that attainment of an acceptable racial composition be demonstrated in the application as a condition to approval is more burdensome and intrusive than necessary. A wait-and-see approach that would allow the charter school to have open enrollment at the outset and correct imbalances only if problems arose, for example, would be more narrowly tailored.

#### IV. CONCLUSION

The racial balancing requirement of South Carolina's Charter School Act is typical of measures that have been attempted in other school districts to prevent segregation. It is difficult to imagine any evil purpose for its enactment. The state merely wants to preserve the diversity that naturally exists in the districts. It is ironic that strict scrutiny, the same tool that has for so long been used to protect minority classes from legal discrimination by the majority, is now used to thwart attempts to institute voluntary solutions to patterns of

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percent white, and thus the racial balancing provision has no relationship to the racial make-up of the pool of students eligible to attend the charter school. *Id.*

The racial balancing provision failed under the fourth factor because of the rigidity of the policies necessary to satisfy the requirement. *Id.* at 6. The court found that the provision "would result in the entire establishment of a charter school being based on race." *Id.* Further, to meet the racial requirement Lighthouse might have "to recruit students from as far as fifty miles away. This expansion of the student pool would result in overburdensome transportation requirements." *Id.* On this point, the court "found it compelling that the Charter School has shown that its proposed enrollment would be within 10% of the relevant population, if the student pool was narrowed to an area with a reasonable proximation to the proposed site of the Charter School." *Id.*

Finally, regarding the fifth factor, the court found "that the provision is unduly burdensome on innocent third-parties" because "students are burdened by the racial classifications" in addition to the transportation burdens discussed in reference to the fourth factor. *Id.*

120. Robinson, *supra* note 26.

121. *Lighthouse*, 335 S.C. at 237, 516 S.E.2d. at 659 (1999).

122. See, e.g., Note, *The Constitutionality of Race-Conscious Admissions Programs in Public Elementary and Secondary Schools*, 112 HARV. L. REV. 940, 957 (1999) ("[E]lementary and secondary education is a context in which the compelling interest in educating students fully may make such programs necessary.").

segregation. Although the door is open for the possibility that diversity is a compelling interest, racial balancing per se is impermissible.<sup>123</sup>

For better or worse, the racial balancing requirement is probably not needed. The *Lighthouse* court determined that Lighthouse was required to comply with Beaufort's desegregation agreement and to obtain approval from the United States Department of Education Office of Civil Rights.<sup>124</sup> This holding would be codified under the current bill.<sup>125</sup> Authorities supervising desegregation agreements are not known for being lenient.<sup>126</sup> For example, the Justice Department has been accused of practically obstructing charter school development in Louisiana through overzealous enforcement of desegregation orders.<sup>127</sup> Thus, the wrongs the Act attempts to proactively prevent are already adequately curbed by the existing system.

While the Act is plainly unconstitutional in its current form, it is unclear whether the Senate's version of the bill to amend the Act would be constitutional. The insertion of legislative findings, advocating diversity as an important interest and a desire that South Carolina not return to its dual system of education based on race,<sup>128</sup> will not guarantee that any court will find the racial balancing provision serves a compelling interest. Further, the analysis does not end with the government's interest. The Senate changes would ease the rigidity and burden of the racial proportionality requirement, thus making the Act more narrowly tailored to achieving its purpose. However, whether these changes are enough remains in doubt.

Clearly, the bill, in its House form, not only narrows the tailoring but, by removing the racial balancing from the face of the Act,<sup>129</sup> takes the Act out of strict scrutiny analysis. Under the House bill, the vast majority of South Carolina's school districts would remain protected by their respective desegregation orders.<sup>130</sup> For the few districts not under such orders, these districts could at least rely on the requirement that charter schools adhere to the same civil rights standards as regular public schools<sup>131</sup> and, perhaps, the "adverse effect" clause<sup>132</sup> to deal with any segregation that might occur. By waiting for and documenting any problems as they might actually occur, a

123. See discussion *supra* Part III.

124. *Lighthouse*, 335 S.C. at 237, 516 S.E.2d. at 659.

125. H.R. 4336, 113th Leg., 1st Sess. § 59-40-60(F)(8) (S.C. 2000) (amended May 4, 2000).

126. Lynn Schnailberg, *Justice Dept. Accused of Obstructing Charter Schools*, EDUC. WK., Oct. 20, 1999, at 21.

127. *Id.*

128. H.R. 4336, 113th Leg., 1st Sess. (S.C. 2000) (amended April 26, 2000).

129. H.R. 4336, 113th Leg., 1st Sess. § 59-40-50(B)(7) (S.C. 2000) (amended May 4, 2000).

130. *Id.* at § 59-40-60(F)(8).

131. *Id.* at § 59-40-50(B)(1).

132. S.C. CODE ANN. §§ 59-40-70(C) (West Supp. 1999). This provision was left intact in the current bill. H.R. 4336 at § 59-40-50(B)(7).

school system would be in a much stronger position to survive strict scrutiny should race-based measures be deemed necessary.

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